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CONTENTS

INTRODUCTORY NOTE ................................................................. v

PART ONE
WORK PRODUCT OF THE 127TH INTERNATIONAL TRAINING COURSE


Visiting Experts’ Papers

- A Suitable Amount of Crime
  by Prof. Nils Christie (Norway) .................................................. 3

  by Ms. Cristina Rojas Rodríguez (Costa Rica) ................................. 25

- Her Majesty’s Prison Service of England and Wales
  by Mr. Michael Spurr (United Kingdom) ........................................ 48

- Probation Services in Singapore
  by Ms. Chomil Kamal (Singapore) ................................................ 61

Participants’ Papers

- The Philippine Corrections System: Current Situation and Issues
  by Ms. Mildred Bernadette Baquilod Alvor (Philippines) .................. 75

- Non-Custodial Sentencing Options in Malaysia
  by Mr. Runjit Singh a/Jaswant Singh (Malaysia) .............................. 88

- United Nations Standards and the Situation of Korean Corrections - Reality and Effective Countermeasures for Them
  by Ms. Kim Soo-Hee (Korea) ...................................................... 93

- Country Report ~ Thailand
  by Mr. Somphop Rujjanavet (Thailand) ...................................... 103

Reports of the Course

- Promotion of Alternatives to Imprisonment
  by Group 1 .............................................................................. 113

- Administration of Penal Institutions
  by Group 2 .............................................................................. 125

- Promotion of Effective Treatment Programmes for Offenders
  by Group 3 .............................................................................. 137
PART TWO
WORK PRODUCT OF THE 128TH INTERNATIONAL TRAINING COURSE
“Measures to Combat Economic Crime, Including Money Laundering”

Visiting Experts’ Papers

- International Cooperation in Criminal Matters with Emphasis on Economic Crime and Money Laundering
  by Mr. Hans G. Nilsson (European Union) .................................................. 149

- Effective Countermeasures against Money Laundering in Thailand

  by Sir David Calvert Smith QC (United Kingdom) .............................. 173

- White-Collar Crime and Major Financial Debacles in the United States
  by Mr. Henry N. Pontell (United States) .................................................. 189

Participants’ Papers

- Country Report ~ Ghana
  by Mr. Alfred Kofi Asiama-Sampong (Ghana) ................................. 202

- Legislative Measures to Deal with Economic Crimes in India
  by Mr. Animesh Bharti (India) ............................................................... 209

- An Overview of the Measures to Combat Economic Crimes Including Money Laundering in the Context of Nepal
  by Mr. Suryanath Prakash Adhikari (Nepal) ...................................... 216

- Country Report ~ Zimbabwe
  by Mr. Erasmus Makodza (Zimbabwe) ................................................. 224

Reports of the Seminar

- Measures to Combat Economic Crime, Including Money Laundering
  by Group 1 ................................................................. 235

- Measures to Combat Economic Crime, Including Money Laundering
  by Group 2 ................................................................. 246

- Measures to Combat Economic Crime, Including Money Laundering
  by Group 3 ................................................................. 254

APPENDIX ................................................................. 261
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. 67.

This volume contains the work produced in two UNAFEI International Training Courses: the 127th International Training Course, conducted from 17 May to 24 June 2004, and the 128th International Training Course, conducted from 30 August to 7 October 2004. The main themes of these Courses were “Implementing Effective Measures for the Treatment of Offenders after Fifty Years of United Nations Standard Setting in Crime Prevention and Criminal Justice” and “Measures to Combat Economic Crime, Including Money Laundering”, respectively.

In 1955 the United Nations adopted the “Standard Minimum Rules for the Treatment of Prisoners” (SMRs). Although not formally binding it was envisioned that States would incorporate the rules into their criminal justice systems and thereby improve the living conditions of their prisoners and also take steps to rehabilitate them. Indeed, many States have adopted the SMRs into their domestic laws and practices and this has greatly contributed to the institutional treatment of offenders. However, an increase in the number of prisoners being incarcerated has made it increasingly difficult for some States to adhere to the SMRs and thus the prisoners’ opportunities for rehabilitation have been diminished. In response to prison overcrowding, and the consequent deterioration in prison conditions, in 1990 the General Assembly adopted the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) to promote the use of non-custodial measures.

Despite the above measures prison populations continue to increase and there are relatively few countries that have fully incorporated non-custodial measures; the norm is still to imprison offenders. However, the international community recently renewed its determination to use and apply the United Nations standards and norms in crime prevention and criminal justice in their national law and practice in the Vienna Declaration on Crime and Justice (2001). It is hoped that this new Declaration will motivate individual States to make the necessary changes to their laws and practices to fully implement these important standards and norms. UNAFEI, as a United Nations Crime Prevention and Criminal Justice Programme Network Institute, held this Course in order that the participants could study the current situation and problems of implementation and find practical solutions and countermeasures.

Economic crime is a serious problem for the world community due to its transnational nature aided by globalization of the economy and the spread of communications technology. It causes not only direct loss to individuals and companies but can also undermine and destabilize a State’s economy. Its complexity and the involvement of organized groups hamper its detection. Among the organized crimes money laundering needs to be focused upon because criminals always conceal and launder their ill-gotten proceeds and reinvest them in further illegal activities. In addition, because economic crime is committed in order to gain profit, the most effective solution is to deprive criminals of the proceeds of crime and thus their incentive to commit crime.

The United Nations has recognised the growing problem of economic crime, including money laundering and has adopted various conventions to combat it. Other international fora have also addressed this issue, especially the Financial Action Task Force on Money
Laundering which developed international standards known as the Forty Recommendations which sets out a comprehensive plan for countries to implement effective money laundering programmes. It is essential that all States incorporate these international standards and harmonize their countermeasures to prevent criminals targeting countries lacking regulations or with weak law enforcement so that criminals will find no safe-haven for their illicit proceeds.

This year the 11th UN Congress focused on economic and financial crimes and included a workshop on “Measures to Combat Economic Crime, Including Money laundering” which UNAFEI, in collaboration with the Government of Sweden, coordinated. In view of the increasing threat that economic crime, including money laundering poses and our involvement with the topic at the 11th UN Congress, UNAFEI decided to hold this International Training Course in order to enable our participants to explore more effective countermeasures and examine ways in which to implement the international standards.

In this issue, papers contributed by visiting experts, selected individual presentation papers from among the Course participants, and the Group Workshop Reports are published. I regret that not all the papers submitted by the Course participants could be published.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Minister of Justice, and 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 assisted in the publication of this series; in particular, the editor of Resource Material Series No. 67, Mr. Simon Cornell.

December 2005

Masahiro Tauchi
Director of UNAFEI
PART ONE

Work Product of the 127th International Training Course

“IMPLEMENTING EFFECTIVE MEASURES FOR THE TREATMENT OF OFFENDERS AFTER FIFTY YEARS OF UNITED NATIONS STANDARD SETTING IN CRIME PREVENTION AND CRIMINAL JUSTICE”

UNAFEI
I. INCARCERATION AS AN ANSWER**

A. Social Arrangements for the Promotion of Crime

If my power was that of a dictator and if I had the urge to construct a situation for the promotion of crime, then I would have shaped our societies in a form very close to what we find in a great number of modern states.

We have constructed societies where it is particularly easy, and also in the interest of many, to define unwanted behaviour as acts of crime - this in contrast to being examples of bad, mad, eccentric, exceptional, indecent or just unwanted acts. We have also shaped these societies in ways that encourage unwanted forms of behaviour, and at the same time reduce possibilities for informal control. This whole situation is obviously one that will influence the prison situation in the industrialised world. It will first and foremost create a situation with increased pressure on the prison systems within most of these societies. But this is not without exceptions. The size of the prison population in any society is also a result of past national history, of major political ideas, and not at least the willingness to look for solutions other than the penal ones.

The table in Appendix A presents the number of prisoners per 100,000 inhabitants in some major areas of our globe. The countries within each area are ranked according to size of their prison populations, in each case with the high-raters at the top. Most of the figures are taken from the useful statistics gathered by Roy Walmsley (2003 and continuously updated and made available through International Centre for Prison Studies.1 Some figures are based on material I have obtained in direct contact with representatives from various prison administrations in countries I have visited. Some of my figures differ from those made available from Roy Walmsley and International Centre for Prison Studies, but these differences are not of importance for the reasoning in what follows. Most figures are from the years 2000-2002.

The huge variation between countries is one of the most striking features in the table. We find Iceland at the very bottom and USA and Russia as the absolute champions in incarceration among industrialised countries.

We will come back to this major table several times in what follows, but let us here, as a first question, ask if they have something in common, the two giant incarcerators.

B. The Great Incarcerators

The USA has today more than 2.1 million prisoners. This means 730 prisoners per 100,000 inhabitants - more than 0.7%. The increase has been unbelievable since 1975. The growth has slowed down recently, but has not come to a full stop. In addition to those imprisoned comes 4.7 millions on bail, probation and parole. This means that 6.8 million of the US population in 2003 is under some sort of control of the institution for penal law. Of the total population in the US, 2.4% is at any time under the control of this institution. Among those 15 years or older, 3.1% of the population is under the same sort of control.

Russia is solidly behind, and increasingly so. On January 1st 2003, they had 866,000 prisoners or 607 per

* Professor, Institute of Criminology, Faculty of Law, University of Oslo, Norway.
** Editors Note: The following paper is excerpted from Nils Christie (2004): “A Suitable Amount of Crime”, Routledge, London. Professor Christie’s lectures at UNAFEI for the 127th International Training Course were based on chapters 4 - 6 of his book. Reprint permission has been granted by Universitetsforlaget, Oslo.
1 http://www.kcl.ac.uk/depsta/rel/icps/home.html.
Two years earlier, they had more than a million prisoners, or 680 per 100,000 inhabitants. The number of prisoners waiting for trial went from 282,000 in year 2000 to 145,000 in 2003. It is the prisons for people waiting for trial that are the particular chambers of horror in Russia. Vivian Stern (1999) has edited a book on Russian prison conditions. “Sentenced to die” is the title. This formulation captures the essence. Sleeping in three shifts in damp rooms with hundreds of prisoners does not give the best of protection against an explosion of TB, HIV and AIDS within these establishments, an explosion that later will affect the whole Russian population. After sentencing, those sentenced are moved out of Moscow to the Colonies, the former Gulag’s. Here conditions are considerably better.

The Duma, their Parliament, passed several important laws in May 2001 with the intention to reduce the prison population with 1/3. The effects of these new laws are easy to observe. Prior to these reforms, the average space in the remand prisons was less than 1 square metre per person. Today the average is 3.5 square metres, while the norm laid down by the public health authorities is 4 square metres (Kalinin 2002, p.17).

C. Common Features

What do they have in common these two states, in addition to being high on incarceration?

A first and obvious similarity between the USA and Russia is simply their size, in land, power and population. With all this, there is also created a foundation for organisational patterns that encourage social distance. At the broad avenues of Moscow there is a special lane in the middle, reserved for the President and the cortège of dignitaries following him. At the small scale of a visiting scholar and on ordinary bumpy roads in Russia, I have mentally been in the same social setting. For several hours, we had one police-car with sirens and blue lights in front and one behind. Ordinary cars were forced to stop, here we come, the emperors or at least someone somehow related to those high up.

But not only in Moscow. Western capitals have their helicopters for their rulers as alternatives to the reserved middle lane. And they have their quota of close-knit associations for power-holders. I have vivid memories from an occasion in Washington DC. It was a setting filled with particularly dignified persons. My lasting memory from the evening was the welcome speech by the host. Many were invited and most came, but some had been unable to attend. But they had all - and we got the name for every invited dignitaries not there - they had all personally phoned the host and explained why they were not able to attend. No secretary could do. I felt as in a party for those close to the King. You were supposed to be there, or personally give over-whelmingly good reasons for absence. Otherwise you might be at the edge of expulsion.

All this is in a way obvious: In large social systems, and I am talking about pyramidal ones, a relatively small part of the population will be at the very top. Or, it demands at least exceptional political ingenuity to create conditions for a broader representation. With a small group at the top, those up there will become extremely important to each other. But then, at the same time, the logic of the situation is that they become distant from those they rule. Social distance is one of the conditions for heavy use of the penal system.

Another similarity between Russia and the US: they have in common a weak position of their judges. In the US, this is obviously the case. Compared to judges in Western Europe, those in the US have gradually lost their power to the politicians and to the prosecutors. The US system of sentencing tables gives the politicians - who are those deciding on the sentencing tables - detailed regulatory power in deciding on punishment. So does also the extensive use of mandatory sentencing laws. If the facts of the case are clear, the judge has nearly no room for discretion. In a survey of United States judges, 86% of district judges and chief probation officers agrees that the guidelines give too much discretion and control to prosecutors. 71.5% were moderately or strongly opposed to retain the current system of mandatory sentencing guidelines.

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2 Source: Ludmilla Alpern, Moscow Centre for Prison Reform.
3 Kaataja Franko Aas has written a fascinating doctoral thesis on the relationship between technology and sentencing theory and practice. (Aas (2003): From Faust to Macintosh: Sentencing in the Age of Information.)
Judges in the US are also to a large extent directly elected. But the political process is based on limited participation in the election process. More than 4 million people, including 1.4 million black men, cannot vote because they have a criminal record. Many will never regain their right to vote (Mauer and Chesney-Lind 2002). For a politician, here is not much to gain. In contrast to the judge, the prosecutor has kept his power. He can make a deal with the suspect, drop parts of the charge if the suspect admits certain other acts. In a system with sentencing tables, the prosecutor can heavily influence the end result.

But also in the classical Eastern European situation, the judge will to a large extent be dependent on political powers to get the job, and retain it. Of particular importance here is the prosecutor. This is one of the major reasons for the great number of people in detention waiting for trial. Russian and Belarus judges hesitate to acquit. Instead, they return cases to the prosecutor. While the prosecutor thinks, the prisoner is waiting it out. Often it takes years.

I cannot prove my point on the balance of power. But I observe, and I listen. I experienced an exposure of this situation during a meeting in Belarus in May 2002. Belarus will soon become the leading country of incarceration in Europe if Russia reduces as planned. A few years ago, Belarus had 500 prisoners per 100,000 inhabitants. In 2001 they had 560. In absolute figures this means 56,000 prisoners. Belarus has 10 million inhabitants.

In this meeting in Belarus, the prison administration attended, together with several directors of prisons and colonies. So did also some judges and prosecutors. Towards the end of the meeting, a little woman far down the table asked for the floor. She had been a judge, but quit, and told us why. While she was speaking, the atmosphere in the room became ice-cold, but she continued. She was trained in law, and had learnt her lesson: The major goal was to catch a maximum number of criminals and then jail them. So she did, as a police jurist. She did it so well that she advanced. She became a judge, with the proper status and apartment belonging to this kind of job. Again she knew the rules of the game: To get the accused sentenced. Lenient punishments and an acquittal-rate of more than at a tiny percentage would be unacceptable. At one point in time, she saw her dependence on the state she was supposed to control, and quit.

A further common feature between some of the leading incarcerators, is the root their prison systems have in servitude or slavery.

Liberty for some is the title Scott Christianson (1998) has given his important book on this theme. In the simplification necessary here and now, it is not much of an exaggeration to say that when the black in the South were set free, also to move, they took their seat in the front of the bus and went North, to the inner cities, and from there to the prisons. Per 100,000 black males, 3535 were in prison on year-end 2001, against 462 per 100,000 of white males.\(^5\) Large prison figures are linked to the tradition of slavery.

The very same phenomena can also be seen in Russian history, a history that here includes Belarus. There were not extremely many prisoners during the era of the Tsar. They had an alternative. They had servitude. Peasants were the property of their masters. They could not move or marry without the consent of the aristocrat who owned them. This meant that the lower classes were under severe control. And should this control fail, or non-peasants misbehave, they had Siberia. The colonisation of that huge country was to a large extent done by prisoners.\(^6\) In this perspective, the Gulag’s were not that much of a break with the past. They were not first and foremost for dissenters. They were production units, filled with males from the lower classes. The servitude found its new form.

So, basically, these are similar systems for the maxi/maxi-incarcerators. And they are developing similar

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5 To me, one person epitomises the resistance against all this. It is Al Bronstein, legal adviser to black people during their actions in Alabama in the dangerous 1960s. And then, until the present, a central activist against the prison development in the North. Today, he is still an important adviser for Prison Reform International in London.

6 Anton Chekov (1967) gives a unique description of the life among the deported to the island Sakhalin, close to Japan, which was colonised in this way in the 1890s. Anton Chekhov was not there as a prisoner, but as a doctor with social consciousness for his country-fellows. I am most grateful to Ludmilla Alpern who made me aware of this unique penological report.
social and cultural traits; their particular music, language, clothes. There exists a FM radio station in Moscow where most of the talk and music is prison talk and prison music. The same is obviously the case in parts of the US culture. There seems also to be similarities in the inner organisation of these systems. At least for the Russian system, it seems clear that it everywhere, except earlier among most of the political dissidents, develops extremely stratified systems with the untouchable losers at the very bottom. Due to better material conditions, more possibilities for isolation of individual prisoners and also more guards per inmate, this might be different in most US system, even though the many reports on gang wars indicate that authorities are far from having complete control.

* * *

But there are also differences. Most importantly, the use-value of prisons differs among the high incarcerators.

Russia is, and has for some time, been in trouble with their prisons and colonies. The colonies are simply not profitable any more. We might dislike it, but the Gulags were essential for the Russian war efforts in 1940-45. They were also possible to operate with some sort of efficiency in command-economy functioning in the USSR after World War II, or the great Patriotic War as it is called in the East. But in a market economy, they cannot compete. In Russia of today, their prison system therefore represent a great drain on their economy.

Laura Piacentini (2002) has worked to find out what happened to the Russian Colonies when the economic system changed. She conveyed two interesting observations. First, adaptation to the new situation was dependent on distance from Moscow. The further away, the freer was the situation of the local prison administration; inspectors from Moscow were few and far between. Close to Moscow, the situation was different. Here, they had to play to the tunes of the central administrators. These were tunes well known in penology. The colonies had no more work to offer, large factory-halls were literally empty, or with small groups of prisoners fiddling with some minor tasks in a corner of the premises. The answer from all penological theory, as well as from the central prison administration, was clear and powerful: Prisoners are here to be changed into law-abiding citizens. Therefore, the colony must offer treatment and education. But in Russian colonies, as in most penal establishments around the world, this turned out to be mere words.

Quite different was the situation in inner Siberia, far from the watching eyes of the central administration. The situation had been difficult to the extreme in the years after 1990. In the colonies, as in ordinary places for work, it had passed months without payment for the staff. Parallel to this, it had also been a critical lack of food, clothes and heating for the prisoners. In this situation, an elaborate system of barter was created. Local colonies scrutinised the local communities for tasks to be done; they had hungry prisoners willing to do nearly everything for a return in something the colony could use for survival.

Gradually, this developed some of the colonies in the periphery of Russia into rather efficient units for production. And here comes the dilemma for those who feel competent on penal matters: These colonies do not offer treatment. Bad, according to theory and international conventions. But they offer work, even food. But then to the other side of the coin, and it is here we come close to a new similarity between USA and Russia: The danger in this situation is that here, solidly planted in both the giant incarcerators - is laid the foundation for a new system of forced labour.

In contrast to the Russian situation, the US can more easily afford its great prison population. To many in the US, the building and running of prisons means profit. This is a major point in my book Crime Control as Industry (Christie 2000). Recently, it has also been described cases where prisons inside the USA prove they can compete with Third World countries in offering cheap labour to the US industry in general. And it is, of course, better that prisoners eat than starve. It is also better that they work than suffer through idle hours. But it is a danger in these obvious advantages. It is convenient for authorities that they work. A captive workforce combines in a beautiful way the need for control of the lower classes with the need for inexpensive labour. It may lead states into temptations. It may lead to revivals of the institution of slavery.

D. On Welfare

The giant incarcerators have been our point of departure for this chapter. But our table in Appendix A on prison populations does also open other important questions and concerns. Of particular interest is what we
find concerning the difference between the US and Canada. The difference here is close to unbelievable. Canada has 116 prisoners per 100,000 inhabitants, against the US with their 702. Two countries so close and still so different. Joint border from coast to coast, same language, mostly same religion, to some extent same content in the media, and also with much of the same ideals when it comes to money and style of life. How can we explain these differences in volume of incarceration? Even if the US had been without any overrepresentation of blacks in their prisons, they would have had more than three times the prison rate of Canada.

First, and before any attempts to explain, it is plainly important to register that the exceptional status of Canada is possible! Canada is a highly developed, well functioning, modern state. They have their troubles with crime as other modern states. They have politicians using crime problems as an agenda for self-presentation. Nonetheless, they have a volume of prisoners at one sixth of their neighbour further south! And this difference has increased during the past years. Canada is steadily decreasing its prison population, while the US continuously is on the increase. When it comes to the volume of crime-control, we are not up to destinies, but to political decisions open to choice.

And then, what is so peculiar to Canada?

It is embarrassing, but I have no clear answers, again only some hunches, this time based on a long life of visits to that country.

First, to visit Canada is for a Scandinavian very much as visiting one of the other Scandinavian countries. A bit dull, perhaps. Well-regulated, orderly behaviour, polite relationships.

Second, penetrating the system a bit, one also finds another basic similarity: Canada is simply a welfare state. They have it all, - old age pension, health insurance, leave of absence before birth and months thereafter, unemployment benefits. Of course, there are defects in the system, and vivid discussions on how to mend the defects, eventually reduce the safety net for the poor. But the situation of the poor is fundamentally different in Canada and the US. Their welfare system is defended from the very top of the political establishment. Increased income inequality in the United States has not taken place in Canada, “due to the offsetting influence of government transfers” (Sharpe 2000, p.158).

Related to this is a third difference. Canada has for years had a staff of civil servants with a conscious policy of keeping the prison population under control. I have a personal experience here, being involved in meetings in the Ministry of Finance in Ottawa on the budget for their prison system. All ministries had been ordered to cut their budgets, but those responsible for law and order said it was impossible, they had to increase their budget since crime increased! But was it impossible, that was the question I was invited to comment on. The question led to fascinating discussions on how to reduce harm - all sorts of harm - in the Canadian society, and for what price.

As a conclusion: To use the penal system as a functional alternative to social welfare seems not to be a major alternative in the Canadian society.

E. East and West in Europe

If we again take a look at the table and then concentrate on the European arena, two observations are striking. First: The major difference in prison figures is between East and West. Only four countries in Western Europe have more than 100 prisoners per 100,000 of their population, while the majority of the Eastern European countries are above this level.

But then, as the second observation, we find huge differences also inside the Eastern European camp. Next to the Russian Federation and Belarus, we find at the top first the Ukraine, and then the Baltic republics, all with figures of 300 and more. At the very bottom we find Slovenia, - that little country has a prison population at level with the Nordic countries, and have had this position for years.

The general picture is clear: Russia is the super-incarcerator in Europe, then follows the former members of the Soviet-Union. Visiting prisons in these countries, it is striking how similar they are in social organisation and material form to the prisons in Russia. Behind these core countries, with lower relative figure of prisoners, but still high, we find those formerly independent states that up to the end of the cold
war belonged to the Eastern block.

These countries are in so many ways squeezed in between East and West. I have, in Crime Control as Industry, described how Finland shortly after World War II made a conscious decision to leave Eastern Europe, also when it came to penal policy. And they succeeded; they have now for years had lower prison figures than Denmark, Norway and Sweden. But, of course, Finland was during the cold war outside the Eastern block, their penal policy was an instrument in their struggle to link themselves to Scandinavia.

But it is clear that the same struggles around penal policy now also go on in the other countries of the former Eastern block. Poland is one of the interesting examples.

F. Polish Rhythms

Seen from a criminological perspective, the diagram in Appendix B is a treasure, and a grim reality for those behind the figures. It is a diagram of the total number of prisoners in Poland from 1945 until October 2002. Three features of the diagram are remarkable.

First, the rhythm in the line. From a start close to the bottom in 1945, it reached its first peak in 1950 with 98,000 prisoners. Six years later it was down to 35,000 then up again in 1963 to 105,000. The maximum came in 1973 with 125,000 prisoners. Like this it ran until 1989, when it again was down, this time to 40,000.

In my interpretation, this is a picture of a prison system without ordinary backdoors, without release procedures to use when the internal pressure on the system becomes too strong. A repressive state, strong prosecutors, stern judges, - it was easier to say yes to imprisonment, than to say no. But tensions build up. There were limits to the number of prisoners that could be accommodated, and also to the number that could be given meaningful work. And prisoners protested. Several riots occurred. The rhythmic answers to this were amnesties. Big ones in 1956, 1964, 1969, 1974, 1977, 1981, - and particularly in 1989, the year when the wall between East and West crumbled. Appendix B illustrates how badly suited prison figures are as indicators of the crime situation in a country. Here it is bluntly clear how the prison population is a reflection of political decisions. Other countries handle this matter more discreetly.

Another fascinating development in the Diagram is the period after 1989. The old regime was broken. Freedom, now also for the prisoners!

But it did not last, at the low level of 40,000 prisoners, but seemed for a period to stabilise around the 55-60,000. These were the years of the political movement - later political party - with the name Solidarity, obviously also with prisoners. But then the new freedom became old, and so also the trend in the diagram. From 1999 and until October 2002 the figures have, to say it in the exact figures, gone up from 56,765 to 81,654. This is the figure I have used in Appendix A where we find Poland with 260 prisoners per 100,000 inhabitants. But in reality, the situation is even more extreme. Prisons are jammed. In the last months of 2002 the official estimate was that 18,000 persons were on the waiting list for serving their prison sentences. This is probably a large underestimate. Had those at the waiting-list also been included, the Polish prison figures would again have passed their 100,000. Once more.

What has happened?

First: Amnesties were seen as belonging to the past, a crude instrument to correct for failures in the system. And it can, rightly, be argued that amnesties are not the best of all solutions. Great numbers of prisoners are released at the same time, putting the system for social assistance under sudden and dramatic pressure. But that strain has, of course, to be weighted against the strain of a dramatically increasing prison population.

A second explanation of the increase in prison figures is simply that Poland is being partially “Westernised”. The old penal system is still there, the police, prosecutors, judges - no great purge took place after 1989. But in this very situation comes the elements discussed in earlier chapters: Poland is on its

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7 I got the diagram and additional figures from Monika Platek and Pawel Moczydlowski during a week of lectures and seminars in Warsaw, and was also assisted by Klaus Witold and Dagmara Wozniakowska.
way towards mono-cultures. And a great number of politicians in Poland as elsewhere in the west use the crime-arena for self-presentation. In this endeavour, they receive perfect assistance from the media. As Maria Los (2002) states, a radical shift has taken place in the mass media profile, from good news in state propaganda to bad news in private media. And she continues:

For a population used to a criminal justice system characterized by routine detention of suspects, disregard for legal niceties, long sentences and a ban on public criticism, these developments (the exposure of the bad news, N.C.) understandably produced images of a system verging on chaos or collapse (p. 166).

My estimate, and I say this with particular reference to the diagram, is that this is a prison-system in great risk of severe turmoil. Poland is now to enter the European Union. This will inevitably lead to a great reduction in the number of farmers. The surplus labour will move towards the towns. Social problems will increase. The pressure on the prisons will increase. Amnesties have regularly followed prison riots. Riot will come, and amnesties will follow. But this is a type of reform with great costs.

G. England and Wales - So Close to Eastern Europe

We have seen that East is East, and West is West, also when it comes to prison figures. But not completely. Slovenia belongs to the Nordic countries. But surprisingly, England and Wales seem to be on a steady course towards East European standards. In 2003, England and Wales have 139 prisoners per 100,000. The figures are steadily raising, with some 600 new prisoners every week. A few years back, Portugal was the leading incarcerator in Western Europe. But that was before, not now. England and Wales have entered Eastern Europe in the meaning that they have passed Bulgaria in relative number of prisoners, and now stand even to Slovakia. Nothing indicates they are about to turn. They have passed Canada, that state previously so close to them, and they have soon - in relative figures - twice as many prisoners as their close neighbour Ireland. They have since long lost connection with the historical period when Winston Churchill and his likeminded looked at imprisonment with considerable suspicion (Bennet 2003) and saw to it that their figures were kept among the lowest in Western Europe. England’s similarity to the US is also visible through colours inside the prisons. One in every 100 black British adults is now in prison according to the latest Home Office figures.

Attempting to understand this situation, I feel the handicaps of the combination of closeness and a large portion of love, - a solid base for blindness. But of course, I cannot escape observing that step by step, England and Wales have changed important elements in their system.

First of all, they are in a process of radical adaptation to the uni-dimensional society. All are better off, compared to the period just after World War II, but the social differences within the population have increased. Poor people are not so poor as before, but they experience the differences and feel unhappy by them. The welfare state is clearly less so, than that state was some 50 years earlier.

Three generations of Britains have been followed from 1946 up to year 2000. In a conclusion on income and living standards, Dearden, Goodman and Saunders (2003) write:

In conclusion, this chapter has demonstrated quite strikingly that, whilst living standards have, in general, risen steadily with each successive cohort, inequalities in income and wages have also increased. These findings alone represent a significant indicator of the changes in British society in the last decades of the twentieth century. However, it is also important to recall our finding that there was also a significant gradient in the incomes of cohort members according to their own parental background, as measured by their fathers’ social class, and that this gradient appeared to have become steeper amongst more recent cohorts. Thus, not only has Britain become an increasingly unequal society, but the income achieved by the more recently born is more strongly linked to the social class position of their own parental generation (p.189).

A second important element: England and Wales have also reduced the power of the judiciary. The Home Office provides the courts with extensive statistics where each court can compare their own sentencing

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practice with what happens in all other courts in the country. Judges also receive various guidelines, not sentencing-tables in the US style, but various forms of central guidance where precise tariffs are specified. And this process is in steady continuation. The Guardian Weekly (May 8, 2003) describes a proposal from the home secretary the day before as this:

Life will mean life for:
- Multiple murders with a high degree of premeditation, involving abduction or sadistic conduct
- Murder of a child in similar circumstances
- Terrorist murderer
- Term will not apply to killers under 20

30-year minimum for killing:
- On-duty police or prison officer
- With gun or explosive
- On contract for other gain such as for racist, religious or sexist motives
- Adult for sadistic or sexual reasons
- Other multiple offences

15 year minimum:
- Other murders by adults and all murders by children under 17

The Guardian reports that “Senior lawyers were unhappy with the announcement. … The Bar Council described it as constitutionally a leap in the dark” and said Mr Blunkett (The home secretary) was trying to “institutionalise a grip of the executive around the neck of the judiciary”. The Howard League for Penal Reform said the package could increase the present 3,900 life-sentence prisoners by 50%”.

Britain has also streamlined their system by establishing a position similar to that of a general procurator. They call him Solicitor General - a position with authority to control that lines are kept. It is also, for the higher courts, developed a system of professional prosecutors, and opened for appeals if prosecution so wants. Earlier, only the sentenced person could appeal. The official reasons for much of this is often named “consistency in sentencing”. But it can also be seen as strong centralising trends. I have met British judges that express the same complaints as some of the US judges; we are not to the same extent free to use discretion as we were earlier! Central authorities are distant from those to be sentenced, but close to politicians. Politicians are sensitive to punitive attitudes in the population and do also encourage such attitudes. Chances are great that a shift in the balance of power - from the judiciary to the politicians and their administrators - will open for more punitive measures.

Important changes have also taken place in the probation service in Great Britain. Once upon a time, the ruling idea here was to befriend the offender. Gradually, this has been changed. As in the US, probation is increasingly seen as an enforcement service. Probation has also been centralised, it is also here possible to control that the workers keep in line.

Penal systems are indicators of type of society.

Changes in penal systems relate to changes within any particular society. The centralising tendencies described in the penal system of England and Wales, the move from befriending offenders to enforcing control, and the strong growth in the prison population, are all probably linked to other basic changes. For the general political process within a country, it is important to be aware of what happens, and use that awareness for self-reflection.

II. STATE - OR NEIGHBOURS?

A. Icelandic Blues?

Iceland is the country of Western Europe with the lowest number of prisoners. In summer 2002 they had one hundred prisoners, which means 35 per 100,000. They have one large prison with a capacity of 87 prisoners. But Icelanders do not like them that big, so happily enough they have also four small prisons with
a capacity of between 6 and 14 persons. Erlendur Baldursson (2000) is from their prison administration. He
tells that “…difficult prisoners have repeatedly been transferred from the largest prison to the smaller
prisons, as a rule successfully”.

It is so easy to dismiss this experience. That little country Iceland, what happens there has no relevance
for huge nations. I agree. On the other hand, some of these other nations also have lots of Iceland in the
form of islands - inside their borders. First, in the form of small towns or cities. But large cities also have
islands, inside. New York has several, Paris is said to consist of a great number of French villages, and
London is also, as far as I can observe, a conglomeration of villages. In my little city, Oslo, I live in one. I
moved to this island some 18 years ago, and have ever since been forced to reflect on why it is so
extraordinarily good to live there.

Basically, because this part of the city by and large, but with exceptions such as myself, is a low-income
district. Simply, there are a large number of poor people around. From that follows four social facts:

- A considerable amount of misery. The length of life for males here is ten years shorter than in the
  West End. Living as single is more common here than elsewhere, so it also to have problems with
  alcohol and drugs.

- As a consequence of poverty, most people here do not have cars. From this follows that most people
do not shop outside the local neighbourhood. There is no convenient transport available to
supermarkets outside the district borders. In addition, many will not have so much cash available
that they can load up for several days. From this follows:

- Local shops survive. There are not many parts of Oslo so filled with kiosks and small shops as in this
  area.

- And one additional factor, a very important one: An extraordinary number of those living here are on
  welfare of one sort or another. This means they have more time available than most people have.

So, when Saturday arrives, and I should have been out skiing in the forest, that is how many natives are
conditioned, then I am instead tempted out into the local streets, shopping, talking, or just being.

This has other consequences. This island is, as you might have gathered, a place for all sorts of people;
some might be in official files with some sort of diagnosis. But in local neighbourhoods with much
interaction, people do not remain only as diagnostic categories. People become characters: that man with the
blind dog, the cigarette-butt collector, the kind old lady, that youngster to keep away from...

This also means that we have less crime in such neighbourhoods than in the more affluent parts of the
city. Of course, I do not, with this statement, say that less property disappears without the consent of the
owner in my neighbourhood than in other neighbourhoods. Nor do I say that fewer people are bodily harmed
than elsewhere. Probably there is more of both. What I do say is that these activities get another meaning on
my island. We are not so scared, since we know our neighbours. And chances are great that we know some
of the involved parties, or someone who knows some. This again means it does not feel quite so natural to
use official designations such as “Theft” or “Violence”. Crime is a man-made phenomenon. Among people
who know something about each other, it is less natural to use crime categories. We might dislike what they
do, and attempt to hinder it. But we do not have quite the same need for the simple categories from penal
law. And if applied, these labels do not stick to the same extent.

B. Extermination of Primary Relations

We know particularly well what follows when primary relations dissolve.

Some among us can still remember George Caspar Homans, that US Navy officer with a voice trained to
deafen storms. He turned anthropologist, and in his book from 1951 with the title “The Human Group”, he
presented the beautiful horror-story about the demise of “Hiltown”. Once this was a town filled with
important decision-making. You could not be away from social life for long, or wrong decisions on important
matters might be taken. It was a place with all the pleasures and pains of social life, a social system well suited for primary control. We know that primary control needs somebody close and concerned. If no one there, the state will provide someone. Then to the sad end of the story: A railway appeared at the bottom of the Hill, giving easy access to the big world. The town converted into a sleepy suburb where internal life became of small consequence.

Forty-nine years later, Robert Putnam (2000) published his book “Bowling alone”. From being socially outgoing, with many friends who often meet, deeply involved in civic life, the ordinary US person of today seems to be much more of a social isolate. From myriads of studies, Putnam compares generations. How did people 50 years old behave in 1955, compared to those of the same age in year 1995? He describes a clear trend towards increased social isolation. As a symbol of it all: Bowling is not so much a group activity any more, it has become an individual one. Bowling Halls acquire huge TV-screens to be watched while waiting for the next play. The adjacent restaurant is gone. So are the friends you used to meet there in-between. Now, after the game – which has become a competition against yourself – you drive home to another suburb, to a household where seven hours of TV watching is waiting - seven hours and two TV-sets is the statistical norm for the country. Life in social networks is shrinking, while consumption of crime from the screen is increasing.

Putnam’s analysis is met with criticism as to its importance for political life. His study is also to a surprising extent without a class perspective. Nonetheless, it is an essential finding that people do not meet people to the extent they once did. This means increased reliance on the media for describing what happens and what gives meaning to the occurrences. It also means greater dependence on the state to cope with these perceived dangers.

If I am acquainted with my neighbours and have some sort of network close to me, I have an easy time if some youngsters misbehave in my hallway. I can call for someone who might know some of them, or I can turn to the athletic neighbour one floor up - or perhaps better - I can ask for help from the little lady I know as particularly good at handling local conflicts.

But without a network, and with all the information on the increase of crime in mind, I would have locked the door and called the police. I would thereby have created conditions both for encouraging unwanted behaviour, and for giving that unwanted behaviour the meaning of crime. Maybe I would also have encouraged conditions leading to an acceptance of some e-mail I received while I was working on this paper.

This was an irresistible offer launched under the title: “Spy on your baby-sitter.” A few days later, I got the same offer under the title: “Watch your teens or keep an eye on the babysitter.”

…it is a secret wireless camera used professionally by CIA, FBI and others .... And here is how it works: A small camera hidden inside a light bulb so inconspicuous no one will suspect they are being watched. You screw it into any lamp, (even over the shower, it could be in a dark place it doesn’t matter. ... Then you take the other piece and plug it into your VCR (or any type of TV, they say in other ads) and it is as if you were standing over the person with a video camera....The video signal “wraps around” the power line, completely separate from the AC voltage. This is a security no home or office should be without.

But there are other dangers. Another e-mail gave comfort: The subject line was “Stop child molesters”, and the offer was to get access to a database with more than 50,000,000 criminal files. And we learn:

The odds are great that one or more of these dangerous criminals may be living in your neighbourhood. Approximately 200,000 convicted rapists are required to be registered in America at any one time. Many are repeat offenders.

Access to the database of sex offenders is free of charge, but access to the file for the 50 million costs ten dollars. The ads are as taken out of the documentary by Michael Moore, “Bowling for Columbine”.

C. Trivial Truths
And what do we do and say, we, the legions of social scientists around?
We know, as a profession, some of the consequences of all this. But we do not tell, not often, not strongly, and particularly, not concretely, with examples and detail. What we have to say is so much against the spirit of our time.

We know about city planning. A large shopping centre is projected outside an old city. Gains: Reduced unemployment during the construction period, increased income to the construction firms and later to the firms running the centres, and probably also a greater assortment of goods and improved conditions for parking. But then the penal costs: Increased number of arrests for shop-lifting, and also the social death of the old city in the neighbourhood, leading to an increased amount of unwanted behaviour. Police and guards become necessary as functional alternatives to the missing counters and the neighbourhood shops.

So, we can say: Dissolve the supermarkets. And let all shops have a counter between customers and commodities.

Or, as an alternative to the methods of the N.Y. subway police, we can say: To reduce penal costs, let no bus or streetcar run without a conductor. Social control carried out by a person who does not give the situation the meaning of having crime control as its primary purpose leads to an increased feeling of security among all passengers, it creates a more quiet atmosphere, more co-operation from other passengers and less use of force. But, of course, economic costs: Salaries to conductors minus costs for ticket machines, electronic surveillance, and an increase in payment from those who usually do not pay.

Or we might turn really radical and say: Poverty is a relative phenomenon. Reduce the wealth of the rich, and the poor would not be that poor.

We know a lot, if questioned by journalists or others. But, of course, we also know the journalists will not be particularly interested and not come back. They will turn to more useful criminologists, not to free eggheads.

D. Old-fashioned Russia

I have the privilege of living close to Eastern Europe. Norway and Russia have a joint border up in the North. And we have had no wars - except for Norwegian invasions in Viking times. But there is more to it than that. I feel at home going East. This is not because of a similarity there with my present living in my home country. It is more like coming back to the days of my grandmother. It is not only in Russia this happens. So is it also in Poland, in Hungary and in many of the other Eastern European countries.

Why?

I have no solid explanation, again only a vague hunch: Perhaps it is due to communism. But not as stated in the old propaganda, not due to the effects of communism as we were told about in their fairytales back in time about workers paradise in 1918. And particularly not because of the efficiency in the changes. On the contrary, it is because of the inefficiency. Capitalism was able to change Western countries, change them into their present monolithic form, change their forms as well as their basic values. State communism of the eastern type was also able to change their societies. They changed the type of government, and exchanged the incumbents of power positions. With enormous human and material costs, they improved living conditions for many. They modernised the material structures. But they were not very good in modernising the human soul.

E. Societies with More than One Leg

Even in the middle of the Cold War, there existed some professional contacts between the East and West of Europe. We received some official visitors from Soviet criminology in Norway in the early 1960s, and returned the visit in 1968. From then onwards, exchanges were frequent. A book of mine - “Limits to pain” (Christie 1981) - was published in the USSR in 1985; I think it was the first “Western” criminology published there. This made contacts more legitimate and opened up for further interaction with the Russians, and by that legitimising fact also with their colleagues in other East European countries.

I give this little sketch of background to establish some sort of credibility to my next point, which simply is as follows: These countries were, and still to some extent are, so remarkably old-fashioned. Again and again the same strikes me when visiting East European countries, or receiving visitors from there: I am, in a
way, back to the days I remember described by my oldest relatives, or find in writings from that time.

Of course, it is like that. These were societies functioning at a much lower technical and material level than in the West. Their populations were living under a political system where the state was supposed to provide the material goods needed for life. But that state was not particularly reliable in delivery. And it was a one-party system. Political opposition was a dangerous matter. People did not want to talk to you in the streets, visits in private homes might be a dangerous endeavour - for the host. Leaving Eastern Europe by train was an unpleasant experience. Armed inspectors entered, scrutinising the luggage compartments, maybe someone had attempted to escape their state, flashlights under the trains, dogs, and of course guns. It was like leaving a prison.

A scarcity of commodities, and an abundance of state control. No wonder many looked for other systems of protection!

I brought a granddaughter to Russia quite recently. It was for a seminar in Astrakhan, a long journey with ample time for talks with the participants. Most encounters had the same beginning: My granddaughter, 14 years old, was warmly greeted, so nice to meet a Norwegian girl. And then, with certainty, a few seconds later came the fatal question: What was she planning to do in her life, what sort of study, and what sort of work was she preparing for? My granddaughter looked at me in despair, until she got accustomed to the repeated question. She was an ordinary Norwegian teenager. Life is open. She would finish her compulsory education, maybe a year of travel abroad, maybe university, maybe first some years of ordinary work to earn money ... Then, perhaps, some years of study, but this would certainly not be a choice for grandfathers to interfere with. “I have with one exception never got such a question at home,” she told me after the first cross-examinations. But I felt the blame from my Russian colleagues. They thought of me as a bad grandfather. Careless in the extreme. With such a clever and lively granddaughter - and he has not been able to put her on the right track for a vocation!

I ought to have been prepared. For years, I have been struck by the survival ability of the intelligentsia in Eastern Europe. In these societies, constructed to benefit the working class, I was rarely able to meet academic people who had not one or two academicians as parents, and often also as grandparents. Probably, but here I am on less safe ice, probably this is only a special case of what had happened in other segments of Russian society. In scarcity, and under daily control of a powerful state, families, and family values, became of greater importance than in the West. Under scarcity, generations are forced into proximity. For a young couple, she might be pregnant - the only solution is a room or a part of a room in the parents’ dwelling. The family has small children and both mother and father need paid work to survive. Grandparents become a treasure, just as children are to them when the old age pension fails to appear. Or the “datcha”, the little summer house so dear to those that had one, a fortune for the extended family, a place to be for the kids, a place for the production of vegetables for them all. To be an outsider in such a system means serious danger. Social capital has material realities.

The dark side of the one-party state pushed in the same direction. Informers are essential in such systems, as was so clearly documented in the Stasi-archives after the collapse of the Federal Republic of Germany. You never could know, for certain, who the informers were. Probably (but not certainly) they were not in the close family. Ivo Moszny, a perceptive sociologist from Brno in the Czech Republic, has in conversations and lectures repeatedly pointed to this phenomenon.

I met him during the “Spring of Prague”, a short period with decreased political oppression. When that peculiar spring had passed, he was in a way rescued. He got a position as a janitor at his old university. Today, he is the Dean of the same faculty. Once, in an old Norwegian bus, a group of Scandinavian criminologists travelled to Vienna via Poland and what was then Czechoslovakia. This was in the period when he still was a janitor. He gave a remarkable lecture, inside our bus, outside of the ears of state control. It was precisely on the importance of the family for resistance against totalitarian states that he spoke.

Hundreds of small lagoons for a life alternative to the one controlled by the state were constructed. The family was one. But so also was the culture of the past, the heritage, the large novels, the music, the poetry. To live in scarcity might also give room for an alternative life. This is one explanation for the cultural interest one also meets today in Russia and in some of the neighbouring states. But maybe there is more to this interest than just being a refuge against a totalitarian regime. Maybe the pronounced cultural/aesthetic
interest is a deep feature of what it is to be Russian. Maybe it will survive material affluence. That crucial test is happily enough not close to us in time.

But the Soviet heritage is not that far back in time. Let me turn to that.

F. Those Polish Students

I was invited to lecture in Poland, and used some of the themes above: the need for informal social networks, the need for knowing your neighbours, and the need for primary control as an alternative to state control. I met blank faces. Of course I met blank faces. Trained to distrust your neighbour, conditioned to situations where that neighbour might be a spy for the system, it might all come back, why establish ties that might prove dangerous? This is one of the serious costs of having been trained into life in a one-party state.

These same costs are also clear when attempts are made to introduce mediation or restorative justice in Eastern Europe. They have had their quota of it. They have had house committees or neighbourhood committees. Or they have had workers courts in the factories - no more of this, thank you!

Again, it is easy to understand. They had it all, but were strictly politically governed. Those who decided, were perhaps mediators, but they were also party members. The great interest for alternative conflict solutions in the West is met with considerably less enthusiasm in Eastern Europe, and with good historical reasons.

But this might also be an important experience for Western attempts to curb the state by introducing civil ways of handling conflicts. Let me turn to this theme.

III. NO PUNISHMENT

A. Two Types of Justice

We know the picture: Females gathering at the water fountain or at natural meeting places along the river. Here they come, often every day at the same time. Fetch the water, wash the clothes, - and exchange information and evaluations. The point of departure for their conversations will often be concrete acts and situations. These are described, compared with similar occurrences in the past and evaluated; was it right or wrong what happened, was it beautiful or ugly, was it a sign of strength or weakness? Males will often do the same, at their places of meeting. Slowly, but far from always, some common understanding of the occurrences might emerge. This is a process whereby norms are created through interaction. Let us call it horizontal justice, created by persons with considerable equality brought about by closeness. Of course, not complete equality. Some have better clothes than others, some are from better families, some have more wit. But compared to what now follows, they are equals. And their decisions are based on being part of a process.

Horizontal justice has three major characteristics:

1. Decisions are locally anchored. How cases are solved in villages far away is of limited interest. What matters is here and now, compared with the past, and with concern for the future. This can lead to inequality between districts, the “same” act can be evaluated differently in district A than in district B and C. But the opinion inside each of these districts might unanimously be that justice has been achieved in their particular area.

2. Questions of relevance are handled in a radically different way from what happens in the legal system. Relevance is seen as a central concern, but in situations with horizontal justice as one without pre-defined solutions. Relevance is established through the process itself. Relevant is what the participants find relevant. A minimum degree of consensus on relevance must be created among all interested parties. That Kari 15 years back in time was humiliated by Per, might be seen as of considerable importance by all interested discussants when Kari’s little sister has now covered Per’s
little brother with tar and thereafter rolled him in feathers.

3. At the water well, compensation becomes more important than retribution. This is related to several structural elements in small-scale societies. Such societies are often relatively egalitarian. Not necessarily in the meaning that all are equal in wealth or prestige, but in the meaning that if conflicts appear, parties will move into alliances with their relatives and friends and thus mobilise until they become somehow equal to their opponents. Many such societies also exist far away from external authorities with power at their disposal. This means that they themselves will have to cope with the conflicts. This is a situation where the participants know each other from far back in time, and also know that they will have to live together in the future. They can not do as modern people, just break off relationships and move to another social system when conflicts loom. Punishments are particularly dysfunctional in such systems. Punishment - infliction of pain intended as pain - means moving towards civil war in fragile systems. With a distant external authority, with nowhere else to move, and with no superiority of power, compensation rather than pain becomes the natural answer.

* * *

Then the other picture: Moses, down from the mountain. Under his arm he carried the rules, engraved in stone, dictated to him by one even higher up than the top of that mountain. Moses was only a messenger, the people - the populace - were the receivers, controlled from far above. Much later, Jesus and Mohammed functioned according to the same principles. These are classical cases of what here will be designated as “vertical justice”.

In the case of Moses and his vertical justice, the situation is different from the one of horizontal justice. With rules engraved in stone, an idea of the existence of general validity is created. Equal cases have to be treated equally and according to the rules. But cases are never equal, if everything is taken into consideration. Of course not. Therefore, everything can not be taken into consideration in formal law. It becomes necessary to eliminate most of the factors surrounding any act to be able to create cases that can be presumed to be similar or equal. This process is called eliminating what is irrelevant. But what is irrelevant is a matter of values. To create equality, it is therefore necessary to create rules for irrelevancy. It is a dogmatically decided irrelevance - as lay people so often experience when their lawyers forbid them to bring up in court what they believe is their best argument. This is what we train law students to know and apply. This type of justice is reached by establishing limitations on what can be taken into account, otherwise equality could not be established in this setting. This is in sharp contrast to horizontal justice where the question of relevance is decided among the participants in the process.

With vertical justice, and the social distance implied in that process, there is also created a situation that opens up for the application of punishment, for pain intended as pain. Modernity means to a large extent a life amidst people we do not know and never will come to know. This is a situation where penal law can be applied with great ease. Penal law and modern time suits each other.

B. The Growth of Formal Law

Every second year, a new edition of a peculiar book comes to my office. It is a book published by The Faculty of Law at the University of Oslo, the book is red, large, and voluminous, even printed on “Bible paper”. In 1930, the book contained 2099 pages, in 2002, the number of pages had increased to 3111. This is the book that contains all valid Norwegian laws from 1687 and up to the present. No lawyer will be without a new edition of this book. Students of law will often carry the book under their arm, - the book has some of the same symbolic function for law students as the stethoscope for students of medicine.

In addition to laws in books, these days there are also the electronically conveyed messages. With the morning coffee, the last legal decisions can be called up on the screen by all the legal experts who are connected to a legal data base. And they will all soon have to be connected if they want to be taken seriously. The courts are under continuous electronic upgrading in all highly industrialised countries. In the case of the penal courts, the sentencing tables of the US type will soon be outdated. Information on offender and offence can be fed into the electronic system, and out comes details of the “profile” - the range of sentences in “similar” cases, not obligatory to follow, but yet persuasive examples of how other judges act. From carved in stone to a diagram on what is a normal sentence on a screen. The electronic revolution has not created equalitarian justice, but a pyramidal one.
In the meantime, the water wells and a great number of other arenas for informal discussions are abolished, even though coffee shops to some extent have taken over. Disappeared have also many of the old villages. But a new type of village has recently appeared. What there happens illustrates some of the strength in the horizontal participatory justice system.

C. The Global Village

The females at the water well would often look differently at much of this. It was as if they were not so sure of their classifications. What is what, and who is who? But they are not there, any more. Instead, a new type of users of mediation has grown in strength and importance. These are the large economic enterprises.

It is often said that in modern societies the village is dead. Gone. Just an empty shell to sleep in. Our destiny is life in the megatown, a life among strangers. That is right. But also wrong. The villages have died. All but the global village.

If we want to study a village of importance today, we must not go to the countryside, but to the very centre of countries. We must go to the City. Literally. We must go to the City of London, Wall Street, or to some of the inner districts of Tokyo or Singapore, perhaps even to Oslo. Arriving there, we must look for some of the best-protected buildings, and then within these, try to get access to some of the major enterprises occupying these premises. In my country, it might be one of the major oil companies, or even better, one of the large law firms. Entering their premises is similar to entering a hut in an African village.

How can I utter such an absurdity?

For three good reasons. But as I list them, you will have to accept that, in what follows, I have had to simplify and give an ideal-typical description

First, those living in the modern hut are linked to their neighbours in ways having functional similarities with the old ones: by telephones, sometimes integrated with TV pictures, by telephone-conferences, often with participants with oceans between them, or faxes or e-mails. Linked together, and with a common cultural landscape from reading the Financial Times, the Wall Street Journal or The Economist.

Second, they are glued to each other, just as the old-fashioned villagers were. There is no other globe available. They live there with the understanding that they will have to remain, or leave for the desert.

Third, the external authorities are far away, and with limited power. One modern law firm might have a larger legally trained staff than the whole Ministry of Justice and the Ministry of the Interior put together. They know more of law, and dispose more resources than their rulers.

This, then, also makes them similar to the old-fashioned villagers when conflicts loom. They have nowhere else to go, so they continue the relationships. But since they have no external authority to turn to for protection they are again forced into ordinary village behaviour. They must solve the conflicts by civil means. We know from personal experience, or from social anthropology, that attempts to punish others in the village mean breaking off relationships. It is a call for war. Conflicts in villages without external authority and where people intend to remain, such conflicts will most often take a form whereby the parties create coalitions to muster some sort of balance of strength. After this groundwork is done, they meet and work towards civil solutions. If wrong acts have been performed, compensation to the victim, not pain to the offender, becomes the major answer where relationships are to continue. As for the villagers everywhere, so also for General Electric.

Penal law is a perfect instrument for certain purposes, but clumsy for others. It is one where we eliminate many concerns, and it is one based on dichotomies - all or nothing - guilty or not guilty. In many situations we are half-guilty. If that half-guilty is seen in the light of earlier misdeeds of the other party - or her or his associates - an opening is given for compromise. Civil solutions are more integrative solutions striving to preserve the social system as a body of interacting individuals.

In analogy with what happens in village law, lawyers in the global village will most often consider the totality of situations and look for peaceful compromises and compensation rather than the use of swords.
They will, as peacemakers and mediators everywhere, be highly regarded and, in our culture, highly paid. Without a high reputation, they will, in certain types of villages, have trouble creating peace. They will therefore guard their honour both against political involvement and against clients of low regard. High salary is a corollary to high regard. In addition to money and prestige, they have probably also more fun than other kinds of lawyers. In their global village, inside the limits of their economic-administrative system, they are back to working with totalities. They have the fun of old-fashioned tribal members in finding out about the law, participating in finding solutions all parties can live with, and thereafter the satisfaction of creating peace inside their system. They are engaged in a holistic activity directed towards peace, in contrast to a specialised one directed towards war.

The paradox is that, as these lawyers are enjoying their global village, they are so often causing destruction of the remaining local villages. Their decisions on the economy are part of the driving forces in the international development of industrialisation. Their activities in their global village are one of the key elements in the process of modernity. Their activities create the conditions where another kind of legal personnel is called for, a kind in extreme contrast to the civil one suited for conflicts at the water well.

So, what have I described so far?

I have described two ways of coping with conflicts, the way of Moses, and the way of the women at the water well. And I have said there is growth and expansion in both solutions. Growth in penal law, but also growth in the interest for mediation.

D. Abolish Punishment?

In discussions on penal matters, a major position is called Abolitionism.

The Abolitionists raise questions like: What logic, and ethic, makes it so certain that punishment has priority over peacemaking? You lost an eye due to my deplorable behaviour, but I will give you my house. You hurt me with your crazy driving, but I have forgiven you. Punishment is intended pain. Has the intended delivery of pain advantages as an instrument for restoring broken values? Has such pain advanta-arges, and therefore priority, over reconciliation, restoration, and forgiveness? I agree with the position behind these questions, but can not follow the Abolitionists all the way.

The most radical among them want to eliminate penal law and formal punishment altogether. But there are several major problems with that position if followed to the extreme.

The first is a concern for those who do not wish to participate in a process of reconciliation or in reaching of a possible agreement. Some offenders do not have the ability, nor would they dare to look the victim in the eye, let alone ask for forgiveness; they panic and want an impersonal court procedure. Neither would some victims consider reconciliation; they prefer the offender being punished. In both cases, a criminal legal process commences. A civil conflict-solving process can hardly be considered in a modern state without a criminal law solution being available as a possible alternative. This might result in one person being forgiven in a civil case, while another person is punished. But it can not be against the code of ethics that some, though not all, receive forgiveness. Those punished encounter what they would have faced if restoration did not exist. Probably, those punished will receive a bit less. If forgiveness exists as a viable alternative in some cases, this would possibly reduce the severity of punishments in general within the system.

Another major concern if punishments were completely abolished, is that reconciliation processes could degenerate. The offender, or his close relatives, might in despair promise too much in order to turn matters into a more favourable direction. The arbitrator, the mediator or participants in a circle must stop this, and might be forced to return such a case to the penal courts. Or the offender might be exposed to too strong pressure from the other party. There are instances from small communities where the men dominate the conflict-solving body and where the abused women are subjected to continued suppression.

For conflicts at the state level, the same objection can be raised. Laura Nader (2002), p. 144) expresses it like this:
Fine-grained fieldwork indicates how coercive harmony operates to silence disputing indigenous peoples who speak or act angrily (p. 127).

It began to look very much as if ADR (Alternative Dispute Resolution, N.C.) were a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion (p. 144).

In enthusiasm for mediation, it is important not to forget that rituals and arrangements in penal courts might have important protective functions. When tensions run high, maybe even immediate violence threatens, the solemn and also often utterly tedious and dull rituals in the penal apparatus might have a calming effect. Court procedures might make certain situations of conflict bearable, just as church rituals - or nowadays the fast developing “human ethical rituals” - make it possible to endure the sufferings at funerals for a beloved one.

A special situation is created when an individual stands against an organisation. It might be the shoplifter against the big firm, the graffiti-younger against the municipality, or the passenger who did not pay against the subway system. The point here is not necessarily the inequality in power, but that one party will be a representative for a big organisation. It might be a representative with a large amount of routine, but a limited amount of personal interest in the conflict. In contrast, the other party might represent herself or himself for the first time. Our official system for mediation in Norway is soaked with shoplifters, cases particularly unsuited for mediation. The system for mediation might easily be perverted into juvenile courts in disguise. Hoigård (2002, pp. 288-293) has a highly relevant critique of this development in her book on graffiti; “Street Galleries”. What goes on in these boards is, in her view, punishment of children.

An exception would be if the mediators in the boards were able to include the top management of the big firm or of the subway system or the municipality. In that case, it would have been possible to raise questions about how the shops are organised, if the temptations in the shop are exhibited in a way that make them close to irresistible to youngsters, and if the shop in order to increase profit has far too few sales’ attendants around. Or the question might be raised if the graffiti on the wall was not more beautiful and/or interesting than the huge advertisements for underwear? Such meetings might be very useful for the social system in general. But to get them going is probably utopian.

A third case for penal procedure is a situation in which there is no actual victim. Perhaps a belief has been offended against. Some people might curse God or Allah in nations where this is considered a serious sin. Or perhaps there is a need to regulate what some people are doing to themselves and their own bodies. Actions against the use of drugs is at present the dominant example.

And then comes the more trivial concern that some simple regulations would ultimately need support. Some drivers insist on driving at the speed of their choice. Civil measures, such as the withdrawal of a driving licence or the impounding of a vehicle, could be attempted, but are not always sufficient. Punishment should remain as a last resort.

For some, none of the above concerns are of importance. Still they would punish. They will say: Society has to do it. Independently of any utility or practical use of punishment, certain acts are so terrible that the perpetrator(s) must receive the vengeance of society. This would be their claim.

**E. A Winter Night**

Forty thousand citizens of Oslo took to the streets the very same week I was writing this chapter. It was on the first day of February, and it was dark and bitterly cold. A strong northern wind swept through the streets, the temperature was 13 Celsius below zero, nonetheless, it was warming to be there.

Benjamin was the reason for it all. Some of his friends gave speeches, so also did the Prime Minister. A young woman sang. Thereafter followed a solemn procession through the streets.

Benjamin was killed three days earlier. He had just turned 15. Knifed by three young people with some sympathies for Nazi ideology. Enough is enough was the dominant mood of the country. Benjamin had black skin. A year earlier he had, on national TV, condemned Norwegian racism. That might have been one of the reasons for his death.
The procession was a manifestation of common values, and also an example of the new types of funeral rites coming into being - as flowers for Diana, candles on graves, or at the places where terrible events had occurred. Public participation encouraged by and broadly covered by the media.

But then the question: Is this enough?

Much has already been done to prevent the spread of Nazi ideology and the establishment of Nazi organisations. The State gives money to youth activists to help to get young people involved in Nazi groups to retreat from these settings, and return to normal life. Parents are active, schools likewise, researchers attempt to get close to the Nazi groups to understand their behaviour and their motivation.\(^\text{10}\)

But again, is this enough? Two young men and a woman have been found guilty.\(^\text{11}\) Is it possible to think in terms of restorative justice in such a case? The value of a human life has been infringed upon. And not only this. The act has been carried out by persons that at least initially might have thought the act was a positive one, a move to fight back the invasion of a less valuable culture, or maybe even a less valuable race.

Would I still insist that this also is a case for restorative justice?

* * *

There are other difficult cases. In Norway recently, the entire population was shocked by the murder of two small girls who were going to swim in a little lake in a forest somewhere in the south of the country. They were sexually molested and killed. Two young men were found guilty and sentenced to long sentences. One of them seemed to laugh when he left the court. The population was outraged, and so was I.

Nonetheless, let us try to imagine another end to the story. What would have happened if mediation had been arranged and the relatives, after a long process, said: You killed our children, but we have forgiven you. With our present knowledge of your past life-history, and with an acceptance of the sincerity of your deep remorse, we have forgiven you. We know what your future will be if you have to spend years in prison, therefore we beg the authorities to release you. What would have happened if this had been said by the relatives, and followed up by the authorities?

I have no doubts about this being a solution in accordance with deep roots in our morality. But at the same time I do not have any doubt that it is completely unreasonable to expect this to happen, let alone to demand that the next of kin to those murdered, should take part in a negotiation process that could possibly lead to an end result like this. It is perfectly understandable and morally above blame for the next of kin to choose punishment for the offender. But if mediation took place, could we then conceive of a situation where the case ended there – ended with forgiveness? Why should it be obvious that the case still belonged to the prosecutor and prison authorities?

If all the victims, and all the relatives of those who could no longer talk had claimed that forgiveness should reign, then, maybe, maybe, a sociologist would take Emile Durkheim in hand and argue that for the sake of the social cohesion of that particular society it might be necessary to let punishment follow the disgusting acts. But the possibility of such a forgiveness from the parties involved is so distant that this kind of warning is as realistic as a warning of the breakdown of the oil market because most people have found it morally right to drop any use of private cars. But if it happened, I would be at the side of those parents that asked for forgiveness. The whole process of finding out what had happened, the determination of guilt, the quest for forgiveness, and then the act of forgiving - it would all be a powerful exposure of terrible, close to unbelievable horrible gruesome acts. The exposure of it all would represent a powerful distancing from those acts, at the same time as the act of forgiveness would take care of another equally important set of fundamental values in our society.

* * *

But would that be justice? In extreme cases, children are sexually abused in a horrible way, then killed.

\(^\text{10}\) Cf. Fangen (2001) and Bjørgo (1997).
\(^\text{11}\) In February 2003 one of the men was sentenced to 17 years of imprisonment, the other 18 years.
can not be right to let the guilty ones get away with words only? But the opposite position might also be a wrong answer. The punishment can never be equal to the wrong done. As Giertsen (2003) writes, here in my translation:

Punishment is a symbolic expression, it can not become equal to the crime on a one to one basis, and can not be used as a measure-stick expressing the value of the victim. Punishment is first and foremost a statement that an act has damaged an important value, a value that must be re-established (p13).

Punishment can not be equal to damage. Relatives might say; he who killed was only sentenced to twelve years, while my boy lost his whole life. That is not right! And they are also right, so far. But they are reasoning in a way that would lead society into unacceptable conditions. If we want to preserve humanity, it is not a question of simple retribution. The lost son can not be brought back, a similar harm would be to take the culprit’s life under conditions equal to his ways of acting. Our ethic must have a broader perspective. If punishment is to take place, this punishment must represent the totality of our values.

Victims, and victim movements, will often feel deeply hurt when their sufferings are not reflected in the punishment on a basis of one to one. This will often be expressed as sharp criticism of the courts, a criticism eagerly brought to the surface in the media and from there to the politicians.

How to handle this situation?

There are no other ways than the usual: counter-arguments, exchange of ideas, attempts at clarification. Choice of penal policy is a cultural question. It is not a question of instinctive actions and re-actions. It is an area filled with deep moral questions. It is an area for novelists, playwrights, artists, - and for all citizens. It is not only for experts, of course not. But it is not only for victims either. It must be a chorus of voices, introducing a forest of concerns, partly concerns that are not easily digested, and also to a large extent not in harmony. The more the field is seen as a cultural one, the less room remains for the simplified solutions.

F. Minimalism

The reasoning up to this point makes it hopefully clear that Abolitionism, in its purified form, is not an attainable position. We can not abolish the penal institution totally. But I have also, hopefully, been able to show that we can go a long way in that direction. Crime does not exist as a natural phenomenon. Crime is just one among several possible ways of looking at deplorable acts. We are free to choose, and the variation in punishment levels over time in individual states and also between states is an illustration of that freedom.

In this situation, what comes close to my heart might be called Minimalism.¹² This is close to the abolitionist position, but accepts that in certain cases, punishment is unavoidable. Both abolition-ists and minimalists take undesirable acts as their point of departure, not acts defined as crimes. And they ask how these acts can be dealt with. Can compensating the injured party help to handle the case, or establishing a truth commission, or helping the offender to ask for forgiveness? A minimalist position opens up choice. By taking the point of departure in the whole sequence of events leading to the undesirable action, punishment becomes one, but only one, among several options. To let the analysis stem from conflicts, rather than from crime, opens up a liberating perspective. It means that we are not captured in a “penal necessity”, but are free to choose.

Good - and bad. It takes away the rigidity in seeing punishment as an absolute obligation, but forces us to give some reasons for our choice of punishment versus non-punishment. Let us, in what follows, test the possibilities of the minimalist position on some catastrophes of our time.

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¹² The term abolitionism is inherited from the struggle against slavery, especially in the USA. Within this movement, the conflict was between those who wanted to abolish slavery altogether, and those who, by various means, wished to limit slavery. And, as in the struggle against slavery, a more moderate group also exists within the abolitionist movement. They are the minimalists. It is a bad name from the history of slavery, but a good one confronted with the complexities of finding answers to severely unwanted acts.
# APPENDIX A

Prison Population Rate per 100,000 of National Populations

## Western Europe
- England/Wales: 139
- Portugal: 135
- Spain: 126
- Italy: 100
- France: 99
- Netherlands: 93
- Germany: 91
- Ireland: 86
- Austria: 85
- Belgium: 85
- Greece: 80
- Switzerland: 69
- Denmark: 66
- Finland: 66
- Sweden: 64
- Norway: 62
- Iceland: 37

## Central and Eastern Europe
- Russian Fed.: 597
- Belarus: 554
- Ukraine: 406
- Latvia: 361
- Estonia: 328
- Lithuania: 327
- Moldova: 300
- Poland: 260
- Romania: 215
- Georgia: 196
- Hungary: 176
- Czech Rep: 159
- Slovakia: 139
- Bulgaria: 114
- Turkey: 89
- Slovenia: 56

## North America
- USA: 730
- Canada: 116

## Central America
- Belize: 459
- Cuba (estimate): 500
- Panama: 359
- Costa Rica: 229
- Honduras: 172
- El Salvador: 158
- Mexico: 156
- Nicaragua: 143
- Guatemala: 71
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APPENDIX B

Prison Population in Poland 1945-2002
APPLICABILITY OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE IN THE LATIN AMERICAN AND CARIBBEAN REGION

Cristina Rojas Rodriguez*

I. INTRODUCTION

A Continent of tremendous socio-economic contrasts, the Latin American and Caribbean Region is far from being homogeneous. It is the cradle of many, different ethnias with their particular backgrounds, religions, cultural uses and languages; with a very rich elite, while the majority of the population is extremely poor; a gap that in recent years has widened to levels never seen before.

Almost all Latin Americans nowadays are living under elected civilian governments. But the region faces severe challenges posed by its slow economic growth, the highest levels of inequality in the world, and a deepening impoverishment\(^1\) of its population\(^2\); that are triggering popular unrest, and destabilizing and undermining the efforts towards the attainment of democratic governments made over the past 25 years; a historic and unprecedented achievement in the developing world.

The increasing socio-economic inequalities in the Latin American Region can be easily evidenced. According to the most recent UNDP report: “Democracy in Latin America” (April, 2004), in 1990, the Regional Gini\(^3\) coefficient was 0.554, but in the year 1999, the coefficient alarmingly raised to 0.580, while the world coefficient in the 90’s was just 0.381 and one of the developed countries was of 0.337. The same study indicates that in 1999 the incidence of poverty had reached 35% of the households; however, in the year 2003, the number of persons living under the line of poverty in Latin America grew to 225 million, (43.9% of the total population). It is important to note that urban critical poverty increased in higher percentages in this period, indicating the tendency towards urbanization of critical poverty. In this same period, the index of criminality increased by 5 %, or by 2.5 times the growth in population.

The lack of economic and human resources has weakened administration of justice systems. The issue of prison population is thus a matter of concern, since the rights of prisoners are frequently violated, as confirmed by the fact that more than half of all prisoners are being held in pre-trial detention.

The incontrovertible correlations between high indexes of social inequality and increases in violence and criminality are not any more in discussion. Explicitly all international and multilateral fora have recognized them lately, and thus, have to be confronted through the adoption of social, economic, health, education and justice policies, centred in the holistic development of the individual, with dignity, and free of all fears.

II. CURRENT SITUATION OF THE APPLICATION OF THE U. N. STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE IN LATIN AMERICA & THE CARIBBEAN REGION

Accurate measurement and evaluation of the degree of use and application of the United Nations Standards and Norms in Crime Prevention and Criminal Justice in Latin America and the Caribbean Region

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\(^1\) In 2002, 43.4 % of Latin Americans lived under the line of poverty. In 15 out of the 18 countries studied, by the UNDP, more than 25 % of the population lives below the poverty line and in 7 of them more than half live under these conditions.

\(^2\) In Guatemala 56% of the population lives below the poverty line (surviving on less than two dollars a day), and 26% live below the extreme poverty line (less than a dollar of income per day).

\(^3\) In the Gini coefficient, 0 represents perfect distribution, while 1 absolute inequality. A Gini coefficient of 0.25-0.35 can be considered as “reasonable”. A Gini coefficient of 0.55 represents extreme inequality.
has not been possible. Governments do not collect data using uniform parameters, due not only to the
diversity and heterogeneity among criminal justice systems, but also because of the lack of manpower and
assigned budget; ineffective coordination among criminal justice institutions; and lack of confidence in the
importance of the standards and norms and on the functions of the UN System in Criminal Justice
Administration.

Non-application or non-implementation is often the outcome, as well as a lack of knowledge of the
standards and norms themselves. In some nations, even domestic laws are not always available to criminal
justice personnel, much less to the public, because of the lack of resources available for document
publication.

A. The Rule of Law in the Region

Law and penal justice are instruments and preconditions of democracy, not so much because they include
prescriptions for individuals, but mainly, because they contain limitations to State power and rights, against
arbitrary power and force.

The rule of law is a key condition for human development, since it is through politics and not only
through economics that it is possible to create more equitable conditions and to expand options for people.
Essential as it is for democratic governance, provides the required potential for the development of a
prosperous economy, ensures life and personal security and reduces risks of political instability, fostering
national development.

On the contrary, the absence of the rule of law, contributes to poverty, violence, and unchecked abuses of
political power; as well as unchecked violence by police, prison officers and other public officials. Under
these conditions, the poor, displaced and minority groups, are more likely to be humiliated and subjected to
arbitrary treatment and intimidation by public officials, prevailing a culture of fear that displaces the proper
role of a culture of legality.

Rampant structural corruption in many countries of the Region has to be considered as one of the most
serious problems that affects negatively the rule of law, with corrosive and harmful effects upon the
credibility of the Justice Administration Systems.

The allocation of resources, both financial and human, to the Criminal Justice Systems offer a clear sign
of the degree of importance that the Latin American States render to the protection of the Rights of the
citizens as can be observed in the following table (UNDP, 2004). The medium regional average of resources
assigned to the Justice Sector is just 2.5% of the total national budget, and in some cases, even less. In eight
out of the fourteen countries in which reliable data was found, there is just one public defender for each
100,000 habitants. 4

Another serious factor that hampers the rule of law in the Latin American and Caribbean countries, is the
proliferation of misery zones or slum areas (better known as “tugurios”, “favelas”, “garrison communities”
or “nobody lands”) surrounding the big metropolitan areas. These vast, overpopulated territories are
generally dominated by criminal organizations that impose their will through fear and terror, and represent
indeed, one of the most serious problems for police officers. On many occasions, they don’t even dare to go
in them. Police only enter these areas when there are clashes between rival gangs. During these incidents,
stray bullets often kill innocent passers-by. State social services are rarely present; there are no hospitals,
no schools, no sewage system, and no police. No preventive work of any kind is done by State authorities.

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4 Table Information: Access To Justice, Country, Year, % of National Budget, Year, number of Judges, Year, number of Public
Defenders, number of Public Defenders per 100,000 habitants.
Marked inequalities persist in the treatment of persons belonging to different population groups, while laws to protect children in the workplace are frequently ignored and workers' social security protection has been reduced.

Most countries in the region have ratified the main international treaties and enacted domestic laws concerned with equality under the law and protection against discrimination as well as women's rights. But, although civil rights are recognized legally in most cases, a significant number of citizens suffer overlapping exclusions and serious failings concerning the effective respect of these guarantees. Programmes such as witness and victim protection are little developed.

In the Latin-barometer of perception of legal equality⁵, in the year 2002, the vast majority of Latin Americans believed that the rich persons always or almost always were able to have their rights respected. This is a different perception to the one that the poor, women, immigrants and indigenous people had, since they believed that they confronted serious legal disadvantages. When asked if their rights were respected, only 67.0% of the Latin American women had a positive answer; 23.1% of the indigenous people, 17.8% of the poor people and 30.8% of the immigrants, as can be observed in the following chart.

In relation to minority and indigenous groups, not all the Constitutions of the Latin American countries recognize and protect the multi-ethnic and pluri-cultural characteristic of the composition of their societies, nor protect their human rights in any specific way. Brazil, Chile, Costa Rica, El Salvador, Honduras, Dominican Republic and Uruguay don’t even mention them in the Constitution, while Bolivia has just a weak reference.

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C. Obstacles to the Equitable Functioning of Legal and Judicial Systems

1. Political Unsteadiness and Linkages between the Judiciary and the Political and Economical Oligarchies

Corruption and political instability can be identified as some of the gravest obstacles in the accomplishment of the rule of law in the Region. Most Latin American countries have had few short periods of democracy, sandwiched between military dictatorships, civil revolutions and intense guerrilla and narco-guerrilla activity.

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<tr>
<td>Región Andina</td>
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<tr>
<td>Mercosur &amp; Chile</td>
<td></td>
<td>71.2</td>
<td>19.2</td>
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<td></td>
</tr>
<tr>
<td>Total América Latina</td>
<td></td>
<td></td>
<td>67.0</td>
<td>23.1</td>
<td>17.8</td>
</tr>
</tbody>
</table>

7 The perception of legal equality makes reference to the number of times a woman, an Indian or a poor person thinks his or her rights are respected, according to the Latinbarometer 2002.
Citizens have been disappointed with the judiciary system’s effectiveness in this Region, where the rule is to denounce abuses made by ex-governors, politicians, and members of the reigning economic and political oligarchies, while giving them almost unrestricted impunity.

Several former Chiefs of State have been impeached by Congress for corruption scandals, but only one of them has been sentenced to jail in Latin America. (Arnoldo Alemán, Nicaragua, 2003). Such is the recent story of the Brazilian President Fernando Color de Mello, impeached by Congress in 1992, prosecuted, and despite abundant evidence, exonerated by the Brazilian Supreme Court. Carlos Menem, former Argentinean President, in June 2001, received a 600-page indictment charging him with authorizing illegal arms shipments to Croatia and Ecuador, and was ordered to remain under house arrest pending an investigation, dealing as well, with money laundering activities. In November 2001, Menem was released from house arrest after being cleared by the Supreme Court.

These two cases are not different from what has happened in other countries, as for example the case of Alberto Fujimori in Peru; Abdalá Bucaram in Ecuador; Col. Ríos Montt in Guatemala; Carlos Andrés Pérez and Jaime Lusinchi in Venezuela, and so on.

The case of Peru and Colombia, with very strong military forces combating insurgents and narco-guerrilla groups, is similar to that of Guatemala, where the effects of 36 years of war between armed insurgents and an all-powerful army, has led, as a consequence, to the government resorting to the worst type of persecution and atrocities that one can imagine, to quell the uprising.

The enormity of the difficulties facing Latin America’s legal and judicial systems, as evidenced, links themes of access to justice and judicial partiality, justice delay, legislation and cultural disparities in the discourse of socio-economic inequalities.

It is impossible to separate the judiciary from the oligarchies that dominate the economy and politics. In the majority of the cases, the dominating considerations on the nomination of Supreme Court Justices include political criteria.

Two extra examples will illustrate in a clearer way what has been said: a) the 52-page report to the United Nations Special Rapporteur on the Independence of Judges and Lawyers, (April 2002) that challenges the independence and effectiveness of Mexican judges and estimates that 50% to 70% of Mexican judges are corrupt; and b) the residence of high magistrates in public offices, including the President of the Supreme Tribunal of Justice, in government-controlled military installations in Venezuela.

2. Access to Justice
Access to the protection of the juridical system in the Latin American countries is not granted to the most underprivileged socio-economic and cultural sectors. Ignorance of the law abounds. The Judicial resources are not only assigned primarily to the urban centres leaving the rural areas with very scarce provision of services and judicial infrastructure; but are also limited. Legal terminology is not only different from that often used by ethnic majorities, but is incomprehensible to the poor, given their insufficient education and the hermetic terminology involved.

Good legal counsel in the majority of the countries is expensive. Richer citizens can win trials, since they can afford good lawyers. On the other hand, citizens who cannot afford private legal counsel, when charged with a crime, receive legal counsel from public defendants, which frequently are of very poor quality. Therefore, the citizens who end up in the prison system are the poorer ones.

In the Penitentiary System as well, aborigine groups and foreigners, that don’t speak the main local language, are especially vulnerable. The majority of the norms in penitentiary ordinances and regulations in the Latin American and Caribbean Region do not specify the right, of those deprived of liberty that are not able to communicate in the official language, to have an interpreter or a translator.
3. Justice Delays

Justice delays are closely linked with the capacity of the Justice Administration Systems to perform efficiently and with efficacy its assigned duties. Responsibilities such as the judgment of the offences, the punishment of the guilty, the protection of the victim and the deprived of liberty, and the retribution of the injuries, are crucial in the attainment of the rule of law.

Unfortunately, justice delays always work directly against the rights of the most vulnerable social groups due not only to the high litigation costs, but to the harmful socio-economic consequences it implies when the economic provider is imprisoned. On the contrary, if the accused happens to be a member of the political, social, cultural or economic elite, or can marshal sufficient support among the powerful, the strategy to delay the process will be effectively applied to grant impunity.


The prevalence of problematic norm-violating behaviour among Latin American and the Caribbean police forces may have deeper roots, reflecting repressive State policies and perhaps biases, such as ethnic and racial biases, against particular sub-populations, accompanied by a culture of social tolerance.

In some countries, deficient training and very low salaries that help undermine self-esteem within police forces; widespread corruption among both the military and the civil police, and their involvement with organized criminal organizations, is a recognized fact. No wonder the poor fear the police brutality more than the criminals.

According to C. Mendes, in Rio de Janeiro, Brazil, the police force is not only corrupt but also extremely violent and responsible for one out of every ten homicides that take place, with hundreds of victims per year. A study by Cano (1997) found that practically 50 per cent of the corpses of police victims in Rio, studied by the Forensics Department in the civil police force, had four or more entry wounds and were basically shot in the head or in the back, as a clear indicator of the intention to kill and not merely to stop the opponent. Unfortunately, there is a general belief that respect for human rights is not compatible with police efficiency.

III. CURRENT SITUATION OF PRISON ADMINISTRATION IN LATIN AMERICA AND THE CARIBBEAN REGION

A. Prison Overcrowding

The problem of prison overcrowding affects, to a greater or lesser extent, almost all countries of the Region. But, the fact of an imprisonment sentence does not make the offender an extra-social being. He continues to be part of the community, with full possession of his rights and thus, ought to be treated as a human being.

Under no circumstances could we justify the inhuman conditions in which the inmates are kept, nor the cruel and degrading treatments that are given in the penitentiary systems to the deprived of liberty in many Latin American and Caribbean countries. Prison overcrowding, lack of healthy physical spaces; deterioration of penitentiary infrastructure; lack of hygiene, douches, toilets; broken sewers; lack of medical attention; physical and psychological mal-treatment; lack of special premises to keep inmates that require psychiatric attention; lack of separate premises to keep the deprived of liberty that suffer communicable and contagious diseases (e.g.: Tuberculosis, Hepatitis B and C, HIV/AIDS); and lack of labour and educational facilities, are just part of the offences to the human dignity and cruel and degrading conditions that the deprived of liberty have to suffer within most of the penitentiary facilities in the region.

One of the most critical challenges confronting all systems of corrections is prison overcrowding. This phenomenon undermines and severely limits reform initiatives and also creates a number of additional challenges. Until this problem is resolved, efforts to improve other aspects of prison administration, will unlikely have any meaningful impact.

In many jurisdictions, prison systems are administered not by civilians, but by the police and the military, and are closely associated with national security and the maintenance of the political status quo.
Most systems of corrections lack a well-developed body of empirical knowledge upon which to base the formulation of policies and the operation of programmes and are affected by a variety of factors including political considerations and public opinion, lack of experimental research and rigorous evaluation of correctional policies and programmes, and lack of independent evaluation to assess their effectiveness.8

<table>
<thead>
<tr>
<th>País</th>
<th>Año</th>
<th>Total de población carcelaria (incluye detenidos sin proceso y en libertad condicional)</th>
<th>Detenidos sin proceso / en libertad condicional (porcentaje de la población carcelaria)</th>
<th>Nivel de ocupación carcelaria (sobre la base de la capacidad oficial)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>1999</td>
<td>38.604</td>
<td>107</td>
<td>55.2</td>
</tr>
<tr>
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<td>8.315</td>
<td>102</td>
<td>36.0</td>
</tr>
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<td>240.107</td>
<td>137</td>
<td>33.7</td>
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<td>33.098</td>
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<td>40.4</td>
</tr>
<tr>
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<td>2001</td>
<td>54.034</td>
<td>126</td>
<td>41.1</td>
</tr>
<tr>
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<td>229</td>
<td>39.5</td>
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<td>359</td>
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</tr>
<tr>
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<td>Venezuela</td>
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<td>686</td>
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</tr>
</tbody>
</table>

Nota: Las cifras regionales son el término medio o promedio de todos los casos para los que existen datos disponibles. Fuentes: Carranza (2004); y Centro Internacional de Estudios Carcelarios (2003).

Regionally speaking, national overcrowding averages are extremely high. In 19 out of 25 countries with prison overpopulation, the overcrowding situation is critical, presenting density equal or superior to 120%, as it is evidenced in the 2004 UNDP report: Democracy in Latin America. While the number of persons deprived of liberty varies considerably from country to country, the low index of penitentiary population for

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8 Table Information: Right of Accused and Prisoners, Country, Year, Total of penitentiary population (including detainees that are not sentenced and in conditional liberty), Index of penitentiary population (per each 100,000 national population), % of inmates without process in conditional liberty (in relation to total penitentiary population), Level of penitentiary occupation (in relation to the official capacity, overcrowding).
every 100,000 inhabitants in Venezuela, Ecuador, Guatemala and Paraguay is very low, while in other countries such as Panama, Costa Rica and Chile is very high.

In most countries, the number of prisoners awaiting trial is higher than the figures shown in the chart since persons in police stations are not included, and it is in these places where most of the prisoners predominantly are. Sentenced persons deprived of liberty but waiting appellation are not included in the figures of people awaiting trial.

Besides presenting a high penitentiary population growth resulting from an increase in the use of imprisonment and stricter penal laws, mainly in relation to violent and drug related offences; the penitentiary systems of the Latin American and the Caribbean Region face meagre budgets. With the exception in the trend of Ecuador and Venezuela, each year, the number of persons within a group of 100,000 persons that goes to prison, has increased.

Most penitentiary facilities are built inadequately, creating conditions that impede proper classification and security, thus promoting internal violence. Under these conditions, it is not possible to fulfil an acceptable standard of almost any other essential penitentiary function, such as health, food, hygiene, security, visits, and other much less important functions such as recreation, sport, training and work, all of which limit the deterioration of persons deprived of liberty.

The Polinter centre of detention in Brazil gives us a good perspective of imprisonment overcrowding in the Region\(^9\). Some 65 to 70 prisoners are kept in cells measuring three by four meters (12 square meters). Of course, there is no room for all of them, even if they decide to spend 24 hours a day standing up. With a lot of imagination and a sense of survival they have created their tier cells: there are those who live on the ground; those who live on the “second” and “third” floors, on hammocks made out of different materials. A doctor specialized in public health, visiting these cells, stated: “The condition of the prisoners in this institution is one of maximum deprivation: overcrowding, lack of air, promiscuity, bad odours, no privacy whatsoever, radical discomfort. One can affirm that the prisoners are living in a situation of physical and mental torture. The intensity of human misery imposed upon these men is unspeakable and indescribable. Most of these men are awaiting trial, although sentenced prisoners may be often also found. A special note should, however, be added: if one has a university diploma, one will never see the interior of these cells…”

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Unfortunately the description of the infrahuman conditions in which the deprived of liberty live in the Polinter Centre of detention, as it was said before, is not very different from the ones that prisoners live in other latitudes in the Region.

As the next chart shows, the number of foreign prisoners in some countries of the region, such as Costa Rica and Panama has been steadily growing mainly due to drug trafficking offences that use their territory for transit operations from Colombia, destined to the United States and Canada; and the high percentage of legal and illegal migrant population.

Costa Rica in the last two decades has gone through a constant increase in the absolute and relative number of its penitentiary population. This situation is revealed both in the statistics that show the increase in the total number of persons deprived of liberty, and in the ones that calculate the total number of inmates in relation to 100,000 inhabitants. For the period 1998-2001, the above-mentioned tendency was emphasized dramatically. In 1998 the increase in the relative numbers with respect to 1997 was 28%. In 1999, the increase in the number of inmates was still very high at 27%. The tendency diminished a little to 18% for the year 2000, even though it always remained high. And for the year 2001, the tendency diminished significantly with respect to the immediate former year, going down to 7%.

In December 1998, the total number of persons deprived of liberty was 4,448, while in November 2001 this number was 11,858 inmates, with a total increase of 60% in the said period. It is interesting to confront this data with the total numbers of the sentenced persons in a semi-institutionalized condition, that went, at the beginning of the same period of the study, from 669 to 1,138 in the year 2000, diminishing again to 934 in the year 2001, with a total increase rate of 40% in the period.

The situation is more serious when we analyze the case of institutionalized minors. In the same period of study, the increase in the number of minors deprived of liberty was 88%.

This is a very grave national situation that should call local authorities to perform a serious in-depth evaluation, specially if we consider that the total rates for each segment of 100,000 inhabitants increased in the last quinquennium, from 159 for each 100,000 inhabitants, to 288 for each 100,000 inhabitants, placing Costa Rica as one of the countries with the largest number of persons deprived of liberty in the whole American Continent.

It is possible to identify different kinds of reasons that could help to understand such a social phenomenon. Perhaps the primary and first reason is of a political character, and is consistent with the decision of the national authorities, mainly legislative and executive, to provide a more repressive response to the aggravation of social conflicts and violence. Other factors such as a major improvement in the functioning of the judicial agencies in charge of investigation, prosecution and judgment of the cases that increases at the same time the number of sentenced persons, and, the excessive use of imprisonment penalties, instead of alternative measures to imprisonment, have also been crucial.
IV. SYSTEMS FOR SECURING TRANSPARENCY AND ACCOUNTABILITY IN THE ADMINISTRATION OF PENITENTIARY INSTITUTIONS AND THEIR IMPLEMENTATION IN THE LATIN AMERICAN & CARIBBEAN COUNTRIES

Latin American countries have enacted very modern and progressive legislation that creates different types of institutions which, among other functions, supervise the application of human rights and the United Nations Standards and Norms in the prevention of Crime and the Treatment of Offenders in the functioning of the judicial and penitentiary systems, such as the Ombudsman, Commissions of Human Rights, and Tribunals that deal with the Inspection of the Judiciary and the Execution of the Penalty, among others.

A. Tribunals of Execution of the Penalty: the Case of Costa Rica

The institute of Execution of the Penalty is ruled under Title V, Articles 452 - 463, of the new Procedural Criminal Code of Costa Rica enacted in January 1998. It introduced significant transformations in the iter of the national Penitentiary System, establishing a series of norms for the control and vigilance of the execution of penalties and of the security measures of the deprived of liberty, through an aggregate of Tribunals of Execution of the Penalty that come to play a radically new role in respect with what, up to that date, the judges of execution of the penalty had been doing. The new legislation assigned a series of general and specific functions to these officers, mainly dealing with the control of the legality of the acts of the Administration.

These series of norms respond to the constitutional mandate that assigns to the Judicial Power the function of: a) administrating Justice, b) resolving definitely the cases that are brought under its knowledge, and c) executing the resolutions of the sentences it pronounces, with the help of the police if it is necessary.

Specifically the Procedural Criminal Code stipulates that the deprived of liberty could exercise the rights and faculties that the laws and the regulations grant them, being able to submit to the knowledge of the Tribunal of the Execution of the Penalty all the pertinent observations.

Two preliminary conclusions could be extracted out of this text:

• that the deprived of liberty or the person that is under a security measure has the legitimacy to present its case directly before the Tribunal of the Execution of the Penalty;
• that this right is referred to, generically, as “any observation”... and thus, it is understood that the concept refers to petitions, requests, complaints, demands, etc. in relation to any decision of the Penitentiary Administration that the inmate might consider prejudicial to their rights and interests.

The exercise of this right does not demand any other prerequisite other than the subjective belief of the interested person that he or she is becoming a victim of a violation of their human and constitutional rights and that the acts of the Penitentiary Administration, illegitimately are violating the principles of equality, proportionality, no discrimination, and/or reasonableness.

The Judge of Execution of the Penalty emerges as a guarantee that the prison penalty and/or the security measure will be executed in conformity with the constitutional and legal mandates. It is legally authorized to intervene, attending the petition of the inmate or of any third person interested, (prosecutor, defender, victim); and to resolve what is pertinent in order to amend the situation. The judge will appraise the gravity of the situation and according to criteria of reasonability will decide what he esteems as more convenient, even if that decision implies a modification of any measure that the Administration might have adopted.

The procedural norm also mandates that all matters in relation to successive settlements, extinction, substitution or modification of any of the conditions of the execution of the penalty, will be under the cognizance of the Tribunal of Execution of the Sentence. It means that this jurisdiction has the legitimacy to intervene once the Penitentiary Administration has fulfilled all the functions assigned to its level of decisions, such as the ones in relation to the modality of the treatment that should be administrated to the inmate, the place and conditions under which the penalty or the security measure should be executed, etc. These functions and attributes of the Penitentiary Administration are stipulated in detailed regulations that deal specifically with the penitentiary regime.

The Tribunals of Execution of the Penalty can revise, confirm or modify any of the measures adopted by
the Administration, before a petition of an inmate, thus controlling the legality of the measures, preventing in this way, the adoption of arbitrary and/or illegal decisions. It must be clear that this does not imply at all, that the Judge will be substituting the functions of the Administration. The Judge, in a motivated resolution will identify clearly the specific violations of the human and constitutional rights of the inmate in which the Administration has incurred, and will order what he deems pertinent to restore them.

According to Article 454 of the Procedural Criminal Code, either the inmate, the prosecutor of the case, the defender or the victim can also go before the Judge of the Execution of the Penalty and present any legal petition in relation to the execution, substitution, modification or extension of the said penalty or measure of security. In case the Judge considers it to be relevant to the case, before adopting the pertinent resolution, can order a summary investigation of the facts and evidence to support his criteria. The matter will be solved in an oral audience.

The Judge of Execution of the Penalty with ample faculties, can order the provisional suspension of the measures adopted by the penitentiary administration that have been objected to, before pronouncing his sentence, during the time that he/she is evaluating evidence and conducting the summary investigation. (Article 455 CPP).

It must be clear that the interested party can go directly and present their case before the Judge of Execution of the Penalty, without having to comply previously with any administrative prerequisites or procedures. The mere adoption of a measure that any of the said parts considers, even in a subjective way, that is harmful and that will affect its interests in any way, will give him the legitimacy to present an incident before the Judge of Execution of the Penalty.

The Judge can confirm the measure adopted by the Penitentiary Administration, or else, substitute it for another, either partially or totally ordering in such case what he considers that proceeds in due respect of the Law.

The resolutions adopted by the Judge of Execution of the Penalty can be appealed before the Judge of the Sentence (paragraph 3, Article 454 CPP).

In January 1998 article 458 of the Procedural Criminal Code (PCC) was modified in order to establish in a clearer way the attributions of the jurisdiction of the Tribunals of Execution of the Penalty, in relation to the vigilance and control of the penitentiary administration. It ought to be understood that the Judge of Execution of the Penalty can intervene both by request of an interested party, or else diligently, by his own initiative when he considers it to be necessary.

According to the law, the functions of the Judge of Execution of the Penalty are:
(i) Maintain, substitute, modify or stop the effects of the penalty or the security measure, as well as the conditions in which it is accomplished.
(ii) Visit the Penitentiary centres in order to verify the respect of the fundamental rights of the inmates, (those that are protected by the constitution, International Treaties and Conventions, laws and regulations) ordering imperatively, the corrective measures to be adopted to correct what he estimates are pertinent.
(iii) Resolve the petitions and complaints that have been submitted to his consideration, in relation with the regime and the penitentiary treatment that the inmate is being subjected to.
(iv) Resolve the claims of the inmates in relation to the disciplinary sanctions imposed on him by the penitentiary administration.
(v) Approve (or disapprove) all the disciplinary sanctions of isolation for more than forty eight hours that the Penitentiary Administration might impose on an inmate.
(vi) Order, previous practice of due medical examinations, the reference of an inmate to a facility in which he can receive adequate medical treatment, ordering the measures that have to be adopted, in order to prevent his escape. Of course in emergency situations, the Penitentiary Administration can authorize what appears pertinent, having the obligation to submit the matter immediately to the knowledge of the Judge of Execution of the Penalty who can confirm or revoke it.
(vii) Defer the execution of the penalty in the case of a mother in an advanced state of pregnancy or the mother has a child less than three months of age, when the life of either one or both may be endangered.
(viii) Defer the execution of the penalty in the case of inmates with severe terminal diseases, or affected by serious maladies that might endanger their lives.

All the jurisdictional attributions in relation with the execution of the penalty are applied in the same way in the case of the security measures imposed on an inmate. In such a case, the Judge has as well, the duty to review the application of the measure every six months in order to check if the motivation that justified its imposition still exists or has disappeared, having the mandate that authorizes him to substitute or modify it.

The efficacy and credibility of the Tribunals of Execution of the Penalty in Costa Rica can easily be verified in the accelerated growth of the number of cases submitted to its knowledge:

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>1997</th>
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<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
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<td>1030</td>
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<td>3974</td>
<td>5117</td>
<td>5498</td>
<td>5047</td>
<td>5338</td>
</tr>
</tbody>
</table>

B. Tribunal for the Inspection of the Judiciary

The Courts have an internal disciplinary jurisdiction, to review cases in which justice administration personnel have been faulted for justice delays, poor service to the public, etc. But, this jurisdiction is not always very functional, since judges can always argue work overload and logistical deficiencies.

As can be observed in the next chart, the total number of judges that have been sanctioned in the Costa Rican Tribunal for the Inspection of the Judiciary is extremely low, and the number of cases in which the sentence has been to revoke their mandate, is even lower.10

<table>
<thead>
<tr>
<th>Año</th>
<th>Jueces acusados</th>
<th>Jueces sancionados</th>
<th>Porcentaje de sancionados</th>
<th>Revocatoria de nombramiento</th>
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<tr>
<td>1998</td>
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<td>2002</td>
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<td>56</td>
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</table>


10 Table Information: Judges Sanctioned by the Tribunal for the Inspection of the Judiciary 1998-2002, Year, Judges accused, Judges sanctioned, % of sanctions, Revocation of their appointment (dismissed).
C. The Ombudsman

From 1990 on, with the exception of Brazil, Chile and Uruguay, the countries of the Region have institutionalized a new organ of control: the Ombudsman, that operates both as an agent of vertical and horizontal control, thus differentiating itself from other control institutions. The Ombudsman receives inquiries and complaints about the practices and services provided by public agencies. While not an advocate, the Ombudsman can conduct impartial and confidential investigations to determine if a public agency is being fair to the people it serves.

The Ombudsman can: provide information about what steps to take in dealing with a public agency; try to settle complaints through consultation; investigate complaints about administrative unfairness by a public agency; make recommendations to a public agency to resolve an unfairness; report to Parliament; issue public reports and submit cases to the Constitutional Branch of the Supreme Court of Justice when fundamental rights are being violated. Also, it investigates complaints about maladministration when a public body fails to act in accordance with the rule of law.

Citizens can complain to the Ombudsman when institutions fail to do something they should have done, when they do it in the wrong way, or when they do something they should not have done. Some of the most common problems that the Ombudsman deals with are unnecessary delays, refusal of information, discrimination and abuse of power.

In all the countries the Ombudsman has helped to ensure transparency and accountability of public authorities, including of course the ones in charge of the penitentiary administration, applying, when necessary, pressure so that the institutions prove in practice their compliance with the Constitution. As a result, the service the institutions provide has certainly improved.

Justice delays, failures in the administration of the Penitentiary Systems, prison overcrowding and violations of the rights of prisoners in the process of execution of the penalty, are recurrent themes that have been present in the annual reports of the Ombudsman.¹¹

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**CUADRO 7.19**

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<tr>
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<tbody>
<tr>
<td>Costa Rica</td>
<td>19,916</td>
<td>26,109</td>
<td>19,405</td>
<td>13,077</td>
<td>19,998</td>
<td>19,787</td>
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<td>5,694</td>
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<tr>
<td>Panamá</td>
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<td></td>
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</tr>
</tbody>
</table>

¹ Consultas de la ciudadanía.
² Casos ingresados.
³ Denuncias tramitadas.
⁴ Quejas del público. En 1998 y 1999 únicamente se incluyen quejas relacionadas con corrupción de funcionarios públicos. En el 2001 se incluyeron todas las quejas recibidas.
⁵ Denuncias tramitadas incluye tramitadas con expediente ordinario, orientación y conciliación.

Fuente: Costa Rica, Defensoría de los Habitantes; El Salvador, Procuraduría de la Defensa de los Derechos Humanos; Guatemala, Procuraduría de los Derechos Humanos; Nicaragua, Procuraduría para la Defensa de los Derechos Humanos y Panamá, Defensoría del Pueblo.

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¹¹ Table Information: Central America: Number of cases submitted to the Ombudsman. 1995-2001 (CUADRO 7.19), Central America: Percentage of cases submitted to the Ombudsman in relation to the institution informed against. Various years (CUADRO 7.20)
The use that citizens give to the Ombudsman’s office in the Central American countries, as can be observed in the above charts, published in the Ninth Report of the State of the Nation on Sustainable Human Development, (2002, www.estadonacion.or.cr ), in a period that goes from 1998 to 2002, varied a lot from country to country, ranging from 870 cases in Honduras to 17,612 cases in Costa Rica. It could be that some of the main reasons for the occurrence of such phenomenon are: the low levels of literacy, ignorance of the law, ignorance of the existence of the institution itself, and doubts on the efficacy of its work, among others.

V. CONCLUSIONS

In order to conclude the present exposé, it is important to say that the Principles and Guidelines of the UN Standards and Norms in Crime Prevention and Criminal Justice are simply awaiting implementation in the Latina American and Caribbean Region.

Solid human rights protection and an independent and vigorous judiciary still need to be significantly strengthened. Due attention has to be rendered to:

• the coordination of all crime prevention policies with strategies for social, economic, political and cultural development;
• the importance of improved transparency and expediency of the criminal justice system, as well as fairness in the sanctioning of offenders;
• the impact of social exclusions and marginalization of the indigenous population, indigents, women, children and migrants, in relation to the application of the rule of law and the access to justice;
• the coordination and planning among the different Justice Administration agencies;
• the incorporation of community-based judicial practices that pay due respect to the traditions and customs of indigenous people - a cross cultural approach;
• the adequate diffusion of the UN Standards & Norms in this field among concerned officers in the justice administration systems of the Region as a vital element for their use and application; and
• the application of an effective system of transparency and of accountability within the Justice Administration Sector.

The efforts to implement more equitable standards and norms in crime prevention and criminal justice in the Region are just starting, but we still aim to see their efficient execution as a reality in the near future. The burden of labour that this ideal requires is big, but stronger is our will to fight for their application without claudication.
## APPENDIX A

<table>
<thead>
<tr>
<th>Country</th>
<th>Ethnic Breakdown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>European: 85% (mainly Spanish and Italian descent); Indigenous: 9.1%; Mestizo, Ameridian, and other non-white groups: 15%</td>
</tr>
<tr>
<td>Bolivia</td>
<td>Spanish, Mestizo; Indigenous: 21.2%</td>
</tr>
<tr>
<td>Brazil</td>
<td>Portuguese, Italian, German, Spanish, Japanese, Arab, African Indigenous people: 34.3%</td>
</tr>
<tr>
<td>Chile</td>
<td>Spanish, Mestizo; Indigenous: 33.5%</td>
</tr>
<tr>
<td>Colombia</td>
<td>Spanish, Mestizo; Indigenous: 22.1%</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Spanish, Mestizo, African Caribbean; Indigenous: 23.2%</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Spanish, Mestizo; Indigenous: 40.2%</td>
</tr>
<tr>
<td>El Salvador</td>
<td>Spanish, Mestizo; Indigenous: 32.3%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>Mestizo (Spanish-Indian); Indigenous: 38.7%</td>
</tr>
<tr>
<td>Honduras</td>
<td>Mestizo (Spanish-Indian); Afro-Caribbean; Indigenous: 34.6%</td>
</tr>
<tr>
<td>México</td>
<td>Indian-Spanish (mestizo), 60%; Indian, 30%; Caucasian, 9%; Other, 1%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>Mestizo (Spanish-Indian); Afro-Caribbean; Indigenous: 23.5%</td>
</tr>
<tr>
<td>Panamá</td>
<td>Mestizo (Spanish-European-Indian): 70%; Indigenous: 10.5%; Caucasian: 10% Afro-Caribbean: 5%</td>
</tr>
<tr>
<td>Paraguay</td>
<td>Spanish, Mestizo (Indian &amp; European); Indigenous: 15.0%</td>
</tr>
<tr>
<td>Perú</td>
<td>Mestizo (Spanish-Indian); African American; Chinese; Indigenous: 16%</td>
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<tr>
<td>Dominican Republic</td>
<td>Mestizo (Spanish-Indian); Afro-Caribbean; Indigenous: 11.5%</td>
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<tr>
<td>Uruguay</td>
<td>Spanish, Mestizo; Indigenous 17.1%</td>
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<tr>
<td>Venezuela</td>
<td>Spanish, Mestizo African American; Indigenous: 28%</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>GRUPOS INDÍGENAS MÁS IMPORTANTES, C. 1993</th>
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<tr>
<td><strong>Grupos más importantes</strong></td>
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</tr>
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<td>Quechua</td>
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<tr>
<td>Maya</td>
</tr>
<tr>
<td>Aymará</td>
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<td>Náhuatl</td>
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<td>Mapuche</td>
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<td>Zapoteco</td>
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<td>Wayúu (Guajiro)</td>
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<td>Otomí (Nahüu)</td>
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<tr>
<td>Garífuna</td>
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<td>Lenca</td>
</tr>
<tr>
<td>Totonaca</td>
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<tr>
<td>Paez</td>
</tr>
<tr>
<td>Ngöbe (Guaymí)</td>
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<tr>
<td>Subtiava</td>
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<td><strong>Total</strong></td>
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### Evolución de algunas variables e indicadores políticos

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<td>Oficinas judiciales de primera instancia</td>
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<td>20,996</td>
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<td>11,650</td>
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<td><strong>Deteridos por tráfico de drogas según la Ley de Psicotrópicos</strong></td>
<td>526</td>
<td>624</td>
<td>770</td>
<td>921</td>
<td>881</td>
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<td>1,114</td>
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<td>Tasa de crecimiento del total de casos entrados a las salas del Poder Judicial</td>
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<td>1,3</td>
<td>14,4</td>
<td>6,3</td>
<td>16,6</td>
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<td>33,5</td>
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<td>Recursos de habeas corpus presentados</td>
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<td>1,328</td>
<td>1,108</td>
<td>1,443</td>
<td>1,547</td>
<td>1,442</td>
<td>1,355</td>
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<td>Recursos de amparo presentados</td>
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<td>5,773</td>
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<td>7,666</td>
<td>8,651</td>
<td>10,740</td>
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<td>Acciones de inconstitucionalidad presentadas</td>
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<td>345</td>
<td>399</td>
<td>350</td>
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<td>329</td>
<td>338</td>
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<td>21 días</td>
<td>19 días</td>
<td>19 días</td>
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<td>2 meses</td>
<td>2 meses</td>
<td>2 meses</td>
<td>2 meses</td>
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<tr>
<td>Duración promedio de las acciones de inconstitucionalidad</td>
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<td>19 meses y 17 meses</td>
<td>25 meses</td>
<td>20 meses</td>
<td>24 meses</td>
<td>3 semana</td>
<td>1 semana</td>
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<td>Personas privadas de libertad (nivel institucional)</td>
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<td>4,408</td>
<td>4,967</td>
<td>5,208</td>
<td>5,374</td>
<td>5,634</td>
<td>6,079</td>
<td>6,571</td>
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<td>784</td>
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<td>902</td>
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<td>37</td>
<td>26</td>
<td>31</td>
<td>17</td>
<td>68</td>
<td>51</td>
<td>65</td>
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<td><strong>Participación ciudadana y rendición de cuentas</strong></td>
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<td>Casos en la Defensoría de los Habitan</td>
<td>19,916</td>
<td>26,109</td>
<td>19,405</td>
<td>13,077</td>
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<td>19,787</td>
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<td>41</td>
<td>33</td>
<td>17</td>
<td>15</td>
<td>13</td>
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<td>Audiencias públicas en la ARESEP</td>
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<td>79</td>
<td>74</td>
<td>61</td>
<td>75</td>
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</tbody>
</table>

APPENDIX D

People Killed by the Military Police in the Brazilian State of Rio de Janeiro, per 100,000 inhabitants - 1995/2001

Source: Police Ombudsman’s offices in the state of Rio de Janeiro

### APPENDIX E

**Police Killings 1978-2000**

<table>
<thead>
<tr>
<th>Year</th>
<th>Killings</th>
<th>Rate as % Homicides</th>
<th>Killed</th>
<th>Ratio</th>
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<td>140</td>
<td>5.4</td>
<td>11</td>
<td>1:13</td>
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<tr>
<td>1998</td>
<td>145</td>
<td>5.7</td>
<td>14</td>
<td>1:10</td>
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<tr>
<td>1996</td>
<td>148</td>
<td>5.9</td>
<td>10</td>
<td>1:15</td>
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<tr>
<td>1994</td>
<td>100</td>
<td>4.0</td>
<td>6</td>
<td>1:16</td>
</tr>
<tr>
<td>1992</td>
<td>145</td>
<td>5.9</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1990</td>
<td>135</td>
<td>5.6</td>
<td>11</td>
<td>1:12</td>
</tr>
<tr>
<td>1988</td>
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<td>7.7</td>
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<td>1:45</td>
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<tr>
<td>1986</td>
<td>179</td>
<td>7.7</td>
<td>10</td>
<td>1:26</td>
</tr>
<tr>
<td>1984</td>
<td>355</td>
<td>15.6</td>
<td>19</td>
<td>1:20</td>
</tr>
<tr>
<td>1982</td>
<td>236</td>
<td>10.9</td>
<td>10</td>
<td>1:24</td>
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<tr>
<td>1980</td>
<td>234</td>
<td>10.9</td>
<td>28</td>
<td>1:10</td>
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<tr>
<td>1978</td>
<td>167</td>
<td>8.0</td>
<td>18</td>
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Data source: Statistics Unit JCF.

# APPENDIX F

## LEGISLACIÓN SOBRE VIOLENCIA CONTRA LAS MUJERES, 1990-2001

<table>
<thead>
<tr>
<th>País</th>
<th>Legislación sobre violencia doméstica y violencia contra las mujeres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bolivia</td>
<td>Ley 1.674, que modifica el Código Penal al referido a delitos sexuales, 1995.</td>
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<tr>
<td>Chile</td>
<td>Acta 19.325, que establece procedimientos estándares y penas para actos de violencia dentro de la familia, 1994.</td>
</tr>
<tr>
<td>Colombia</td>
<td>Ley 204 para prevenir, castigar y erradicar la violencia familiar, 1996 (parcialmente modificada por la Ley 575, 2000).</td>
</tr>
<tr>
<td></td>
<td>Ley 360 sobre delitos contra la libertad sexual y la dignidad humana, 1997.</td>
</tr>
<tr>
<td></td>
<td>Ley del Código Penal 199, que trata sobre la violencia intrafamiliar, 2000.</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Acta 7.142, que promueve la igualdad social de las mujeres; incluye el capítulo 4 sobre violencia en la familia, 1990.</td>
</tr>
<tr>
<td></td>
<td>Ley 7.586, contra la violencia doméstica, 1996.</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Ley 103, sobre violencia contra la mujer y la familia, 1995.</td>
</tr>
<tr>
<td>El Salvador</td>
<td>Decreto Ley 902, sobre violencia familiar, 1996.</td>
</tr>
<tr>
<td>Guatemala</td>
<td>Decreto Ley 97-96, de prevención, castigo y erradicación de la violencia familiar, 1996.</td>
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<td>Ley por la dignidad y protección integral de la mujer, 1999.</td>
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<td>Honduras</td>
<td>Decreto 132-97, de prevención, castigo y erradicación de la violencia contra la mujer, 1997.</td>
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<td>México</td>
<td>Ley para tratar y prevenir la violencia familiar, 1996.</td>
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<td>Decreto de reforma de los códigos civiles y penales en referencia a la violencia familiar y la violación, 1997.</td>
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<td>Nicaragua</td>
<td>Ley que contiene modificaciones y agregados al código penal de 1995; y ley que crea el Servicio de Policía de Mujeres y Niñas, incluido en la legislación que establece el Servicio Nacional de Policía, 1996.</td>
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<td>Ley 230, que establece la protección de las mujeres víctimas de la violencia doméstica, 1996.</td>
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<td>Ley 4 sobre igualdad de oportunidades para la mujer, 1999.</td>
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<td>Ley 26.263, que establece mecanismos para prever mayor protección a las victimas, 1997.</td>
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<td>Ley 26.770, que reforma el código penal estableciendo que el matrimonio no viola los argumentos para el procesamiento de crímenes contra la libertad sexual, 1997.</td>
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<td>República Dominicana</td>
<td>Ley 24-97, que define los delitos de violencia doméstica, acoso sexual e incesto, 1997.</td>
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<td>Uruguay</td>
<td>Acta 16.270, sobre seguridad de los ciudadanos, que agrega un nuevo artículo al código penal, definiendo a la violencia doméstica y estableciendo sus penalidades, 1995.</td>
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<td>Ley 27.514 sobre violencia doméstica, 2002.</td>
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<td>Venezuela</td>
<td>Ley de igualdad de oportunidades para la mujer, 1993.</td>
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<td>Ley sobre violencia contra la mujer y la familia, 1998.</td>
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At least 103 prisoners have died, and many more subjected to serious burns, in a major fire at a northern Honduras correctional facility. It was the worst jail disaster in Honduras and the second time that dozens of gang members have been killed inside a Honduran prison in a little over a year, Reuters reported. Some inmates complained that security forces were slow to help Monday and some family members suspected it was no accident.

Although there was little specific information about the fire victims, many gang members have been convicted on charges of murder, drug smuggling or robbery. They are often housed together in prisons because of frequent clashes with other groups of inmates.

One of the members who survived said guards at the prison were extremely slow to help the inmates.

“The explosion was above my bed. The fire started at 1:30 (a.m.) and the police arrived to open up the cells at 3:30, although we were shouting ‘Help, help!’” Antonio Hernandez said in an interview with Radio America.

Family members gathered outside the prison and some suspected foul play.

“Why was the fire only in the area of the gang members? Why wasn’t it in another area where the other prisoners are? The same thing happened in La Ceiba,” said Sara Gomez, the mother of a Mara Salvatrucha member, said the Reuters report.
Fire Caused By Short-Circuit Kills More Than 100 in Honduras Prison

Monday, May 17, 2004 (05-17) 12:01 Pdt San Pedro Sula, Honduras (AP)

A fire sparked by a short-circuit killed more than 100 inmates and injured more than two dozen in a prison in northern Honduras early Monday. It was the second major jail fire in the country in a little more than a year.

The short-circuit apparently occurred when a refrigerator motor overheated in a cell block housing 186 gang members, Police Commissioner Wilmer Torres said. Some prisoners were burned to death while others died from smoke inhalation. There were no reports of any escapes, Torres said.

As word of the fire spread, hundreds of the inmates’ family members began gathering outside the prison, located in the city of San Pedro Sula, 110 miles north of the capital, Tegucigalpa.

Authorities closed off all streets near the prison as police, rescue crews and army troops worked to control the situation.

“We’re doing everything possible to work fast, but it is chaos,” Torres said.

“Everything happened fast while we were sleeping,” prisoner Jose Mauricio Lopez told a radio station from his hospital bed. “We woke up with our clothes and our beds in flames.”

Authorities said 103 prisoners died, and 25 were taken to area hospitals with injuries after the fire broke out about 1:30 a.m. Authorities originally estimated the death toll at 90. They later raised it to 101 after more bodies were found, then to 103 when two prisoners died at the hospital.

The fire already had consumed a large part of the jail when fire-fighters entered. They were able to bring it under control quickly despite resistance from some of the gang members, prison spokesman Commissioner Jose Bustillo said.

One of the surviving prisoners, Pablo Cardona, claimed that guards “fired at us repeatedly from outside the cell block to stop us from leaving, despite our cries for help.”

But Bustillo said guards fired guns in the air “to prevent a massive prisoner escape.”

Honduras’ prisons consist of 27 old buildings housing 13,000 prisoners, twice their capacity. The prison in San Pedro has room for 800 prisoners, but held 1,960 at the time of the fire, Torres said. Authorities earlier said the prison’s population was 2,200. Torres later noted that some of the inmates had been transferred to other facilities in recent days.

All of the prisoners in the affected cell block belonged to the Mara Salvatrucha, one of the most violent of Central America’s gangs.

There are more than 100,000 gang members belonging to 500 different gangs in Honduras. Most of the members are between 8 and 35 years old.

Monday’s was the second major jail fire in a little more than a year. Some prisoners were locked in their cells, doused with gasoline, and set on fire, during an uprising at El Porvenir prison on April 5, 2003, that killed nearly 70 people, including guards and visitors.

The uprising began with clashes between prisoners, many also gang members. The violence quickly escalated, and a government report blamed guards for many of the deaths.
Gang Members Call Honduras Jail Fire Arson

Mark Stevenson
Associated Press

SAN PEDRO SULA, Honduras - Survivors of a prison fire that officials blamed on a short-circuit claimed Tuesday that the inferno that killed more than 100 gang members was intentionally set by fellow inmates.

A similar fire that broke out a year ago during clashes at the nearby La Ceiba prison killed 70 gang members. As in Monday's fire, last year's blaze burned only a cellblock housing the gangs.

Most of those killed were members of the feared Mara Salvatrucha 13 gang, characterized by tattoos of saints, skulls, daggers and dice.

"Many of the guys who died in there were in jail just because they had tattoos," said 18-year-old gang member Olmon Alberto Contreras, who lay in a hospital bed with severe burns.

At least 103 of 186 prisoners in the cell block - the only one of 18 at the prison to burn - died in the blaze at the state prison in San Pedro Sula, 110 miles north of the capital, Tegucigalpa.

Some were burned to death; others died from smoke inhalation. The death toll was expected to rise as many of the survivors lay in hospital beds with burns over as much as half their bodies.

The government acknowledged overcrowding and poor conditions in Honduras jail cells and promised to provide more funding.

But some survivors alleged that other inmates set the fire by throwing gasoline into their cell block and lighting the fuel, while officials stood by and did nothing. The gang members say the guards' apathy was part of a government strategy of elimination that began with last year's federal anti-gang law.

"When you sow hatred, you reap hatred," Contreras said. "As you treat us, we will treat you. If you hit me, I must seek revenge."

Government authorities deny they are out to exterminate the gangs but say tough action is necessary to control an increasingly violent force blamed for everything from common crimes to grisly homicides.

Many of those killed Monday were detained during the country's recent crackdown on the estimated 100,000 gang members in Honduras.
I. THE MANAGEMENT OF PRISONS AND THE REHABILITATION OF PRISONERS

A. The Organisation and Functions of Her Majesty’s Prison Service

1. Mission Statement

The Mission Statement of Her Majesty’s Prison Service for England and Wales is:

“Her Majesty’s Prison Service serves the public by keeping in custody those committed by the courts. Our duty is to look after them with humanity and help them lead law-abiding and useful lives in custody and after release.”

2. Background

The Government of the United Kingdom is complicated. While the UK is governed overall from Westminster, some of the Home Secretary’s responsibilities in England and Wales are discharged by the Secretaries of State for Scotland and Northern Ireland in those countries. Her Majesty’s Prison Service covers England and Wales, while Scotland and Northern Ireland have their own Prison Services and there are some differences in their legal frameworks. Although Wales also now has an elected Assembly with some devolved powers and responsibilities, it does not have its own Prison Service.

England and Wales does not have a Justice Department as many other countries do. Policing and the delivery of punishment are the responsibility of the Home Office, while courts and sentencing come under the Department of Constitutional Affairs, formerly the Lord Chancellor’s Department. The judiciary are staunchly independent of Parliament and the Executive.

3. Executive Agency Status

Historically the Prison Service has always been linked with the Home Office but the closeness of this link has changed; at times it has been largely independent, at others it has been a fully integrated department within the Home Office.

In the 1980s the British Government first introduced the concept of Executive Agencies, separating out those former Government Departments and organisations whose role is to deliver specific services from the main policy-making Departments of State. Executive Agencies have wide delegated authority within a formal Framework Document. Parent departments set budgets and standards, and give Executive Agencies delegated authority and responsibility for delivering the service, while Ministers retain overall accountability to Parliament.

The decision to make the Prison Service an Agency dates back to 1991. In 1990 there was a major riot at Manchester prison, then known as Strangeways, with outbreaks of lesser copycat disorder elsewhere. Lord Justice Woolf’s investigation into the disturbances identified issues about the management structures of the Prison Service. In August 1991, the then Home Secretary appointed Admiral Sir Raymond Lygo to conduct a review of the managerial effectiveness of the Prison Service. He reported in December 1991.

In his report he said: “The Prison Service is the most complex organisation I have encountered and its problems some of the most intractable”. He went on to list a number of problems that were outside the control of the Prison Service - overcrowding, neglect of buildings, increase in violent crime and terrorism, and public attitudes to sentencing. However, there were also internal managerial issues: leadership,
independence and unity. Lygo said “If the Prison Service is to achieve the direction and unity for which successive reports have called, it must be allowed to operate much more independently of day to day Ministerial control and more separately from the Home Office”. He went on “The critical factor in the success or failure of any new arrangement will be the ability of Ministers to allow the Prison Service to operate in an almost autonomous mode while retaining their responsibility to Parliament for the overall policy and conduct”. Lygo strongly recommended Agency status for the Prison Service – a recommendation that was accepted. He also set out a number of structural devices to ensure the correct balance between operational independence and Ministerial accountability.

The Prison Service became an Executive Agency in 1993.


In 2003 the then Director General of the Prison Service, Martin Narey, was appointed to a new post of Commissioner of Correctional Services. This brought together custodial and community interventions under a single line manager.

Earlier this year the Government published the report “Managing Offenders - Reducing Crime”. Its recommendations, which the Government has accepted, aim to ensure a more seamless service between prison and probation to do more to reduce re-offending through the creation of a National Offender Management Service (NOMS).

The key elements of this are:
(i) To cap the prison population at 80,000 by encouraging more use of fines and other non-custodial sentences. This is going to be challenging. A Sentencing Guidelines Council is to be created but it remains to be seen how far this will influence the judiciary and magistracy. And the report also proposes measures to increase confidence in alternatives to custody and fines.
(ii) To develop seamless links between prison and probation so that offending behaviour programmes can be continued in the community. The Prison Service and the Probation Service will both be part of the National Offender Management Service.
(iii) To create “contestability” to ensure a wider base of providers of both custodial and non-custodial programmes. Providers will be from both the public and private sectors.
(iv) To introduce a model of commissioning services with the creation of Offender Managers (commissioners/purchasers) who are separate from community and custodial providers.
(v) To introduce a new sentencing framework including:
   • Custody Plus – a sentence part served in prison and part in the community.
   • Intermittent custody where low risk offenders are imprisoned at weekends so as not to lose their job and home; or during the week only so as to maintain family ties.

In organisational terms this will mean that the Prison Service will no longer be an executive agency but will be part of NOMS, and thus will revert to being an integral part of the Home Office. This is because of the different legal position of the Probation Service, which cannot become part of an executive agency. Martin Narey has been appointed Chief Executive of NOMS.

5. The Management Structure of HM Prison Service

Directors and Area Managers

The Prison Service will continue to operate as a discrete public sector provider within NOMS with significant ‘operational freedoms’, headed by the Director General, Phil Wheatley, a permanent Civil Servant and former Prison Governor who reports to the Chief Executive of the National Offender Management Service. He chairs the Prison Service Management Board.

The Director of Operations line manages most of the public sector prisons through 13 Area Managers. The only prisons not managed in this structure are the nine High Security Prisons that are managed separately by the Director of High Security Prisons. Otherwise all prisons are managed on a geographical basis regardless of their function. However there are two Assistant Directors who retain a functional lead responsibility for female prisoners and juveniles (under-18s) respectively.

The Directorate also includes the Estate Planning and Development Group whose main functions are to monitor actual and forecast prison population changes and to identify, plan and manage programmes to
develop and expand the prison estate to meet population needs; and the Population Management Unit whose most immediate daily task is to ensure that spaces exist in appropriate places for all the prisoners committed to custody by the courts that day.

**The Prison Governor**

The individual Prison Governor has a legal status conferred by the Prison Act 1952 and has considerable delegated authority to manage their prison within a budget agreed with their Area Manager. They have to meet a range of Key Performance Targets, also agreed with the Area Manager, and which contribute to the Prison Service as a whole meeting its targets. In addition to the ongoing management oversight exercised by the Area Manager, prison establishments are subject to regular Standards Audits by the Prison Service’s own Standards Audit Unit and to a range of external checks and inspections described later in this paper.

Governors are managers of an operation, of people and of resources and to the “normal” manager role is added the need to interface personally with the client population to a degree unprecedented in most other occupations. The Governor has to be “a Manager with a Social Purpose”. The Governor must understand and take personal responsibility for everything that happens in a gaol; a medium sized gaol may have a budget of £19m, 250 staff and 600 prisoners.

The Governor is supported by a management team which includes the Deputy Governor and other senior operational managers who are responsible for specific functions (such as Residential care; Regime/Activities; Operations). Health Care in prisons is now provided in partnership with the National Health Service who commission provision of services in prisons.

6. The Private Sector

Nine out of 137 prisons are privately managed. Two of these were built by HMPS but are privately operated; the other 7 were procured under DCMF – Design, Construct, Manage & Finance – arrangements whereby the contractor – usually a consortium – has a contract under which they raise the capital, design and construct the prison as well as operate it. Private sector prisons are managed separately within the National Offender Management Service. The Director General and Management Board of HM Prison Service are only responsible for the management of the 128 public sector prisons. High security prisoners are only held in public sector prisons.

The private sector is likely to grow for two reasons. Firstly, for some time now it has been Government policy to fund most major capital expenditure through the Private Finance Initiative, which means new prisons are likely to be constructed under DCMF. And secondly, “Reducing Crime – Changing Lives” envisages more contestability by encouraging a thriving private sector.

The main ways in which the private sector makes efficiencies in comparison with the public sector is through greater use of technology and also by setting local pay rates which can be lower in some parts of the country. The Prison Service is tied to national pay agreements, albeit with some local pay additions in areas where the cost of living is particularly high.

The private sector has succeeded in winning contracts for the running of a number of new prisons, and competition has brought efficiency improvements to the public sector too. However, over recent years the Prison Service has an excellent record of success where it has been able to compete with the private sector to run existing gaols. The Prison Service has never lost to the private sector in any competition to run an existing public sector prison; and where the early private sector contracts have come up for renewal, the Prison Service has won the contract to take over two prisons previously managed by private companies.

B. Current Trends in the Prison Population and their Characteristics

The prison population is at record levels. On 16th April 2004, the population was 75,532, of whom 4,625 were women.

The use of prison and probation has increased by a quarter since 1996, whilst the use of fines has fallen by a similar amount. In 1996, 85,000 offenders were given custodial sentences. By 2001 this figure had risen to 107,000.

Sentencing is becoming more severe. The number of people arrested in 2001- 2.1 million – was in fact
slightly fewer than in 1996. The number of offenders found guilty fell from 1.44 million in 1996 to 1.35 million in 2001. There has not been any increase in the overall severity of offenders brought to justice to justify the greater use of prison and probation. In 1995/96, someone convicted of domestic burglary stood a 27% of being given a custodial sentence. By 2000, this had increased to 48%, with the average sentence length increasing from 16 to 18 months. Between 1992 and 2002, the longer sentenced population (four years and over) rose from 42% of the population to 48%. More first time offenders are being sent to prison.

Sentencing severity has increased significantly for women. At magistrates courts the chances of a woman receiving a custodial sentence has increased seven-fold. The number of women in custody as a percentage of the total population doubled between 1992 and 2002, from 3% to 6%.

While the average overall population increased by 7% between June 2001 and June 2002, the female population increased by 15% and the remand population by 14% over this period.

Sentencing has become more severe for several reasons because of both legislative changes, including the introduction of more mandatory life sentences for repeat offenders, and public, political and media pressure. A recent example has been a major high-profile campaign to reduce street robbery which has seen more severe sentencing as well as measures to improve arrest and conviction rates.

Recent legislation has increased the number of life sentenced prisoners and this trend is set to continue. There are currently about 5,700 life sentence prisoners and this number is expected to double over the next five years. Only a handful of these prisoners are actually likely to remain in prison for their whole natural life. In the English and Welsh system, when imposing a life sentence, the judge will also set a tariff which is the minimum period the offender should serve in custody. Upon expiry of the tariff, their release is subject to the approval of the independent Parole Board, who will decide on the basis of reports and assessments from prison staff whether the offender can safely be released without posing a threat to the public. Life sentence prisoners approaching release have to be tested in open prison conditions from which they will eventually go out to work in the community for a period before being released. Life sentence prisoners can remain in prison for several years beyond tariff expiry. When they are released, they remain on life licence and can be recalled to prison at any time for the rest of their life if their behaviour indicates the risk of re-offending has increased.

In response to political and public pressure, life sentences are now imposed for a wide range of offences; apart from the serious offences such as murder, a life sentence can be mandatory for repeat offences even where the offence itself is quite minor. Such life sentences do however attract short tariffs – as little as eighteen months in some cases – but have the effect of ensuring that release is subject to an assessment of risk and that the prisoner remains liable to recall throughout the rest of their life.

C. Treatment Programmes for Offenders

Offending Behaviour Programmes (OBPs) are a key part of the Prison Service’s Strategy to reduce the risk of re-offending, alongside a range of other regime activities for prisoners such as basic skills education and drugs treatment.

The Prison Service has steadily increased its repertoire of offending behaviour programmes that have been designed and are delivered in line with the principles of “What Works” research into what is likely to be effective in reducing reconviction. The programmes are accredited as such by an independent panel of international experts, the Correctional Services Accreditation Panel (CSAP).

The repertoire includes a general programme, Enhanced Thinking Skills (ETS) which is designed to develop skills in effective problem solving, social perspective taking and moral reasoning. There is a family of five programmes targeting sexual offending according to level of risk, stage in sentence and intellectual ability. Additionally there is the CALM (Coping with Anger/Learning to Manage It) programme targeting offending associated with emotional management; the Cognitive Self Change programme which targets high risk violent adult offenders; and the healthy relationships programme for domestic violence offenders; Programmes for short-term prisoners and for women are also under development.

Prisoners in 108 establishments completed accredited offending behaviour programmes in 2003-04. The Prison Service delivered 8720 prisoner programme completions, of which 1191 were Sex Offender
Treatment Programme completions.

The programmes are subject to ongoing evaluation. This allows the Prison Service to develop and improve provision. Evaluations examining reconviction rates for prisoners who have undertaken general offending behaviour programmes has produced mixed results; the evidence of their effectiveness in reducing re-offending is mixed, although their impact on behaviour within the institution is clearer. However, research conducted outside the UK shows that some variation in evaluation results can be expected.

Providing programmes on such a scale presents many challenges. A comprehensive programme of work is underway to increase our understanding of “What Works” with who and in what circumstances, and to apply our learning, so that we can optimise the impact of programmes. However, we believe that without improving their thinking skills many prisoners will not be able to make proper use of help with accommodation, employment and other rehabilitation support, which we are also increasingly putting in place.

Provision of sex offender programmes has steadily increased. At the end of June 2003, there were about 5,400 prisoners whose index offence involved sexual offending, of these about 950 (17.6%) would have been serving sentences of less than 2 years and therefore will not be in custody long enough to complete a Sex Offender Treatment Programme (SOTP). In addition there were 590 lifers who had a sexual element to their offending.

The SOTP is open to all adult male prisoners who have been convicted of a sexual offence, or whose index offence appears to have a sexual motive, and to those who have been convicted of a sexual offence in the past and are assessed as needing to participate in the programme.

They must be willing to participate in it. A large number of sex offenders are refusers and deniers and are therefore unsuitable for the existing programmes. Research has been undertaken, a strategy produced and work is being undertaken to address this issue.

The Prison Service’s Offending Behaviour Programmes Unit (OBPU) is working closely with the National Probation Directorate, Drugs Strategy Unit and Women Estate Policy Unit to develop and deliver an increased range of programmes for women in custody, the community and across both settings.

The Prison and Probation Services have also been working together to develop a programme specifically for short term prisoners. This is currently being piloted in two establishments. The two Services have established a project to develop an intervention strategy for this group of prisoners which takes account of the broad range of interventions available to help short term prisoners. This looks strategically at the overall balance of provision within prisons and between prison and the community, anticipating the implementation of Custody Plus.

Custody Plus is a new form of sentence in which offenders will be required to spend a period in custody followed by a period under supervision in the community. It aims to combine the severity of a loss of liberty with programmes to resettle the offender into the community and to complete programmes that there would not be time to deliver in custody.

An experiment in Intermittent Custody is also under way. Under this scheme, offenders can be sentenced to weekend custody, so they can retain their jobs outside but also suffer loss of liberty while attending programmes at weekends. Alternatively those who do not have jobs can be sentenced to mid-week custody, leaving them free to maintain family ties at weekends. This sentence should be imposed instead of continuous custody, not instead of a community penalty.

It is early days for the Intermittent Custody project but the emerging picture is that there are a number of sentences of weekend custody but very few of midweek custody. This leads to inefficient use of accommodation. It may be possible to continue and expand weekend custody by dovetailing it with the empty accommodation created by releasing prisoners with release dates of Friday, Saturday or Sunday on the Friday.
D. Systems and Procedures to Maintain Discipline and Order in Prison Establishments

There is a need to strike the right balance between rigid control and operating an active regime that keeps prisoners content through purposeful activity. Aside from their impact on re-offending, many offending behaviour programmes, such as anger management, have a real impact on behaviour in an establishment.

1. Management of the Most Dangerous Prisoners

HM Prison Service operates a Dispersal system – highest security prisoners ("Category A") are distributed between six high security prisons where they are mixed with a good number of Category B (the next highest category) prisoners. This system is preferred to the concentration of all of the most dangerous prisoners in a single "Supermax" jail, because it enables prisoners to be moved around individually, preventing the building up of dangerous liaisons, prevents the conditioning of staff and dilutes the risk.

There are a number of dangerous and difficult to manage prisoners with Dangerous and Severe Personality Disorders who are held in prisons rather than secure mental hospitals because their conditions are not treatable. They are held in discrete, dedicated units within the High Security Estate.

There are also five Close Supervision Centres (CSCs) within the High Security Estate. These are small discrete units holding the most disruptive prisoners in the system. At present there are 37 prisoners managed in Close Supervision Centres. Staff are specially trained and the CSCs aim to manage the most difficult prisoners safely and humanely working with them to return individuals to mainstream prison accommodation wherever possible.

2. Categorisation

Prisoners are categorised according to potential to escape and the risk they present to the public should they succeed, and not according to control. Category A are highest risk and Category D the lowest – these are suitable for open conditions and often work outside the prison. However, Category Cs are also scored according to factors generally associated with threats to order and control. Those presenting the highest risk are Score 3. Each Category C prison has an agreed upper limit of Score 3s according to its ability to cope with them on the basis of design, total population, regime and staffing levels.

3. Bullying

Within any institutional environment there will be a hierarchy of prisoners and the potential for stronger prisoners to prey on the weak. Thus the Prison Service is committed to ensuring that every prison has a strategy to tackle the bullying of prisoners by other prisoners. Each establishment should have an anti-bullying co-ordinator and an anti-bullying committee. Indicators of bullying must be monitored and there should be confidential prisoner surveys to measure the scale of the problem.

The following may indicate a bullying problem

i. number of absconds from open prisons;
ii. number of assaults;
iii. number of applications to the Independent Monitoring Board;
iv. number of escape attempts;
v. number of fights;
vi. number of successful requests for segregation under Prison Rule 45 (for own protection);
vii. number of refusals to work;
viii. number of requests to move wing;
ix. number of requests for transfer;
x. number of incidents of self-harm;
xii. number of Security Information Intelligence Reports (SIR’s) indicating bullying;
xiii. number of unexplained/explained physical injuries;
xiv. number of victim concern referrals.

Responses to bullying can include:-

i. Increased or targeted supervision to tackle identified patterns of bullying e.g. shouting from windows, taking of property;
ii. Programmes targeted at changing bullying behaviour, ideally accompanied by removal of bullies to a separate unit;
iii. Disciplinary adjudication;
iv. Use of the Incentives and Earned Privileges scheme;
v. Removal of the offender from a particular job or location where the bullying is taking place;
vi. It is important not to make the victim suffer by removing or transferring them, but some establishments do provide programmes for victims of bullying which may combine coping mechanisms with guidance on how to avoid behaviour that may encourage victimisation.

4. Intelligence Systems

There are standard procedures for staff to record intelligence information based on, for example, “tip-offs” from prisoners, things they observe or overhear; and for this information to be collated and assessed by the prison’s Security Department. There are procedures and guidelines for the use of prisoner informants who provide intelligence from within the prison, and prisoners can leave anonymous messages in a mail box.

Each prison has a police liaison officer to supply intelligence coming from outside.

5. Control Systems

All prisons operate a system of Incentives and Earned Privileges (IEP) designed to encourage good behaviour. Earned privileges can include better cells, more time out of their cell, more visits, more access to private cash which can be spent in the prison shop. Rather than separate and segregate vulnerable prisoners such as those convicted of sexual offences, many prisons offer integrated regimes. Prisoners who can be trusted not to bully vulnerable prisoners can benefit from more attractive conditions and regimes than those who do not. On the other hand, prisoners who present a threat to the safety of other prisoners or the good order of the establishment can be segregated although there are strict levels of authorisation required for this to happen and to continue for any length of time.

6. Prison Disciplinary System

Where a prisoner is alleged to have committed an offence against prison discipline, they face an adjudication before one of the Operational Senior Managers of the prison. The role of the adjudicator is to enquire objectively into the facts, reach a finding as to guilt, and to award an appropriate punishment taking account of the prisoner’s record of behaviour. Punishments range from a caution through to a fine or a period of cellular confinement. Moving to a lower level of the IEP scheme is not, however, an available punishment although it may follow as a management action. For serious offences against prison discipline, (for example assault on an officer or possession of a Class A drug) the charge will be heard by a visiting circuit Judge who can impose added days (loss of remission) to the prisoner’s sentence. A maximum of 42 days can be added to a sentence by the Judge for any one offence.

Disciplinary hearings must be conducted according to the principles of natural justice and the standard of proof is “beyond reasonable doubt”. Prisoners are only allowed legal representation in limited circumstances, but they must be given the opportunity to obtain legal advice if they wish.

There are twenty five prison disciplinary offences, and racially motivated offences are identified separately. However, all the offences are specific. A former “catch all” offence of “offends against good order and discipline” was abolished a few years ago because it was open to abuse. One of the natural justice principles is that it must be clear to the prisoner what they are alleged to have done and why it constituted an offence.

The full list of offences against discipline is:
(1) commits any assault;
(1A) commits any racially aggravated assault;
(2) detains any person against his will;
(3) denies access to any part of the prison to any officer or any person (other than a prisoner) who is at the prison for the purpose of working there;
(4) fights with any person;
(5) intentionally endangers the health or personal safety of others or, by his conduct, is reckless whether such health or personal safety is endangered;
(6) intentionally obstructs an officer in the execution of his duty, or any person (other than a prisoner) who is at the prison for the purpose of working there, in the performance of his work;
(7) escapes or absconds from prison or from legal custody;
(8) fails to comply with any condition upon which he is temporarily released under rule 9;
(9) administers a controlled drug to himself or fails to prevent the administration of a controlled drug to him by another person (but subject to rule 52);
(10) is intoxicated as a consequence of knowingly consuming any alcoholic beverage;
(11) knowingly consumes any alcoholic beverage other than that provided to him pursuant to a written order under rule 25(1);
(12) has in his possession -
   (a) any unauthorised article, or
   (b) a greater quantity of any article than he is authorised to have;
(13) sells or delivers to any person any unauthorised article;
(14) sells or, without permission, delivers to any person any article which he is allowed to have only for his own use;
(15) takes improperly any article belonging to another person or to a prison;
(16) intentionally or recklessly sets fire to any part of a prison or any other property, whether or not his own;
(17) destroys or damages any part of a prison or any other property, other than his own;
(17A) causes racially aggravated damage to, or destruction of, any part of a prison or any other property, other than his own;
(18) absents himself from any place he is required to be or is present at any place where he is not authorised to be;
(19) is disrespectful to any officer, or any person (other than a prisoner) who is at the prison for the purpose of working there, or any person visiting a prison;
(20) uses threatening, abusive or insulting words or behaviour;
(20A) uses threatening, abusive or insulting racist words or behaviour;
(21) intentionally fails to work properly or, being required to work, refuses to do so;
(22) disobeys any lawful order;
(23) disobeys or fails to comply with any rule or regulation applying to him;
(24) receives any controlled drug, or, without the consent of an officer, any other article, during the course of a visit (not being an interview such as is mentioned in rule 38);
(24A) displays, attaches or draws on any part of a prison, or on any other property, threatening, abusive or insulting racist words, drawings, symbols or other material;
(25) (a) attempts to commit,
   (b) incites another prisoner to commit, or
   (c) assists another prisoner to commit or to attempt to commit, any of the foregoing offences.

Where a prisoner’s behaviour also constitutes a criminal offence, for example a serious assault, the Governor may call in the police to conduct a criminal investigation leading to further criminal charges.

7. Deaths in Custody
There were 126.2 self-inflicted deaths per 100,000 of the prison population in 2003-04, (94 cases) which was a reduction from 146.9 (105 cases) in 2002-03. 62% of cases have a recent history of drug abuse. The first days in custody are the time of highest risk with 10% of deaths occurring within the first 24 hours and 27% within the first week.

The Prison Service has been pursuing a vigorous programme to reduce self-inflicted deaths over a number of years. The programme includes support from specially trained “listeners” (fellow prisoners) and the development of safe cells where ligature points and other means to self-harm are, as far as possible, designed out.

8. Drugs
Drugs are a major problem in any custodial setting. Drug misuse is a major factor in crime, especially acquisitive crime to fund a habit of drug misuse, and many prisoners come into custody with a pattern of drug misuse.

Of the 160,000 people who pass through prisons in England and Wales in a year, 40-50% of men and 60% of women have a chronic substance misuse problem which requires clinical treatment.

The loss of access to drugs is therefore an additional distress factor added to the loss of freedom and can put prisoners at risk of self-harm. Prisoners’ history of drug use is identified at the reception stage and appropriate detoxification treatment and therapy offered. Last year around 53,000 prisoners completed a
The number of drug treatment (rehabilitation) programmes available within prisons has increased from 6 in 1999 to 60 this year with around 5,000 prisoners entering drug treatment. We are currently working to increase capacity with a target of 9,000 prisoners entering treatment programmes by March 2006.

However, effective treatment is a long term process and it can be difficult to do so effectively where prisoners have to be moved between establishments or are in custody for short periods. Also, while every effort is made to prevent access to drugs, prisoners, whether convicted or not, cannot be compelled to undergo medical treatment against their will.

It follows that drugs are a highly sought after commodity within prison and efforts to obtain them can lead to theft, bullying and taxing between prisoners and attempts to bribe or condition staff. Attempts are regularly made to bring drugs into prison by mail and through visits, and prisoners are always inventing new ways of concealing drugs in permitted items as well as passing sealed packets from mouth to mouth in visits and swallowing sealed packets while out of the prison e.g. at court.

Measures to detect drugs include:

- Searching of visitors, including the use of passive drugs dogs
- Monitoring of visits by staff assisted by closed circuit television
- Screening of incoming mail and strict controls on what may be brought in
- All purchases being made by mail order from approved suppliers
- Searches of cells using search dogs (and volumetric controls of what prisoners may have in their possession)

Prisoners who admit to a drug problem are offered help to overcome it. But many have to be dealt with through the disciplinary process. Any prisoner can be subject to a random Mandatory Drug Test, and refusal to give a sample is itself a disciplinary offence. Prisoners with a history of drug misuse are subject to targeted testing more frequently than the general population. Testing positive is a serious disciplinary offence as is possession. Progression to certain attractive and lower security prisons may require a drug-free record, as can progression through IEP. Some prisons offer drug-free units at the higher levels of IEP and prisoners applying to these units are required to agree to frequent voluntary drug tests.

The dual approach of tackling both supply and demand for drugs has been successful. The overall drug positive rate in prison has been reduced by 50% from over 24% positive in 1997 to 12.6% in 2003/4. The use of heroin (the most common drug used by offenders when entering custody) has also fallen sharply by 40% from 5.5% to 3.6% last year. Nevertheless, the drug problem is likely to remain a continuing issue in managing prisons and dealing with drug addiction and dependency is a key part of our strategy to reduce re-offending.

E. The System for Securing Transparency and Accountability in the Administration of Institutions and Its Implementation

1. Historical Context

Although the Courts have historically had ‘authority over all the Prisons in the land’ (Lord Justice Manston), until the late 1970s there was a policy of ‘judicial abstention in public cases’. Prisoners were limited in their access to communicating with any other persons without the permission of the Secretary of State, and this included their legal advisers.

From 1977, and the relaxation of the rules applied by the Supreme Court for those wishing to seek redress through Judicial Review, there has been an increase in the intervention of the Courts in how Prisons are administered and the emergence of an ‘active judiciary’. The predominant opinion has moved from ‘prisoners do not have the same rights as other individuals’ to that of ‘a prisoner retains all his civil rights that are not taken away expressly or by necessary implication … by his imprisonment’. They have the right of access to the Courts and the right of access to legal advice to make that access a reality.

The incorporation of the Human Rights Act into domestic law on 2nd October 2000 took this a step further, opening up opportunities to make legal challenges on issues previously outside the remit of the British Courts, such as the administration of the Prison and Prison rules. Prison reform groups, together
with civil rights campaigners and solicitors specialising in prisoner litigation, have also had a significant impact on Prison regulations and the way in which prisoners are held. Although recourse to the Human Rights Act is now available through the domestic Courts, recent judgements from the European Court of Human Rights (ECHR), in Strasbourg have had a significant impact on the Prison Service, necessitating reconsideration of certain practices within the UK prison system. The ECHR ruling in Ezeh and Connors effectively removed the right of prison Governors to award added days (loss of remission) to prisoners who were found guilty of disciplinary offences. It was as a result of this decision that Independent Adjudicators (Circuit Judges) were introduced to deal with the most serious disciplinary offences in prison.

There has been a substantial growth in the access and use of the legal system by prisoners to challenge and influence their treatment and access to facilities, and as described below, the statutory inspection and monitoring systems have been strengthened. In addition, in the prison system as across the administration of Government as a whole, voluntary and pressure groups have gained greater influence and access to Ministers and senior civil servants. Established groups such as the Prison Reform Trust, the National Association for the Care and Resettlement of Offenders, the Howard League and the New Bridge Trust have been instrumental in influencing the treatment of and conditions for prisoners, and in some cases are now actually working in partnership with the Prison Service to deliver services to prisoners. Some of these established national groups include senior establishment figures in their management, including in two cases former Home Office Ministers, but they have now been joined by some energetic grass roots groups such as Partners of Prisoners. Senior Prison Service managers have found it worthwhile and instructive to give time to meet personally with the founders and leaders of these groups; “ordinary” former prisoners and partners of prisoners who have a first hand experience of how the system affects individuals and whose representations have led to the identification and implementation of real improvements in the way the Prison Service deals with prisoners and their families. Among the products of these links have been the cooperation between the Prison Service and the ex-prisoners’ organisation Unlock to produce information books for prisoners and the involvement of Partners of Prisoners in setting up support networks for minority ethnic prisoners.

2. Parliamentary Accountability

The Home Secretary is accountable to Parliament for the operation of the Prison Service. Individual Members of Parliament can ask questions in writing, orally or by letter; while this may often appear to be a token gesture, the question and answer will be published in Hansard, the record of Parliamentary proceedings, and if it is an oral question it will be broadcast on television or radio. They can also use the mechanism of an adjournment debate to raise the profile of particular matters; an Adjournment Debate is a Parliamentary device whereby any matter raised by a Member of Parliament chosen by ballot is debated for 30 minutes at the end of the day’s business.

Ministers and Civil Servants may be called to give evidence to a Select Committee of MPs (held in public and often shown on television).

3. International Accountability

In addition to the European Court already mentioned, there is a European Committee on the Prevention of Torture. Members of the Commission visit prisons in England and Wales on a regular basis to satisfy themselves that prisoners are being treated properly and conditions are acceptable. In the past they have criticised levels of overcrowding and access to sanitation. However, all prisoners in England and Wales now have 24 hour access to sanitation/toilets. The Committee’s recent interest has focussed on the small number of detainees held under Anti-Terrorism legislation, and some of the issues raised relate to the appropriateness of detention which is not, of course a matter for the Prison Service. However, some concerns have been raised about the care and treatment of detainees considered by the delegation to be mentally ill. The Committee have suggested that the level of care given to some such detainees amounts to inhuman or degrading treatment. They have not suggested that detainees are being subjected to torture by the Prison Service. This is not the case. But they have suggested that the fact of indeterminate detention is sufficient to evoke memories of experiences of torture elsewhere in the past. These concerns are taken seriously and considered by the Special Appeals Courts established to review detention for individuals detained under Anti-terrorist legislation.

The CPT is an important body and any issues raised by the CPT will be investigated and a full response
will be provided.

4. Handling Questions and Complaints from Prisoners

Any prisoner can make either an oral or written request or complaint at any time. They are encouraged to raise their complaints orally and informally so that staff can listen to a prisoner’s problem, give advice and deal with straightforward matters quickly. However they have the right to use the formal written complaint system straight away. Until about three years ago, prisoners had to ask staff for a form on which to make a request or complaint, but there were concerns that prisoners were being obstructed or deterred from doing so. Complaint forms are now freely available for prisoners to pick up, complete and return without having to ask a member of staff, and the boxes must not be in or directly outside the wing office. All informal applications and formal complaints have to be recorded and must be answered within strict time limits.

Most complaints are answered by an appropriate member of staff in the prison, and the prisoner has a right of appeal to the Governor if they are unhappy with the reply. Complaints with a racial element are monitored by the prisons’ Race Relations Liaison Officer. Certain subjects – appeals against disciplinary adjudications and a few key decisions that are handled at Prison Service Headquarters – are described as reserved subjects and complaints about these are referred to Prison Service Headquarters.

Prisoners can also make a complaint under confidential access which means it goes unopened to the Governor or the Area Manager. This enables prisoners to report serious matters such as alleged harassment by staff to a senior manager without fear that it will be intercepted and lead to retribution.

Of course, there is nothing to stop prisoners or their relatives raising complaints directly with Prison Service Headquarters, through solicitors or with their Members of Parliament.

5. Prisons Ombudsman

Lord Justice Woolf’s inquiry into the Manchester riots in 1990 identified lack of prisoner confidence in the complaints system as a contributory factor in prisoner unrest. This led to the creation of a Prisons Ombudsman who is independent of the Prison Service. He can investigate any complaint only after internal Prison Service procedures have been exhausted, and the prisoner must apply to the Ombudsman within 30 days of the Prison Service reply. However he can also investigate any case where the Prison Service has not replied to the prisoner within the appropriate time limit.

The Ombudsman has full access to prison staff, records and prisoners. Prison staff must provide him with documents and information. However he must clear his reports with the Prison Service to ensure that they do not reveal any information which would compromise the security of the prison. He can make recommendations to the Prison Service. These are not binding but the Prison Service is committed to accepting most recommendations, and in practice this is what occurs.

The Prisons and Probation Ombudsman also deals with complaints against the Probation Service and since 1 April 2004 he has also been given the responsibility for investigating all deaths in prison custody.

In 2003-03, the Ombudsman received 3,132 complaints about the Prison Service, a 15% increase on the previous year. The most common subject (17%) is lost or damaged property, followed by 12% about general conditions. 33% of complaints are upheld, but the Ombudsman reports that increasingly the problem is put right locally by the Governor when the problem is pointed out and he does not need to make formal recommendations to the Prison Service.

6. Independent Monitoring Boards

The 1952 Prison Act created Boards of Visitors made up of lay members of the local community who have unfettered access to the prison and were described as the eyes and ears of the Home Secretary. They were able to raise any matter whether about the welfare of prisoners or staff or the fabric of buildings. They were expected to visit regularly, talk to prisoners and hear their complaints. They met regularly with the Governor and aim to resolve matters at the appropriate level locally, but they had access to the Home Secretary and a duty to report to him on anything they feel they need to. In any event they were required to submit an Annual Report to Home Office Ministers containing their assessment of the prison, issues of concern to the Board, and an account of their activities.
Boards of Visitors were independent of the Prison Service. They were made up of volunteers, appointed by the Home Secretary for three years at a time, and paid expenses only. Understandably it proved difficult to recruit Board members because only a limited number of people could make the time available, especially during the normal working day. Recruiting members from minority ethnic groups and others representative of the prison population was particularly difficult and boards tended to be made up of white middle class middle aged people, such as those running their own business or the active retired.

Boards of Visitors used to hear the more serious disciplinary charges – they had more serious penalties available – but this was withdrawn as it created conflict with their role in support of prisoners. They were also required to approve the continued segregation of any prisoner for longer than 72 hours.

Boards of Visitors have now been replaced with Independent Monitoring Boards (IMBs). While broadly similar, they are no longer responsible for authorising segregation. Whereas the old Boards of Visitors operated largely independently, IMBs have a new National Council with the authority to direct Boards rather than just advise, so ensuring greater consistency. They have a particular role in the complaints process and are bound by law to be satisfied with the treatment of prisoners, including examination of the complaints records and statistics as well as individual replies. Prisoners may raise confidential access complaints with the IMB.

There are about 1800 volunteer Board members in 137 prisons and 9 immigration detention centres.

7. Inspection of Prisons

Her Majesty’s Inspectorate of Prisons was established in 1980 following recommendation of the May Committee of enquiry into the United Kingdom Prison Services. It provides independent scrutiny and public assurance and reports in public. At times in the past, various Chief Inspectors of Prisons have indeed taken a high and controversial public profile, although at the present time the Inspectorate combines robust inspection with a constructive approach to guiding and encouraging improvements in the care and treatment of prisoners and in reducing re-offending.

The Chief Inspector is appointed by the Home Secretary from outside the Prison Service; although some of the Inspectorate staff are seconded from the Prison Service.

She is the Inspector of Prisons, not of the Prison Service; she and her team will comment on the management structures and practices of the Prison Service, and indeed on the policies of the Government, where they consider that they adversely affect conditions for prisoners, but they do not inspect Prison Service headquarters.

The Inspectorate inspects for outcomes not processes. It inspects against published criteria, and focuses on four tests of a healthy prison:
   i. Safety;
   ii. Respect;
   iii. Purposeful Activity; and
   iv. Resettlement.

The Inspectorate’s focus is therefore different from the Ombudsman, who is concerned with individual prisoners, and the Prison Service’s own Standards Audit Unit, who are more process-oriented and provide Prison Service Managers with assurance about adherence to procedures and standards. The Inspectorate provides infrequent but in-depth inspection, in contrast to the IMB who provide continuous monitoring. Inspections always include surveys and interviews with prisoners.

The Inspectorate carries out a five year cycle of full inspections (three yearly for juveniles), together with a programme of short inspections, usually unannounced, in-between to check progress. In 2003-04, their programme provided 24 full announced inspections and 24 unannounced, 17 juvenile inspections, six immigration removal centres and one Military Training Centre inspection, and five thematic inspections. Between September 2002 and August 2003, unannounced inspections followed up 2237 recommendations of which 54% had been achieved and 14% partly achieved.
8. Commission for Racial Equality

The Commission for Racial Equality has a statutory role to monitor application of Race Equality legislation. It recently conducted a formal investigation into racism in the Prison Service. This arose out of a number of allegations of racist incidents including in particular:

i. The murder of a young Asian prisoner in Feltham Young Offender Institution by his cellmate in March 2000. It was found that the murderer had a history of displaying racist behaviour and violence but had been located in the same cell as an Asian prisoner.

ii. An Employment Tribunal that found against the Prison Service for the victimisation and harassment of a black member of staff at Brixton prison.

Following completion of the Investigation the Prison Service is now working closely with the Commission to implement a Joint Action Plan to promote Race Equality and ensure that Race discrimination is eradicated. This is one of the Service’s highest priorities. Minority ethnic prisoners account for 17% of the prison population (compared to 7% in the community) and ensuring that the Prison Service treats all prisoners fairly and promotes good race relations is absolutely essential in this context.

F. Current Challenges

The main challenges now facing the Prison Service are population pressures, organisational change and contestability (competition).

As indicated in section B of this paper, the population is at a record level and it is quite possible that by the time you read this, we will have had to resort to accommodating prisoners in police station cells because the absolute capacity of the prison estate will have been passed. That is not only expensive but it also provides inadequate conditions and regimes for prisoners.

If nothing is done to change sentencing practice, the prison population is forecast to reach 93,000 by 2009. The report “Managing Offenders – Reducing Crime” postulates that the measures it recommends to increase confidence in alternative punishments will in fact enable this to be capped at 80,000. It remains to be seen how far this is actually achievable; but even this figure requires the provision of a further 5,000 prison places over the next few years.

While endeavouring to manage this record population, the Prison Service also has to engage in the major re-organisation described earlier in this paper with the loss of Agency status and the creation of the National Offender Management Service. Large parts of Prison Service headquarters will move into the centre of NOMS while the Prison Service must adapt to being just one of the suppliers of custodial services and associated programmes in a competitive market.

This adjustment to competition will require a major cultural change for the Prison Service, to become more flexible and customer focused. While it seems likely that only the various private sector operators will be able to bid for the provision of new prisons, it is also likely that the Service will have to compete to retain some of its existing operations. And it remains to be seen whether the Prison Service is also able to compete to deliver non-custodial interventions or to continue offending behaviour programmes started in custody following a prisoner’s release.

The Prison Service is a public service organisation largely made up of people who are committed to a public service ethos. We are committed to working more closely with our criminal justice partners to reduce re-offending. But at this point in time it is clear that we are facing a period of major change and uncertainty. It will require a great deal of managerial skill and commitment to ensure that the day-to-day business of running safe and secure gaols is continued effectively during this period of upheaval.
THE PROBATION SERVICE IN SINGAPORE

Chomil Kamal*

I. INTRODUCTION

Probation is a community-based rehabilitation programme for offenders. It offers the courts with an alternative sentencing option in dealing with offenders who may otherwise be committed to a juvenile correctional facility or prison. Under the law, probation orders can be anything from six months to three years.

During the probation period, the offender is placed under the supervision and personal care of a Probation Officer (PO). The probation order makes it obligatory for an offender to report regularly to his/her Probation Officer, comply with conditions of the Probation Order and participate in programmes formulated for him/her. For offenders below 18 years of age, the families are invariably involved in the rehabilitation programme as part of a holistic approach to bringing about a positive change in the probationer’s life.

II. MISSION & VISION

We aim to effectively rehabilitate offenders on community-based orders with maximum participation of their families and the community so they may be reintegrated into mainstream society as socially responsible and law abiding individuals.

In the long term, we envision the development and implementation of a probation service delivery model that goes beyond mere administration of probation towards proactive and strategic delivery of rehabilitative services, using empirically based approaches to offender assessment, supervision and programming.

III. LEGAL FRAMEWORK

Probation in Singapore initially derived its mandate from the Children and Young Persons Act, CYPA (1950). The Act provides for the constitution of a juvenile court and a juvenile probation service. Section 44 Sub-section (1), (e) of the Children and Young Persons Act (CYPA) Cap 38 states:

“Where a Juvenile Court is satisfied that an offence has been proved, or where the child or young person (below the age of 16 years) admits the facts constituting the offence, the Court shall, have power….to make a probation order requiring the offender to be under the supervision of a probation officer or a volunteer probation officer for a period of not less than 6 months and not more than 3 years.”

(Section 28 Children & Young Persons Act)

The CYPA further specifies that:

“Every court in dealing with a child or young person who is brought before it, either as being in need of care or protection, or as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.”

(Section 28 Children & Young Persons Act)

It was only in 1951, when the Probation of Offenders’ Ordinance was passed, that probation became an option for dealing with offenders above 16 years of age. This Act was later revised in 1970 and then again in 1985. The Probation of Offenders Act, provides for the Courts to make:

“A probation order ..... for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences”. (Section 5(2) Probation of Offenders Act)

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In line with this broad legislative injunction, Probation Officers strive to guide, assist and supervise offenders to ensure they comply with their probation requirements, receive appropriate and timely intervention and support (e.g. casework and counselling, risks/needs-based programming) and that they steer away from future offending. A conscious effort is made to achieve a fine balance between giving regard to the offender’s need for rehabilitation, accountability for her/his offending behaviour, and the risks he/she poses to public safety. The same philosophy governs the treatment of both juvenile and adult offenders on probation.

In 2001, the Children and Young Persons Act was revised to give the Juvenile Court a wider range of order options to deal with the individual risks/needs issues of probationers and their families. Section 44 of the amended Act provides for:

a) Probation with detention at an approved home not exceeding 6 months;

b) Probation with weekend detention at an approved institution (not exceeding 52 weeks);

c) Probation with periodic training;

d) Weekend detention order to be administered on its own; and

e) Community service order to be administered on its own; and

f) Mandatory orders for parents to attend counselling or other programmes

Besides the Probation of Offenders Act and the CYPA, the administration of probation in Singapore is also influenced by the following statutes, human rights instruments and best practices in working with involuntary clients:

a) Women’s Charter

b) Intoxicating Substances Act

c) Misuse of Drugs Act

d) Convention on the Rights of the Child

e) National Standards for the Probation of Offenders and their Rehabilitation in the Community, 2000


IV. PHILOSOPHY, VALUES, BELIEFS & PRINCIPLES

We believe:

a) every offender has a capacity to change and grow if given the opportunity, support, goodwill and understanding;

b) our officers need to be developed and supported to be competent and innovative individuals/teams;

c) a culture of continual learning and work improvement is necessary if probation is to remain viable;

d) mutually beneficial partnerships can and will garner support for and wider acceptance of community sanctions from the community and criminal justice agencies.

The following values, beliefs and principles inform and influence our programmes and services:

a) institutionalisation must be a last resort;

b) the family is the bedrock of our society and to that extent, needs to be preserved or strengthened to provide and care for its members, and take ownership and accountability for bringing about the desired changes when members go astray;

c) each offender has to be helped to own his/her actions and be empowered to exercise self-help in the rehabilitation process;

d) the many helping hands of the community are vital in bringing about a continuum of care and control, and in supporting offenders in the community;

e) transparency of service and safeguarding due process in the treatment of mandated clients.

V. FRAMEWORK FOR COMMUNITY-BASED REHABILITATION

In attempting to break the cycle of crime and social dysfunctioning, the probation practice in Singapore draws on a “Strengthen Families, Engage Community” framework. We put high premiums on an active engagement of the offender’s family (or in certain cases, significant person(s) with whom the offender bonds emotionally), and community involvement in the restoration and social reintegration of offenders on probation supervision.

Whether in rehabilitation programmes for probationers or individual casework and counselling by the
supervising Probation Officers, our key thrust is on inculcating personal discipline and a sense of responsibility in the offender. Depending on the nature of the offence, needs and risks of the offender and intensity of intervention required, programmes for probationers centre on the following issues/areas, known to have an impact in reducing re-offending:

a) pro-criminal thinking
b) substance abuse
c) sexual deviance
d) self and anger management
e) educational development
f) work and training
g) sports and recreation
h) relationship issues
i) absence of a fixed place of residency
j) spiritual and moral persuasions according to the offender’s individual affiliation.

VI. CORPORATE OBJECTIVES
The following 3 corporate objectives drive the performance of the Probation Service in Singapore:
1. provide quality and timely advice to the Courts and through effective case management, assist probationers to comply with court orders and minimise re-offending;
2. encourage and facilitate maximum community involvement in delivering effective services and programmes to offenders and juveniles at risk of re-offending; and
3. strategically plan and efficiently manage resources to produce results in a work environment which are safe, equitable and focused on best practices.

Strategies
To achieve these, the following strategies were mapped out:

a) continually develop and deliver strong research-based programmes;
b) harness IT to reap greater effectiveness and efficiency in training and work processes;
c) forge strong partnerships to provide a continuum of care and services to meet individualised needs of offenders and their families;
d) improve management processes and systems particularly in quality management and best practices;
e) strengthen competencies of staff and key partners in community-based rehabilitation;
f) enhance public understanding on how strong rehabilitation programmes help reintegrate probationers and improve public safety;
g) develop culture-specific interventions;
h) as much as possible, involve children and youth in policies and programmes which affect them.

VII. PERFORMANCE MEASURES
We measure the success of our probation service by the rates of successful completion of court orders by probationers and re-offending after probation. Monitoring of conduct after probation spans up to 3 years after the expiry of each court order.

As a measure of commitment to the use of non-custodial measures in dealing with offenders, the Probation Service also monitors the probation placement rate of all pre-sentence investigation cases and work towards the reduction of offenders in custody through diagnostic assessments and creative case planning and management.

VIII. NATIONAL STANDARDS
To reap maximum benefits of partnerships with families and the community, the probation of offenders and their rehabilitation in the community must be made transparent to all parties, especially to the probationer and his/her family. A significant milestone was crossed in August 2001 when the Probation Service publicly committed itself to a set of service standards aimed at securing transparency and public accountability in the execution of probation investigation and supervision. “The National Standards for the Probation of Offenders and their Rehabilitation in the Community”, which was launched in partnership with the Subordinate Courts of Singapore, provide a clear framework and concrete guidelines for various aspects of probation work, including time frames for work to be done, procedures, and the proper notification of
parties involved at different stages of the youth/criminal justice process. It is available to the public and
given out to every new person who enters the system

IX. INTERNATIONAL CERTIFICATION

In 2003, the Probation Service received ISO certification from a UK-based certification body, as an
organisation which is committed to service excellence in 6 core areas of probation work. Drawing inspiration
from this, a group of VPOs, the Operation Night Watch Team, that specialises in planning and mounting
curfew checks, took on the challenge of documenting the procedures and work processes involved in curfew
check operations. They are currently waiting to be audited for certification.

X. STRUCTURE AND ORGANIZATION

The Probation Service is one of 3 operational arms of the Rehabilitation and Protection Division of the
Ministry of Community Development and Sports, Singapore. The organization chart is at Appendix A. The 3
operational arms and 2 support units of the Division work closely to reap synergic partnerships and a
seamless service for the benefit of children, youths and families in the system.

Staff establishment of the Probation Service stands at 80 personnel; 12 corporate support personnel and
60 Probation Officers to take on the core elements of probation work. These 60 officers are organized into 5
operations teams. The remaining 8 staff members assume a dual role – besides taking a smaller
investigation and supervision load, they also perform specialist’s duties such as conceptualizing and
promoting creative concepts of inter sector/agency partnerships to bring in new resources and opportunities
for persons on community-based rehabilitation. Appendix B outlines the teams’ roles and functions. The
current organizational set-up was introduced in 2000 to position the Probation Service in a proactive stance
amidst the rapid changes in the probation population and the complexities that were becoming apparent.

The Probation Committee headed by the Chief Justice, or his representative, oversees the work of
Probation Officers and Volunteer Probation Officers (VPOs). This Committee is supported by 2 Case
Committees namely the Juvenile and Adult Probation Case Committees, and their primary tasks are to
review the progress of persons on probation and set procedural guidelines to ensure due process in the
treatment of offenders on non-custodial sanctions. This is in addition to the monitoring mechanisms at
departmental level e.g. case conferencing, one-on-one supervision which every Probation Officer is entitled
to, and a computerized case management system which prompts action and flags irregularities in casework
or court procedures in the management of each probationer.

Clinical intervention, therapies and forensics are undertaken by the Psychological Services Unit. The
PSU also supports the Probation Service by developing or conducting research-based programmes to
address emerging needs and issues of probationers. The Theft Prevention Programme (TIP) for chronic
theft cases, Violence Prevention Programme (VPP) for those prone to violent and aggressive behaviour, as
well as the Positive Adolescents Sexuality Treatment (PAST) are some examples of PSU’s response to new
trends and rehabilitative needs.

XI. PRE-SENTENCE REPORTS

In Singapore, Pre-Sentence Reports (PSRs) are prepared by Probation Officers or gazetted Volunteer
Probation Officers. A PSR provides a comprehensive profile of the offender, obtained mainly from interviews
with the offender and his/her family or significant people, reports from schools or employers, and social
service agencies (if applicable). It takes into account the social, contextual and other factors surrounding the
offending e.g. nature of crime, family history, education/employment situation and history, health and medical
issues and personal interests and attitudes.

The PSR is a court document which is also accessible to the offender and his/her parents besides the
judge, prosecutor and defence counsel. In Singapore, a PSR is usually called for if a sentencing judge deems
probation as an option he/she is prepared to consider for case disposition. A Probation Order is made only if
the offender consents to being imposed with such an order and indicates a willingness to abide by the
conditions of probation. A successfully completed probation order does not amount to a conviction record.
Failure to comply with any of the conditions specified in the probation order constitutes a “breach of the probation order” and renders the probationer liable to be brought before the original sentencing court to be sentenced for the offence for which he was placed on probation. Where a fresh offence is committed while serving probation, the normal recourse taken by the Courts is to revoke the probation order and sentence the offender for both the new offence and the original offence for which probation was granted.

XII. STRENGTHENING PROBATION

In the last few years, the probation of offenders and their rehabilitation in the community has been strengthened through various legislative and administrative measures and actions to address concerns over the mass perception that community sanctions amount to a let-off. The amendment of the Children and Young Persons Act provided the Court with a wide array of programmes which are implemented as part of stand alone or combination orders, to meet the individualised rehabilitative needs of each offender. The main programmes are listed in the following paragraphs.

A. Community Service Order

The Courts may order probationers to complete between 40 to 240 hours of community service by imposing a Community Service Order as a condition of probation or in the case of juvenile offenders, as a stand alone order without probation. This Order provides young offenders with a chance to repair the harm or hurt caused by their offence(s) by giving something back to the community. It is an opportunity for offenders to help the less fortunate and develop understanding and consideration for others. In the process, the offenders acquire a sense of social responsibility, self discipline and interpersonal skills.

Probationers discharge their court-ordered community service in not-for-profit organisations. They learn to provide care and befriending services to elderly persons, people with special needs, perform general maintenance and repair works in welfare facilities and hospitals, and participate in organising fund-raising and social activities for socially disadvantaged families. Depending on the need, an offender may also be assigned to a value-added community service programme. Through an integrated management of community service placements and work-life skills training for offenders, probationers assessed to be needing a “leg up” to acquire marketable skills are sent for pre-CSO work skills training in areas such a foot reflexology, nail art technology, chef-in-the making, pottery in motion, air-conditioning repair, etc. They are then channelled to practise their newly acquired skills in not-for profit organisations. On completion of the programme, the probationers either go on an apprenticeship programme, get placed in a job or they join the “Be an Entrepreneur” programme.

B. Periodic Training Order

The Courts may order probationers to complete a Periodic Training Order as a term of probation. A PTO is used to allow the probationer to improve his/her ability to cope with the challenges of life and to increase his/her potential either in school or at work. Under the PTO, the probationer is required to report to a social service agency (e.g. a family service centre) for a fixed number of training hours which can vary from 40 to 60 hours. Usually held over 3 training sessions, the training focuses on helping the probationer to understand and work on his/her conduct and performance in school or at work in order to bring about a more positive school/work experience.

C. Probation with Condition of Hostel Residency

The Courts may order probationers to stay in a hostel. The hostel, with its rules and regulations, will provide a stricter environment to help the probationer cultivate discipline and self responsibility. Probationers given hostel residency as a probation requirement are required to either stay in a government

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1 Probation Conditions include:
   a) that the defendant shall be of good behaviour and keep the peace;
   b) that the defendant shall report to and receive visits from the Probation Officer/Volunteer Probation Officer;
   c) that the defendant shall not change his job without the prior approval of the Probation Officer/Volunteer Probation Officer;
   d) that the defendant shall notify the Probation Officer/Volunteer Probation Officer forthwith of any change of the defendant’s residence or employment;
   e) that the defendant shall carry out such lawful instructions as may from time to time be given by the Probation Officer/Volunteer Probation Officer.
run hostel for a maximum of 12 months, or in a hostel run by a Voluntary Welfare Organisation, which can be for the entire term of probation. For such an arrangement the condition of probation is given as voluntary stay in the specified hostel. During the stay in the hostel, the probationer is required to continue to attend school or work as usual.

D. Weekend Detention Order

A Weekend Detention Order (WDO) can be given on its own, or with a Probation Order. The Order requires probationers to be detained in a WDO facility on weekends, for a maximum of 52 weekends. This option is suitable for offenders whose lifestyles or habits put them at risk of offending during weekend and those who need a structured regime to develop life or work skills to sustain their resolve against future offending.

E. Detention Order

A Detention Order is a separate Order placed by the Court and must be completed before the probationer starts his probation. Detention Orders require the probationer to be detained for up to 3 months for a short, sharp, shock. It aims to help the probationer improve his/her situation through intensive supervision in a detention facility. Detention Orders have proven useful in diverting some probationers away from a prolonged institutional stay.

F. Mandatory Order - Parent Involvement

When young people go astray, their rehabilitative journey must necessarily involve the support and involvement of their parents or persons who are significant in their lives, if there are to be sustainable improvements during and beyond probation. The Juvenile Court can issue a mandatory order requiring the parents to attend suitable parenting and other programmes. This option is only used if the Probation Officer assessment shows the parents are highly unlikely to seek help without a court order. In 2003, 102 parents were given this order. In most of these cases, there is a delinquency prevention consideration for the younger children who are at high risk of falling into the system if nothing is done to help the parents improve their parenting and problem solving skills.

Dialogues with parents at various stages of the probation process are held to give information on the progress of the probationers, and collate information necessary to ensure probation programmes and services remain relevant and meeting targeted needs, and to identify service gaps which could potentially impact on desired outcomes.

G. School-Probation-Court Link

Slightly more than 60% of probation cases are persons who are still in the school system and therefore spend a good proportion of their time in school. An analysis of data on offending and re-offending shows clearly that most incidents of breach of probation requirements including re-offending occur in school or with schoolmates. The School-Probation-Court Link was formed in 2000 to provide a platform for school authorities, Probation Officers and the Court to work in close partnership to enhance assessments, case planning and casework to bring about an integrated management of probationers in the school system. To-date about 70 schools and vocational training institutions are on the SPC Link and they are actively involved in the process of investigation to determine if a person is suitable for probation, attend the court sessions and work closely with the Probation Service in reviewing the progress of probationers in their schools.

The 2nd phase of implementation of the SPC Link involved the setting up of school-based probation service in several targeted schools with a relatively high percentage of pupils on probation. The strong presence of Probation Officers in these schools meant better supervision of probationers and early detection of trouble spots. At another level, it also serves to “incentivise” schools which are more forthcoming in giving school placements to offenders who may have dropped out of the system by giving them due recognition in the form of awards, media coverage on human interest stories involving their schools and so forth.

H. Victim-Offender Conferencing

A Victim Assistance Team (VAST), formed in 2000, was based in the Probation Services Branch to provide sensitive and supportive services to crime victims who are involved in its rehabilitation programmes for offenders on non-custodial treatment programmes. VAST supports a range of programmes aimed at
improving probation outcomes by increasing the offenders’ awareness of the impact of the crime on the victims, such that they develop empathy towards their victims and consequently, refrain from future offending.

In early 2004, Project HEAL (Healing, Empowering And Linking) was launched jointly by the Ministry of Community Development and Sports and the Subordinate Courts to enhance victim involvement in Family Conferences held at the pre-disposition stage. Project HEAL is executed by a multi-disciplinary team comprising probation officers and psychologists of MCDS and the Family and Juvenile Justice Centre.

I. Post-Probation Care

Post care is available to probationers who have completed their orders. A toll-free line operating from 8.30 am to 10 pm daily, 6 days a week, ensures that post care is available and accessible to persons who need post probation support. Aptly tagged “Help is just a phone call away” the PSB Care line has become an avenue for collecting information on social, economic and other contextual factors that confront those leaving or have left the system so resources may be more targeted towards reducing re-offending.

XIII. INTEGRATED CASE MANAGEMENT SYSTEM (ICMS)

Leveraging on technology, the Ministry of Community Development and Sports initiated the development of an Integrated Case Management System (ICMS) to enhance operational support to officers in terms of easy access to client information, effective case management and a strengthened policy response to emerging issues and challenges. As an IT system, it is designed to facilitate information sharing within the Division, ensure seamless and effective client management, as well as streamlined work processes. Policy making decisions in turn are facilitated through consolidated data and cross-functional analysis. At the operational level, ICMS is designed to meet the needs of both case managers and their clients. It is easy to navigate and makes access to information, data entry of case notes and case management a relatively simple process. Effective use of the ICMS as a case management tool will free Probation Officers to focus on effective intervention to reduce offending.

Features of ICMS

ICMS displays a list of tasks awaiting Probation Officers’ follow up; thus enabling them to manage, organize and multi-task. E-reminders and notifications alert them of outstanding or urgent tasks needing follow up.
Managing Client Appointments

At a glance of a probationer’s diary in ICMS, a PO is able to see the probationer’s appointments with different officers (e.g. Psychologist, group-based programme run by probation programme officers). Better customer service can be achieved by coordinating the schedule for reporting and programme attendance.

Easy retrieval of documents

With case documents neatly categorized into subfolders, a PO can view, retrieve, and upload reports or client’s personal documents with ease.

If a referral has been made, the referred officer will be able to access some of these important documents too.
**Assign activities online**

As part of case management, a PO can assign their cases for activities such as group therapy or counselling, via ICMS.

**Request for volunteers online**

A PO can request a volunteer to be involved in befriending his or her case. ICMS provides a PO with additional search criteria of skills and interests to select suitable volunteer(s) to meet their probationers’ individual needs.
Online referrals for psychological assessment.
Click ‘submit’ and the referral will reach the coordinating psychologist instantly!

Seamless Case Management
ICMS allows the PO to screen clients for prior history of child abuse, family violence or committal to correctional facilities under MCDS. This in turn facilitates case assessment & planning.
Data re-entry is minimized with ICMS, as there will be auto-population of data.
ICMS saves time and presents relevant information to aid case management.

Report Tracking
Function enables tracking of the movement of the report that has been submitted.
The Probation Service and the Psychological Services Unit were engaged in the roll-out of the ICMS on 31 May 2004. The system will be fully commissioned by the end of 2004.

XIV. ELECTRONIC TAGGING

Electronic monitoring of selected probationers needing intensive supervision was introduced in March 2003 to target probationers whose offences and/or repeated curfew violations would cause them to be sent to a correctional facility. E-tagging as a probation requirement is imposed for a period of 3-4 months. Electronic surveillance of curfew compliance is supplemented with a cognitive behavioural support programme for probationers and their parents; the SONIC (Support for Offenders in Need of Intervention from the Community) programme using Cognitive Behavioural Technique. SONIC involves the Probation Officers’ active engagement of parents and school authorities.

XV. PHYSICAL CURFEW COMPLIANCE CHECKS

For the majority of probationers who are not on electronic surveillance, enforcement of the curfew compliance is strengthened through a “Operation Night Watch” (ONW), a programme involving a pool of carefully selected and trained VPOs to conduct physical checks on probationers residing in areas near their residence or preferred residential areas. On an average, the ONW Team makes about 400 checks a month and curfew compliance is about 85% of all cases checked. Outcomes of checks by VPOs are expeditiously relayed to the Probation Officers via the ONW module of the web-based volunteer portal, thereby facilitating prompt, appropriate intervention to prevent escalation of problems and consequent need to revoke the probation order.

XVI. VOLUNTEER PROBATION OFFICERS: COMMUNITY PROBATION SERVICE (CPS)

Introduced in June 1971, CPS is now 33 years old and has long surpassed its modest objective of merely setting out to promote community awareness of the work involved in the rehabilitation of offenders. CPS has a membership of 413 VPOs as at the end of May 2004. More than 70% are actively engaged in helping probationers in one way or another. VPOs are a special force in terms of having the potential to effectively complement the work of probation officers to positively impact on offenders who need help to remain clear of trouble or to better cope with problems.

Sustaining, supporting and providing continuous training and other support to keep the growing pool of volunteer probation officers sufficiently motivated and challenged pose a real problem in today’s fast pace work setting, changing profile of probation staff and the demands for work life harmony. To appeal to the diversity of interests, skills, talents, volunteer aspirations, and ability to commit their time at various stages of their volunteer life cycle, CPS offers a wide scope of involvement in community-based rehabilitation of persons in conflict with the law. Among some of the more popular areas of volunteering are:

a) Casework and counselling  
b) Project work  
c) Assisting in social investigation to determine if an offender can benefit from probation  
d) Organising activities for probationers, parents or fellow volunteers  
e) Conducting curfew checks  
f) Committee and volunteer coordination work  
g) Conducting groupwork

With 33 years of partnership with probation officers in rehabilitation work with offenders, CPS has matured to a level where VPOs are involved in formulating annual work plans and joining forces with the Probation Service in initiating programmes with a strong strategic focus to attain by VPOs and staff to lend a sharper focus on results. Consequently, the VPO recruitment criteria, VPO grading system, core and functional competencies and communication between VPOS and staff were refined.

Their contributions have been wide ranging; from organising VPOs Skills Training Seminars, producing newsletters, information materials and a guidebook to support VPOs in rehabilitation work, planning and executing curfew check operations to monitor probationers’ compliance with time restrictions, working with staff in the development of a web-based e-portal for VPOs and more recently, mobilising grassroots organisations to provide constituency-based post care and support to offenders after the expiry of their court orders.
For the web-based e-portal, there is a promise that once all VPOs have completed training (given by staff, and net savvy probationers and former probationers) on how to optimise the use of the portal, they can expect to see the formation of a closely-knit virtual community of VPOs. Market reach of potential volunteers will then extend to those who are comfortable with e-learning and e-platforms for communication and information sharing. To ensure good support to VPOs remains even as technologies are harnessed; a toll-free VPO help desk was set up to enable all VPOs to have a single contact point when they encounter problems or need to contact their probation officers urgently.

**XVII. CONCLUSION**

Much has been done and much more will have to be done to bring about the necessary changes if we are to achieve a more restorative and humane treatment of offenders.
Ms Chomil Kamal
DEPUTY DIRECTOR

OPERATIONS YOUTH
5 teams
Deals with offenders below 18 years

OPERATIONS ADULT
2 teams
Deals with offenders 18 years and above

COMMUNITY PARTNERSHIP
RESOURCE MANAGEMENT
REVIEW & PLANNING
INTERNAL AUDIT
Deputy Director / Chief Probation Officer

Reports directly to DD/PS

**OPERATIONS / YOUTH TEAM**
Below 18 yrs old
- Enhance judicial decision making through effective assessment of offenders’ needs and risks
- Ensure that community service orders are retributive, reparative and rehabilitative
- Increase the community’s confidence in the Probation Service through effective supervision and imparting of skills, knowledge and attitudes for the offenders to become socially responsible and law-abiding individuals

**OPERATIONS / ADULT TEAM**
18 yrs old & above

**COMMUNITY PARTNERSHIPS**
- Foster maximum community participation in the rehabilitation of offenders through cultivation of strategic alliances and partnerships with government, people and private sectors

**RESOURCE MGT TEAM**
- Strategically plan & efficiently manage Branch’s resources to produce quality results in a working environment that is safe, equitable & focussed on achievement & best practice
- Look in to the training & development of staff to build up staff competency

**REVIEW & PLANNING**
- Ensure that supportive & administrative work by corporate support staff are effectively applied & documented
- Maintain, procure & manage office equipment & facilities to ensure a productive & efficient working environment in pursuit of the Branch’s mission

**INTERNAL AUDIT / QA**
- Promote and support best practice in the administration & mgt of probation services

**FINANCIAL MGT**
- Prepare & submit financial & manpower reports
- Prepare yearly budget submissions & attend to budget matters

**HR DEVELOPMENT**

**FACILITIES MGT**

- Nurture and support evidence-based probation practice and assist in formulating strategies for effective community-based rehabilitation of offenders by providing policy planning and review support to the organisation
THE PHILIPPINE CORRECTIONS SYSTEM:
CURRENT SITUATION AND ISSUES

Mildred Bernadette Baquilod Alvor*

I. INTRODUCTION

The Philippine Corrections System is composed of the institutions in the government, civil society and the business sector involved in the confinement, correction and restoration of persons charged for and/or convicted of delinquent acts or crimes. The public sector formulates sound policies and rules on corrections, penology and jail management, rehabilitation and restoration. All prisons or penitentiaries, jails and detention centres are under the direct control and supervision of the government. The government, thus, plays a dominant role in the correction and rehabilitation of offenders.1

The civil society which includes the non-government organizations, people’s organizations, religious organizations, academe and the media, provide support services such as health services, training, livelihood, spiritual guidance and counselling. It is also active in advocacy and social mobilization for the protection of inmates’ human rights and enhancement of access to justice.2

The business sector has minimal participation in corrections services but offers tremendous opportunities for improved efficiency and public sector exit options.3


The Philippines adheres to the provisions of the UN Standard Minimum Rules for the Treatment of Prisoners and UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) and other international human rights instruments which define and guarantee the rights of inmates. Some of these provisions are already embodied in the Philippine Constitution4 and in its laws, rules and regulations and ordinances. Section 2, Article of the Constitution, moreover, provides that “The Philippines… adopts the generally accepted principles of international law…”.

B. Prison/Penitentiary, Jail Distinguished

In the Philippines, there is a distinction between a “jail” and “prison”. A “jail” is defined as a place of confinement for inmates under investigation or undergoing trial, or serving short-term sentences. It is differentiated from the term “prison” which refers to the national prisons or penitentiaries managed and supervised by the Bureau of Corrections, an agency under the Department of Justice.5 Jails include provincial, district, city and municipal jails managed and supervised by the Provincial Government and the Bureau of Jail Management and Penology (BJMP), respectively, which are both under the Department of the Interior and Local Government.

Municipal and city prisoners are committed to municipal, city or district jails managed by the BJMP. A district jail is a cluster of small jails, each having a monthly average population of ten or less inmates, and is located in the vicinity of the court.6 Where the imposable penalty for the crime committed is more than six months and the same was committed within the municipality, the offender must serve his or her sentence in the provincial jail which is under the Office of the Governor. Where the penalty imposed exceeds three years, the offender shall serve his or her sentence in the penal institutions of the BuCor.

* State Counsel, Department of Justice, Republic of the Philippines.
2 Ibid.
3 Ibid.
4 See Art. II (Declaration of Principles and State Policies), Art. III (Bill of Rights) and Art. XIII (Social Justice and Human Rights).
5 Supra.
6 Ibid.
C. Four Classes of Prisoners\(^7\)

1. **Insular or national prisoner** – one who is sentenced to a prison term of three years and one day to death;
2. **Provincial prisoner** – one who is sentenced to a prison term of six months and one day to three years;
3. **City prisoner** – one who is sentenced to a prison term of one day to three years; and
4. **Municipal Prisoner** – one who is sentenced to a prison term of one day to six months.

D. Three Types of Detainees\(^8\)

1. Those undergoing investigation;
2. those awaiting or undergoing trial; and
3. those awaiting final judgment.

II. INSTITUTIONAL FRAMEWORK

Three major government functionaries are involved in the Philippine correctional system, namely: the Department of Justice (DOJ), Department of the Interior and Local Government (DILG) and the Department of Social Welfare and Development (DSWD). The DOJ supervises the national penitentiaries through the Bureau of Corrections, administers the parole and probation system through the Parole and Probation Administration, and assists the President in the grant of executive clemency through the Board of Pardons and Parole. DILG supervises the provincial, district, city and municipal jails through the provincial governments and the Bureau of Jail Management and Penology, respectively. DSWD supervises the regional rehabilitation centres for youth offenders through the Bureau of Child and Youth Welfare.

A. Bureau of Corrections (BuCor)

BuCor has for its principal task the rehabilitation of national prisoners\(^9\), or those sentenced to serve a term of imprisonment of more than three years. Since its creation, the BuCor has evolved with modern penology and has shifted from the traditional view of imprisonment as society’s retribution against criminal offenders into one which regards imprisonment as a humanizing and enriching experience. Corrections focus on rehabilitation and regards inmates as patients who need treatment and guidance in order to become productive and responsible members of society upon their release.

At present, BuCor has seven prison facilities for its 26,792 prisoners. It has one prison institution for women and one vocational training centre for juveniles.

All prison institutions have their own Reception and Diagnostic Centre (RDC), Classification Board, Rehabilitation and Vocational Training Programmes, Inmate Complaints, Information and Assistance Centre (ICIAC), Inmate Council and Board of Discipline. RDC receives, studies and classifies inmates committed to BuCor. The Classification Board classifies inmates according to their security status. To extend prompt, efficient and timely services to inmates, BuCor created ICIA which is tasked to act, within seventy-two hours, on all the complaints, requests for information and assistance of inmates.\(^10\) The common complaints/requests made by inmates are complaints against employees/co-inmates, status of prisoners’ release, computation of Good Conduct and Time Allowance and problems regarding visitors’ visits. The Inmate Council, which is composed of finally convicted inmates, serves as an advisory body of the Superintendent of each institution.\(^11\) The Board of Discipline hears complaints and grievances with regard to violations of prison rules and regulations.\(^12\)

B. Bureau of Jail Management and Penology (BJMP)

Also known as the Jail Bureau, BJMP, an agency under the DILG, was created pursuant to Section 60, Republic Act No. 6975\(^13\), which took effect on January 2, 1991. It is mandated to direct, supervise and control

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\(^8\) Id., Sec. 6.

\(^9\) Sec. 26, Chap. 8, Title III, Book IV of Executive Order No. 292, otherwise known as the “Administrative Code of 1987”.

\(^10\) Sec. 1, Chapter 11, Part III, Bureau of Corrections Operating Manual.

\(^11\) Ibid., Sec. 2.

\(^12\) Ibid., Sec. 1, Chapter 2, Part IV.

\(^13\) The Department of the Interior and Local Government Act of 1990.
the administration and operation of all district, city and municipal jails nationwide.

1. Functions
   (i) Formulate policies and guidelines on the administration of all district, city and municipal jails.
   (ii) Formulate and implement policies for the programmes of correction, rehabilitation and treatment of inmates.
   (iii) Plan and programme funds for the subsistence allowance of inmates.
   (iv) Conduct research, develop and implement plans and programmes for the improvement of jail services throughout the country.14

After twelve (12) years of existence as a separate agency under the DILG, the BJMP still shares its responsibilities with the Philippine National Police (PNP). The involvement, however, of the police in penology and jail management is a temporary arrangement in view of BJMP’s limited capacity.15

C. Bureau of Child and Youth Welfare
   Presidential Decree (P.D.) No. 603, as amended16, was promulgated to provide for the care and treatment of youth offenders from the time of apprehension up to the termination of the case17. The Bureau provides intensive treatment for the rehabilitation of youth offenders on suspended sentence.

   Under the said law, a youth offender is defined as a child, minor or youth who is over nine years but under eighteen years of age at the time of the commission of the offence.18

D. Provincial Government
   Provincial jails, numbering 104 in all, including sub-provincial extensions, are under the supervision and control of the provincial governments.19

E. Parole and Probation Administration (PPA)
   The PPA was created pursuant to Presidential Decree (P.D.) No. 96820, as amended, to administer the probation system. Under Executive Order No. 29221, the Probation Administration was renamed as the “Parole and Probation Administration”, and given the added function of supervising prisoners who, after serving part of their sentence in jails are released on parole or granted conditional pardon. The PPA and the Board of Pardons and Parole are the agencies involved in the non-institutional treatment of offenders.

   Probation is the status of an accused who, after conviction and sentence, is released subject to conditions imposed by the court and to the supervision of a probation officer.22 It is a privilege granted by the court; it cannot be availed of as a matter of right by a person convicted of a crime. To be able to enjoy the benefits of probation, it must first be shown that an applicant has none of the disqualifications imposed by law.

1. Criteria for Probation
   In determining whether an offender may be placed on probation, the court shall consider all information relative to the character, antecedents, environment, mental and physical condition of the offender, and available institutional and community resources. Probation shall be denied if the court finds that:

   (i) the offender is in need of correctional treatment that can be provided most effectively by his commitment to an institution;
   (ii) there is an undue risk that during the period of probation, the offender will commit another crime; or
   (iii) probation will depreciate the seriousness of the offence committed.

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14 Supra.
15 Supra.
16 The Child and Youth Welfare Code.
17 Ibid., Title VIII, Chapter 3, Articles 189-204.
18 Ibid., Art. 189.
19 Supra.
22 Supra. (Sec. 3[a]).
2. Disqualified Offenders

Offenders who are disqualified are those:
(i) sentenced to serve a maximum term of imprisonment of more than six years;
(ii) convicted of subversion or any offence against the security of the State, or the public order;
(iii) who have previously been convicted by final judgment of an offence punished by imprisonment of not less than one month and one day and/or a fine of not more than Two Hundred Pesos (₱200.00); or
(iv) who have already been on probation under the provisions of the Decree.

3. Probation Conditions

The grant of probation is accompanied by mandatory or discretionary conditions imposed by the court:
(i) The mandatory conditions require that the probationer shall (a) present himself or herself to the probation officer designated to undertake his or her supervision at each place as may be specified in the order within 72 hours from receipt of said order, and (b) report to the probation officer at least once a month at such time and place as specified by said officer.
(ii) Discretionary or special conditions are those additional conditions imposed on the probationer which are geared towards his or her correction and rehabilitation outside of prison and right in the community to which he or she belongs.

A violation of any of the conditions may lead either to a more restrictive modification of the same or the revocation of the grant of probation. Consequent to the revocation, the probationer will have to serve the sentence originally imposed.

4. Revocation of Probation

At any time during probation, the court may issue a warrant for the arrest of a probationer for any serious violation of the conditions of probation. The probationer, once arrested and detained, shall immediately be brought before the court for a hearing of the violation charged. The probationer-defendant may be admitted to bail pending such hearing. In such case, the provisions regarding release on bail of persons charged with a crime shall be applicable to the arrested probationer. An order revoking the grant of probation or modifying the terms and conditions of the said order cannot be appealed.

F. Board of Pardons and Parole (BPP)

The Board of Pardons and Parole was created pursuant to Act No. 4103, as amended. It is the intent of the law to uplift and redeem valuable human material to economic usefulness and to prevent unnecessary and excessive deprivation of personal liberty.

1. Functions

(i) To grant parole to qualified prisoners;
(ii) to recommend to the President the grant of pardon and other forms of executive clemency;
(iii) to authorize the transfer of residence of parolees and pardonees, order their arrest and recommitment, or grant their final release and discharge.

2. Basis for Grant of Parole

BPP may grant parole if it finds that:

(i) the prisoner is fit to be released;
(ii) there is a reasonable probability that, if released, he or she will live and remain at liberty without violating the law; and
(iii) his or her release will not be incompatible with the welfare of society.

The BPP provides invaluable assistance to the President in exercising the power of executive clemency. It is exercised with the objective of preventing a miscarriage of justice or correcting a manifest injustice. Executive clemency may be exercised through a reprieve, absolute pardon, conditional pardon, or commutation of sentence.

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23 The Indeterminate Sentence Law.
24 SEC. 19. Except in cases of impeachment, or as otherwise provided in the Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment. He shall also have the power to grant amnesty with the concurrence of a majority of all the members of the Congress. (Article 7, 1987 Constitution).
“Reprieve” refers to the deferment of the implementation of the sentence for an interval of time; it does not annul the sentence but merely postpones or suspends its execution. “Commutation of Sentence” refers to the reduction of the duration of a prison sentence of a prisoner. “Absolute Pardon” refers to the total extinction of the criminal liability of the individual to whom it is granted without any condition. It restores to the individual his or her civil and political rights and remits the penalty imposed for the particular offence of which he or she was convicted. “Conditional Pardon” refers to the exemption of an individual, within certain limits or conditions, from the punishment which the law inflicts for the offence he or she had committed resulting in the partial extinction of his or her criminal liability.

3. Basis for Grant of Executive Clemency
   The BPP recommends to the President the grant of executive clemency when any of the following circumstances are present:
   
   (i) the trial or appellate court recommended in its decision the grant of executive clemency for the prisoner;
   (ii) under the peculiar circumstances of the case, the penalty imposed is too harsh compared to the crime committed;
   (iii) offender qualifies as a youth offender at the time of the commission of the offence;
   (iv) prisoner is seventy years old and above;
   (v) prisoner is terminally-ill;
   (vi) alien prisoners where diplomatic considerations and amity among nations necessitate review; and
   (vii) other similar or analogous circumstances whenever the interest of justice will be served thereby.

4. When Applications for Executive Clemency will not be Favourably Acted Upon
   Notwithstanding the existence of any of the circumstances mentioned above, the BPP shall not favourably recommend petitions for executive clemency of the following prisoners, those:
   
   (i) convicted of evasion of service of sentence;
   (ii) who violated the conditions of their conditional pardon;
   (iii) who are habitual delinquents or recidivists;
   (iv) convicted of kidnapping for ransom;
   (v) convicted of violation of the Dangerous Drugs Act of 1972 and the Comprehensive Dangerous Drugs Act of 2002;
   (vi) convicted of offences committed under the influence of drugs an; and
   (vii) whose release from prison may constitute a danger to society.

Where the President grants conditional pardon to a prisoner, the BPP monitors the prisoner’s compliance with the conditions imposed for the duration of the period stated in the grant of executive clemency. Upon determination that a prisoner granted conditional pardon has violated the conditions of his or her pardon, the Board recommends to the President the prisoner’s arrest or recommitment.

III. ISSUES CONFRONTING THE PHILIPPINE CORRECTIONS SYSTEM

A. Overcrowding of Certain Prison Institutions/Jails
   The PNP’s consistent and unrelenting drive to get the job done against criminals, terrorists and those who threaten the peace has resulted in the arrest of thousands of individuals. There is, thus, a continuing increase in the prison population of the Philippines as shown in the table below and, unless the trend is reversed, prisons and jails will soon be facing severe problems of overcrowding and congestion.

<table>
<thead>
<tr>
<th>Institution</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>BuCor</td>
<td>23,965</td>
<td>25,002</td>
<td>26,792</td>
</tr>
<tr>
<td>BJMP</td>
<td>37,153</td>
<td>40,903</td>
<td>48,907</td>
</tr>
</tbody>
</table>

For 2003, BuCor reported a congestion rate of 33% while BJMP reported a monthly increase of its jail population of 2.2%.

B. Fragmented Set-Up of the Corrections System

Authorities say that the present set-up of the corrections system does not lead to sound management and is not in keeping with the government’s machinery. It also results in functional overlaps and diffusion in the conduct of corrections and restoration activities.

C. Lack of Information Technology Systems and Expertise

Lack of technology to properly maintain inmates’ records and process documents for their immediate release is a prevailing situation. Limited use of information technology to support investigation and validation of information on inmates with pertinent agencies like the courts, prosecutors’ offices and law enforcement agencies, to back up recommendations for early release of qualified offenders, and/or for providing them with other needed services, impedes corrections and rehabilitation programmes.

D. Lack of/Inadequate Training

Lack of or inadequate training has been cited as one of the reasons for the lack of awareness and understanding by some prison/jail officials and staff on the rights of inmates.

IV. MEASURES UNDERTAKEN TO IMPROVE THE TREATMENT OF OFFENDERS

Consistent with its constitutionally-declared policy that “[t]he State values the dignity of every human person and guarantees full respect for human rights” and its obligations as a State Party to some, if not most, of the international human rights instruments, the Philippine government has undertaken measures to improve the treatment of offenders. These measures include:

A. The Muntinlupa Juvenile Training Centre

The establishment of a separate facility for juveniles serving sentence at BuCor has long been a serious concern of the Department of Justice. As stipulated in our laws, and the UN Standard Minimum Rules for the Administration of Juvenile Rules (the Beijing Rules) and UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Rules), youth offenders should be segregated from adult offenders and given different rehabilitation programmes that will answer their special needs.

Unable to establish a separate facility for juveniles serving sentence at the national penitentiaries, due mainly to limited resources, the Philippine government successfully sought financial assistance from the Government of Japan, through Japan International Cooperation Agency, for the construction of a juvenile training centre. Since the completion of the construction of the training centre in October 2003, youth offenders at BuCor are segregated from adult offenders and given different rehabilitation programmes and services.

B. Prioritization of Projects

The establishment of a Drug Treatment and Rehabilitation Centre for National Prisoners and DOJ Intranet were identified as the priority projects, among others, of the Department in its Development Agenda for 2001-2005.

The Centre, established in 2002, is now providing rehabilitation services to modify the behavioural dysfunction of drug dependent inmates. It fills the void between an institution that is punishment-oriented and one that is wholly rehabilitation-centred.

While the DOJ Intranet is not yet fully implemented, the BuCor and BPP have expanded their computerization programmes which facilitated the processing of the release on parole/executive clemency of qualified prisoners through the use of a computerized inmate monitoring and tracking database system capable of generating prison records/reports. As a result, BuCor was able to speed up the processing of prison records and the immediate forwarding of 6,414 prison records to the BPP for evaluation.

26 Supra.
27 Sec. 11, Art. II (Declaration of Principles and State Policies), 1987 Constitution.
C. Jail Decongestion Programme/OPLAN Decongestion

In 1993, The DOJ launched a jail decongestion programme designed to facilitate the release of inmates. To implement the programme, a Memorandum of Agreement was entered into between and among the Public Attorney’s Office (PAO), National Prosecution Service (NPS), BJMP and the three corrections agencies of the DOJ – BuCor, PPA and BPP. The Agreement aims to help the government decongest jails, unplug court dockets, provide detention prisoners with a fair and speedy trial, provide access to the programmes of probation and parole, and lessen expenditures for prisoners’ daily maintenance and subsistence.

Pursuant to the programme, the PPA conducted 3,858 jail visits with the end in view of assisting detention prisoners to avail of the benefits of probation, parole or executive clemency. Through PPA’s interviews with inmates, 6,239 inmates were found to be qualified for probation, 2,079 for parole and executive clemency, while 3,119 records were referred to the PAO for assistance in the preparation and filing of petitions for probation.

The BJMP has also launched its own OPLAN Decongestion Programme which seeks to help inmates avail themselves of the benefits of the applicable laws and such other legally recognized means for their early release from incarceration.

D. Proposed Legislation on Jail Integration

Executive Order No. 324 dated April 12, 1996 created a Review Committee to study the integration into one department of all government agencies involved in corrections. Its member-agencies include the DOJ, the National Police Commission, BuCor, BJMP, PPA, BPP, the Bureau of Child and Youth Welfare of DSWD, the Commission on Human Rights, League of Provincial Governors and three non-government organizations.

The Review Committee prepared a draft of a proposed legislation integrating all national prisons and all provincial, city and municipal jails and consolidating the functions of BuCor and BJMP under a new bureau to be known as the Bureau of Correctional Services under the DOJ. The bill was prepared several years ago but Congress has yet to enact the same into law.

E. Full Utilization of Early Release Schemes

The full utilization of early release schemes such as release on recognizance, probation, parole and executive clemency has greatly reduced the number of persons in detention, thus, reducing the congestion rate of some prison and detention facilities.

In 2003, the BPP handled and processed 13,872 petitions for parole/executive clemency. It likewise received and considered 3,046 petitions for parole out of which 2,285 had been granted; recommended the grant of conditional pardon to 126 prisoners and the commutation of sentence of 1,020 prisoners.28

The PPA, on the other hand, investigated 9,418 applications for probation/parole/executive clemency and submitted a total of 7,558 manifestations/petitions recommending the grant of probation/parole/executive clemency29.

F. Increasing Public Awareness on the Plight of Inmates

Proclamation No. 551, series of 1995, issued by then President Fidel V. Ramos, declared the last week of October as “National Correctional Consciousness Week”, otherwise known as NCCW. The annual celebration of the NCCW has played a great role in generating public awareness on the plight of inmates and their need for rehabilitation. It educates the community on the situations prevailing in prisons/jails and making the people aware that prisoners are human beings that should be accorded full respect for their human rights. It also encourages public participation in the re-socialization and public acceptance in the reintegration of prisoners into society as productive and law-abiding citizens after service of sentence in prison.

28 Ibid.
29 2003 Parole and Probation Performance Highlights.
V. CONCLUSION

The improvement of the corrections system and the inmates’ successful reintegration into the mainstream of society is not the sole responsibility of the corrections pillar. The other pillars of the Philippine criminal justice system – law enforcement, prosecution, judiciary, and the community must also do their share. An offender must be afforded his or her rights throughout the different stages of the criminal justice system – from the commission of the offence, to investigation and apprehension, to prosecution, trial and conviction and, finally, punishment and correction.\textsuperscript{30} The community, in particular, plays a significant role in the administration of criminal justice as it functions even before the commission of the offence. Failure of the community to prevent the commission of an offence means an added responsibility of rehabilitating the offender and reintegrating him or her into society.\textsuperscript{31} Also, after going through the entire system, and after release - either by complete satisfaction of penalties, or on probation or parole – they either rejoin the community and lead a peaceful life, or commit another crime and go through the criminal justice system again.\textsuperscript{32} Greater community involvement in the treatment of offenders must, therefore, be encouraged.

The Philippine government, despite many difficulties, has taken and continues to take concrete steps towards the improvement of its prison/jail conditions and the treatment of offenders. But the government cannot do this alone. It needs the cooperation and active involvement of all the sectors in our society – media, academe, business, etc. Prison reforms can only be achieved through the active involvement of all the members of society. Each one has a responsibility in making these reforms possible. Decent and humane prison conditions can be realized, and prisoners can be successfully rehabilitated if every sector of society will work together.

\textsuperscript{32} \textit{Supra.}
### Table 1 - Prison Population of BuCor (CY 2003)

<table>
<thead>
<tr>
<th>Prison Facilities of BuCor</th>
<th>Official Capacity</th>
<th>Population</th>
<th>% Share</th>
<th>Rate of Congestion</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Bilibid Prison</td>
<td>8,700</td>
<td>16,795</td>
<td>63%</td>
<td>93%</td>
</tr>
<tr>
<td>Correctional Institution for Women</td>
<td>1,000</td>
<td>1,055</td>
<td>4%</td>
<td>6%</td>
</tr>
<tr>
<td>Iwahig Prison and Penal Farm</td>
<td>3,500</td>
<td>2,223</td>
<td>8%</td>
<td>-</td>
</tr>
<tr>
<td>Davao Prison and Penal Farm</td>
<td>3,100</td>
<td>3,470</td>
<td>13%</td>
<td>12%</td>
</tr>
<tr>
<td>San Ramon Prison and Penal Farm</td>
<td>1,300</td>
<td>959</td>
<td>3%</td>
<td>-</td>
</tr>
<tr>
<td>Sablayan Prison and Penal Farm</td>
<td>1,500</td>
<td>1,256</td>
<td>5%</td>
<td>-</td>
</tr>
<tr>
<td>Leyte Regional Prison</td>
<td>1,000</td>
<td>1,034</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>20,100</strong></td>
<td><strong>26,792</strong></td>
<td><strong>100%</strong></td>
<td><strong>33%</strong></td>
</tr>
</tbody>
</table>

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33 Relevant statistical data from the Bureau of Corrections.
### APPENDIX B

#### Table 2 - Authorized and Actual Number of Custodial and Civilian Personnel from Each Penal Institution.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
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<td></td>
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<td>Civilian</td>
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<td>266</td>
<td>318</td>
<td>294</td>
<td>318</td>
<td>289</td>
</tr>
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<td>Custodial</td>
<td>32</td>
<td>29</td>
<td>32</td>
<td>29</td>
<td>32</td>
<td>28</td>
</tr>
<tr>
<td>NBP</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
<td>206</td>
<td>181</td>
<td>206</td>
<td>196</td>
<td>206</td>
<td>193</td>
</tr>
<tr>
<td>Custodial</td>
<td>804</td>
<td>754</td>
<td>804</td>
<td>762</td>
<td>804</td>
<td>757</td>
</tr>
<tr>
<td>CIW</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
<td>19</td>
<td>18</td>
<td>19</td>
<td>19</td>
<td>19</td>
<td>19</td>
</tr>
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<td>Custodial</td>
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<tr>
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</tr>
<tr>
<td>DPPF</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
<td>96</td>
<td>85</td>
<td>96</td>
<td>88</td>
<td>96</td>
<td>88</td>
</tr>
<tr>
<td>Custodial</td>
<td>224</td>
<td>206</td>
<td>224</td>
<td>200</td>
<td>224</td>
<td>193</td>
</tr>
<tr>
<td>SRPPF</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
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<td>37</td>
<td>44</td>
<td>42</td>
<td>44</td>
<td>40</td>
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<td>Custodial</td>
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<td>88</td>
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<td>88</td>
<td>84</td>
</tr>
<tr>
<td>SPPF</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
<td>57</td>
<td>50</td>
<td>57</td>
<td>54</td>
<td>57</td>
<td>53</td>
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<tr>
<td>Custodial</td>
<td>77</td>
<td>72</td>
<td>77</td>
<td>72</td>
<td>77</td>
<td>71</td>
</tr>
<tr>
<td>LRP</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civilian</td>
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<td>54</td>
<td>61</td>
<td>56</td>
<td>61</td>
<td>55</td>
</tr>
<tr>
<td>Custodial</td>
<td>49</td>
<td>48</td>
<td>49</td>
<td>46</td>
<td>49</td>
<td>45</td>
</tr>
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<td><strong>TOTAL</strong></td>
<td>4363</td>
<td>4144</td>
<td>4363</td>
<td>4218</td>
<td>4363</td>
<td>4182</td>
</tr>
</tbody>
</table>

#### Table 3 - Ideal and Actual Ratio of Custodial Officer Per Inmate.

a. Ideal - 1:06
b. Actual Ratio:

<table>
<thead>
<tr>
<th>Institutions</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>NBP</td>
<td>1:23</td>
<td>1:23</td>
<td>1:33</td>
</tr>
<tr>
<td>CIW</td>
<td>1:16</td>
<td>1:18</td>
<td>1:20</td>
</tr>
<tr>
<td>IPPF</td>
<td>1:16</td>
<td>1:16</td>
<td>1:18</td>
</tr>
<tr>
<td>DPPF</td>
<td>1:14</td>
<td>1:16</td>
<td>1:19</td>
</tr>
<tr>
<td>SRPPF</td>
<td>1:12</td>
<td>1:10</td>
<td>1:10</td>
</tr>
<tr>
<td>SPPF</td>
<td>1:11</td>
<td>1:12</td>
<td>1:15</td>
</tr>
<tr>
<td>LRP</td>
<td>1:18</td>
<td>1:19</td>
<td>1:22</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>1:19</td>
<td>1:19</td>
<td>1:24</td>
</tr>
</tbody>
</table>
Table 4 - Rate of Recidivism from Each Penal Institution.

<table>
<thead>
<tr>
<th>Institutions</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>NBP</td>
<td>4.80%</td>
<td>5.14%</td>
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</tr>
<tr>
<td>CIW</td>
<td>1.55%</td>
<td>1.01%</td>
<td>3.25%</td>
</tr>
<tr>
<td>IPPF</td>
<td>6%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DPPF</td>
<td>8.28%</td>
<td>4.43%</td>
<td>3.50%</td>
</tr>
<tr>
<td>SRPPF</td>
<td>0</td>
<td>5.45%</td>
<td>4.46%</td>
</tr>
<tr>
<td>SPPF</td>
<td>1.14%</td>
<td>0</td>
<td>50%</td>
</tr>
<tr>
<td>LRP</td>
<td>10.77%</td>
<td>10.52%</td>
<td>5.55%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6.43%</td>
<td>5.04%</td>
<td>3.59%</td>
</tr>
</tbody>
</table>

Table 5 - Number of Inmates who Violated Prison Rules.

<table>
<thead>
<tr>
<th>Institutions</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>NBP</td>
<td>158</td>
<td>138</td>
<td>242</td>
</tr>
<tr>
<td>CIW</td>
<td>89</td>
<td>94</td>
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<tr>
<td>IPPF</td>
<td>209</td>
<td>123</td>
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<tr>
<td>SRPPF</td>
<td>73</td>
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<td>40</td>
</tr>
<tr>
<td>SPPF</td>
<td>15</td>
<td>20</td>
<td>23</td>
</tr>
<tr>
<td>LRP</td>
<td>16</td>
<td>0</td>
<td>38</td>
</tr>
<tr>
<td>TOTAL</td>
<td>767</td>
<td>604</td>
<td>945</td>
</tr>
</tbody>
</table>
**APPENDIX C**

**BJMP's Average Jail Population Data for CY 2003**

<table>
<thead>
<tr>
<th>Region</th>
<th>Sentenced</th>
<th>Detained</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>94</td>
<td>1,268</td>
<td>1,362</td>
</tr>
<tr>
<td>II</td>
<td>51</td>
<td>847</td>
<td>898</td>
</tr>
<tr>
<td>III</td>
<td>102</td>
<td>2,995</td>
<td>3,097</td>
</tr>
<tr>
<td>IV-A</td>
<td>293</td>
<td>5,362</td>
<td>5,655</td>
</tr>
<tr>
<td>IV-B</td>
<td>14</td>
<td>851</td>
<td>865</td>
</tr>
<tr>
<td>V</td>
<td>128</td>
<td>1,531</td>
<td>1,659</td>
</tr>
<tr>
<td>VI</td>
<td>326</td>
<td>2,646</td>
<td>2,972</td>
</tr>
<tr>
<td>VII</td>
<td>564</td>
<td>3,846</td>
<td>4,410</td>
</tr>
<tr>
<td>VIII</td>
<td>92</td>
<td>1,184</td>
<td>1,276</td>
</tr>
<tr>
<td>IX</td>
<td>72</td>
<td>2,005</td>
<td>2,077</td>
</tr>
<tr>
<td>X</td>
<td>272</td>
<td>1,762</td>
<td>2,034</td>
</tr>
<tr>
<td>XI</td>
<td>179</td>
<td>1,230</td>
<td>1,409</td>
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<tr>
<td>XII</td>
<td>44</td>
<td>1,175</td>
<td>1,219</td>
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<td>XIII</td>
<td>47</td>
<td>593</td>
<td>640</td>
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<tr>
<td>NCR</td>
<td>874</td>
<td>17,404</td>
<td>18,278</td>
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<tr>
<td>CAR</td>
<td>21</td>
<td>716</td>
<td>737</td>
</tr>
<tr>
<td>ARMM</td>
<td>8</td>
<td>311</td>
<td>319</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>3,181</strong></td>
<td><strong>45,726</strong></td>
<td><strong>48,907</strong></td>
</tr>
</tbody>
</table>
APPENDIX D

Total Number of Children in Conflict with the Law/Youth Offenders (as reported and served by DSWD for CY 200334)

<table>
<thead>
<tr>
<th>Region</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Capital Region</td>
<td>1,523</td>
<td>252</td>
<td>1,775</td>
</tr>
<tr>
<td>Cordillera Administrative Region</td>
<td>111</td>
<td>13</td>
<td>124</td>
</tr>
<tr>
<td>Region I</td>
<td>417</td>
<td>43</td>
<td>460</td>
</tr>
<tr>
<td>Region II</td>
<td>316</td>
<td>19</td>
<td>335</td>
</tr>
<tr>
<td>Region III</td>
<td>772</td>
<td>72</td>
<td>844</td>
</tr>
<tr>
<td>Region IV</td>
<td>696</td>
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<td>733</td>
</tr>
<tr>
<td>Region V</td>
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<td>10</td>
<td>49</td>
</tr>
<tr>
<td>Region VI</td>
<td>244</td>
<td>11</td>
<td>255</td>
</tr>
<tr>
<td>Region VII</td>
<td>870</td>
<td>75</td>
<td>945</td>
</tr>
<tr>
<td>Region VIII</td>
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</tr>
<tr>
<td>Region IX</td>
<td>655</td>
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</tr>
<tr>
<td>Region X</td>
<td>664</td>
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<td>709</td>
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<tr>
<td>Region XI</td>
<td>1,300</td>
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<td>1,449</td>
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<td>Region XII</td>
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<td>404</td>
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<tr>
<td>CARAGA</td>
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<td>11</td>
<td>287</td>
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<td><strong>867</strong></td>
<td><strong>9,329</strong></td>
</tr>
</tbody>
</table>

NON-CUSTODIAL SENTENCING OPTIONS IN MALAYSIA

Runjit Singh a/l Jaswant Singh*

I. INTRODUCTION

An important development of The United Nations Standard Minimum Rules for the Treatment of Prisoners (1955) was the adoption by the General Assembly on 14 December 1990 of the United Nations Standard Minimum Rules for Non-custodial Measures. Since these Rules were defined by the work of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) based in Tokyo, the General Assembly approved that the Rules should be known as “the Tokyo Rules”. In adopting the Tokyo Rules, the General Assembly expressed its conviction ‘that alternatives to imprisonment can be an effective means of treating offenders within the community to the best advantage of both the offenders and society’. The Tokyo Rules reflect the current sentiment that the ultimate goal of the criminal justice system is the reintegration of the offender into society and the restriction of liberty is only justifiable from the view points of public safety, crime prevention, just retribution and deterrence. The General Assembly recommended member states to implement the Tokyo Rules at the national and regional levels.

Malaysia has its own share of the universal problem of a swelling prison population. There has been much discourse on the negative consequences of prison overpopulation especially with the advent of AIDS. Fortunately, the criminal justice process is provided with clear alternatives to imprisonment. In a similar spirit to that of the Tokyo Rules, these alternatives enable offenders to be processed or diverted away from the traditional prison system. Malaysian penal laws contain a broad spectrum of non-custodial punishments that enhance the rehabilitation/reintegration function of criminal justice. This paper gives a comprehensive overview of the existing non-custodial measures used in law enforcement.

II. SENTENCING OPTIONS

The main repository of non-custodial sentencing orders is the Criminal Procedure Code (Act 593 in the Laws of Malaysia series) relating to criminal procedure. Since 10 January 1976, the Criminal Procedure Code is applicable throughout Malaysia having superseded the four separate Codes that existed earlier, namely, one each for the Federated Malay States, the Straits Settlements, Sabah and Sarawak. Various other penal statutes provide for the usual punishment of fine as an alternative to imprisonment but a default to pay the fine, however, would still lead to imprisonment.

The foremost provision in the Criminal Procedure Code (CPC) providing for the non-institutional treatment of offenders is the power to discharge an offender conditionally or unconditionally. A conditional discharge is commonly known as a good behaviour bond. The power to discharge is set out in section 173A, CPC. When a charge is proved against an offender, the Court can make an order under section 173A ‘… having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed…’. For minor infractions of the law or compelling mitigating circumstances the Court does no more than give an admonition or a caution to the offender. The Court may alternatively discharge the offender conditionally on a bond of good behaviour; the conditions imposed are geared towards ensuring the offender practices good behaviour during the period of the bond. Such bond shall not exceed three years although the Court can order a shorter period. If the offender remains on good behaviour during the specified period, he will not be called back to the Court. No conviction on the charge is recorded under section 173A and the offender is thereby assured of a ‘clean slate’. Other than the charge and possible trial the offender continues living and working in the community. More importantly there is no lasting stigma as a result of the offending.

A variation of the bond of good behaviour under section 173A is provided under section 294, CPC. The sub-stratum for the consideration of the Court is similar to the one set out in section 173A (in italics above).

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1 Resolution 45/110.

2 Ibid, Para. 2.
However, unlike section 173A, the offender has to be convicted first before a bond of good behaviour is considered under section 294. Naturally section 294 is applicable to offences of a more serious category where a record of the offending is necessary. Nevertheless, the offender yet again remains in the community and will be free from any fetters once the bond period expires and he has complied with all the conditions therein. Under section 294A, CPC the Court can require that there is included in the bond one or more of the following conditions:

(a) a condition that the person shall remain under the supervision of some other person named in the bond during such period as may be specified in it;
(b) such conditions for securing the supervision as the Court may think it desirable to impose;
(c) such conditions with respect to residence, employment, association, abstention from intoxicating liquors or with respect to any other matter whatsoever as the Court may think it desirable to impose.

In case of any breach of a bond of good behaviour executed under section 173A or section 294, CPC the Court may issue a warrant for the apprehension of the offender. Once apprehended the offender is brought before the Court which dealt with his original offence. If the Court accepts his explanation or answer to his conduct relating to the alleged breach of the bond, the bond of good behaviour earlier executed continues. Where such a breach is clearly made out, the bond of good behaviour is cancelled and the Court can proceed to sentence the offender as it deems appropriate.

The length of a prison sentence may be reduced by having resort to an order of police supervision under section 295, CPC. Immediately after serving a sentence of imprisonment an offender can be ordered to be subject to the supervision of the police for a period of not more than three years or not more than one year depending on the jurisdiction of the Court issuing the order. Section 296, CPC lists the obligation of persons subject to police supervision as follows:

(a) notify the place of his residence to the officer in charge of the police district in which his residence is situated;
(b) whenever he changes his residence within the same police district notify such change of residence to the officer in charge of the police district;
(c) whenever he changes his residence from one police district to another notify such change of residence to the officer in charge of the police district which he is leaving and to the officer in charge of the police district into which he goes to reside;
(d) whenever he changes his residence to a place beyond the limits of Malaysia notify such change of residence and the place to which he is going to reside to the officer in charge of the police district which he is leaving;
(e) if having changed his residence to a place beyond the limits of Malaysia he subsequently returns to Malaysia notify such return and his place of residence in Malaysia to the officer in charge of the police district in which his residence is situated.

The principle of restitution in sentencing is addressed in the CPC by the provisions relating to the payment of compensation by the offender to the victim of the crime. Such compensation can be ordered by the Court in addition to the bond under section 173A, CPC or generally for all convictions under the power of section 426, CPC. It is interesting to note that under section 426 the court is empowered to fix the sum of the compensation. This provides an avenue for a just and fair compensation to be ordered in an appropriate case. In addition to the payment of compensation, the Court can also order the offender to pay the costs of his prosecution.

Besides compensation, the power to compound offences under the CPC is another example of restorative justice in Malaysia. Section 260, CPC tabulates the offences that are compoundable. A total of 23 offences under the Penal Code (Act 574) are compoundable, the abetment of these offences or attempt to commit them are also compoundable in the like manner. Examples of compoundable offences are causing hurt, wrongful restraint, use of criminal force, house-trespass and criminal defamation. For all compoundable offences, the victim of these offences may compound them provided there is no prosecution pending for such offence. If a prosecution is pending, the consent of the Court is also required for the compound, presumably because action has been taken by the Court, for example, registering the charge and issuing a summons. When an offence is compounded it does not mean that no offence is committed, it means that the victim is
prepared to forgive the offender and will accept compensation. Sub-section (4) of section 260 makes specific reference to the contractual nature of composition of offences. It authorises any person competent to contract on behalf of the victim to compound the offence. The effect of a composition under section 260 is that of an acquittal of the accused. Again, the ‘clean state’ result is achieved enabling the uninterrupted social integration of the accused.

Another statute that provides an alternative to a sentence of imprisonment is the Offenders Compulsory Attendance Act 1954 (Act 461). As the name suggests, the Court makes a Compulsory Attendance Order. With this order the offender has to attend daily at a Centre to be specified in the order and to undertake compulsory work for a period not exceeding 3 months and for such hours, not exceeding 4, as may be specified in such order. Section 5 of the Act states that where a person has been convicted of an offence for which he is liable to be sentenced to imprisonment or is liable to be committed to prison for failure to pay a fine or debt, and the Court is of the opinion that such person would have been adequately punished by a sentence of imprisonment for a period not exceeding three months, and having regard to the character of such person, the nature and seriousness of the offence or the circumstances of such person’s failure to pay (as the case may be) and all the other circumstances of the case, it is inexpedient to commit him, the Court may, in lieu of such sentence or committal, make a Compulsory Attendance Order. The obligations of offenders under a Compulsory Attendance Order as set out in section 6 of the Act are as follows:

6. (1) Subject to the provisions of any Rules made under this Act and to the terms of the Compulsory Attendance Order, an offender shall, during the continuance in force of such Order report daily at such time and place as, having regard to the offender’s circumstances, the Compulsory Attendance Centre Officer may specify.

(2) An offender shall each day undertake such compulsory work as may be ordered by the Compulsory Attendance Centre Officer, which shall be such work as can, in the opinion of that Officer, be completed by the offender having regard to his physical capacity during the number of hours specified in the Compulsory Attendance Order.

(3) If an offender is gainfully occupied in employment, the time at which he is ordered to report daily under subsection (1) shall be such as not to interfere with such employment.

Sub-paragraph (3) is important in that an offender subject to this Order continues to be gainfully employed.

Being in close proximity to the golden triangle, Malaysia has been fighting the scourge of drugs. Although capital punishment is imposed for drug trafficking under the Dangerous Drugs Act 1952 (Act 234), on the other hand, as is consistent with international standards, Malaysia also realises that drug dependants have to be treated for their dependency. Hence, under the Drug Dependents (Treatment and Rehabilitation) Act 1983 (Act 283), the government has established Rehabilitation Centres for the residence, treatment and rehabilitation of drug dependants. A proven drug dependant need not be processed through the criminal justice system but may be immediately processed for his dependency. A Magistrate can order a drug dependant to undergo treatment and rehabilitation at a specified Rehabilitation Centre for a period of two years and there after to undergo supervision by a Rehabilitation Officer or any police officer at the place specified in the order for a further period of two years. Alternatively, the drug dependant can be ordered to undergo only supervision at the place specified in the order for a period of not less than two and not more than three years. Even section 38A of the Dangerous Drugs Act 1952, empowers the Court to order offenders who are below the age of eighteen and certified to be drug dependants to be sent to these Rehabilitation Centres to be followed by two years of after-care supervision. This provision, however, does not apply where the drug dependant is found guilty of a serious category of offence like drug trafficking and cultivation of drug-extracting plants.

For child offenders, in tandem with worldwide trends, Malaysia is equally concerned with their welfare and rehabilitation. It is a recognized fact that even the modern prison system is deemed harmful to children and special laws have to be enacted for the treatment of child offenders. In Malaysia, child offenders are governed by the provisions of the Child Act 2001 (Act 611). This Act superseded the old Juvenile Courts Act 1947 and has been in force since 1 August 2002. A child is defined as a person aged above 10 years and under 18 years. The courts constituted under this Act are known as the Courts For Children and are vested with jurisdiction to try all offences except offences punishable with death. Where an offence has been proven
the Court for Children has the power to make the following orders:

(i) admonish and discharge the child;  
(ii) discharge the child under a bond of good behaviour with such conditions as may be imposed by the Court; 
(iii) order the child to be placed in the care of a relative or other fit and proper person with such conditions as may be imposed by the Court; 
(iv) order the child to pay a fine, compensation or costs.

One special feature of the Child Act 2001 is the power of the Court to order the parent or guardian of the child to execute a bond for the child’s good behaviour. The conditions attached to this bond make it imperative that the parent or guardian plays an interactive role in the supervision and care of the child. Failure by the parent or guardian to comply with the conditions of the bond constitute an offence punishable with a fine of up to RM5,000. Such provisions have a semblance to the ‘parenting order’ made under section 8 of the Crime and Disorder Act 1998 of England.

Further provisions of the Child Act 2001 provide for the probation of child offenders. A probation order shall have effect for a period not less than one year and not more than three years from the date of the order. Under section 98 of the Child Act 2001, a probation order is made for the purposes of securing the good conduct and supervision of the probationer or preventing the repetition by him of the same offence or commission of other offences. The Court for Children is empowered to include any one or more of the following requirements in a probation order:

(i) that the probationer shall reside at a probation hostel, at the home of his parent or guardian or relative or at some other place; 
(ii) that the probationer shall attend an educational institution to be recommended by the probation officer; 
(iii) that the probationer shall remain indoors at his place of residence, be it at the probation hostel or at home, during hours to be specified.

Before making a probation order containing requirements as to residence, the Court shall consider the home surroundings of a child.

Perhaps mention should also be made that the Child Act 2001 contains provisions relating to the protection and rehabilitation of children which are pre-emptive to any offending by a child.

III. POST-SENTENCING OPTIONS

Included in the Tokyo Rules are guidelines for post-sentencing dispositions that should be available to the competent domestic authorities. Rule 9.2 refers to some specific post-sentencing dispositions such as:

(a) Furlough and halfway houses 
(b) Work or education release 
(c) Various forms of parole 
(d) Remission 
(e) Pardon

In Malaysia offenders sentenced to imprisonment have resort to remission and pardon to avoid further incarceration.

The remission system applicable to prisoners in Malaysia is provided under Part 6 of the Prisons Regulations 2000 (made under the Prison Act 1955). The relevant provisions set out the rationale for the grant of remission i.e. with a view to encouraging good conduct and industry and to facilitate reformatory treatment. A convicted prisoner sentenced to a term of imprisonment exceeding one month may be granted a one-third remission of his sentence. The remission system is explained to all prisoners on admission and when, for any reason, remission is forfeited the prisoner is made fully aware of such forfeiture. At stipulated intervals the Officer-in-Charge of the prison is required to prepare a report on the work and conduct of the

3 Rule 9.
Article 42 of the Federal Constitution gives power to the Yang di-Pertuan Agong (the King) to grant pardons in respect of all offences committed in the Federal Territories. The Ruler or Governor of a State has power to grant pardon in respect of all offences committed in his State. To implement the power of pardon, Pardons Boards are constituted for each state and a single Pardons Board exists for the Federal Territories. All cases of offenders sentenced to capital punishment are as of right referred to the Pardons Board.

IV. FUTURE DIRECTIONS

Rule 9.4 of the Tokyo Rules states:

Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

Malaysia takes a proactive approach in searching for alternatives to incarceration in prison. One such suggestion is for the introduction of community service. In fact, as early as 1979 the Minister of Social Welfare and Services suggested that community service in Malaysia should be implemented in lieu of short-term imprisonment. Clearly then the search for alternatives to custodial penalties has been on for the last two decades. Of late, the Law Reform Unit of the Attorney-General’s Chambers conducted research to study the rationale and introduction of the community service scheme. The study is looking into possible rationale such as cost savings, deterrence, reparation to the community and rehabilitation of offenders. The study shows the spirit of the legal system to consider improvements in the treatment of offenders. Indeed, the main concern of any modern sentencing policy should be the circumstances of the offender involved and how best they can be addressed by non-custodial measures such as community service.

Another area being looked at is the possible introduction of the parole system. Again the Law Reform Unit of the Attorney-General’s Chambers has prepared the relevant paper which studies the parole system in other jurisdictions with a view to explore the possibility of the implementation of parole in Malaysia. For that matter, the Prisons Department too has prepared a paper detailing the logistics of the parole system. Among other reasons, this paper stresses the social re-integration of the offender as the main justification for parole. Parole affords an opportunity to continue the correction of the offender in a ‘real’ environment.

V. CONCLUSION

Incarcerated offenders who leave prison face stigma, ostracism, suspicion and isolation and hence despair, which may very well spur them to return to prison. Statistics in Malaysia show that about 50% of offenders in prison are recidivist offenders. It is to avoid the undesirable effects of imprisonment that the Tokyo Rules encourage the promotion of non-custodial measures with due regard to an equilibrium between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention. The laws referred to in this paper provide a range of non-custodial measures at both ends of imprisonment. Provided all necessary conditions are met an offender has access to these measures as part of the criminal justice process. The treatment of offenders in this manner ensures that they continue being part of the community. Law enforcement and social service agencies can provide the requisite framework to assist the offender to lead a law-abiding and self-supporting life. Of course, the biggest challenge is to promote among offenders a sense of responsibility towards society and to restore their dignity in order for them to function productively. To that end the search for suitable alternatives to incarceration continues.

In the final analysis, prison and custodial institutions should remain only for offenders of grave crimes, recidivists and hard-core criminals.

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4 See New Straits Times, 9 November 1979 and 28 August 1979.
5 Community service: A Rationale. (1981) 2 MLJCCCXXV.
6 Proposal for the Parole System in Malaysia.
7 Ibid, note 6.
UNITED NATIONS STANDARDS AND THE SITUATION OF KOREAN CORRECTIONS ~ REALITY AND EFFECTIVE COUNTERMEASURES FOR THEM

Kim Soo-Hee*

I. INTRODUCTION

The Penal Administration Law was enacted in 1950. According to the law, its purpose is “to segregate prisoners under sentence, to correct and educate them, to cultivate a sound national thought and work ethic and to enhance technical education, so that they may be brought back into society as sound citizens”. Korea has been making great efforts to develop a correctional administration suitable to accomplish its objectives. Nevertheless, the challenge Korea faces is more serious than we expected.

In the global view, domestic crimes start to be beyond the control of each jurisdiction, and international crime cases also increase without appropriate countermeasures by the international society. These crimes, are one of the main factors that interrupt everlasting development, distort the effect of economic growth and harm the quality of life. In addition, crime is a serious threat to democracy, free trade and moreover to security, welfare and the dignity of human beings. For these reasons, crime prevention and criminal justice have been one of critical concerns of the United Nations.

After the 2nd World War, with recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family, the United Nations adopted the Universal Declaration of Human Rights in 1948. Following this movement, the Standard Minimum Rules for the Treatment of Prisoners was acknowledged and adopted at the 1st United Nations Congress on Crime Prevention and Criminal Justice in 1955.

The increasing number of criminals, however, brought overcrowding in prison and caused a high level of recidivism, which consequently put the aim of corrections, the rehabilitation of inmates, to shame.

Based upon the realization of the effectiveness of the community for treatment, as a response to the increasing number of inmates in each country and as a result of the 8th United Nations General Assembly, the Tokyo Declaration was born in 1990. Its purpose to devise countermeasures against an increasing number of inmates and to facilitate inmates’ rehabilitation.

In this paper, the United Nations Standards for inmates’ treatment, the reality and issues of the Korean Correction system, and countermeasures against rising problems will be examined.

II. THE PENAL ADMINISTRATION ACT AND CRIME FIGURES IN KOREA

As a central organization of Korean corrections, the Correction Bureau of the Ministry of Justice performs it duty under the guidance of the Director General. Under the Director General, there is a Deputy Director General and six divisions. These are the Correction Division, First Security Division, Second Security Division, Prison Industry Division, Educational Reformation Division and Management Division.

Rapid economic development in the 1970’s in Korea accompanied social transformation with a sharp increase in crimes. In the 1980’s, the focus of criminal justice changed from punishment or deterrence to rehabilitation under the influence of the social trend of the time: pursuing democracy. Accordingly, corrections also started to adopt this ideology.

Furthermore, the resolution recommending the establishment of a human rights organization in each country was adopted by the United Nations General Assembly in 1993 and the guideline for it was made in 1995. Following these recommendations and the guideline, the National Human Rights Commission Act of Korea was enacted in 2001.

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Based upon the law, the National Human Rights Commission of Korea was established as an independent governmental organization and the authority of the commission is as follows.

- Recommendations to improve or rectify human rights concerned statutes, legal systems, policies and practices
- General investigation regarding human rights
- Visit and investigation of detention or protective facilities
- Education - the Commission and government-sponsored institutions can jointly conduct research on human rights.

The commission is composed of 10 members of the committee including a president, senior commissioners, secretary general, etc.

The purpose of the National Human Rights Commission Act is firstly, to supplement the human rights protection system of the government and justice department, secondly, to relieve any human rights breach as swiftly as possible, thirdly, to protect and promote inalienable rights of human beings and fourthly, to realize the dignity and value of human beings and lastly, to contribute to the establishment of democratic order in society.

The present situation of Korea is considered as a transition period because the awareness of human rights came to the forefront after the end of years of military government. The correctional administration had no other choice but to get involved in this movement. So, some side effects such as litigation, maintaining that the current system and regulations violate human rights, are being raised in large numbers. This increase in litigation somewhat hinders our duty of compliance and causes a lot of trouble.

The Penal Administration Act of 1953 was amended 7 times up until 1999 in response to social changes and the introduction of new correctional policies.

The latest amendment focuses on ensuring security and order, facilitating a harmonious atmosphere of correction where order and inmates’ human rights can co-exist. It also focuses on revising relevant regulations to encourage inmates’ successful return to society, and on creating legal grounds to contract out correctional services to relieve overcrowding and to maximize the effectiveness of correctional programmes.

Major parts of the amendment are as follows.

1. Stipulation of inmates’ human rights (Referring to Article 6-1, United Nations Standard Minimum Rules for the Treatment of Prisoners)
2. Establishment of legal grounds for the introduction of private prisons
3. Stipulation of a petition system for making requests or complaints without any obstacles that is fair to everyone (Referring to Article 36, United Nations Standard Minimum Rules for the Treatment of Prisoners)
4. Notification of prison life guidelines for inmates who are newly admitted.
5. Strict guidelines on the use of restraints (Referring to Article 33, United Nations Standard Minimum Rules for the Treatment of Prisoners)
6. Easing restrictions on visit supervision and letter inspection
7. Permitting inmates to use the telephone
8. Establishment of legal grounds for inmates’ to study and have vocational training in the community
9. Specifying the inmate’s right to write letters and the limitations on that right
10. Moderation of furlough conditions and introduction of a special furlough
11. Specifying disciplinary punishment conditions and embodiment of countermeasures against overuse of disciplinary punishment (Referring to Article 29, United Nations Standard Minimum Rules for the Treatment of Prisoners)
12. Invitation of community members to the disciplinary punishment committee to ensure fairness
13. Introduction of suspension in the practice of disciplinary punishment

For greater clarification the statistics of December 31, 2002 will help explain the general crime figures of Korea in depth.
Table 1: Inmates by Gender at the End of 2002

(Unit: Person)

<table>
<thead>
<tr>
<th></th>
<th>Convicted</th>
<th>Unconvicted</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>36,145</td>
<td>19,139</td>
<td>55,284</td>
</tr>
<tr>
<td>Female</td>
<td>1,501</td>
<td>1,779</td>
<td>3,280</td>
</tr>
<tr>
<td>Rate of female inmates</td>
<td>4.2%</td>
<td>9.3%</td>
<td>5.9%</td>
</tr>
<tr>
<td>Total</td>
<td>37,646</td>
<td>20,918</td>
<td>58,564</td>
</tr>
</tbody>
</table>

Table 2: Inmates by Gender at the End of 2003

(Unit: Person)

<table>
<thead>
<tr>
<th></th>
<th>Convicted</th>
<th>Unconvicted</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>36,646</td>
<td>19,241</td>
<td>53,887</td>
</tr>
<tr>
<td>Female</td>
<td>1,702</td>
<td>1,949</td>
<td>3,651</td>
</tr>
<tr>
<td>Rate of female inmates</td>
<td>4.9%</td>
<td>10%</td>
<td>6.8%</td>
</tr>
<tr>
<td>Total</td>
<td>38,348</td>
<td>21,180</td>
<td>59,528</td>
</tr>
</tbody>
</table>

Table 3: Convicted Inmates by Age at the End of 2002

(Unit: Person)

<table>
<thead>
<tr>
<th>Age</th>
<th>Total</th>
<th>Under 16</th>
<th>16~ under 18</th>
<th>18~ under 20</th>
<th>20~ under 25</th>
<th>25~ under 30</th>
<th>30~ under 40</th>
<th>40~ under 50</th>
<th>50~ under 60</th>
<th>Over 60</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unconvicted</td>
<td>37,646</td>
<td>3</td>
<td>70</td>
<td>541</td>
<td>5,568</td>
<td>5,971</td>
<td>12,217</td>
<td>9,416</td>
<td>2,982</td>
<td>878</td>
<td></td>
</tr>
</tbody>
</table>

Table 4: Inmates by Crime Type at the End of 2002

(Unit: Person)

<table>
<thead>
<tr>
<th>Type</th>
<th>Theft</th>
<th>Assault</th>
<th>Fraud &amp; Embezzlement</th>
<th>Criminal Negligence</th>
<th>Robbery</th>
<th>Murder</th>
<th>Violence</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>6,444</td>
<td>829</td>
<td>4,097</td>
<td>1,627</td>
<td>5,715</td>
<td>3,686</td>
<td>3,277</td>
<td>11,971</td>
</tr>
</tbody>
</table>

Additionally, from August 1, 2003, the Correction Bureau, Ministry of Justice of Korea ordered the local correctional institutions to release accused persons in custody immediately at the court when the court had determined him/her to be innocent or they received a suspension verdict or a penalty. Previously the accused was released when they got back to the detention centre.

From 2003, one-day health leave per month has been permitted for all female inmates. On average 357 female inmates are granted a day-off monthly under this policy.

Prison modernization and health service reformation is being carried out as a trial to facilitate rehabilitation and reduce recidivism with a long term and short term view. There are also lots of opportunities for education and vocational training.
As a reference, recommendations from international organizations of the UN about criminal justice are as follows.

1. Guarantee of lawyer participation in investigation
2. Guarantee of swift counselling with judge on arrest or detention
3. Reduction of detention periods in the police station
4. Prohibition of torture and establishment of legal punishment against torture
5. Punishment for rape between married couples
6. The gradual abolition of the National Security Law
7. Abridgement of capital punishment cases
8. Establishment of regulations preventing and punishing any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Among the above mentioned recommendations, the guarantee of lawyer participation in the investigation and the guarantee of swift counselling with a judge before incarceration were approved by the Policy Committee of the Ministry of Justice. Following this approval, the Criminal Procedure Code is under revision at this stage. In addition, the Policy Committee ensured the availability of a court appointed lawyer in the matters of lawyer participation in the investigation and counselling with the judge on arrest or detention in order to practically protect the rights of defendants. This also will be considered in the revision of the Criminal Procedure Code.

III. THE CURRENT CONDITIONS AND ISSUES IN REGARD TO INMATES’ TREATMENT IN KOREA

There were 45 correctional institutions across the nation with approximately 58,000 inmates at the end of 2003. The inmates include persons detained by warrant of the court and those convicted. The optimal housing capability is about 44,350. Currently, the Korean prison system houses about 14,000 inmates more than its optimal housing capacity.

Table 5: The Change in Increasing Number of Inmates
(Unit: Person, the end of each year)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accommodation</td>
<td>36,000</td>
<td>49,000</td>
<td>53,000</td>
<td>64,000</td>
</tr>
</tbody>
</table>

Figure 1: The Change in Increasing Number of Inmates
(Unit: Person, the end of each year)
The ratio of correctional officers to inmates is around 1:5.4 and the total number of uniformed officers is 11,099 as of April 2004.

In terms of cell space, each inmate has 1.7 m². Considering these facts, overcrowding is more serious than previously thought.

Nevertheless, the construction or renovation of correction facilities to improve prison living conditions is not feasible due to the lack of budget. As an effort to rectify this issue, the Ministry of Justice amended the “Design and Building Guide for Secure Correctional Facility” in December 30, 2002 and revised the regulations on standard cell space use per inmate from 1.65 m² to 2.4 m². However, the endeavour to realize this standard will need to be carried out over a long period of time.

In terms of medical services, $74, which is far less than required, is allocated per inmate each year. To make matters worse, there are only 151 medical staff for all the institutions - which is not sufficient to provide basic services. Also, medical facilities and the equipment are mostly outdated.

As laid out above, the present condition of the Korean correctional administration has various difficulties regarding finance and the recruitment of personnel, etc. Whereas, the enactment of the National Human Rights Commission Act and requests to promote inmates’ human rights by the public have given inmates grounds to speak out for the improvement of their treatment. With this antinomy, correction staff are experiencing confusion in the performance of their various duties.

Litigation by inmates requesting better living conditions is increasing sharply. Awareness of human rights, the birth of the National Human Rights Commission, and various policies focused on human rights are believed to affect this situation more than anything else. In other words, this situation implies that the control on corrections by the court is being intensified in order to guarantee standard prison living conditions and basic civil rights of inmates.

When these cases were scrutinized, some were dismissed due to the inmates’ ignorance of correctional policies and administration. Also, some cases were deemed to favour the protection of inmates’ rights too much rather than policy administration when it comes to correctional administrators’ view.

One of the most serious problems is that some inmates misuse human rights policy or administration to their advantage ignoring legitimate regulations and procedures. They are consequently disrupting internal orders.

The statistics on petitions decided by the National Human Rights Commission are shown on Table 6 and Figure 2.

Table 6: Decisions Made By the National Human Rights Commission

<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
<th>Dismissal</th>
<th>Rejection</th>
<th>Dismissal, Rejection</th>
<th>Recommendation</th>
<th>Transfer to other agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>458</td>
<td>72</td>
<td>325</td>
<td>10</td>
<td>29</td>
<td>22</td>
</tr>
</tbody>
</table>
The National Human Rights Commission was established on November 25, 2001. There were 4,226 petitions up until June 30, 2003. Among them 458 cases were concluded with 29 recommendations. Except for these 29 recommendation cases, almost all cases (approximate 94 %) were cancelled or regarded by the Commission as having no grounds for inspection.

As a result, correctional officers in the field are asking for more strict disciplinary punishment. Considering the fact that protection of human rights within prison can only be insured as long as internal order is established, the revision of the Penal Administration Act is inevitable. Inmates who violate major disciplinary regulations repeatedly should be given more harsh punishment, such as excluding their disciplinary punishment term from their prison service term, within strict conditions. A monetary penalty or visiting judge system may also be possible options.

IV. THE PROBLEMS IN THE APPLICATION OF THE UNITED NATIONS RECOMMENDATIONS AND ITS SOLUTION

A. Accommodation

   Article 10, Specification of minimum floor space use
   Article 19, Provision of a separate bed and of separate and sufficient bedding in accordance with local or national standards to all inmates
   Article 21, Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
   Article 86, Untried prisoners shall sleep singly in separate rooms, with the reservation of different local customs in respect of the climate.

2. The Application of the Standards in Korea
   Sharing a cell with other inmates is the usual way of housing inmates because of an insufficient number of cells and overcrowding, even if the provision of a solitary cell is stipulated in the regulations.
   Several detention centres are high-rise structures and therefore cannot provide outdoor exercise. Given that high-rise structures are the norm in order to address the overcrowding problem, the application of the standards is difficult in practice.
   A large scale correctional facility should not be constructed. Correctional facilities which are annexed to relevant agencies or departments such as the prosecutors’ office or the court should be encouraged to
maximize the effect of criminal justice procedure and inmates' treatments.

High-rise correctional facilities, which are prevalent in Korea to solve the problem of overcrowding, are also facing difficulties. The NIMBY (Not in My Backyard) movement in Korea, that shows a hostility towards correctional facilities, make it more difficult even to select a facility site. An effort to make the public understand that a correctional facility is not a bad thing but will bring improvements to the local economy and other positive results, needs to be continually made.

In addition to this, the endeavour to overcome outdated prison management, which has depended mainly on human resources in the operation of facilities and treatment of inmates, and to facilitate an environment in which appropriate inmates' treatment can be performed, should be made.

For example, every inmate should be supervised by correctional officers in visitation with their family or friends. And a correctional officer always has to guard inmates at each dormitory. These conditions require a system wholly dependent on staff.

**B. Custody Management**

   - Article 54, Statement on the use of force.

2. The Application of the Standards in Korea
   - United Nations Standard Minimum Rules for the Treatment of Prisoners restricts the use of force and firearms more strictly than the Penal Administration Act of Korea. Carrying firearms in an inmates' presence is prohibited in principle.

   Article 14 and 15 of the Penal Administration Act of Korea stipulates the conditions under which the use of force or firearms may be used. When it comes to an inmates’ serious violation of internal orders, causing fatal danger to the facilities or equipment including an attempt to escape, force or firearms may be used. However, the conditions in which force or firearms are used should be interpreted in a more limited way. Particularly, escape or escape attempts should be translated as continuing to escape even if there has been intervention by the correctional officers.

**C. Visitation and Others**

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners
   - Article 39, Prisoners shall be regularly informed of the more important items of news by having access to newspapers, periodicals or special institutional publications, by wireless transmissions, lectures or any similar means as authorized or controlled by the administration.

2. The Application of the Standards to Korea
   - With the installation of TV sets in all cells, this has minimized the alienation caused by indirect contact with the outside.

   Since the introduction of a Video Visit System in seven correctional institutions through the intranet of the Ministry of Justice in 2003, the system has expanded to all correctional institutions across the nation. This system was devised for the convenience of visitors who would otherwise have to travel a long distance.

**D. Medical Services**

   - Article 22-1, at every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry.

   Article 22-3, the services of a qualified dental officer shall be available to every prisoner.

2. The Application of the Standards in Korea
   - As mentioned above, it is difficult to provide appropriate medical services because of overcrowding and a shortage of medical staff.
With a ratio between doctors and inmates far higher than that of the community, and facilities and equipment that are outdated, the adequate provision of medical services for prisoners is a serious problem. Without significant counteraction, therefore, recruiting well qualified medical officers is next to impossible.

In order to improve medical services, which are now a main topic of the Task Force of the Ministry of Justice, short-term and long-term policies are being implemented. The following measures are being planned and are on the way to being implemented: Training assistant nurses among the correctional officers, recruiting more public doctors within prisons and giving health insurance to all inmates.

E. Disciplinary Punishment


   Article 30-2, No prisoner shall be punished unless he has been informed of the offence alleged against him/her and given a proper opportunity of presenting his/her defence.

   Article 32-1, Punishment by close confinement or the reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

   Article 34, the patterns and manner of use of instruments of restraint shall be decided by the central prison administration.

2. The Application of the Standards in Korea

   According to critics, discipline is too extensive for inmates to observe and limits their living more than is required.

   The reduction of diet referred to in the United Nations Standard Minimum Rules for the Treatment of Prisoners was abolished as it breaches human rights. Protecting inmates’ human rights was portrayed in this decision.

   The involvement of community members in the Disciplinary Punishment Committee was introduced to ensure objectivity.

   The Correction Task Force within the Ministry of Justice was established to develop policies and revise relevant laws and regulations in August 2003. The work of the Task Force Team will focus on the promotion of human rights within prisons taking into consideration the criticism on human rights of the people in custody. The Correction Task Force Team is composed of human rights movement group members, specialist from universities and the community and staff of the Correction Bureau. They discuss how to amend the Penal Administration Act and its subordinate regulations. As the first fruit of the discussion, the revision of the “Ministerial Decree on Discipline and Punishment” and “Ministerial Decree on the Patterns and Manner of Use of Restraint” has been prepared.

   It is desirable to delete No. 35 of Article 3 of the “Ministerial Decree on Discipline and Punishment” and to specify the conditions that require disciplinary punishment. Also, guarantee of due process, where a proper opportunity is given to an inmate to present his or her defence where practically possible, is required.

F. Grievance Resolution


   Article 36-3, Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in a proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.

2. Good Examples in the Application of the Standards to Korea

   Every inmate can make a request or complaint to the Minister of Justice’s Department or inspection officials when they are not satisfied with their treatment within prison. This grievance procedure is articulated in the Penal Administration Act to exclude prior inspection or accompanying disadvantage.
As a reference, the grievance resolution methods against the breach of an inmates’ rights and maltreatment is shown in the following table.

Table 7: Category of Grievance Resolution

<table>
<thead>
<tr>
<th>Judicial Resolution</th>
<th>Un-judicial Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Litigation</td>
<td>Petition to the Minister or Inspection Officials</td>
</tr>
<tr>
<td>Civil (Criminal) Suit</td>
<td>Interview with Warden</td>
</tr>
<tr>
<td>Constitutional Suit</td>
<td>Petition to the National Human Rights Commission</td>
</tr>
<tr>
<td></td>
<td>Administrative Decision</td>
</tr>
<tr>
<td></td>
<td>Civil Appeal Inspection System</td>
</tr>
</tbody>
</table>

G. Inmates under Trial

   Article 93, For the purpose of his/her defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his/her legal adviser with a view to his/her defence and to prepare and hand to him/her confidential instructions.

2. The Application of the Standards to Korea
   Legal aid by visiting lawyers of the Korea Legal Aid Corporation is being provided in all 63 correctional facilities including prisons, detention centres and juvenile prisons and other institutions across the nation in order to reinforce the counselling system for inmates’ grievance resolution and to facilitate legal assistance. From June 16, 2003, when visiting legal aid started, to December 15 of the same year, 3,387 legal consultations were conducted.

H. Open Door Policy - Toward Community-Based Treatment

   Traditional inmates’ treatment behind bars has been one of the major parts of the criminal justice system since the establishment of modern society, and has played a key role in correction. To sum up, imprisonment has functioned to separate criminals from society and eliminate malignancy, and consequently return them to society as sound citizens.

   This system, however, has limited inmates’ contact with outside and made it difficult for them to adjust themselves into society after release. Critics also maintain that just putting people behind bars does not facilitate self-reliance and accountability, and causes various side-effects such as getting criminals more involved in crime and made inmates’ rehabilitation more difficult as a result.

   Therefore, the balance is now moving towards open treatment or treatment outside prison by supplementing or mitigating traditional treatment according to contemporary correctional ideology to facilitate a successful return to society.

   The pattern of open treatment is classified mainly as treatment in the society and treatment within a facility. The following open treatments are currently in operation: furlough, weekend leave, conjugal visits, day leave for work, study tour in the community, open treatment in an open facility, etc. However, halfway houses, community treatment centres, community diagnostic and treatment centres or other similar systems have not yet been introduced.

   The future of correctional administration is expected to focus on the symmetry between treatment within prison and treatment in the community by giving more freedom to inmates. Therefore, an open door policy into society is required more than at anytime else.

   Nevertheless, the open door policy and expansion of community treatment may increase the possibility of disturbances, and may put more responsibility and risk on society and the correctional authority.
Therefore, sharing the responsibility and risk with all members, including correctional staff, inmates and the public in equal measure is necessary to successfully implement an open door policy.

As the open door policy is not treatment within prison but treatment in the community, the community should open its arms and accept the possibility of contact or association with inmates. Also, the effort to relieve social conflicts through this policy will make the correctional goal, i.e., inmates’ rehabilitation, be accomplished in a shorter time.

V. CONCLUSION

Throughout the United Nation’s activities, many standards, norms and recommendations have been developed and adopted, and are being complied with for inmates’ treatment. Major examples of this are the ‘Basic Principle for the Treatment of Prisoners’, ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, ‘Code of Conduct for Law Enforcement Officials’, ‘United Nations Standard Minimum Rules for the Administration of Juvenile Justice’, ‘Basic Principles on the Use of Force and Firearms by Law Enforcement’, etc.

As illustrated earlier, the Korean correctional administration has tried to realize the Universal Declaration of Human Rights and other international standards and norms in respect of its laws and regulations. Nevertheless, some areas need improvement. In an effort to meet those recommendations, the Korean government has taken various measures for the promotion of human rights and has reported the results to international organizations.

The Korean correctional administration is currently pursuing openness through broad community involvement. As a part of this policy, private prisons are being introduced with the enactment of relevant laws and regulations.

In conjunction with the elevated role in the United Nations, Korea should devote its efforts to the internationally cooperative challenge by actively participating in international conferences for crime prevention and criminal justice, and by supporting the United Nation’s activities in terms of human resources and finances.
I. GENERAL SITUATION OF THE CRIMINAL JUSTICE SYSTEM

A. The Thai Constitution B.E. 2540 (1997)

It might be said that it was not until 1891, during the reign of King Rama V, that the criminal justice system in Thailand was applied in the same way as Western countries. The major reform of the justice system, however, occurred subsequent to the enforcement of the Thai Constitution B.E. 2540 (1997). As a result, the Thai Constitution B.E. 2540 (1997) decreed the Court an independent public agency separate from the Ministry of Justice. In the case of the Department of Corrections, this is administered by the Ministry of Interior.

B. The Bureaucracy Reform in 2002

In order to enhance the role of the Ministry of Justice on rights and liberties protection, crime prevention and rehabilitation of offenders, including legislation development, the Bureaucracy Reform was introduced in 2002. As a result of the bureaucracy reform, the Department of Corrections was transferred to the Ministry of Justice in October 2002 after having been under the administrative chain of the Ministry of Interior for 69 years. Also, the Office of the Narcotics Control Board has been transferred from the supervision of the Prime Minister to the Ministry of Justice. In addition, new agencies in the justice system have been established such as the Office of Justice Affairs, Special Investigation Department, Rights and Liberties Protection Department and the Central Institution of Forensic Science. The principle objective of streamlining the state bureaucracy is to enable it to function efficiently and transparently with a higher degree of public accountability. Agencies that perform the same duties are grouped in the same cluster. The Department of Corrections as a significant unit in the criminal justice system, therefore, has been transferred and works closely with the Department of Probation and the Department of Juvenile Observation and Protection under the supervision of the Justice Minister.

* Penologist 7, Chief of Information and International Conference Section, Department of Corrections, Ministry of Justice, Thailand.
Moreover, in the Thai Justice System, treatment of offenders is categorized into several forms which focus on offenders’ characteristics and the causes of offending. In general, offenders’ treatment may be divided into Custodial Treatment and Non-Custodial Treatment. Accordingly, it is noted that the latter form can be put into practice previous to and subsequent to the court hearings.

Nevertheless, both Custodial Treatment and Non-Custodial Treatment, aims to reduce crime rates and re-offending, including returning decent citizens to society.

II. CURRENT SITUATION AND PROBLEMS IN REGARD TO THE TREATMENT OF OFFENDERS

A. Prison Population

During this last decade, the prison population in Thailand has increased dramatically. Especially after the Royal Thai Government declared the drug prevention and suppression policy in 1998, the number of drug offences notified to the police has been the number one crime in Thailand. This has lead to a rapid increase in the number of drug offenders in prisons throughout the country. In the past, offences against property was the highest crime in prisons but since 1996 drug offences have become the highest and has increased dramatically. Given the Department of Corrections (DOC) statistics, the number of inmates convicted for drug offences in 2003 was as high as 104,999, nearly four times greater than property crime which ranks in second place. Approximately 70% of drug offenders were drug producers, sellers and smugglers.

It can be said that Thailand is one of the countries that have a very high ratio of prisoners per population. Remarkably, in some years there was a collective royal pardon according to the importance of the nation; when some convicted inmates were released, which slightly decreased the prison population. In 2003, the number of prisoners had dropped from 250,000 to around 210,000 because of the Narcotic Addict Rehabilitation Act B.E. 2545 (2002), which came into force in October 2002. According to the Act, offenders committing drug-related offences, especially drug users, will be sent to undergo medical examinations and receive proper rehabilitation and treatment in Drug Rehabilitation Centres of the Department of Probation. Even though such numbers of prisoners is still considered relatively high, the decreasing number has shown a positive trend in the prison population. This significant change is a result of the recognition that overcrowding is not merely a problem for the Department of Corrections, but is a consequence overall of the criminal justice system. Therefore, the government has taken the problem of solving prison overcrowding as corporate policy thereby various agencies, both private and public, have cooperated in trying to solve this problem.

### Prison Population in Thailand

<table>
<thead>
<tr>
<th>Year</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>94,776</td>
<td>8,553</td>
<td>103,359</td>
</tr>
<tr>
<td>1995</td>
<td>101,130</td>
<td>9,898</td>
<td>111,028</td>
</tr>
<tr>
<td>1996</td>
<td>92,353</td>
<td>10,849</td>
<td>103,202*</td>
</tr>
<tr>
<td>1997</td>
<td>114,389</td>
<td>16,608</td>
<td>130,997</td>
</tr>
<tr>
<td>1998</td>
<td>141,131</td>
<td>23,320</td>
<td>164,451</td>
</tr>
<tr>
<td>1999</td>
<td>171,730</td>
<td>31,972</td>
<td>203,702*</td>
</tr>
<tr>
<td>2000</td>
<td>157,454</td>
<td>33,087</td>
<td>190,541</td>
</tr>
<tr>
<td>2001</td>
<td>204,429</td>
<td>46,424</td>
<td>250,853</td>
</tr>
<tr>
<td>2002</td>
<td>204,737</td>
<td>49,333</td>
<td>254,070</td>
</tr>
<tr>
<td>2003</td>
<td>168,523</td>
<td>42,952</td>
<td>211,475</td>
</tr>
</tbody>
</table>

* In these years, there was a collective royal pardon.
B. Overcrowding Problem

Overcrowding is regarded as the most important problem in regard to the treatment of offenders in Thailand. At present, there are 139 prisons and correctional institutions under the supervision of the Department of Corrections. Sleeping cells in Thai prisons are common rooms or dormitories. The total space in the dormitories is 245,033 sq.m. while the standard sleeping area stipulated by the Department of Corrections is 2.25 sq.m. per person. This standard sleeping area consequently allows 108,904 prisoners. However, as of 31 March 2004, there were 200,476 prisoners in prisons across the country. It is obvious that the number greatly exceeds the sleeping capacity and one can just imagine how tightly packed prisoners have to sleep. Overcrowding is the cause of many related problems; both to the custodial system and to the physical and mental status of the prisoners. Indeed, overcrowding is not merely a problem for the Department of Corrections, but is of consequence to the overall criminal justice system.

C. Main Causes of Prison Overcrowding

There are various factors that lead to higher numbers of inmates in Thai prisons.

1. The Increase of Drug Offenders

The government’s policy on drug suppression: Suppression is carried out by destroying drug production sources and by arresting drug users and drug dealers. The main sentence imposed on drug offenders is imprisonment. The more drugs suppressed, the higher the number of drug offenders. Furthermore, the Prime Minister’s Order on Treatment of Drug Offenders which was issued by the Office of the Prime Minister in 1998 indicated that drug users should receive treatment programmes. On the other hand, drug dealers should receive severe punishment and should not receive any lenient or commutative pardon. The order has had a direct effect on drug dealers who have to spend a longer time in prison than other offenders. This long-term imprisonment is certainly one main cause of overcrowding.

2. The Incarceration of Unsentenced Inmates

Among the total number of the prison population, approximately 30 percent are inmates awaiting investigation and inmates awaiting trial. Generally, remandees or unsentenced inmates are incarcerated in Remand Prisons. As for Provincial Prisons, there must be a separate section for remandees, which had previously been approximately 10 percent of the total capacity. However, at present the number of remandees represents almost half of the total population. Most prisons are overcrowded. Some have to incarcerate unsentenced inmates together with convicted prisoners due to the lack of facilities.

3. The Frequent Use of Imprisonment in the Thai Criminal Justice System

In Thailand, forms of punishment vary from forfeiture of property, fines, imprisonment to capital punishment. However, the main punishment is imprisonment. Those who cannot afford to pay a fine are imprisoned. Imprisonment could be replaced by probation in the case of a first-time offence. Despite probation, the imprisonment rate is still very high and is imposed for every type of offences including petty offences, gambling, offences against traffic laws, etc. In short, this over frequent use of imprisonment has simply aggravated the prison overcrowding situation.

D. Solving the Overcrowding Problem

Overcrowding has long been a problem in Thailand due to an imbalance in the receiving and releasing of prisoners which is the result of the government’s policy on drug suppression. The Department of Corrections has tried to solve the problem by expanding sleeping areas within the prisons but this has only made a slight improvement on the problem. During recent years, the government has recognized the prison overcrowding problem and has rendered a helping hand. The number of prisoners, which used to be around 250,000 in 2001, was reduced to around 210,000 by 2003. This is the first time in a decade in which a decrease has been recognized.

However, it cannot be said that this decrease in numbers is the solution to prison overcrowding since the number of prisoners is still much higher than total capacity. It may be interesting to see the projects that have been implemented to lessen the overcrowding problem during the last few years.

1. Rehabilitation of Offenders in Boot Camp

With cooperation from the Royal Thai Army, the Department of Corrections has classified some offenders
to receive rehabilitative programmes in a boot camp. The offenders are given parole and transferred to the boot camp. The programme comprises the Ministry of Public Health’s drug treatment programme, the army’s discipline practice, and some agricultural training. Each year, 5,000 prisoners, both male and female, are sent to approximately 40 boot camps across the country, where they attend 3 - 6 months training before being released on parole.

2. Pre-release Centre Project
Thailand has never had a pre-release centre outside prison; it still does not have one. The pre-release centre project operated during 2002 - 2003 uses space in prison camps or open correctional institutions as a centre for pre-release prisoners. The prisoners are given a special parole and are sent to the centre for agricultural training and pre-release activities for a period of time before a real parole follows. At present, there are 12 pre-release centres across the country.

3. The Release of Detainees
According to Thai laws, offenders who cannot afford to pay fines are incarcerated in a House of Detention, under the responsibility of the Department of Corrections. These offenders are poor people that have committed petty offences. In 2002, the government decided to pay fines on their behalf which released quite a number of detainees from prisons. Even though this was an ad hoc approach it effectively resulted in a decrease of offenders at certain levels.

Apart from the above approaches, the Department of Corrections is studying innovations to manage the overcrowding situation as follows:

- House arrest using electronic monitoring systems
- Work release projects
- Periodic detention or weekend imprisonment

If these three projects come into practice, it will certainly be a good solution in managing the present crowded prison system in Thailand. Nonetheless, one undeniable fact is that the prison-overcrowding problem cannot be solved solely by the Department of Corrections, but needs cooperation from every party in society. During recent years, though the Thai government has given some assistance, the problem is still there. There has to be alternatives to imprisonment, the amendment of certain laws so as to lessen the number of prisoners or the imprisonment period. One of the most effective approaches is certainly prevention, which society, family, education and other institutes should play roles to accomplish.

E. Improving Living Conditions in Prisons
In the last decades, overcrowding has been a major obstacle in the improvement of living conditions. Nevertheless, at the moment, the prison population has considerably decreased as a result of the enforcement of the Narcotic Addict Rehabilitation Act B.E. 2545 (2002). The Department of Corrections, thus, can take advantage of the decreasing numbers to improve living conditions in prisons. The following are some major issues taken into account by the Department of Corrections to improve the living standards of inmates in Thai prisons.

1. Sleeping Place
Sleeping cells in Thai prisons are dormitory style, where inmates sleep in rows on a mat or blanket provided by each prison. There is no fixed standard of sleeping material; therefore, some inmates may get a better material than others. The Department is now studying whether it would be possible to provide a standard mattress for each inmate, so that at least the inmate can have a good sleeping place while in custody. It is expected that, with a standard mattress given to each inmate, it will prevent the problem of some prisoners taking advantage of other prisoners as well as the problem of corruption of prison officers.

2. Kitchen and Food
In order to improve living standards for prisoners, the Department of Corrections require all prisons and correctional institutions to make higher quality kitchens and food. To provide hygienic kitchens and good quality food can help to promote prisoners’ health in general.
3. Medical Service

In each prison and correctional institution, there is a nursing home that provides basic medical services for sick prisoners. Those sick prisoners that need long-term treatment are transferred to the Central Correctional Hospital in Bangkok, which is the only hospital of the Corrections Department. In 2003, the Department obtained the budget to construct a new building for the Central Correctional Hospital. This new facility will be opened and ready to provide medical services to sick prisoners in 2004.

4. Access to Visits

In order to uphold good relationships between prisoners and their families, the Department requires every prison to hold contact visits for qualified prisoners across the country. In other words, the prisoners’ families are accessible for visits to the prisoners throughout the year instead of once or twice a year as it used to be. The regulations pertaining to contact visits have been changed to promote more access for visits. Each prison shall hold contact visits upon its convenience in order to offer opportunities to both prisoners and their families to meet each other as much as possible.

Improving living condition in prisons seems to be an easy plan and yet a difficult target to achieve. To make the plan become concrete, the Department of Corrections set a goal that within the year 2004 there will be at least 20 standard prisons in Thailand where prisoners receive good food, good sleeping places and good living standards.

III. COUNTERMEASURES CONCERNING THE USE AND APPLICATION OF THE UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE

Under the Thai Criminal Code, there are five mandatory penalties imposed on offenders comprising of capital punishment, imprisonment, confinement, fines and forfeiture of property to the state. However, due to concern for human rights issues, the criteria and approaches of punishment in Thailand have been consistently put into consideration by the Thai Justice System. It can also be found that laws and legislation, including several practices, have been developed as significant countermeasures concerning the Use and Application of the United Nations Standard and Norms in order to vigorously deal with crimes and offending.

A. Penal Punishment

It may be said that at present, there is no punishment which is seen to be cruel or inhumane in Thailand. Accordingly, a provision in the Thai Constitution B.E. 2540 (1997) affirmed that any brutal or inhumane punishment to offenders was prohibited. However, the death penalty, is still carried out for offences categorized as felonies. Therefore, this may undeniably show that the use and application of punishment in the country conforms to the United Nations Standards and Norms in Crime Prevention and Criminal Justice, particularly the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

B. The Death Penalty

Whereas Thailand is one of the retentionist countries which still carries out the death penalty, only offenders who commit offences categorized as felonies are given such severe mandatory penalty. Furthermore, Thailand has abandoned the firing squad and adopted lethal injection as the new method of execution since 19 October 2003. Currently, there are 53 convicted inmates that have been sentenced to death.

Remarkably, execution cannot be carried out due to the appeal procedure of individual royal pardons submitted to His Majesty the King. In addition, under the Thai law, if the inmate is pregnant at the time of the crime, an execution cannot be carried out until the inmate has given birth. Likewise, for inmates with mental problems at the time of the crime, the implementation of execution has to be suspended until such people have recovered. More importantly, according to Thai law, the death penalty and life imprisonment for people aged under 18 years at the time of the crime will be replaced with a maximum penalty in criminal cases of 50 years imprisonment. In addition, it may be noted that the implementation relating to the death penalty mentioned above has been carried out in accordance with Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.
C. Rehabilitation and Treatment of Offenders

Providing vocational training or occupation programmes for inmates is seen as a great form of rehabilitation. Generally, the Department of Corrections is the agency in charge of such responsibility. Apart from offering vocational programmes, the Department of Corrections also provides educational programmes to inmates. Both vocational or educational programmes aim to assist inmates to enhance their potential, particularly the opportunity to earn a living upon release.

Recently, the Department of Corrections has developed some new rehabilitative programmes for inmates before returning them to society. Such new rehabilitative programmes consist of programmes relevant to the fundamental needs of offenders such as education, vocational training, medical services, recreation programmes and drug treatment programmes and special programmes relevant to special needs of offenders such as programmes for property-related offenders, sex-related offenders, bodily-harm or life-related offenders, aged offenders and recidivism prevention programmes.

In cases of treatment of offenders, although the Penitentiary Act B.E. 2479 (1936) determines some main approaches for inmates’ treatment and rehabilitation, the Department of Corrections has constantly developed and created many more approaches pertaining to the treatment of prisoners in accordance with the Standard Minimum Rules for the Treatment of Prisoners, especially focusing on the improvement of living conditions in prisons.

D. Probation/Suspended with Conditions

Probation or supervision is viewed as a significant non-custodial measure. According to the Thai Criminal Code, probation is usually imposed on offenders combined with a suspended sentenced. What is more, it is found in many cases that an offender who commits petty offences and is sentenced to imprisonment for less than 3 years is likely to receive probation or a suspended sentence with conditions. This is because mitigation factors, such as the offender’s age, behaviour and health, are taken into account by the court. For example, a person aged under 18 years at the time of the crime is more likely to receive a suspended sentence with conditions as he/she is still young and also has never committed a crime before.

To augment probation, an Act relating to probation or a suspended sentence with conditions has been enacted under the Thai Criminal Code B.E. 2522 (1979). Furthermore, the Department of Probation has been set up to be responsible for enforcement of such sentences on offenders, including inmates who are on parole or are released with conditions. Then, it may be undeniable that to impose probation or a suspended sentence with conditions on offenders rather than imprisonment is in support of the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

E. Implementation of Non-custodial Measures

Public service or public work is one of the conditions under the period of probation. Recently, due to the amendment of the Thai Criminal Code, offenders may be required to do public work instead of paying fines to the court. It is noted that to do public work may be a good option which can certainly benefit offenders. Furthermore, in the near future, another non-custodial measure called ‘home detention’ will be brought into practice by the Department of Corrections. When home detention is applied, offenders have to wear an electronic bracelet and be controlled by electronic monitoring by the central control centre. More importantly, it is believed that to implement non-custodial measures will lessen the prison population and also help to promote the United Nations Standard Minimum Rules for Non-Custodial Measures.

F. Treatment and Rehabilitation of Drug Offenders

The Narcotic Addict Rehabilitation Act B.E. 2545 (2002), considerably contributes to the positive effects on the treatment of drug offenders in Thailand. Consequently, drug users and drug dealers are no longer locked up in the same places because of the Act. In particular, in the case of drug users, they are seen as patients who need to receive appropriate treatment and rehabilitation in specific institutions rather than be in custody in prisons. Moreover, the Act indicates that in every province, there is a sub-committee responsible for making a decision upon drug tests of offenders. Then, the sub-committee has to report the decision and the result of drug tests to a public prosecutor in order to decide prosecution for drug users. Accordingly, drug users will be sent to receive compulsory treatment and complete rehabilitative programmes in specific institutions before returning to the community. The enforcement of the Act is deemed to have led to a decrease in the number of drug-related cases in the courts. Also, it has resulted in a decrease of drug offenders incarcerated in Thai prisons. Thus, to put the Act in force may be the best active
strategy to solve drug problems in accordance with the United Nations Standard Minimum Rules for Non-Custodial Measures.

G. Implementation of Restorative Justice

It seems that restorative justice has developed and improved upon the traditional criminal justice practice. That is because in the traditional criminal justice system, it basically conducts and addresses only offender-oriented services and punishment. The victims, in contrast, are refused involvement in the process, although, the rights of victims should actually be promoted and considered. Furthermore, the needs and roles of victims are usually not taken into consideration. Most victims are ignored or marginalized by the criminal justice process. Accordingly, some victims have often experienced re-victimization such as in the process of police investigation and in the prosecution of the court.

As a result, many benefits, particularly victims’ benefits can definitely be acquired from the concept of restorative justice. In addition, such concepts also recognize the importance of community participation and initiative in responding and reducing crime rather than leaving the crime problem to the government alone. Accordingly, it can be seen that there are some restorative justice programmes and services which have been established for victims such as victim-offender reconciliation and mediation and restitution programmes.

It can be concluded that restorative justice is a useful process for victims as it promotes the repair of harm caused by crime and the active involvement of victims and communities in justice processes. In addition, it is also concerned specifically with the need to provide victims with a sense of fairness and access to the justice system which has formal obligations to make things right for victims.

Yet, restorative justice has not been a widespread concept in the Thai Justice System. Until now, only some restorative approaches have been employed in the country such as mediation. Likewise, laws relating to suspended prosecutions have now been introduced into the justice system. It is believed that applying the concept of restorative justice will generate better standards in the justice system of Thailand. For instance, only serious criminal offenders will now be forwarded for court processing. For other petty offences, offenders will be dealt with professionally by the police or probation officers.

IV. CONCLUSION

In general, the bureaucracy reform has caused a significant change in the criminal justice system in Thailand. Accordingly, nowadays, laws, legislation and practices are employed in accordance with the United Nations Standards and Norms in Crime Prevention and Criminal Justice. More importantly, the occurrence of the justice system from the endorsement of the Thai Constitution B.E. 2540 (1997) has lead to the establishment of new justice agencies for the protection of Thai citizens such as the Office of the National Human Rights Commission of Thailand and the Office of the Ombudsman. Therefore, this is a good indication that the Thai justice system has developed in the proper direction.

What is more, when laws and legislation relating to suspended sentences in prosecution are endorsed throughout the country, it will contribute to a variety of advantages or positive effects. For example, petty offences will be moved away from Court processing. It will also benefit the categorization of normal offenders and serious criminals. The serious criminals will be imposed harsher sentences and at the same time normal offenders should receive more lenient sentences.

Additionally, the issue of restorative justice seems to be a hot topic in the justice system. That is because it is likely to be a major concept adopted in the justice system. It is believed that restorative justice is a response to crime which focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused and also generating peace within communities. Therefore, at present, restorative justice may be one of the best concepts which should be brought into practice.

To sum up, I believe the development of laws and legislation pertaining to criminal justice in Thailand and putting the concept of restorative justice into practice will be a better way to enhance the justice system in Thailand to the universal standard, particularly the United Nations Standards and Norms.
APPENDIX

Statistics on Prison Population & Correctional Manpower

Chart 1: Prison Population

Chart 2: Prisoners by Status

Chart 3: Convicted Prisoners by Type of Offence
Chart 4: Convicted Prisoners by Sentence Term

Chart 5: Convicted Prisoners by Age

Chart 6: Correctional Manpower
### Staff: Inmate Ratio in 1995 - 2003

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<th>Ratio</th>
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I. INTRODUCTION

This Group was assigned to analyse and study the Promotion of Alternatives to Imprisonment. Since the participants in this Group are from Indonesia, Malaysia, Palau, Papua New Guinea, Thailand (one participant each) and Japan (four participants) the emphasis is on the criminal justice systems of these countries in relation to the topic under discussion. Next year (2005) is the 50th anniversary of the United Nations Standard Minimum Rules for the Treatment of Prisoners. A natural progression in the better treatment of offenders worldwide was the adoption of the Standard Minimum Rules for Non-custodial Measures by the United Nations in 1990. In short these measures are called The Tokyo Rules. This paper reflects the ongoing efforts of all countries to enhance the use of non-custodial measures in order to alleviate problems related to prison overcrowding and encourage the reintegration of offenders into the community.

Besides assessing the current non-custodial alternatives available to the domestic criminal justice systems of the participants’ countries, this Group will explore the introduction of other alternatives to imprisonment and attempt to highlight the associated problems and tentative solutions upon evidence-based practice. Since a holistic approach to non-custodial measures is advocated in The Tokyo Rules, agencies that implement non-custodial measures and the use of community resources are matters that will be looked at. Of equal importance is the expertise that is required to supervise, guide and support offenders in non-custodial programmes. Therefore, this paper will also look at the staff and volunteers’ training that is required for the successful rehabilitation and reintegration of offenders into the community.

II. CURRENT USE OF ALTERNATIVES IN THE PARTICIPANTS’ COUNTRIES

This Group decided that surely the right approach to the given topic is to gauge the availability and use of the non-custodial alternatives in the participants’ countries. Effective and comprehensive utilization of the current alternatives can in itself produce immediate results in reducing prison overcrowding besides accelerating community participation in the treatment of offenders. What follows is a synopsis of the comparative situation in each participating country vis-à-vis the use of non-custodial alternatives at three important stages of the criminal justice system, each stage providing an opportunity for the diversion of offenders from custodial measures.

A. Pre-trial Stage

1. Investigation

The legislation of most countries only allows for the custody of suspects by police for 24 hours (48 hours in Thailand and Japan) before the suspect is taken to court for further detention. The period of detention that can be ordered by the court is fixed by law and is generally accepted by all countries as a reasonable period for investigation. All participants agree that their respective courts subject the request for detention by the
police to strict scrutiny. Suspects not satisfied with the detention order can appeal to a higher court.

2. Prosecution/Indictment
   Once a suspect is charged/indicted in court, bail is generally given by most countries at the pre-trial stage. For example, bail is widely given in Malaysia (about 90%), in Palau bail is given in about 95% of the cases, it is generally given in Papua New Guinea. By law bail is given in Thailand in all cases and, according to the Constitution, excessive bail should not be set. However, in practice many offenders have no money for bail security and are kept in custody. For grave crimes like drug smuggling and murder bail is not allowed. In Japan, in about 70% of the cases at the investigation stage, investigation is carried out without arrest of the offenders. For offenders who are eventually prosecuted and are under detention at the time of prosecution, about 30% of them apply for bail and bail is granted in about 13% of such cases. The only exception to the granting of bail is Indonesia where bail is generally not given. In fact, there is no provision for bail in the Indonesian law but there is customary practice to allow bail in certain cases.

3. Administrative Fines/Compound
   Administrative fines and compounding of offences by the police and other law enforcement agencies (e.g. local authorities in Malaysia) is another avenue for the diversion of offenders. Such fines are widely used in Malaysia, Papua New Guinea, Palau, Thailand and Japan and this alternative takes care of most petty crimes especially those punishable with a fine only, for traffic offences. In Papua New Guinea, referral of minor offences may even be made to a village court. The option of administrative fine is, however, not available in Indonesia where all offenders are prosecuted in court.

4. Drug Dependents
   Drug dependents are diverted for rehabilitation and treatment in Malaysia and Thailand and do not face criminal prosecution. In Indonesia, although there is a Narcotics Law for rehabilitation of drug addicts it is seldom used, only a few addicts are sent for rehabilitation. In Papua New Guinea and Palau there is no provision for the diversion and treatment of drug addicts. In Japan, there is no law for rehabilitation at present although a pilot project has been started in Gunma prefecture where the rehabilitation of drug addict offenders at a voluntary run centre is part of the bail conditions.

5. Other Alternatives
   Other alternatives exist in Japan at the pre-trial stage namely suspension of prosecution, summary prosecution and caution by the police which can be used for offences like minor theft, minor injury, minor assault and all other minor cases punishable with fine. In Papua New Guinea, under the Summary Offences Act 1988, the police can use their discretion to caution and discharge offenders for minor assault, abusive behaviour and drunk/disorderly behaviour as long as the consent of the victim is obtained. Suspension of prosecution, summary prosecution and caution by the police are not available as an option in Malaysia, Indonesia, Palau and Thailand.

B. Sentencing Stage
   1. Caution and Discharge
      The courts in Malaysia, Indonesia and Papua New Guinea can caution and discharge offenders in minor cases. In Palau, Thailand and Japan there is no provision for a caution and discharge.

2. Fine
   Fines are the most widely used alternative in all participating countries except Indonesia. In Japan a fine is used as a sentence in about 90% of the prosecuted cases whereas in Malaysia, Papua New Guinea, Palau and Thailand a fine disposes of almost all traffic cases, petty criminal cases, like simple theft and assault, and cases of minor infractions of building and employment laws. In Indonesia although there is provision for fines, offenders are normally sentenced to imprisonment.

3. Conditional/Unconditional Good Behaviour Bond
   First offenders in Malaysia committing less serious crimes are generally placed on good behaviour bonds. In Papua New Guinea good behaviour bonds are given for suspended sentences. In Indonesia, Palau, Thailand and Japan good behaviour bonds are not provided for as a non-custodial alternative.
4. Compensation and Compounding
The payment of compensation is used in various ways as an alternative to imprisonment. In Malaysia, compensation may be ordered to reduce the length of imprisonment. In Papua New Guinea, the payment of compensation to the victim may be a condition for the release of the offender. Compensation may also be ordered in addition to a fine. In Indonesia, Palau, Thailand and Japan there is no provision for the payment of compensation at the sentencing stage. In Malaysia, 23 listed criminal offences can be compounded by the victim after prosecution has begun. Such compounding has the effect of an acquittal of the offender.

5. Suspension of Execution of Sentence
Suspension of execution of sentence is practiced in Papua New Guinea, Thailand and Japan either with or without probation. In Japan suspension of execution of sentence is widely used in up to 60% of the cases where the sentence is one of imprisonment while in Thailand suspension of execution of sentence is moderately ordered. In Palau suspended sentences are usually given to first time offenders. Malaysia and Indonesia do not have provisions for the suspension of execution of sentence.

C. Post-Sentencing Stage

1. Police Supervision
Only Malaysia has the provision for the court to order police supervision to enable the early release of offenders who are sentenced to imprisonment. This order can be used as a device to reduce the length of the sentence of imprisonment.

2. Remission/Parole
Remission of sentence exists in all countries except it takes different forms, for example: remission for good behaviour in Malaysia; good time allowance in Thailand; and release on parole in Papua New Guinea, Palau and Japan. In Indonesia remission is in the form of early release for good behaviour but decided by the executive for release on National Independence Day.

3. Pardon
In all participant countries there are provisions for pardon or amnesty. In Indonesia, Papua New Guinea, Palau and Thailand the decision on pardon is made by the government to coincide with the celebration of important national events. In Malaysia, pardons are rare and decided on a case by case basis. Similarly, in Japan amnesty by Cabinet order is seldom given.

D. Juvenile Offenders
Although the focus of this paper is on the common non-custodial alternatives for all offenders, juvenile offenders deserve a special mention. All criminal justice systems have a special interest in the treatment of juveniles because of the greater opportunity for modifying their behaviour at a young age. In one way or the other, juvenile offenders can be diverted from custody in all participant countries by unconditional discharge, probation orders, good behaviour bonds, placed in the care of parents or relatives or sent to juvenile training homes/reform schools.

Wherever possible, juvenile offenders are put on bail pending trial and they are always remanded in separate facilities to adult remandees. Most countries have special training programmes for the rehabilitation of juvenile offenders which include components like character building, acquiring skills and social adjustment.

III. PROBLEMS AND SOLUTIONS TO THE INTRODUCTION OF ALTERNATIVES
Upon concluding their appraisal of the current use of alternatives in all countries, the Group proceeded to explore the introduction of new alternatives in their respective criminal justice systems, the associated problems and the possible solutions. This task was undertaken with the understanding that the proposed new alternatives are practical in nature and would modify or upgrade the current alternatives. In this context they could hopefully be implemented in the near future. Such alternatives aim to provide a broader and better choice for the application of non-custodial measures. Again, for ease of reference, this sub-topic was considered along the lines of the pre-trial, sentencing and post-sentencing stage.
A. Pre-trial Stage

1. Caution by Police

In Japan, in a designated range of cases for example shoplifting, petty theft and taking into consideration other factors like the suspect has no criminal record and a stable residence, the police can caution the offender as a means of diversion. The only problem to the more extensive use of this alternative is that the range of crimes where a caution can be given is limited. The proposed solution to a wider use of this alternative is to extend the category of crimes that can be disposed of by way of caution. Minor assault is one such example. The Japanese participants suggested that as a safeguard for the wider implementation of this alternative, the consent of the victim should be taken into consideration before the police exercise their power of caution. It should be noted that since arrest is not a prerequisite to begin an investigation in Japan, a caution is not a direct diversion to custody.

2. Administrative Fine/Compound

In Malaysia this alternative can be widened for administrative fines to cover more offences for example traffic accidents involving minor negligence, failure to renew permits/licenses, etc. The category of persons who can compound offences can be widened for example in simple theft and damage to property cases. The problem would lie in increasing the manpower to handle the extra workload. Simpler procedures for payment of administrative fines and compounds, for example by automated teller machines, would make this alternative more viable.

Indonesia proposes to introduce provisions for administrative fines/compounds as an alternative at the pre-trial stage since this option is not currently available.

3. Bail

In Malaysia, Palau, Thailand and Indonesia the current situation of release on bail at the pre-trial stage is effective. Therefore, modification for the further use of this alternative at the pre-trial stage is deemed unnecessary.

In Papua New Guinea, bail is a problem in certain areas, especially rural areas, where High Court Judges only sit on circuit. Hence, the offender has to be remanded in custody until the Judge is available. The solution to the problem would be to allow lower court judges and, where necessary, even the police to give interim bail in certain cases until the circuit sitting of High Court Judges.

In Japan, release on bail is low. Among the reasons for this situation are that the amount of bail may be fixed too high and defence counsel do not make requests for bail. Presently the only solution for the wider use of bail would be to give more flexible consideration in fixing the bail sum.

4. Suspension of Prosecution

In Japan, in the case of suspension of prosecution, aftercare services for offenders who have been detained is provided by the government for a certain period based upon statute. This service consists of shelter, care and temporary aid such as food, clothing, etc. However, this aftercare service has not been widely utilized because of budget constraints. The proposal is for such services to be consolidated so that the discretion to suspend prosecution can be more widely exercised with the assurance that offenders who have been detained can avail themselves of the aftercare services.

In Thailand, the government is proposing to introduce the law on suspension of prosecution with the objective of solving the problem of case overload in the courts.

Indonesia, Malaysia, Palau and Papua New Guinea do not currently practice this procedure.

Similarly, summary prosecution is currently not practiced in Indonesia, Malaysia, Palau, Papua New Guinea and Thailand. Although it may be a good measure to introduce in Malaysia, acceptance by the public may be a problem since the concept of an open court hearing is deeply rooted in the Malaysian judicial system. Perhaps public education on the benefits of summary prosecution is one solution in changing public perception towards the implementation of the system. The necessary legislation would have to be drafted.
In Japan summary prosecution continues to function smoothly as a non-custodial alternative.

B. Sentencing Stage

1. Fine

While a sentence of fine is widely used by the courts in Malaysia, Palau, Papua New Guinea and Japan, both Indonesia and Thailand have room for the further promotion of this alternative.

In Indonesia, at present fines are only used for traffic offences. It is suggested that this option be used to cover other offences as well but the social atmosphere is geared towards custodial sentences, the reality is that punishment by imprisonment is the preferred method rather than non-custodial measures. So the problem here is one of attitudes and perception of society towards the sentence of a fine only.

In Thailand, fines are used in about 40% of the cases. For certain offences like carrying arms (not firearms), offensive weapons like knives, a fine is considered too lenient an option and courts prefer to impose a harsher sentence. A better solution would be the introduction of community service for such offenders. In fact, last year Thailand amended the Penal Code for fine defaulters to do community service instead of going to prison. Measures like this would promote the further use of fines as a non-custodial alternative.

In Papua New Guinea, flexibility is given to certain offenders to pay a fine within a certain period so that defaulters do not go to prison immediately. Child offenders, the ill and the elderly, pregnant women or women with small children, important persons and those in employment are some of those given time to pay their fine. For offenders who have been in pre-trial custody, the time spent in such custody may be computed at the sentencing stage resulting in shorter sentences which may even be executed at the police lock-up itself. In this manner prison overcrowding is reduced.

2. Probation

All participants were unanimous that probation in one form or another should be widely used to moderate prison sentences or, coupled with other non-custodial measures, it should make non-custodial options more effective. For example, formal probation can be a condition of good behaviour bonds in Malaysia for the better supervision of offenders. With such probation the courts may be more inclined to put more offenders on good behaviour bonds.

Probation could also be widely used in Indonesia where the prosecution supervises the probationer by keeping in contact with the village chief where the probationer resides.

In Japan, if an offender who is on probation upon suspension of execution of sentence commits another offence during the period of probation, he cannot be given a suspension of execution of sentence again. This limits the discretion of the courts to order probation for the second offence even where the courts feel that probation would still be a suitable alternative. An example would be where the probationer has committed a minor traffic violation but it is recorded. In such a situation, it is suggested that the law should be amended to give discretion to the courts to order probation as a second chance for offenders. For this second time probation, the courts could impose more intensive supervision/probation. In cases where the first suspension of execution of sentence was made without probation, the suspension of execution of sentence for the second offence should be ordered with compulsory probation. Currently about 30% of adult probationers are recommitting offences and the concern is that if second time probation is allowed there would be an increase in the workload of probation officers. This area would have to be looked into before this suggestion is implemented.

Other new alternatives that can be introduced in Japan at the sentencing stage are restitution or compensation orders for victims and suspension of execution of sentence with community service. The introduction of these alternatives would require amendments to the penal law.

Thailand has a similar concern of imposing an extra workload on probation officers. Currently, professional probation officers are handling four categories of offenders—i.e. adult parolees, adult probationers, juvenile parolees and juvenile probationers. As of 1 October 2002 even drug addicts are placed
under probation. Since the courts are aware of the workload (burden) of probation officers, there are fewer orders for the suspension of execution of sentence with probation. This alternative can be increasingly used if more professional probation officers are recruited and sufficient training given. Furthermore, the administration of the probation service should be improved with better salaries for probation officers and taking care of their welfare, for example, paying allowances for home visits. Although 300 professional probation officers posts were approved by the government last year, the actual recruitment has not been carried out due to financial constraints.

Malaysia will consider the introduction of the suspension of execution of sentence with probation since such an alternative is not available at present. The necessary amendments to the law have to be made and a specialized probation service has to be created.

C. Post-Sentencing Stage

When considering the expansion of alternatives at the post-sentencing stage, the Group had in mind Rule 9.4 of The Tokyo Rules i.e. Any form of release from an institution to a non-custodial programme should be considered at the earliest possible stage.

1. Parole

A large part of the discussions were centred on the extensive and better use of community-based parole for a quicker processing of offenders out of the prison gates. Special attention was paid to the parole system in Japan which is more developed than that of other participant countries.

In Japan, the problem appeared to be that the rate of parole is about 56% of all discharged offenders. The rate of parole for drug offenders is also low. It is felt that a wider use of parole should be realized by examining parole discharge procedures. Currently the Penal Code provides eligibility for parole after 1/3 of the sentence is served (executed) but in reality more than 2/3 of the sentence is served in prison. If the execution rate of the sentence in prison is less than 2/3 then more offenders can be put on parole. However, the risk of re-offending and harm to society is an important consideration in shortening the execution rate especially in the case of serious offenders and recidivists. Re-offending by prisoners on parole and the media coverage that would follow may eventually lead to longer prison sentences which in itself may further compound the effectiveness of parole in the long run besides leading to prison overcrowding. One solution to this problem would be to introduce intensive parole/specialized treatment programmes for certain categories of offenders so that parole supervision would receive better public support. In this manner, even the more risky offenders can be released on parole. Another area that should be looked at is expanding the role of the Parole Board such that the Parole Board should be able to function in an independent manner in parole decision making. Currently, the Parole Boards appear to be dependent on the prison authorities to initiate the application for parole. A common recognition of the policy of parole by the prison authority and the Parole Board would widen the net for placing offenders on parole. There was common consensus in the Group that we should be mindful of the safeguards that ensure a fair working of the system of parole so as to guarantee its due process.

The role of professional probation officers is also important in determining offenders suitable for parole. In 10 large scale prisons in Japan, professional probation officers visit prisons on a regular basis and through this process, even prior to an application for parole by the prison warden, the candidates for parole can be screened by the professional probation officers. Of course, it would be ideal if full time professional probation officers are stationed in prisons, as is the practice in the United Kingdom.

In Palau, the parole system is working well where prisoners can apply for parole as of right after serving 1/3 of their sentence. The application is made to the Parole Board and the Parole Board will refer the application to three departments, i.e. the Minister of Justice, Attorney-General’s Office and the Corrections Division. If any two of these departments recommend parole, release on parole is granted by the Parole Board. The conditions for parole are set by the Parole Board. A somewhat similar process is used for the commutation of sentences by the President.

Release on parole is also available in Papua New Guinea where it is widely used to suspend execution of part of the prison sentence.
In Thailand, inmates have no right to apply for parole; it is a privilege for those of good behaviour. There are Parole Committees in every prison which initiate the parole. These Committees determine the inmates for parole and make recommendations to the Parole Board for release on parole. The Parole Board is chaired by the Director-General of the Corrections Department and consists of committees representing other criminal justice agencies. Parole is widely used in Thailand and the figures from October 2002 to August 2003 show that a total number of 22,073 inmates were released on parole.

There is no parole in Indonesia; however, offenders are given early release after having served 2/3 of their sentence and are certified to be of good behaviour.

In Malaysia, the proposal to introduce release on parole for offenders is currently under study.

2. Remission and Pardon
As mentioned earlier, remission for good behaviour and pardon are available in almost all countries. The standard procedures for release on remission and exercise of the executive discretion for pardons do not provide any room for the further promotion of this alternative. However, the Group noted with interest the good time allowance system practiced in Thailand where inmates can work towards an early release by earning remission for good behaviour, progress in education and/or support of prison activities. In this manner the offender himself is empowered with the motivation and the opportunity to secure an early release.

IV. FUTURE PROSPECTS

The Group discussed future prospects by adopting an integrated approach to the promotion of alternatives; reference to the criminal justice system of a particular participant country is only made for purposes of illustration. Besides presenting the mission of non-custodial measures, this chapter considers some pertinent issues related to the given topic, for example, alternatives for target groups like juvenile offenders, drug addicts/abusers and offenders at the pre-indictment stage, the requisite staff training and the importance of an evidence-based assessment of alternatives. Consonant to the spirit of The Tokyo Rules, across the board alternative dispositions can hopefully be found for all participant countries. This would be reflected in the recommendations of this Group at the end of this paper.

As a starting point for future prospects, this Group discussed the principles of a legal/social system that would support the widespread use of non-custodial measures. Some of these principles are discussed below.

A. Principles

1. Public Consensus/Awareness of Criminal Justice Officials
One of the most important challenges for criminal justice practitioners to promote the wider use of non-custodial alternatives is the perception of the offender by society. Public education is needed for the realization that alternatives are workable and bring immense benefits. On the other hand, criminal justice officials must be made aware of the need to understand and promote non-custodial alternatives. There has to be an integrated approach in criminal justice policy where the victim, the offender, the public and the penal authorities are active participants in the use of non-custodial measures. In other words, where applicable, non-custodial measures are seen as a complete answer to the diverse needs of all the parties involved in a criminal justice system. The gains of reintegration/rehabilitation should be subjected to an empirical evaluation and given wide publicity. Empirical studies can illustrate the success of rehabilitation.

It is an obvious fact that a rehabilitated offender who is a socially responsible individual is the best outcome of any criminal justice system. In fact, this is the ultimate goal of all criminal justice systems. Modern prisons too stress the eventual rehabilitation of offenders. And yet, non-custodial measures which best promote rehabilitation are not widely used because the public, criminal justice officials and policy makers are not aware of the gains of rehabilitation.

Transparency of rehabilitation programmes would be a step in the right direction to foster an understanding and appreciation of non-custodial measures. Issues like stigmatization should be tackled head on to make a real difference to the offender-society relationship.
2. Victim Redress Mechanism

One main concern expressed by all participants during the Group workshops is that victims can feel short-changed when the offender is given a non-custodial punishment. In fact, some participants felt that in such a situation the victim himself may resort to revenge/retaliation resulting in further offending in society. To counteract this, a better victim redress mechanism has to be in place, a mechanism that would not disregard the victims’ loss or feelings arising from the commission of a crime. The term ‘victim’ itself should be given the widest possible definition so that other members of society directly affected by a crime perpetuated on the victim can avail themselves of the victim redress mechanism. Among others, a victim redress system would include opportunities for victim support/counselling, victim impact statements, restoration and victim participation in offence resolution.

3. Alternative Offence Resolution Mechanism (Restorative Justice)

The current practice in all participating countries is that offenders are diverted either by the police, prosecution or the courts. In all these situations both the victim and the offender do not participate jointly. More importantly, neither the offender nor the victim sees both sides of the proverbial coin. This is where the role of an alternative offence resolution mechanism comes in. Instead of concentrating on either the offender or the victim what needs to be resolved is the offence itself i.e. the commission of a crime in society. An offender-victim mediation approach will throw much light on how the offending came about to be, the victim’s loss or feelings and the offender’s reason and motivation for committing the crime. Solving the offence in this manner would open up wider possibilities for non-custodial alternatives thereby giving a human face to crime. Many offences can be resolved and re-offending prevented where the offender is apprised of the commission of the crime in an objective manner. This mechanism would also open up real and effective possibilities for restoration.

4. Offender Screening and Classification Programmes (Needs and Risk Assessment)

It is wrong to think of offenders as a homogenous group whose only hope lies in the prison system. Many offenders have the will and circumstances to turn over a new leaf if given the opportunity. In this respect, the criminal justice system, especially the courts, should have the benefit of offender screening and classification programmes where a professional analysis of the needs and risk assessment of the offender and his circumstances is available to the adjudicatory authority. Among other matters, such professional analysis would chart the offender’s profile and provide the social information necessary to make an informed decision relating to the appropriate punishment. It is something like the ‘real person behind the offender’ concept. A parallel may be found in the pre-sentence reports for juvenile and youthful offenders that are currently being prepared in most countries. One obvious benefit of such classification is that it would enable the justice system to divert offenders whose profiles are most conducive to non-custodial treatment.

5. Real and Workable Alternatives to Imprisonment

A practical drawback to the extensive use of alternatives is that most countries simply do not have a wide range of real and workable alternatives to imprisonment. On the other hand, some current alternatives may not be suitable for present realities. In that event, criminal justice systems must ensure that real and workable alternatives are in place so that offenders can be comprehensively processed. Such alternatives would give law enforcement agencies and adjudicatory bodies a wide choice of non-custodial measures. This would lend credence to the belief that the policing of offenders can be done by the non-custodial process.

6. Evidence-based Practice Approach

The success of non-custodial measures can be best gauged with the introduction of an evidence-based practice approach which will provide an accurate evaluation of the effectiveness of such measures. It is of importance that the various aspects of the related research should be based upon a randomized controlled trial (RCT). Databases of statistics have to be updated and strengthened so that they can be reliable sources of current diversionary practices. Cost performance is another area that would benefit from this approach. An objective assessment of non-custodial programmes is the best way to determine their success or failure in any one system. In this respect, staff training for the management, implementation and assessment of non-custodial supervision is a vital component.

However, it should be remembered that in evaluating resources and programmes, no value tag can be placed on the human values/ethics that are inherent in the alternative treatment of offenders.
B. Real Targets

Against the background of the principles stated above, the Group proceeded to discuss some real targets which can be realized by the commitment of all countries. The eventual realization of these real targets would further promote the diversion of offenders from the present incarceration based practices at various stages of the criminal justice process. Besides being alternatives, these real targets would add some check and balance to current practices that impede quick diversion.

1. Pre-trial Stage

Pre-trial stage incarceration should only be ordered if absolutely necessary. A real meaning should be given to the ‘innocent until proven guilty’ concept. Incarceration for purposes of investigation should be a last resort measure. With advances in technology and forensic science, speedy investigation of offences should be the norm so that offenders do not need to be in custody while evidence is gathered and examined. Efficiency in investigation will reduce the need to incarcerate offenders for long periods at that stage.

The reasons for investigative detention should be transparent and open to scrutiny. In this respect, legal representation should be available to the suspect at the hearing of the application for detention. As stated in Chapter II, investigative detention is usually not for a long period so speedy bail procedures should be introduced for release from pre-trial detention. For example, the law can mandate that an application for bail should be disposed of by the relevant authority within 24 hours of its filing or as soon as possible. Another step would be to decentralize the power to grant bail as in the example of Papua New Guinea, discussed earlier in this paper. A simple application for bail in the prescribed form can be introduced where even the suspects’ family, relatives or counsel are given the right to apply for bail on the offender’s behalf.

As part of strengthening bail procedures to ensure that offenders do not abscond/disappear during the investigation stage, the conditions of bail can be expanded. Suspects can be required to report at regular intervals to the investigating authority or sureties of good standing can be stipulated as part of the bail requirements. Where appropriate, bail conditions can be stringent, even if they appear punitive in nature, so long as the incarceration of the suspect is avoided. Bail release with electronic tagging (monitoring) is an effective measure to reduce pre-trial detention and prevent offenders from absconding.

Similarly, detention of the accused after indictment should only be made on very exceptional grounds. The law should set a specific time limit for the detention period at the pre-trial stage so that the object of a speedy trial is realized. As a general rule, bail should be given to all offenders upon indictment. Reasons for pre-trial detention should be clear, perhaps the only reason for justifying pre-trial detention would be the real possibility of further re-offending by the offender or the existence of evidence that the offender would abscond. As in the investigative stage, provisions relating to the granting of bail should aim towards the quick and effective processing of release on bail. The amount of bail bonds should be flexible so that it is affordable to each offender and sufficient to secure his attendance at the trial.

Outside the formal structure of arrest and/or indictment, there should exist a summary mechanism for the disposal of cases at the police stage. Most minor crime can be dealt with by dispositions such as caution, discharge, administrative fine, compound and compensation/ restitution. Furthermore, instead of restricting offence processing activities to the police and local authorities, other agencies like the customs and immigration departments can be given the power to deal with offenders who violate the respective laws.

Offenders like drug addicts/abusers, the mentally disturbed and traffic violators can be immediately put on special treatment programmes outside of the penal system as a form of categorized diversion. Guarantees for the due protection of human rights of such offenders should guide the formulation of these treatment programmes.

2. Sentencing Stage

As stated earlier, the courts have to be provided with a wide variety of non-custodial alternatives. The severity of the offence and the resultant harm to victim and society can itself be graded so that the public and the courts are better informed of the suitability of non-custodial measures.

After indictment and before sentencing, victim-offender mediation should be attempted to achieve an amicable resolution of the crime. Perhaps, a start can be made with crimes which are personal to the victim,
for example causing hurt, assault or theft of property.

Warnings and verbal sanctions are sufficient punishment for most minor crime. A record of such warnings can be made and the offender informed about it as a signal to the offender that such an opportunity may not be available upon re-offending. With this record, warnings and verbal sanctions will not be taken as an easy let-off.

The scope of a fine as a sentence can be widened as for example fines for property or economic crime which take into account the monetary gain made by the offender. Fines may also be imposed to reduce the length of incarceration where a prison sentence is deemed necessary. To reduce imprisonment of fine defaulters, a day fine system of payment or payment of fine by instalments is one solution.

Confiscation of the proceeds of crime or expropriation orders can be made to deprive offenders of the profits of crimes. Upon confiscation, such proceeds can be used to compensate the victim as restitution.

Community-based treatment can start at the sentencing stage with orders like binding over, community service, probation orders, and compulsory day attendance centres. Under these orders, offenders are released back into the community under the protection and guidance of parents or relatives or, in the more serious cases, a social worker or professional probation officer. Fixed amounts of money can be made a condition of such orders so that pecuniary punishment follows in the case of breach. As for community service, the court orders offenders to perform paid/unpaid labour in public institutions like schools, hospitals or local authority projects. For parity in the use of these non-custodial measures, it is imperative that such measures are available nationwide.

In all sanctions ordered at the sentencing stage, provisions should be made for the appropriate orders of compensation/restitution to the victim.

Special courts to deal with offending within the family/domestic situation, drug offenders, juveniles and traffic offenders can provide specific non-custodial sanctions for such offenders. For example, fixed hours of counselling and education programmes can be prescribed besides conditions like the suspension of licenses, regular reporting to the police and compliance with restraining orders. For juvenile offenders, special training schools/reform schools should be established with the avowed aim of rehabilitating such offenders.

Suspension of sentence/suspension of execution of sentence and the practice and promotion of these options in the participant’s countries has been discussed earlier.

3. Post-Sentencing Stage

Measures at this stage should accommodate the early release of offenders from prison. Besides the remission for good behaviour, a well managed parole system is the best avenue for early release and supervision of the offender within the community. Parole Boards should play a proactive role in the release and management of parolees. The involvement of the community, particularly the offender’s family, in the parole process should be encouraged so that the offender is sufficiently supported in the community. Eligibility for parole should be spelt in clear terms where the parole procedure and parole decision-making are transparent. Wherever possible, the victim should be allowed the opportunity to participate in the parole deliberations. The offender himself, his counsel, his family and even the victim should be given the opportunity to apply for parole subject to assessment by the Parole Board.

For the more difficult cases, parolees should get the support of professional halfway houses to enable them to adjust to residence and daily living in the community. Local voluntary bodies should be sensitized to the needs of offenders leaving prison so that the net for community rehabilitation is widened. Without community participation, parole can be a demanding programme on the probation authority. It requires commitment, finances and time to make it work.

A variation of the usual remission for good behaviour is earned remission. A prisoner’s conduct and desire to participate in prison programmes would enable him to earn a longer remission. Remission is a useful programme to reduce prison overcrowding while encouraging discipline among inmates.
A more effective form of early release being introduced is the work release to integrated employers based upon the through care concept. In this measure, employers who are prepared to give job opportunities to prisoners to work under the supervision of the prison authorities can eventually get the early release of prisoners into their work establishment. Employers and the prison authorities work hand in hand to monitor the work aptitude and discipline of the prisoners. This partnership gives employers a chance to assess the suitability and conduct of prisoners who are still in the custody of the prison administration. Offenders, on the other hand, are motivated to get a real opportunity to secure employment upon their release.

Prisons and the community should work together for the early release of offenders to encourage the positive reintegration of offenders into society. Pilot projects of mutual cooperation can be started for those offenders convicted of less serious crimes. An example is the pilot project under study by the Department of Corrections, Thailand where offenders will be allowed to work on weekdays outside the prison and return to detention on the weekends (weekend detention scheme). If programmes like this prove successful, they can be extended to all categories of prisoners. Likewise community/family participation in prison activities should be encouraged, provided of course that such participation does not compromise on security.

The reconciliation of offender and society should not cease just because the prison gates have been shut on the offender.

V. RECOMMENDATIONS AND CONCLUSION

Community-based alternatives including intermediate sanctions can take many forms and can be used simultaneously for any one offender. It should be made clear that the full use of community-based alternatives does not mean that offenders are getting a lenient punishment. To quote from our Visiting Expert from Singapore, Ms. Chomil Kamal, well organized and result-oriented community-based alternatives are definitely not seen as a let-off from the traditional incarceration emphasizing system. To illustrate this, Ms. Chomil Kamal went on to say that in her experience, there are offenders who prefer a prison sentence to being placed on probation and supervision that compacts the offender’s release into the community. Cultural and social progress is also indicative of the better treatment of offenders worldwide, with non-custodial measures at the forefront.

Based on all our discussions, we make the following recommendations which reflect our common platform for the promotion of non-custodial measures.

A. Recommendations

1. Mission Statement
   All criminal justice systems should incorporate a clear mission in their sentencing policies that advocates the extensive use of non-custodial measures. This has to be achieved by adopting a holistic approach involving the offender, the victim and society. In doing so, countries should pay heed to their social, cultural and criminal policy situation. Wherever possible, the rights of offenders at all stages of the criminal justice process should be guaranteed by legislation, such as to reduce incarceration as an easy alternative to other modes of treatment.

2. Public Awareness, Political Will and Education
   Real change can only come about by public acceptance of the rationale for the wider use of effective non-custodial measures. Re-socialization of offenders requires public awareness of the need to rehabilitate and reintegrate offenders. Public perception that an offender is a social-outcast must be replaced with an informed appreciation of the plight of offenders. To bring about this change, political will should be present at all levels of society. Policy makers and politicians, who have better access to the mass media, should be the agents for standard setting in the better treatment of offenders. Continuous multi-layered campaigns by public and private bodies can promote the use and benefits of non-custodial measures. Such campaigns, coupled with other forms of education, can bridge the wide use of non-custodial dispositions with an equally receptive public.

3. Organizational Framework
   Non-custodial treatment like rehabilitation programmes can only flourish within an effective framework
that streamlines such treatment. Criminal justice systems must pay attention to the detailed management of the release and rehabilitation of offenders in society. Some areas that should be looked at are:

i. Comparative availability of alternatives at each stage of the criminal justice system.
ii. Maximum utilization of community services.
iii. Integrated and cooperative network between voluntary sectors and public community-based services.
iv. Periodic review of domestic laws to ensure non-custodial alternatives are viable.
v. Transparency/accountability in the non-custodial process at all levels.

4. Implementation
   Countries must be committed to set a timeframe for the implementation and assessment of non-custodial measures. The model of non-custodial alternatives in other countries can be modified/adapted to the domestic situation. The role of all agencies involved in implementing non-custodial alternatives should be clearly defined. Priority should be given to manpower, funding and staff training to create professional and responsive community-based treatment programmes. Victim redress and alternative offence resolution mechanisms, offender classification, categorized treatment and broad-based community participation should be developed as some of the key components of alternative treatment.

5. Research and Study
   Research and study are essential to ensure that non-custodial measures work and continue to remain relevant. The objectivity of research and study is the best method for monitoring non-custodial alternatives. Systematic evaluation of alternative treatment programmes on evidence-based practice provides vital information as to the efficacy of these programmes. Nationwide use of non-custodial measures and all related matters can be comprehensively assessed thereby ensuring uniformity of practice. Reliable data can facilitate the proactive search for new alternatives. An evidence-based practice approach enables the use of alternatives to withstand public scrutiny.

B. Conclusion
   The Tokyo Rules were an integral part of our Group discussions. Likewise, all countries should use the benchmark of The Tokyo Rules as the standard setting for the promotion of alternatives. An easy strategy would be to infuse small incremental changes in the social, justice system to eventually blend in non-custodial alternatives. Socio-economic inequalities should be addressed to strengthen community-based programmes. Effective alternatives can complement the ultimate aim of criminal justice policies i.e. the reduction of crime in society. Consequently, obvious and lasting improvements will be seen in the persistent problem of prison overcrowding.

   We leave this paper with the hope that society, which may invariably be responsible for the offending within it, should galvanize itself to progressively search and successfully apply alternatives to imprisonment for the better treatment of offenders.
GROUP 2

ADMINISTRATION OF PENAL INSTITUTIONS

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I. INTRODUCTION

The United Nations Standard Minimum Rules (UN SMR) for the Treatment of Prisoners sets out what are generally considered as good principles and practices in the treatment of prisoners and the management of institutions.\(^1\) However, since its adoption by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, most, if not all countries, still have some difficulties implementing the basic rules laid down by the UN SMR.

Given this background, the group was assigned to discuss the current situation/practices of the prison administrations of each participating country, analyse the issues/problems confronting their prison administrations, and endeavour to find ways to overcome difficulties in the application of the UN SMR. The group agreed to include in its discussions the following aspects of prison administration as subtopics: accommodation, separation of inmates, provision of medical services, information to prisoners, contact with the outside world, discipline and punishment, grievance mechanisms, prison incidents, inspection and community participation.

In keeping with the preliminary observations of the UN SMR that the rules enumerated therein are “not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes [...].”\(^2\), the group considered measures outside of the UN SMR to solve the problems/issues confronting the prison administrations of each participating country.

II. PRISON ADMINISTRATION

A. Current Situation

Except for the Philippines, the administration of prisons of the participating countries is centrally-administered either through the Ministry of Internal Affairs, Ministry of Internal Security, Ministry of Justice or the Police Department.

In the Philippines, local jails are managed and supervised by the Department of the Interior and Local Government through the Bureau of Jail Management and Penology (BJMP) and the Provincial Government while national prison institutions are managed and supervised by the Department of Justice through the Bureau of Corrections (BuCor). Juvenile institutions are supervised by the Department of Social Welfare and

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\(^1\) Preliminary Observations 1, United Nations Standard Minimum Rules for the Treatment of Prisoners.

\(^2\) Ibid, Preliminary Observations 3.
Development through the Bureau of Child and Youth Welfare. However, the executive department prepared a draft proposal integrating all national prisons and all provincial, city and municipal jails and consolidating the functions of the Bureau of Corrections and Bureau of Jail Management and Penology under a new bureau to be known as the Bureau of Correctional Services under the Department of Justice. The bill is currently pending in Congress.

As regards privatisation of prisons, Korea enacted the “Law of the Establishment and Operation of Private Prisons in January 2000”. The law was enacted to reduce the financial burden while alleviating prison overcrowding and enhance the effectiveness of rehabilitation. The first private prison in Korean Correction history will be opened in 2005. The role of correctional staff in private prisons can be limited by the contract with the Ministry of Justice. In general, the correctional corporation should keep suitable manpower for reception, management, rehabilitation and other correctional service.

Japan recognizes the need to reorganize the correctional administration in order to maximize the functioning of institutional operations and the treatment of prisoners. In this connection, the Corrections Bureau has decided to contract with a private company to construct an institution with a 1,000 capacity by employing the Private Finance Initiative (PFI) scheme by 2007. Discussions are still going on as to what extent the private sector can perform prison functions.

Malaysia and Thailand are studying the possibility of introducing privately managed prisons while Vanuatu and Egypt are not interested in having private prisons due to present government policy.

B. Problems and Countermeasures

The main problem of prison administrations is the inadequate budget allocated to the prison service. In some countries, an adequate budget for prisons is given the least priority. Given such condition, the prison service suffers to a certain extent as prison management tends to focus more on the security aspect rather than on rehabilitation of prisoners.

To address the problem of inadequate resources, the group considered reorganizing the prison structure to economize expenditure of funds. It also considered outsourcing certain corrections services to the private sector (e.g. provision of food), subject to the situation of the market.

Concerns were raised for having private prisons since imprisonment can be considered as an infliction of pain which must be carried out only by the State. However, severe overcrowding in many countries requires living space to be provided in a relatively short time. In this regard, some form of private initiative may be considered inevitable. Nevertheless, most of the participants agree that the main functions of prison service such as custody, security and discipline should remain with the government.

The basic function of imprisonment was discussed among the participants. As stated in the UN SMR 58, it was agreed that the basic function of prison is to protect society against crime and to rehabilitate prisoners to be law-abiding citizens. Therefore, prison is expected to play multiple roles in managing prisoners. They include maintaining the safe custody of prisoners, providing welfare to prisoners, protecting community safety, providing guardianship and social services.

III. ACCOMMODATION

A. Current Situation

Thailand and the Philippines do not have single cells except for disciplinary punishment. They have dormitory style accommodation. The sleeping area for each inmate in Thailand is fixed at 2.25 sq. m. while Korea provides each inmate with an average area of 1.7 sq. m. The Philippines does not provide a fixed space for each inmate.

Egypt, Korea, Vanuatu and Japan have both single and group cells while Malaysia has single cells and dormitory style accommodation.

3 A “group cell” means a cell that accommodates three to six inmates, while a “dormitory” means a living space that accommodates more than twenty inmates.
B. Problems and Countermeasures

Prison overcrowding creates difficulties in the observance of the UN SMR. Except for Vanuatu, all the members of the group share a common problem of accommodation due to overcrowding. The problem of overcrowding can be attributed to, among others, a dramatic increase of drug offences, old/lack of facilities, frequent use of imprisonment as a penalty and non-custodial measures not being fully utilized as an alternative to imprisonment.

In Malaysia, old prison institutions lack ample space for the exercise of prisoners. Overcrowding in Malaysia results in a shortage of water supply, in-fighting among the inmates and commission of homosexual acts.

In Malaysia and Japan, a single cell is made to accommodate more than one inmate. The Philippines, Malaysia and Thailand transfer inmates to less congested prison facilities. In effecting the transfer of inmates, the prison authorities have to consider certain factors: the transfer should not cause problems to other institutions; residence of inmate’s family, rehabilitation programme being undertaken by the inmate, etc.

Full utilization of the early release schemes, amendment of penal laws providing long-term sentences and transfer of inmates to less congested facilities subject to certain conditions (e.g. transfer should not create problems for the receiving prison), were some of the measures considered to reduce the prison population.

To reduce the stress level of the inmates due to overcrowding, prison institutions should provide more recreational activities such as inviting well-known entertainers to perform during weekends.

IV. SEPARATION OF INMATES

A. Current Situation

All the participating countries observe separation of male inmates from female inmates, juveniles from adult offenders and high risk prisoners from low risk prisoners.

Japan, Korea and Egypt have separate institutions for unsentenced and convicted inmates. The Philippines and Thailand provide separate correctional institutions for drug offenders where they are provided with appropriate treatment and rehabilitation programmes.

B. Problems and Countermeasures

Thailand, the Philippines and Malaysia cannot provide separate facilities for unsentenced and convicted inmates due to overcrowding and lack of facilities. However, they are placed in specific sections in the same facility.

In Malaysia, separation of inmates cannot be fully implemented in certain areas of the prison facilities such as the dining hall and place of work. Certain rules on separation of inmates are likewise relaxed after taking into account the security risk involved.

The presence of transsexual inmates creates problems in prison institutions due to the difficulty in determining their gender. Malaysia identifies the gender through legal documentation. In Thailand, Japan and Malaysia, transsexual inmates are incarcerated in a specific section separate from other inmates.

V. MEDICAL SERVICE

A. Current Situation

The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.4

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4 Art. 24, UN SMR.
All the participating countries provide basic medical treatment to the inmates in a specific area inside the prison. Many countries have medical doctors present during the daytime. In other cases, sick inmates are assisted by medical assistants.

Japan and Thailand have separate medical prisons for specific medical treatment. In all countries, referral is made to a hospital outside the prison in the event that the prison hospital cannot provide the specific medical treatment. In Malaysia and Egypt, referral is limited to government hospitals. In the Philippines, Thailand, Korea, and Vanuatu, an inmate may be allowed to be treated at a private hospital at his/her own expense. In both cases, the inmate has to be escorted by prison guards.

In Thailand, the Ministry of Public Health provides a medical service card to an inmate who has a permanent address and residence registration. The Korean correctional authority is planning to introduce national insurance to be used for inmates as medical coverage.

B. Problems and Countermeasures

Except for Egypt, the participating countries face the problem of a lack of medical service staff. In some countries, inmates sometimes overuse or take advantage of the free medical treatment provided by the prison.

In countries where there is a lack of medical staff, discussions must be conducted with the Ministry of Public Health or medical associations with a view to providing adequate medical staff. Most of the participants agree that it is possible to have a medical prison as practiced in Japan and Thailand. Malaysia is studying the possibility of contracting with private medical doctors for prisons. Although not considered in the other participating countries, there is a possibility of contracting private companies to provide medical care in prison.

VI. INFORMATION TO PRISONERS

A. Current Situation

In all countries, every newly-admitted inmate is informed of the prison rules and regulations, rights and privileges and daily schedule of the prison.

Thailand, Malaysia, Korea, Philippines and Japan conduct orientation on the prison rules and regulations to newly-admitted convicted inmates in a separate section. Japan and the Philippines fix the period of orientation at fourteen and sixty days, respectively.

Illiterate inmates are informed orally on the prison rules and regulations. In Egypt, prison staff have to remind the illiterate inmates on a daily basis of the prison rules and regulations.

B. Problems and Countermeasures

Most countries are facing an influx of foreign inmates which causes problems on imparting information to prisoners. Prison institutions in Thailand, Malaysia, Philippines and Vanuatu may contact the embassy concerned for interpretation/translation services. Japan usually relies on in-house interpreters/translators and volunteers. Inmates who speak the same language may be requested to interpret the prison rules and regulations for the newly-admitted convicted foreign inmates.

In order to overcome the problem, the group agreed on the use of audio-visual aids as a means of informing inmates of the prison rules and regulations, in addition to strengthening the current practices.

Transfer of sentenced foreign prisoners should be considered especially in countries where there are a large number of foreign inmates.

VII. CONTACT WITH THE OUTSIDE WORLD

A. Current Situation

All the participating countries allow prisoners to communicate with their family, friends, counsel, diplomatic or consular representative, etc.
Vanuatu, Egypt, Malaysia, Korea and the Philippines allow inmates to be visited at the weekend. Thailand and Japan do not have scheduled visitation on weekends. Korea, Philippines and Thailand allow the system of conjugal visits. Malaysia and Egypt allows a woman prisoner to visit her convicted husband under escort.

Korea is now implementing the video visit system wherein a family member who resides in a place far from the institution of confinement of an inmate can communicate with that inmate through the Intranet system installed in the prison located in the prisoner’s family hometown. Inmates and their families respond positively to the system.

Both Thailand and Korea allow the inmates to receive e-mail from their families by using the prison e-mail address. In 2002, Thailand launched a pilot project which allows convicted inmates in certain prison institutions to send and receive e-mail messages. A prison staff member censors the messages. An inmate who wants to reply has to first write the message and the prison officer-in-charge will then send the message for him/her. In Korea, convicted inmates are not allowed to reply via e-mail. They must reply by ordinary mail. In both countries, inmates are not allowed to access the Internet.

Vanuatu, The Philippines, Korea and Thailand allow inmates to make telephone calls under the supervision of prison officers. In Vanuatu, an inmate is allowed to make phone calls in an emergency. In the Philippines, an inmate who demonstrates good behaviour earns one telephone call to an authorized individual every ninety days. In such a case, the telephone conversation is monitored and cannot exceed five minutes. In Thailand, a convicted inmate uses a phone card bearing only five numbers for outgoing calls. In Korea, phone calls are recorded while telephone conversations are monitored by the prison officers in Korea.

B. Problems and Countermeasures

Security problems could arise when prisoners contact someone from outside the prison especially when the person on the receiving end cannot be fully identified during the telephone conversation. In order to control this problem, participants agreed that prison officers should strictly monitor the phone conversation.

Sometimes visitors bring prohibited articles, especially during contact visits. In Thailand, Egypt, Malaysia and the Philippines, a body search is performed on the visitors and inmates. In Vanuatu and Korea, a body search is conducted on the inmate after the visit.

Mobile phones brought by the visitors may cause problems as they can be used by the inmate to communicate illegally with others. Recently, the new technology of mobile phones allows recording of conversations and taking pictures. In many participating countries, visitors are requested to refrain from carrying in mobile phones to the visitation area; however, they can still be brought in. In order to counter the problem, countries install security lockers where mobiles can be deposited. Metal detectors may be installed in order to detect prohibited articles from being brought in to the visitation area.

VIII. DISCIPLINE AND PUNISHMENT

A. Current Situation

Japan, Korea, Malaysia, Thailand and the Philippines have a collegial body in each prison institution which hears and decides cases involving violations of prison rules and regulations©. In Egypt, the prison or deputy warden decides on the punishment to be imposed on the inmate. In Vanuatu, the officer-in-charge of the prison decides on the case of the inmate. Each participating country gives the inmate an opportunity to defend himself/herself and punishment imposed on the inmate is based on the law or prison regulations.

In Japan, an inmate is assisted by a prison staff member during the hearing of the case while the Philippines allows the inmate to have a witness/es.

Reprimand or forfeiture of certain privileges may be imposed on an inmate in Malaysia, Vanuatu, Korea and Thailand. In addition, the Philippines and Thailand impose a reduction or deprivation of Good Conduct Time Allowance while Malaysia imposes a reduction in stages, forfeiture of remission and a restricted diet.

© Japan has the Inspection and Investigation Committee for Discipline, the Philippines has the Board of Discipline while Korea and Thailand both have Committees for Discipline.
The Philippines may change the security status of the inmate to the next higher category\(^6\) while Thailand may downgrade a prisoner’s class.

Except for Malaysia, solitary confinement as a form of punishment is considered as a last resort. In all countries, solitary confinement is carried out only after the medical prison officer has certified that the inmate is fit to undergo such punishment. The maximum period for solitary confinement in Thailand is three months, two months in the Philippines, Korea and Japan, twenty-one days in Malaysia, fifteen days in Egypt and fourteen days in Vanuatu. In practice, however, all countries impose a lesser period for solitary confinement. Its duration depends on the gravity of the offence.

Whipping\(^7\) is practiced in Malaysia for prisoners who commit aggravated prison offences such as escape or attempted escape, destruction of prison property or possession of drugs or weapons. The maximum number of strokes is twelve. A medical officer must certify that the inmate is medically and physically fit to be caned. Male prisoners who are more than fifty years old and female prisoners are exempted from this form of punishment.

In all the participating countries, appeal from the decision of the adjudication board is not available but an inmate may file a complaint with authorities either within or outside the prison.

B. Problems and Countermeasures

Some of the participating countries expressed reservations on the effectiveness of solitary confinement as a form of punishment, especially where the prison is overcrowded. In an overcrowded prison, to have a single room might be considered a privilege by some prisoners. However, each participant agreed that there is a strong psychological effect of solitary confinement and should, thus, be considered as a last resort. In regard to whipping, although its legality is guaranteed by law, the question of human rights was expressed by some members of the group.

To ensure transparency of the adjudication process as well as the accountability of the collegial body/prison authorities, the group considered adopting some features of criminal trial proceedings such as the composition of the disciplinary panel, the right to counsel and appeal to authorities outside the prison institution. In Korea, at least one representative from the community sits as a member of the Disciplinary Board.

The participants discussed the possibility of an inmate being assisted during the hearing of his/her case. Assistance may be provided either by a lawyer, fellow inmate or a prison officer. All countries expressed reservations on having an inmate represented by a lawyer. A lawyer might only cause difficulties in the disciplinary procedure. Japan, Malaysia, Egypt, Vanuatu and Korea did not completely agree with the option of having an inmate assisted by a fellow inmate due to the concerns of objectiveness and security.

The group agreed on the importance of the role of an independent tribunal such as the tribunal of the execution of the penalty/sentence in Costa Rica. The tribunal acts on cases/appeals filed by a prisoner, prosecutor or victim against a decision of the prison administration. The penalty imposed by the prison administration is suspended while the case is pending with the tribunal. The Judge of the Execution of the Penalty can either vacate or modify the penalty imposed by the prison administration. The importance of having a “controller of legality” is both to ensure the fundamental human rights of the inmate and the legality of the decision of the prison administration. The decision of the “controller of legality” must have a binding effect on the prison administration.

Some form of mediation may be considered in case of conflicts between prisoners as one of the alternative measures to disciplinary action as this can ensure peace and stability in prison.

\(^6\) In the Philippines, inmates committed at the national prison institutions are classified according to their security status - maximum, medium and minimum while Thailand classifies its inmates as excellent, very good, good, medium, bad and very bad.

\(^7\) Whipping is a form of punishment with a rattan inflicted on the buttocks of the offender (Rule 131[4], Prison Regulations 2000).
IX. GRIEVANCE MECHANISMS

A. Current Situation

In all countries, an inmate is given the right to air his/her grievances against the prison administration or any of its officers/staff either within or outside the prison administration system. It may be made orally or in writing depending on the level of authority of the person or body to which the complaint or petition is made. An inmate may seek remedy outside the prison administration either through judicial or other administrative bodies. In all the participating countries, judicial action may be initiated by an inmate against the prison administration and any of its officers/staff.

In Egypt, an inmate can file a complaint to the Prison Director or General Attorney while an inmate in Malaysia can air his/her grievances to “visiting justices” or the officer-in-charge of the prison. In Vanuatu, the chairperson of the committee composed of prisoners brings general complaints such as food and accommodation to the Superintendent or Inspector of the Prison. A personal complaint by an inmate in Vanuatu may also be filed with the Public Solicitors and Ombudsman officers who visit the prison regularly.

In Japan and Korea, a petition may be made by an inmate to the Minister of Justice or the visiting officer authorized by the Minister to inspect the prison. In both countries, an inmate may request an interview with a warden.

In the Philippines, each national prison institution has an Inmates’ Complaint, Information and Assistance Centre (ICIAC) which receives and acts on complaints, requests for information and assistance of inmates. An inmate may choose to file his/her complaint or petition with the Director or Assistant Directors of the Bureau of Corrections or directly to the Secretary or Undersecretaries of Justice.

In Thailand, a prisoner can make a request or file a complaint with the Prison Director or Director General of the Department of Corrections. Each prison in Thailand has a red box wherein an inmate can place his/her complaint. Only the Prison Director can open the red box. In addition, Thailand has a Grievance Section under the Office of the Inspectorate which is responsible for all prisoners’ complaints.

In the Philippines, Thailand and Korea, complaint may also be made to the Human Rights Commission or the Office of the Ombudsman. In Vanuatu, after the introduction of the Public Solicitors and Ombudsman officers, the number of complaints decreased.

In all the participating countries, a judicial action may be initiated by an inmate against the prison administration and any of its officers/staff.

B. Problems and Countermeasures

In Korea, the creation of the Human Rights Committee increased the number of complaints as inmates bring to the attention of the Committee even small issues which can be considered in the corrections office. From November 2001 to June 2003, out of the 458 cases filed against the prison administration, only 29 cases were given recommendations while the rest were dismissed or rejected.

Inmates sometimes abuse or misuse the process afforded to them by not using the proper channels for filing complaints. oftentimes, wrong information is given to non-government organizations and the media.

The group discussed the importance of having different types of grievance mechanisms in penal institutions. It is necessary to maintain a good personal relationship between prisoners and staff, so that most of the prisoners’ complaints could be made orally to the officers. If inmates are not satisfied with the handling of the complaint, they should make an official written complaint. There should be more than one process for prisoners to write complaints, preferably including independent agencies from the penal administration to ensure transparency.

The group agreed that the increase in the number of complaints shows that the inmates have confidence in the grievance mechanism. It also diffuses conflict in the prison and shows an increased awareness of the

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8 The system will be explained fully in “Community Participation”.
9 It is composed of prison staff and is directly under the Office of the Superintendent.
inmates of their right to air their grievances.

X. PRISON INCIDENTS

A. Current Situation

The two most serious prison incidences faced by prison administrations in all participating countries are suicide and escape.

Malaysia had five incidences of escape in 2002 and one in 2003. In Thailand, the number of escapees in 2003 was 61, or 0.03% of the prison population. Fifty-five of the inmates escaped from outside the prison while the other six inmates escaped from inside the prison. In the Philippines, there have been an increased number of escapes by detention prisoners. In Korea, escape rarely occurs: one case of escape occurred last year while the inmate was undergoing treatment in a private hospital.

Suicide of inmates rarely occurs in the prison institutions of all the participating countries. In Malaysia, the prison administration recorded six suicides of inmates in 2002 and one in 2003.

B. Problems and Countermeasures

1. Escape and Suicide

The group considers the incidence of escape and suicide as serious problems of prison administration even if they seldom occur. The group agreed that there should always be a balance between the security of the prison and rehabilitation of prisoners. These two aspects of prison administration should be taken into consideration in order to avoid prison incidents.

Escape creates security concerns in the community, thus diminishing public confidence in the penal system. Suicide gives the impression that prison conditions are poor and inmates are not treated well.

Security lapses or negligence by prison officers, lack of good physical security systems and the close relationship of prison officers with the inmates were among the reasons cited for the escapes.

Malaysia cites lack of staff to conduct security inspections and lack of cooperation of the inmates themselves during investigations as the problems encountered by its prison administration in its efforts to reduce the incidence of escape.

To prevent or reduce the incidence of escape, Malaysia, the Philippines and Thailand, aside from imposing the appropriate disciplinary action, have tightened up security measures, conduct more frequent inspections and continue to foster discipline among the inmates. Japan added that providing humane prison conditions and improvement in the treatment of offenders will be better measures in preventing prisoners from escaping or attempting to escape from prisons.

To address the problem of suicide, Malaysia uses blankets that cannot be easily torn and conducts frequent searches of cells to look for articles that might be used in committing suicide. All unlawful item/items that can invite a suicidal act by a prisoner such as ropes, sharp items and blankets that can be easily torn are confiscated.

In Japan, inmates who are diagnosed with a particular high risk of suicide are placed in a special cell where a camera is installed to monitor their activities. Japan suggested the necessity of counselling. The provision of information on prison life can also reduce the tension of imprisonment.

A more strict and sensitive prison officer will be assigned to blocks/workshops to guard prisoners who are prone to attempting suicide. A prison officer that is found guilty of negligence should be held liable.

Counselling sessions should be increased for prisoners who have a high tendency of committing suicide.

The group agreed to review existing security measures, improve prison conditions and promote better relationships between the prison staff and prisoners to prevent further occurrences of serious prison incidents.
2. Bribery of Prison Officers

Bribery of prison personnel is a common problem in Malaysia, Thailand and the Philippines. In Japan, Korea, Egypt and Vanuatu, bribery rarely happens in the prisons. In many countries, bribery usually involves giving special treatment or allowing inmates to have prohibited articles inside the prison such as cigarettes and cellular phones.

In all countries, a prison officer found to have committed bribery will be held criminally and administratively liable. It could result in the removal from office of a prison officer.

Low salary, inadequate welfare benefits and weak ethics were cited as the main reasons why prison officers commit bribery. Instilling good ethical values in the prison officers, aside from increasing their salary and benefits, was considered in order to prevent or reduce bribery in prisons.

XI. INSPECTION

A. Current Situation

There are two types of inspection - internal inspection which is conducted by the prison administration, and external inspection which is conducted by independent bodies or persons from outside the prison service.

All of the participating countries conduct regular internal inspection of their prison institutions and services to ensure that the institutions are administered in accordance with existing laws and regulations and to bring about the attainment of the objectives of the penal system.

In Egypt, the Prisons Department has an Inspection Section composed of specialists in prison administration - high ranking police officers, doctors and psychologists - which inspects prisons under the supervision of the deputy of the Authority Manager. The result of the inspection is reported to the Authority Manager.

In Korea, inspection is conducted regularly by the central organization, regional correctional headquarters and Ministry of Justice. In the Philippines, the Secretary of Justice conducts announced and unannounced inspections/visits of national prison institutions.

As stipulated by law, a senior officer entrusted by the Minister of Justice of Japan has to visit once every two years prisons with less than a thousand prisoners. For prisons which have a capacity of more than one thousand prisoners, inspection is performed once every year. Regional correctional headquarters have to inspect prisons once every two years. Consequently, each prison is inspected at least once a year. Judges and prosecutors are also entitled to visit prisons.

In Thailand, the Minister of Justice has the power to appoint a Prison Commission to inspect and examine the prison administration and give advice to prison officials. The Commission consists of not more than five members appointed from the judiciary, Ministries of Education, Agriculture and Cooperatives Finance, Foreign Affairs and a medical officer and public prosecutor.

In Malaysia, the Commission on Human Rights and the “visiting justices” conduct jail visits. In the Philippines, the Commission on Human Rights exercises visitatorial powers over jails, prisons, or detention facilities. In Korea, the Human Rights Committee, upon receipt of any complaint, conducts an investigation and inspection of the prison institutions.

In Vanuatu, prisons are inspected by the Minister of Internal Affairs or his/her designated representative. As stipulated by law, at least three persons should visit prison institutions at least once a year. The Minister may constitute a Prison Visiting Commission where three of its members shall visit each prison at least once a year.

In Egypt, the Attorney General and prosecutors are entitled to inspect prisons at any time. The Superior Judges of the City Courts can inspect the prison located within their jurisdiction. The head of the Supreme

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10 The role of the visiting justices is discussed in “Community Participation”.
Court can inspect any prison in Egypt at any time.

B. Problems and Countermeasures

Some of the officials mandated by law to conduct inspections/visit are not qualified and experienced inspectors and they rarely inspect/visit prison institutions. Sometimes they delegate their responsibility to their subordinates. Further, some of them are not really concerned about the real situation and problems faced by prison institutions.

Visits by judges and prosecutors in Japan are conducted formally and the information is not fully disclosed to them.

In Vanuatu, a constant change of government poses a problem as the new government appoints a new minister.

The group agreed that procedural and substantive matters must be considered in the inspection. Procedural inspection means looking into the procurement procedure for prison supplies, food, etc. Substantive inspection means looking into the compliance by the prison administration with constitution/statutory laws and human rights instruments in the treatment of prisoners.

To ensure transparency, the group recognizes the importance of having a third party to conduct inspection of the prison institutions. In this connection, an opinion was expressed that the inspection team should include at least one member from the community. However, some of the participants expressed reservations on this matter as it could compromise the security of the prison.

The participants agreed that an external inspectorate should be introduced such as Her Majesty’s Inspectorate of Prisons in the United Kingdom. It provides independent scrutiny and public assurance and reports in public. The Chief Inspector is appointed by the Home Secretary from outside the Prison Service although some of the Inspectorate staff are seconded from the Prison Service. The Inspectorate inspects for outcomes, not processes. It also inspects against published criteria, and focuses on four tests of a healthy prison, namely safety, respect, purposeful activity and resettlement. The Inspectorate provides infrequent but in-depth inspection. It carries out a five year cycle of full inspections (three yearly for juveniles), together with a programme of short inspections, usually unannounced, in-between to check progress.

XII. COMMUNITY PARTICIPATION

A. Current Situation

In Thailand, the Ministry of Justice created a Correctional Council Board in every province this year. The Board consists of fifteen members appointed from the criminal justice agencies and various public and private agencies for two years. The Director of the Provincial Prison is appointed as the Secretary of the Board. It is responsible for giving advice, policy or guidelines to develop work and recruit resources for the rehabilitation and treatment of offenders. The Board has also the duty to receive a prisoner’s complaints relating to the misconduct of a prison staff member.

In Korea, at least one community member sits on the Disciplinary Board. Due to the recent amendment of the Prison Law in 1999, Korean prisons started to invite community members to attend disciplinary hearings in order to secure fairness of the procedure. The members are usually volunteers who do some other activities in prison such as prison chaplain duties or educational activities. Community members can express their opinion during the hearing as usual board members but the final decision is made by the warden.

In Malaysia, visiting justices comprise of people of different professions from the community elected on a yearly basis by the government. A board of visiting justices is assigned to each prison. They are entitled to visit prisons each month and hear complaints by prisoners. The law also allows them to inspect prisons. The comments of the visiting justices are forwarded to the chairman of the board and to the Director General.

B. Problems and Countermeasures

In all the participating countries, community involvement is limited to the implementation of the
inmates’ rehabilitation programmes such as religious and educational activities either voluntarily or upon request.

Each participant agreed that the positive attitude and active involvement of the community are indispensable factors in the successful rehabilitation of prisoners. The group agreed that the extent of participation of the community should be left to each country taking into account their own culture and local needs.

It was expressed that community participation should be limited to the rehabilitation aspect of prisoners. Allowing community participation in the other aspects of prison may disrupt the smooth running of the prison administration.

The Independent Monitoring Boards (IMBs) of the United Kingdom, which replaced the Boards of Visitors, is worth mentioning. IMBs are composed of volunteer Board members who regularly visit prisons. While the old Boards operated largely independently, IMBs have a new National Council with the authority to direct Boards rather than just advise, thus, ensuring greater consistency. IMBs have a particular role in the complaints process and are bound by law to be satisfied with the treatment of prisoners, including examination of the complaints records and statistics as well as individual replies. Prisoners may also raise complaints confidentially with the IMB.

XIII. RECOMMENDATIONS

Prison administrations are confronted with issues and problems that hinder the full and effective implementation of the rules laid down by the UN SMR. The group, after taking into account the diverse legal, social, economic and geographical conditions existing in their respective countries, discussed the possible recommendations to the problems confronting their prison administrations. The summary of the group’s recommendations include:

1) Full utilization of existing facilities by transferring prisoners can alleviate overcrowding of some institutions. However, in order to fully counter the problem of overcrowding, increased use of alternatives to imprisonment is inevitable;

2) More recreational activities should be considered to reduce the stress level of the inmates due to overcrowding;

3) Separation of inmates is important in any situation and when separate facilities cannot be provided, separate sections should, at least, be considered;

4) Dialogues must be conducted with the health department or private medical organizations/associations to improve prison medical services. Every country must ensure that the healthcare of the prison population is at least equal to the medical health service provided to the general population;

5) Audio-visual aids should be used in imparting information to prisoners. Prison administrations should consider the use of audio-visual aids in informing the prisoners of their rights, privileges, responsibilities, application of prison rules and regulations and the conditions of their imprisonment. The use of audio-visual aids is especially effective in conveying information to uneducated prisoners as the information is presented to more than one sense (e.g. sight as well as hearing), hence, more information is taken in and better understood and remembered;

6) The group acknowledges that maintaining contact with family and friends play an important role in the rehabilitation process of prisoners. There is a need, therefore, to incorporate the latest communications technology such as e-mail and a video visit system. However, these forms of communication must be strictly monitored when necessary;

7) Certain basic features of natural justice as in criminal trial proceedings are to be observed in disciplinary proceedings to ensure transparency and fairness. Human rights issues should also be taken into consideration in procedures pertaining to prison disciplinary punishment;
8) Adoption of some form of mediation to settle prison conflicts/disturbances. Mediation could have a role in reducing prison tension and building social and conflict resolution skills for inmates;

9) Effective prison and inmate management must be employed to reduce prison incidents. Suicide and other prison incidents such as escape, conflicts and disturbances are serious. They are significant issues that must be addressed by prison management. Inmates having a particular high risk of committing suicide, escaping and causing a disturbance must be given greater attention;

10) Establishment of independent bodies to inspect prisons may be considered. Prisons, being closed institutions, need an independent body or person from outside who will conduct an independent inspection of all the aspects of prison administration and make necessary recommendations for the improvement of the treatment of prisoners and the effective administration of penal institutions;

11) Active community involvement in certain prison affairs must be encouraged to ensure transparency and accountability. The prison administration should disclose as much information as possible in order to gain the confidence of the community; and

12) Outsourcing of certain functions of prison administration to the private sector may be considered under certain suitable conditions in order to effectively utilize available resources. In some countries, private companies may be allowed to operate prisons. However, it must be ensured that the rules and regulations for prison management are determined by the government, including disciplinary action.

The Group would like to stress that the recommendations reflected in this paper are not exclusive. Other measures relevant to the effective administration of penal institutions have to be continually explored and additional solutions sought through the experiences and practices of other countries.

**XIV. CONCLUSION**

There is no single or easy solution to the problems confronting the prison administrations. Prison management must continue to explore and consider measures, both short-term and long-term, in resolving their problems. In this connection, it is important for prison management to initiate and use forward planning, this means that management must not be reactive, its plans and programmes must be based on clearly developed objectives and able to anticipate issues and problems.

To fully realize the objectives of the penal system, changes in the attitude of the people from within and outside the prison must simultaneously take place. Efforts must be directed not only towards improving the attitude of the prison officers/staff and prisoners but also the attitude of policy and decision makers, members of the business sector, academia, media and the individual members of the community. Prison reforms in the administration of penal institutions and the improvement of the treatment of prisoners can only be achieved through the concerted efforts of all the sectors of society.
I. INTRODUCTION

The purpose of criminal justice is to maintain a safe society by preventing crime. Under criminal justice the offence and punishment is preset and the court decides and imposes the punishment on the offender in accordance with the law he/she has violated.

The prison department is responsible for the enforcement of the punishment imposed on the offender by the court. The imposition of the punishment on the offender will deter him/her from committing further crime after release from prison. Imprisonment deprives the offender of his/her freedom which he/she enjoys in the normal community. It also intimidates the criminal behaviour of the offender to make him/her realise the consequences of his/her criminal act.

Traditionally, the responsibility of prisons was to ensure safe custody of prisoners and the protection of society. Basically, such responsibility focuses only on effective treatment of prisoners to ensure that they maintain a healthy and well-ordered community life while in custody.

Alone, this approach has been considered a failure because when prisoners are released, the probability of their re-offending is relatively high because their criminal behavioural problems were not addressed and eliminated while in custody but were merely lying dormant and would re-surface when opportunity allows.

Given this background, most participating member countries’ prisons have placed more emphasis on rehabilitation in the treatment of offenders in order to reduce recidivism, which is a common problem in all countries, in their efforts to prevent crime. The group in its discussion identified problems existing in the respective countries’ prisons that restricts or hinders the effective implementation of treatment and rehabilitation programmes of offenders, and offered possible solutions thereof as contained in the following chapters.

II. PURPOSE OF TREATMENT PROGRAMMES

The SMR\(^1\) clearly provides the general purpose of treatment of persons sentenced to imprisonment:

Article 65: “The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The

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treatment shall be such as will encourage their self-respect and develop their sense of responsibility.”

Member countries have similar, or almost the same as the above SMR article, purposes stated in their legislation or organisation policies. For example:

1) To promote effective rehabilitation and resocialisation of prisoners in accordance with their individual characteristics and environments (Correction Bureau, Ministry of Justice, “Prison Administration in Japan”)

To protect the society and promote the individual and public welfare by aiding the reformation and rehabilitation of offenders, appropriately effectuating amnesty, providing for an impartial and proper system for administering parole and other pertinent affairs and facilitating the activities of crime prevention. (Article 1 of the Offenders Rehabilitation Law, Japan)

2) To provide safe, secure and humane treatment of persons in custody by providing opportunities to correct offending behaviour, develop life and work skills and perform community service. (Mission statement-Fiji Prison Services)

3) To encourage and enhance the offenders’ self respect, dignity, sense of responsibility and make them productive and useful citizens. (BJMP rules and regulations of the Philippines)

Types of treatment programmes vary according to the cultural, historical and economic background of each participating country. However, the countries are continuously striving to meet the purpose of the treatment of offenders as defined in the SMR as best as they can.

III. PROBLEMS AND COUNTERMEASURES IN RELATION TO IMPLEMENTING EFFECTIVE PROGRAMMES

In spite of the various treatment measures for offenders available in the participating countries’ prison systems, problems of treatment programmes emanate from a lack of proper resources and programmes, as evidenced by the high rate of recidivism experienced in the respective member countries. For example, in Fiji, the recidivism rate in 2001 was about 50.2%².

Offenders have unique criminal characteristics hence the types of crime they commit varies. For example, in Japan, they have researched the factors contributing to recidivism (see Appendix A). The treatment programmes available in the prisons may not be suitable for certain types of offenders and there is a need to identify and establish appropriate programmes for these offenders. The Group identified some of the contributing factors that lead to crimes being committed by offenders in their respective countries, as follows:

- a) Unemployment
- b) Lack of basic academic background
- c) Lack of social relationships (poor family environment, poor personal relationships, poor background, inability to communicate with others, lack of understanding of social life)

The above contributing factors would determine the most appropriate rehabilitation programmes in terms of work, education, social relations and aftercare that the offender would be subjected to, however, the effectiveness of such programmes would very much depend on the existence of an efficient classification system, and also the provision of a privilege grading system that would enhance such a programme. In any rehabilitation programme, it is essential that the programme be holistic and at least should include the following components to realise its effectiveness as discussed and agreed by the group:

- a) Classification
- b) Privileges
- c) Work
- d) Education
- e) Social relations and aftercare

A. Classification

Classification is an integral part of the treatment process and is provided for by the relevant provisions of the SMR, as follows:

Article 67: “The purpose of classification shall be;
(a) To separate from others those prisoners who, by reason of their criminal records or bad character, are likely to exercise a bad influence;
(b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.”

Article 68: “So far as possible separate institutions or separate sections of an institution shall be used for the treatment of the different classes of prisoners.”

Article 69: “As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions.”

The classification is a dual process in that it determines the appropriate containment and reformation process of the prisoner. Some of the constraints that hinder the effectiveness of the classification system that exists in the member countries are due to archaic conditions of the prison facilities that restrict the implementation of such a programme and do not conform to the spirit of correcting the offending behaviour of inmates. It would be worthless to shift the emphasis from a custodial approach towards a correctional approach when facilities do not permit the implementation of such programmes. The following member countries have highlighted hereunder the existing problems in their prisons that affect their prisoners’ classification process.

In the Philippines, the lack of prison space and overcrowding exacerbated by the lack of skilled human resources and financial resources to some extent limits the effective implementation of their classification process. Construction of additional facilities, recruitment of additional personnel skilled in special field sciences for therapeutic programmes would address these problems.

Conversely, in Fiji, the outdated infrastructure in most prisons is indeed a problem, which deserves to be highlighted as it borders on contravening certain aspects of the SMR. Fiji was a colonial state, which only gained independence from Britain in 1970. The colonial hangover cannot be discounted, as it is evident in all the prisons design and layout. Suva Prison, for example, was built in 1912 and exhibits the colonial legacy as emphasised in the way the infrastructure is set up. The prison cells are structured purely for containment and do not accommodate modern facilities for rehabilitation purposes. Also the problem of overcrowding and lack of proper rehabilitation programmes in the prisons have hindered, to a great extent, the effectiveness of its prisoners’ classification system. Growth and development in the correctional circle has demanded an adjustment and improvement of the existing facilities so that proper rehabilitation programmes could be made available to conform to the spirit of correcting the offending behaviour of inmates and to enhance the effectiveness of the classification process.

In Japan, there are two sets of criteria, namely ‘Allocation Categories’ and ‘Treatment Categories’; but almost all prisoners admitted to prison are classified in the ‘G’ category. Therefore, it is difficult to properly assess the individual prisoner so that it would facilitate his/her treatment and rehabilitation. As a whole, the current classification only provides guidelines for the supervision of inmates. A combination of classification categories is too ambiguous and difficult to implement. The limited number of rehabilitation programmes available in the prisons is inadequate to cater for the various classification categories of inmates. The current classification system needs to be reviewed and improved in order to reflect the actual rehabilitation programmes existing in the prisons. It is also essential to increase the number of training programmes in the prisons to meet the various classification categories.

B. Privileges

The provision of a system of privileges is articulated in most of the statutes of the participating countries. Basically, the purpose of such provision is to encourage good conduct, develop a sense of responsibility and

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3 ‘G’: Those who need living guidance.
secure the interest and co-operation of the prisoners in their treatment that are on par or near the SMRs\textsuperscript{4}. Some of the existing problems and proposed countermeasures that came to light in the group’s discussion, are as follows.

In Japan, the progressive stage system does not in any way determine an inmate’s eligibility for parole. In other words, even if a prisoner keeps good behaviour, it does not guarantee his/her early release. Also the progressive system is inadequate in motivating inmates serving short and long-term sentences, because inmates serving imprisonment for a short period, such as three months, would not be able to complete the whole progressive stage system and whereas inmates serving a longer prison sentence, such as twenty years or more, the benefits of the system is limited for them. So the motivating effects of such a system are also limited. A more gradual practical system should be established to cover both short and long-term sentences.

In the Philippines, there is no progressive treatment system, but good inmates can avail for early release through good conduct time allowance, in which an inmate with good behaviour may be given a one month reduction for a one year sentence. However, the progressive system can be introduced to improve the treatment programme.

Whereas in Fiji, the amount of stage gratuity being earned by inmates ranges from $2 to $6 per month according to their stage which does not have much of an effect as an incentive to their good behaviour and general discipline. An increase in their stage earnings would increase the incentive.

C. Work

The SMR provide that all physically and mentally fit convicted prisoners are required to work\textsuperscript{5}. They are to be given adequate employment to keep them gainfully occupied. The group discussed and identified the existing problems in their respective countries and proposed countermeasures to these problems.

In Fiji, about 75\% of convicted prisoners are employed in some form of agricultural work (Including the maintenance of cemeteries) with around 10\% occupied in cooking and cleaning and the final 15\% engaged in either manufacturing or maintenance of prison buildings. The emphasis on agricultural work may be desirable for prisoners who come from the villages or a farming background and are likely to return to them after release with newly acquired farming skills. However, for prisoners who do not come from villages or have a farming background and whose future employment is likely to be in the manufacturing or service industries, concerted efforts should be made to increase the range of manufacturing industries in the prisons to cater for the latter group of inmates. Such industries should have real prospects for the employment of ex-prisoners that would reduce the probability of their re-offending by giving them job skills which will assist their rehabilitation.

In the Philippines, a work programme is mainly used so that they can get jobs when they leave prison. Due to a lack of space, resources, and custodial personnel for security, specific work is only given to selected offenders based on their criminal record and behaviour inside prison. Remuneration is given to offenders according to the specific work they do. The money they earn is within their disposition either to spend it or give to their family during visits. Prisons have the authority to initiate efforts to improve facilities and provide work opportunities for all prisoners as far as the circumstances of the prison permits.

In Japan, the variety of work offered in prison is limited and insufficient orientation is given to prisoners. Prison authorities focus more on security than work and inmates are not given adequate training. The work they do does not make them conscious of the importance of work nor encourage them to work outside the prison. The prisoners should be offered work that can impress the significance of work on them. It is also important to acquire qualified work instructors to train prisoners.

\textsuperscript{4} Article 70 of the SMR states, “Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoner in their treatment”.

\textsuperscript{5} Article 71.(2) of the SMR states, “All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.”
D. Education

Article 77 of the SMR states that “Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration”. Problems existing in some of the participating countries’ prison education systems and their countermeasures are as follows:

In Fiji, in 2001 about 45.7% of the total number of prisoners admitted to prison either have no formal education or only attained primary education level. At present its education programme is mainly focused in one of the prisons (a Young Offenders Prison). The programme needs to be extended to other prisons to ensure that other prisoners are given a similar opportunity to further their education level.

In the Philippines, offenders in prison are often either school dropouts or have a low level of literacy. The government should provide a literacy programme through the department of education, culture and sports to enable them to know how to read and write. And provide an education programme to undergraduate offenders and give them accreditation after passing the examination given by the department of education, culture and sports, so they can continue their study after release.

In Japan, more emphasis is placed on labour rather than education. Most of the prisoners are sentenced to imprisonment with labour and required to work eight hours a day, leaving less time for educational programmes. Education is not mandatory for inmates although the prison administration may find it fit that the inmates need education. The current legislation needs to be reviewed to allow more emphasis on the importance of educational programmes for the rehabilitation of inmates.

E. Social Relations and Aftercare

Article 79 of the SMR states, “Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both”. In relation to this, the problems existing in some of the participating countries’ prisons and proposed countermeasures are as follows:

In Fiji, the standard entitlement to family visits is one visit of fifteen minutes duration every four weeks. One must realise that one of the most important factors leading to a crime-free society is the maintenance of close family ties. The current frequency and duration of visits is inadequate to achieve that and hence the visits need to be extended. Consequently this would require provision of adequate visiting facilities and extra staff to supervise visits. It is recommended that the frequency and duration of the visits be increased to a desirable standard subject to the provision of adequate visiting facilities and staffing.

Also in Fiji, environmental adjustments before releasing offenders are conducted in a pre-release institution. Aftercare programmes are not part of the prison’s responsibility; however, within three months before discharge the legislation provides that the prison authorities should make arrangements with families or relatives of the prisoner to facilitate his/her smooth transition back into the community.

The Ministry of Fijian Affairs is tasked with the responsibility of aftercare programmes for Fijian prisoners when discharged. The Ministry makes necessary arrangements with village elders to assist in providing pieces of land for the prisoners to farm and produce derived from the farm is utilised for their consumption and the surplus sold to market for income to meet other expenses. However, due to lack of funding, the Ministry on most occasions is unable to fully implement this programme. So a provision of adequate funding is necessary if this programme is to realise its full potential.

In Japan, there are aftercare programmes, but the programmes are not obligatory for all offenders. Therefore, ex-offenders who do not go through the programmes are likely to re-offend. It is crucial that more aftercare programmes be in place to cater for the rehabilitation of offenders when released from prison in order to prevent them from re-offending, particularly for prisoners who are released at the end of their full term of imprisonment. The prison authorities need to share information and co-ordinate activities of aftercare programmes with their counterparts in the probation department to ensure the effective socialization of offenders or ex-prisoners in the general community.
IV. EVALUATION OF TREATMENT PROGRAMMES

Evaluation of treatment programmes of offenders is necessary to measure the success or otherwise of the programmes. Collation and analysis of programme data would determine this end. As discussed, most member countries do not have a specific system of evaluating their treatment programmes. However, the normal practice in some member countries, is to use their annual reports as a basis to evaluate their treatment programmes; however, the reports do not always cover the whole treatment programmes. All the members have agreed that a more structural evaluation system be implemented.

The Group determined that the provision of an evaluation mechanism should be established in all member countries’ prison systems and propose a model for consideration (See Appendix B).

V. RECOMMENDATIONS

The following recommendations are drawn from the problems and countermeasures existing in the participating countries (For clarification, please refer to problems and countermeasures of each participating country as mentioned above):

• That improvement or replacement of archaic prison facilities be made to improve prisoners’ living conditions.
• That provision of additional facilities and recruitment of additional personnel experts in psychology and psychiatry for therapeutic programmes be acquired.
• That review and improvement of the existing classification system be made to reflect the actual rehabilitation programmes existing in the prisons.
• That review and introduction of a more practical progressive stage system be made in all prison systems.
• That a review of stage gratuity (stage earnings) be made to increase the amount of money for stage earnings to be equivalent to the value of the prisoner’s actual work.
• That industries with real work potential in the outside industries be introduced in the prisons for the benefit of prisoners on release.
• That suitable work be made available in all prisons to provide work for prisoners and prevent their deterioration.
• That all prison legislation be reviewed to incorporate in them provisions for prisoners’ education.
• That all prisons be fully fledged with integrated rehabilitation programmes, including education.
• That the frequency and duration of the visits be increased to a desirable standard subject to the provision of adequate visiting facilities and staffing.
• That a mechanism is in place between the prison department and probation department to co-ordinate aftercare programmes.
• That an evaluation mechanism is in place in all prisons to evaluate the success or otherwise of their rehabilitation programmes.

VI. CONCLUSION

This report was compiled following extensive group discussions, in which all members participated, expressing their ideas and bringing useful and relevant perspectives from their own countries. The paper explains the countermeasures to improve effective treatment programmes. “There is substantial evidence that rehabilitation programmes work. There is a body of research supporting the conclusion that some treatment programmes work with at least some offenders in some situations. Effective rehabilitation
programmes are structured and focused, use multiple treatment components, focus on developing skills (social skills, academic and employment skills), and use behavioural (including cognitive-behavioural) methods (with reinforcements for clearly identified, overt behaviour as opposed to non-directive counselling focusing on insight, self esteem or disclosure.“

The Governments of the various countries need to take the lead in committing resources to improve the conditions of the prison facilities and to introduce rehabilitation programmes that are holistic which would ensure promotion of effective treatment programmes for offenders so that the rate of recidivism is reduced.

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APPENDIX A

Research on Factors Contributing to Recidivism

There is a significant difference between recidivists and the rehabilitated group

Group A: recidivists
Group B: rehabilitated

1. Intelligence Quotient (a rate of less than IQ=59)
   Group A: 22.7%
   Group B: 9.0%

2. Educational background
   (i) Unfinished compulsory education
       Group A: 26.3%
       Group B: 21.9%
   (ii) Received a high level of academic education (more than high school)
        Group A: 11.7%
        Group B: 22.6%

3. Occupation (the rate of unemployed)
   Group A: 50.5%
   Group B: 12.7%

   Note: Especially, recidivists who committed theft, have a higher unemployment rate
   Group A: 65.0%
   Group B: 37.8%

4. “Bouryokudan” Gangster group
   Group A: 38.2%
   Group B: 7.7%

5. Family condition
   (i) Persons with no fixed abode
       Group A: 21.5%
       Group B: 9.8%
   (ii) Those living together with wife and children
        Group A: 6.5%
        Group B: 25.0%

6. Relations with family (the troublesome person of the family)
   Group A: 54.5%
   Group B: 17.4%
7. Habits
   (i) Alcoholic dependence
       Group A: 31.0%
       Group B: 3.0%

   (ii) Drug dependence
       Group A: 11.1%
       Group B: 2.2%

APPENDIX B

1. Basic model of evaluation research:

   Input → Output → Outcome

   Input: Treatment programme (i.e. vocational training)
   Output: Product of the treatment (i.e. employment)
   Outcome: Decrease of recommitment

2. Research on ‘Output → Outcome’

   To find out what kinds of outputs (factors) are effective in decreasing recommitment.
   For example, if statistics show that offenders who have a steady job are less likely to commit crime again
   than others, ‘Employment’ shall be recognised as an important ‘Output’.

3. Research on ‘Input → Outcome’

   To compare two groups of offenders; one group receives an ‘Input’ (treatment), while the other does not.
   Research on ‘Input → Outcome’ has 3 major disadvantages:
   1) Subject of the research is limited to treatments that are actually practiced.
   2) The research is impossible to contribute to the improvement of basic treatments.
      In the research, researchers compare offenders who receive an additional treatment programme with
      other offenders. Therefore we cannot evaluate basic treatment programmes, which both of the
      groups equally receive.
   3) Ambiguity of definition of ‘Input’
      We sometimes discuss Inputs (treatment programmes) with no distinction between Outputs and
      treatment methods.

4. The above two research methods will work well in combination with each other. There is much research
   on treatment programmes, and some researchers have started making efforts to overcome the above
   disadvantages.

Reference: “KEISEI” Vol.110 No.7-9, “Research on Evaluation of Treatment Programmes (1) - (3)”, Hiroshi
Tsutomi (1999).
PART TWO

Work Product of the 128th International Training Course

“MEASURES TO COMBAT ECONOMIC CRIME, INCLUDING MONEY LAUNDERING”
I. INTRODUCTION

The notion of economic crime is very large and there is, to my knowledge, not any precise and internationally established definition of what constitutes economic crime, although there may be such definitions in national law (for instance when defining the competence of an “economic crime prosecution office” and the like).

The Council of Europe adopted in 1981 a Recommendation No R (81) 12 on economic crime, which contains a list of economic offences. But this list is conditioned by the further complication that “owing to the generally recognised difficulty of giving an exact definition of economic crime, it was found necessary to delimit the concept by means of a list of offences (reference to the object) and a footnote (reference to the loss caused and description of the author)”. The Recommendation then goes on further to define 16 types/categories of offences which are then qualified by the footnote in question. The list is as follows:

1. Cartel offences
2. Fraudulent practices and abuse of economic situation by multinational companies
3. Fraudulent procurement or abuse of state or international organisations’ grants
4. Computer crime (e.g. theft of data, violation of secrets, manipulation of computerised data)
5. Bogus firms
6. Faking of company balance sheets and book-keeping offences
7. Fraud concerning economic situation and corporate capital of companies
8. Violation by a company of standards of security and health concerning employees
9. Fraud to the detriment of creditors (e.g. bankruptcy, violation of intellectual and industrial property rights)
10. consumer fraud (in particular falsification of and misleading statements on goods, offences against public health, abuse of consumers’ weakness or inexperience)
11. Unfair competition (including bribery of an employee of a competing company) and misleading advertising
12. Fiscal offences and evasion of social costs by enterprises
13. Customs offences (e.g. evasion of customs duties, breach of quota restrictions)
14. Offences concerning money and currency regulations
15. Stock exchange and bank offences (e.g. fraudulent stock exchange manipulation and abuse of the public’s inexperience)
16. Offences against the environment.

The footnote to the Recommendation mentions that the non-specific offences (3, 4, 9, 12-16) are to be taken into consideration when they caused or risked causing substantial loss, presuppose special business knowledge on the part of the offenders, and were committed by businessmen in the exercise of their profession or functions.

It is of importance to note that money laundering at the time of writing of the Recommendation apparently was not considered to be an economic crime; in most countries at that time it was probably not even considered to be a crime.\footnote{Head of Division, Council of the EU. The opinions expressed are the author’s own and cannot be attributed to the Institution for which he works.} It was simply legal to do money laundering at the time since the act of

\footnote{It was in fact only within the context of the discussions on the 1988 Vienna Drugs Convention that the definition of money laundering was thrashed out in an international setting. The Council of Europe had however, much before its time, already tackled the prevention of money laundering in a Recommendation No R (80) 10.}

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money laundering intervenes after the predicate offence has been committed and subsequent acts are in
general not punishable. In some countries, however, the act of money laundering could probably be
prosecuted as an offence of “receiving of stolen goods” (in French: recel), since that act presupposes a
predicate offence (usually a theft) and knowledge or substantive suspicions that the goods or money was
stolen or defrauded. The author “ought to have known or suspected” that the goods had been stolen or
defrauded.

Inspiration for what can be seen as economic crime can also be sought for example in the definition of
predicate offences in the second money laundering Directive\(^2\) of the European Parliament and the Council
of the European Union, which in some respects goes further than the Council of Europe list (drugs, criminal
organisations, fraud against the European Community, corruption, serious offences which may generate
substantial proceeds and which may engender severe punishment - the Directive is not more specific than
this, which de facto means that it is left for the member states to define what is a serious crime).

Moreover, offences like smuggling or trafficking in human beings, black labour or sexual exploitation of
human beings are increasingly considered to be relevant in the context of economic crimes.

For the sake of clarity one can consider economic crime to be serious crime which normally is committed
with a view to obtaining financial gain.

However, when it comes to putting money laundering into the concept of economic crime, it becomes
more difficult; the money launderer may commit money laundering with a view to concealing the
commission of a predicate offence that he himself committed\(^3\). In such a case, the primary purpose is not to
obtain economic gain but to conceal the money and to avoid the consequences of the act (or at least to be
able to keep the proceeds of the crime). One may therefore ask the question whether money laundering can
be seen as an economic crime at all since it does not fit in well even with such a broad definition. Since
money laundering after all is a question of money, it seems however appropriate to deal with it in the context
of economic crime although it may not fit in well with the definition above.

When one examines the offences of the Council of Europe list, one realizes that most of the offences on
the list have not been the subject of harmonisation through the adoption of international treaties, nor to
specific judicial cooperation conventions. There are however some exceptions, sometimes at the UN level
but, as far as I am aware, mostly in Europe within the context of the European Union or the Council of
Europe.

Computer crime has been defined both in the European Union\(^4\) and the Council of Europe\(^5\). Unfair
competition is the subject of an extensive regulation inside the European Community, but not through
criminal law but through the European Commission as a watchdog (with possibilities to have extensive
financial sanctions meted out by the European Court of Justice). Customs offences are subject to the
Convention on the Protection of the European Communities’ financial interests\(^6\). Offences concerning
forgery of money are the subject of the 1929 UN Convention\(^7\) and of a special Framework Decision of the
EU on counterfeiting of the Euro\(^8\). Offences against the environment, finally have a very weak legal basis in
the CITES Convention, but a stronger one in the Council of Europe Convention on the Protection of the
Environment through Criminal Law\(^9\) and the Framework Decision\(^10\) of the EU on the same subject.

\(^2\) See below.

\(^3\) In some States, this act is not criminal per se; it is considered to be an act “after the act” and thus not criminal.

\(^4\) Framework Decision on attacks on information systems (doc 8818/03 DROIPEN 28, 8687/03 DROIPEN 26); political
agreement on 28.2.03; awaiting parliamentary reservation but adoption expected soon.

\(^5\) Convention on Cybercrime, adopted on 23.11.2001, has entered into force after 5 ratifications; currently has 6 ratifications
and 32 signatures.

\(^6\) 26 July 1995; it has entered into force among the EU Member States and has in addition several Protocols.

\(^7\) International Convention for the suppression of counterfeiting currency, Geneva, 20 April 1929.


\(^9\) 4.11.98; not yet entered into force.

The EU Framework Decisions, which are binding on the Member States and which may become the subject of interpretation by the European Court of Justice, are used to harmonise (or “approximate” as the Treaty says) the law of the Member States of the European Union. They usually do not contain measures relating to judicial cooperation since other instruments within the European Union expressly deal with those, but will in any case be relevant as far as jurisdiction is concerned.

Other offences which have not been the subject of multilateral treaties or Framework Decisions inside Europe are nevertheless dealt with under civil law or company law within the European Union. For instance, a Directive deals with market abuse, but it does not include criminal law sanctions since under the Treaty, it is considered that Directives in the so-called first pillar (the European Community part) are not capable of containing criminal law sanctions.

In order to explain a bit more for the reader, who perhaps may not be so familiar with the institutional set up of the Union, I should like to give some more explanations on some of the terms that I use to explain European Union law, since this is a new, but fast moving area of international cooperation in criminal matters. In addition, the EU does not only concern its 25 current Member States but influences also widely in the States that are aspiring to become members - potentially some 15-20 more States. Moreover, since the EU through the implementation of the Common Foreign and Security Policy has become an important player on the international scene, in particular in UN negotiations, what the EU is deciding internally has also become very important in this area.

II. EUROPEAN UNION

The European Union was established by the Maastricht Treaty, which entered into force 1 November 1993. Before that date, criminal law cooperation of the European Community was outside of the Treaty - it was mainly carried out in the other European organisation, namely the Council of Europe which now has 45 Member States and which is clearly intergovernmental in nature whereas the EU is to a great extent a supranational body, which can take decisions that are binding on its Member States and liable to be scrutinized by the European Court of Justice.

In the new so-called third pillar of the EU, a legal basis was established for the adoption of measures, inter alia, in the fields of judicial cooperation in criminal matters and police cooperation. This reflected an acceptance by the Member States that the need for action at the European level in these areas had increased, in particular in the light of the free movement of persons, goods, services and money realised by the development of the internal market. Not only ordinary people, but also the criminals, benefited from the internal market, and countermeasures were needed.

Further momentum was given to the process by the entry into force of the Amsterdam Treaty on 1 May 1999. The Amsterdam Treaty provided for the integration of the Schengen acquis in the EU. It also made it possible to adopt more efficient legal instruments than those which had been available so far. In particular, the old Joint Action was replaced by the binding Framework Decision, and the jurisdiction of the Court of Justice was increased.

The fight against organised crime and economic crime was very much in focus from the outset, and it has been possible to adopt a number of EU instruments on approximation of substantive criminal law and cooperation in criminal matters. Of course, when adopting these instruments in the third pillar, account had to be taken of activities in the so-called first pillar of the EU - the European Community. And activities of various international organisations, such as the UN, the OECD and the Council of Europe also needed to be

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11 See Articles 34 and 35 of the Treaty on European Union.
12 For instance the European Arrest Warrant, which replaces extradition among the Member States of the EU since 1 January 2004, the Council of Europe Convention of 1959 on Mutual legal assistance in criminal matters and the Convention of 29 May 2000 on mutual legal assistance between the Member States of the EU.
13 A case is currently pending before the European Court of Justice in relation to the environment to verify if that doctrine is correct.
14 A Convention that was established in 1985, with an implementation agreement in 1990, that provides for increased measures in the field of judicial cooperation and free movement of persons.
15 The second pillar deals with Common Foreign and Security Policy.
kept in mind.

One example of non-criminal law EC measures (first pillar legislation) is the 1991 money laundering Directive16 which does not deal with the criminal law per se but only with the prevention aspects. The issue of money laundering is dealt with more closely below.

Other examples of these so-called first pillar measures are provisions on the protection of the EC’s financial interests as previously stated and different provisions in the field of company law, insurance law and intellectual property law.

A number of criminal law measures have been taken at the international level, both within the EU and within the wider17 European organisation called the Council of Europe. There has during the years been a lot of interaction between the EU and other international fora, in particular the Council of Europe. Therefore, a number of instruments have either been drafted first within the Council of Europe (environment, computer crime) and then taken over wholly or partially by the EU or vice versa (mutual assistance convention, terrorism). This may seem confusing to a non-European reader (and to many Europeans as well), but it is linked with the different legal status of the instruments and with the different institutional set up.

Important measures affecting the European scene have also been taken in the UN on transnational organised crime, and in particular the Convention and its 3 Protocols are relevant in this context. The UN Convention against corruption, adopted by the UN General assembly in October 2003, and signed in Mexico in December 2003, is also an important tool in the general fight against the form of economic crime consisting of corruption.

The Council of Europe and the OECD have also adopted measures on corruption, including a number of important Conventions.

Finally, the Council of Europe Conventions on environmental crime and on cybercrime are important as they, to a very large extent, have formed the basis for negotiating the EU Framework Decisions on the same subjects, as noted above.

But it is not only specific measures that are important in fighting economic crime and money laundering. We should also remember that general style criminal law measures are relevant, as they contain provisions directly or indirectly applicable in the fight against economic crime and money laundering. It is obvious that provisions improving the cooperation between the Member States in the fight against crime in general have a positive effect also regarding economic crime and money laundering. The EU 2000 Convention on mutual assistance18 in criminal matters provides for example: 1) assistance shall also be afforded regarding legal persons; 2) a framework for establishing joint investigation teams (repeated in the 2002 Framework Decision on joint investigation teams)19; and 3) provisions on interception of telecommunications. As regards investigations on money laundering, provisions in the Convention on undercover operations and on controlled delivery may be of particular interest.

The 2001 Protocol to the 2000 Convention20 contains a number of provisions of particular relevance to economic crime and money laundering: 1) A Member State must on request a) give details on bank accounts held by any natural or legal persons subject to a criminal investigation; b) inform on transactions made concerning specified bank accounts; and c) monitor bank transactions “real time” and 2) mutual legal assistance may not be refused on the sole ground of bank secrecy, or on the sole ground that it is about a fiscal offence.

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17 The EU has 25 Member States and the Council of Europe an additional 20, i.e. 45 member States.
18 Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States.
Examples of other general type instruments are the 2002 Decision setting up Eurojust\(^{21}\) and the 2002 Framework Decision on the European arrest warrant\(^{22}\). One could also mention in this context the recently adopted agreements with the USA on extradition and mutual assistance.

As regards criminal law EU measures particularly relevant to economic crime the following can be noted. As noted above, under the Maastricht regime, the EU adopted the 1995 Convention on the protection of the EC’s financial interests and its 1995 and 1996 Protocols. These instruments have to a large extent served as models for later instruments in the field of substantive criminal law. They define fraud and corruption against the European Community and oblige Member States to make the defined offences punishable. It is important to recognise that EU measures in the field of substantive criminal law are minimum measures. They provide for minimum definitions of offences, which must be punishable in all Member States. But each Member State of the EU may have a larger definition.

Instruments adopted after the above Convention, and in particular the Framework Decisions under the Amsterdam regime have also gone some way towards approximation of criminal sanctions. They provide for a minimum for the maximum penalty, which must be available for the defined offences. But each Member State of the EU may punish more severely if it wants to.

A separate Convention on corruption\(^{23}\) with a broader scope was adopted in 1997, and a Framework Decision on corruption in the private sector\(^{24}\) was adopted in July 2003. The adoption, also in July 2003, of the Framework Decision on the execution in the EU of orders freezing property and evidence is important, and linked with certain other draft instruments which will be discussed later.

As regards instruments currently negotiated in Brussels, in particular, two proposals on confiscation should be highlighted\(^{25}\).

The draft Framework Decision on confiscation orders is designed to follow the same principle as the below mentioned Framework Decision on freezing\(^{26}\) in relation to the final measure of confiscation. Confiscation orders may be issued as a follow-up to a freezing order or directly. The State in which the property concerned is located can only refuse to confiscate in limited and specified circumstances. The draft Framework Decision on confiscation of crime-related proceeds does in particular two things: It obliges all Member States to be able to confiscate proceeds of crime, or value corresponding to such proceeds, regarding all crimes punishable with 1 year or more of imprisonment. And it obliges all Member States to provide for “extended powers of confiscation” making it possible, under certain conditions, to confiscate property of the person sentenced other than property constituting proceeds of crime.

The Framework Decision on freezing makes it possible for a judicial authority in one Member State to issue a freezing order concerning property present in another Member State for the purpose of the subsequent confiscation of the property concerned. It is based on the new concept of mutual recognition that is being introduced gradually in different areas within the EU. The freezing order is not a request for freezing, but an order. The competent authorities of the Member State where the property is located must execute the order, unless it may refuse on the basis of a very limited list of grounds for refusal in the instrument.

The EU is also working on a few other instruments relevant to the fight against money laundering and economic crime in general. These are for instance the draft Framework Decisions on attacks against

\(^{21}\) Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

\(^{22}\) Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States.

\(^{23}\) Council act of 26 May 1997 drawing up the Convention on the fight against corruption involving officials of the European Communities or officials of the member States of the EU.


\(^{25}\) Latest texts are doc 10027/04 COPEN 69 (draft Framework Decision on the application of the principle of mutual recognition of confiscation orders) and doc 5299/03 DROIPEN 3 (draft Framework Decision on confiscation of crime-related proceeds, instrumentalities and property).

\(^{26}\) Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence.
information systems, on ship source pollution and on financial penalties.

III. MONEY LAUNDERING

The offence of money laundering was first, in an international context, mentioned in the old Council of Europe Recommendation from 1980 referred to above. The reason for this was that in Italy, terrorists had begun kidnapping politicians and had at the same time asked for ransom money which they later sought to conceal via money laundering operations in the banks. The first predicate offence to money laundering in Italy was in fact kidnapping.

With the explosion of the drugs trade in the 1970s and 1980s the situation became different. The issue was brought up in the context of the negotiations on the 1988 Vienna Drugs Convention and the international community was prepared to deal with the issue - there was a generally spread feeling among legislators and policy makers that there was a need to tackle the phenomenon resolutely.

The definition of money laundering was taken up not only in the 1988 Convention but also in the 40 Recommendations of the FATF and in the 1990 Convention. This contributed to a general consensus that something had to be done, although there was (and still is) doubt in some countries about making money laundering a criminal offence across the line (the so-called general approach), and not only for proceeds from drugs trafficking.

The activities of the FATF, MONEYVAL or other international groupings have however, had a great impact and there is a growing international consensus on the topic.

In the European Union, a number of initiatives have been taken in the form of binding legislation. Many of these initiatives follow the FATF Recommendations and, in fact, it is an official policy of the EU to support the FATF. This policy has been laid down in two meetings of the Justice and Home Affairs Ministers meeting with their counterparts in the Finance in 2000 and 2001.

The most important instrument is the Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. The Directive, which is binding on the Member States, was drafted following the first set of the 40 Recommendations of the FATF. The Directive provides in principle that credit institutions and financial institutions shall 1) identify and keep a record of customers and certain transactions, 2) on their own initiative or by request by the competent authorities inform these authorities on suspect activity relating to money laundering and 3) refrain from carrying out transactions they know or suspect are related to money laundering.

The scope of the 1991 Directive has been considerably enlarged by the 2001 amendment to it, both in terms of the criminal activity covered and in terms of the definition of the credit and financial institutions obliged to cooperate under the Directive. Thus, the obligations of the Directive were extended to certain non-financial activities and professions, including lawyers and accountants. This is a very important example of efficient, but very delicate, preventive non-criminal EU measures in the fight against economic crime.

The Directive is now under renegotiation for the third time with a view to including the recent amendments to the 40 Recommendations and also terrorist financing.

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28 This is a Council of Europe FATF style regional body operating within the framework of the Council of Europe.


30 OJ L 166/77, 28.6.91.


The Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime should be mentioned next. This Joint Action deals with a number of issues such as reservations to the previously mentioned Council of Europe Convention, training and other issues.

The Framework Decision on the same topic, which partially replaces the above mentioned Joint Action, approximates criminal law and addresses the issue of predicate offences and sanctions (at least 4 years imprisonment). Value confiscation is introduced throughout the EU, not only for purposes of international cooperation but also in purely internal procedures. The decision to do so was, in my opinion correct, as value confiscation is a modern measure that can be very effective against money launderers.

The Decision on cooperation between Financial Intelligence Units was adopted in 2000 and codifies the Egmont definition of FIUs. The Decision, which is binding on the Member States, enjoins the FIUs to cooperate to assemble, analyse and investigate relevant information within the EU. It lays down rules on exchange of information and on analysis thereof.

Several Member States have also set up a network between them, the so-called FIU.NET. In the long term, this will become an EU wide, compatible computer based service providing an automated and secure electronic environment for the controlled and structured receipt, processing and dissemination of disclosures of suspicious transaction reports made under the 1991 Directive and of financial intelligence between and among the financial institutions of the Member States, the FIUs and all other actors in the money laundering chain which are directly concerned. Currently about 10 member States are connected to the FIU.NET but as the other Member States see that tangible results are achieved, they will not be late in joining this interesting initiative. One problem has however been that the nature of the FIUs are different in the Member States; some are administrative, some police, some judicial in their nature, and some are a mixture. It has therefore been difficult for some FIUs to cooperate with one another; for instance to exchange information between a police and an administrative body. This problem has however been overcome with the entry into force of the above mentioned Framework Decision on the FIUs and the problems are less acute now.

The 1990 Council of Europe Convention on money laundering is of course extremely relevant regarding economic crime and also money laundering. The Convention which has been ratified by nearly 40 States, including all EU States, lays down rules on provisional measures and confiscation and defines money laundering in accordance with the 1988 Vienna Drugs Convention but promotes the general approach to predicate offences.

The Council of Europe is now taking steps towards a revision of the 1990 Convention within the context of a Committee called PC-RM. The first meeting on the subject took place in Strasbourg on 15 - 17 December 2003 and a recent meeting was held in the week of 6 September 2004. The aim of the work in Strasbourg is to include prevention, FIUs and some parts of terrorist financing. As negotiations are still ongoing, it is hard to predict the final outcome. Detailed discussions are however ongoing on a number of issues, such as reversal of the burden of proof as regards the lawful origin of alleged proceeds or other property liable to confiscation, expeditious freezing, freezing and confiscation of transformed or converted property, property acquired from legitimate sources if proceeds have been intermingled, the incorporation of some of the provisions of the 2001 Protocol to the EU mutual assistance convention mentioned above, etc.

All these measures have been developed in Europe in the space of some 15 years, mostly through the impulses given by the FATF, the Council of Europe and the EU. Since the EU has been able to develop legal instruments which are binding on the Member States - and which are even liable to be adjudicated before the Court of Justice if they have not been implemented properly - the EU instruments have had an enormous importance.

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33 OJ L 333/1, 9.12.98.
34 OJ L 182/1, 5.7.01.
35 OJ L 271/4, 24.10.00.
But it is of no use to develop instruments at an international level if implementation at the national level does not follow through. It could therefore be of some interest to take a closer look at how implementation has been in practice, and for that purpose I have chosen Belgium as an example.

Belgium set up in 1993 its FIU, the so-called CTIF\textsuperscript{38} in the context of the implementation of the 1991 Directive. Some organ had to receive the suspicious transaction reports which were rendered mandatory to make by the Directive and that task fell to CTIF which also had to collaborate with financial institutions, police, prosecuting authorities, banking regulators and foreign authorities.

CTIF is placed under the joint control of the Ministry of Justice and Finance in Belgium. It reports once a year to the responsible Ministers.

The task of CTIF is to receive the suspicious transaction reports, to analyse them and, after verification if serious reasons are present that money laundering may be at hand, to transmit the information to the police and the prosecutors. CTIF has thus a filtering role but does not have its own police or judicial powers, although it is headed by a prosecutor. Inside CTIF, financial experts with long experience are working, and they have to take an oath before the Minister of Justice. They are subject to professional secrecy. Until 2002\textsuperscript{39} 3 prosecutors and 3 financial experts were working for CTIF and were members of the Governing Body the “Cellule”, but its members are now 8 because of the increase in STRs. The Cellule meets twice a week and examines cases of suspicious money laundering. The Cellule has a Secretariat at its disposal of some 30 collaborators to the financial experts. There is an investigation department, a documentation department and a legal department. 3 police and one customs officer assists the Cellule.

When the Cellule receives an STR, it is immediately looked at, so as to enable a decision to block a money laundering operation. Such a decision must be taken within 24 hours. A verification is also immediately made with the database to enable CTIF to see if there are files connected with the STR. The Cellule may make contact with the bank, the police or other authorities and receive information from them.

When the file is complete, the Cellule itself examines it. At that stage 3 decisions may be taken: to request complementary information, to file the case or to transmit the case to the prosecutor. It is enough that only 2 persons (including the President) are present for a decision to be taken.

Between 1/12 1993 and 31/12 2002, the CTIF received 73,202 suspicious transaction reports. It transmitted 4972 to the prosecutor with sums involved of 9.82 Billion Euro. It made opposition in 140 cases. During the first year of its operation, CTIF received only 113 STRs but the figure had augmented to 5771 in 1996 and to 13,120 in 2002. Most declarations (46,109) have come from the Bureaux de change and from banks (15,632) and 5568 from stock exchange companies. According to the CTIF statistics, 60 % of the laundering cases transmitted to the prosecutor were in the placement stage, whereas 35 % were in the layering phase. Most cases concerned drugs (41.2 %) whereas 22.5 % concerned illicit trafficking in property, 8.5 % each concerned organised crime in general and fiscal fraud. Fifty-five cases, i.e. 1.1 %, were considered to concern terrorism. As a result of the transmission to the prosecutor, and according to CTIF’s minimal estimations, 416 cases were adjudicated in which 659 persons were convicted, 1332 years of imprisonment were handed out and fines of 14.2 Million Euro were meted out. 358.9 Million Euro were confiscated.

CTIF considers that its activities are very efficient and that its contribution to the fight against serious crime has been very important. After seeing these statistics, it is difficult not to agree.

**IV. CONCLUSION**

It is difficult in a short paper like this to deal with the vast subject of economic crime and money laundering in other than a cursory way and to be able to speak about experiences and international cooperation as well. The lessons learned of more than 18 years of discussion of economic crime and in particular money laundering can, however, be summarized as follows.

\textsuperscript{38} Cellule de traitement des informations financières - the body responsible for treating financial information.

\textsuperscript{39} According to available information.
It is impossible to fight money laundering without a clear legal basis. The first thing that has to be done is to adopt this clear legal basis in the criminal code so that not only money launderers but in particular law enforcement and regulators have something to hold on to. It should be remembered that money laundering until some 20 years ago was not criminalised in many countries, and it is only after a long discussion at the international level that the international community has come to realise the serious dangers represented by money laundering. Nowadays it seems that no one, at least no one serious, denies the fact that money laundering is one of the more serious offences we have in the statute books and that it is entirely justified to go after money launderers effectively.

When drafting a law on money laundering, seek to make the predicate offences as broad as possible. The United Kingdom started with drugs offences, then widened to include terrorism and ended up with all indictable offences. Italy started with kidnapping, then included drugs and ended up to include all crimes and delicts. Denmark had a list approach and has gone to a general approach. The United States, if it were to begin again, would probably take a similar approach but has now, I believe, more than 200 offences defined as predicate offences, etc. Learn from the mistakes of others.

Set up a dedicated FIU immediately and give it resources so that it can fulfil its task. It will pay off 100 fold. One of the tasks of the FIU should be to communicate with banks and other financial institutions and to give them feedback so that they understand that they are important in the chain of events. There is some money that banks don’t want and some money that does smell. It is a good business proposition to keep the banks clean - for the banks themselves in particular.

Plug into the international network of money laundering organisations wherever possible. Today’s money laundering operations are truly international so it is important to cooperate internationally - Egmont Group, FATF Regional Style bodies, join conventions, etc. This is the only way to be efficient.
EFFECTIVE COUNTERMEASURES AGAINST MONEY LAUNDERING IN THAILAND

Police Major General Peeraphan Prempooti*

I. FOREWORD

The Government of the Kingdom of Thailand has taken important steps to address the threat that the laundering of criminal proceeds poses to our financial stability and national security. The Thai Government has therefore demonstrated its serious commitment to combat money laundering through its enactment of the Anti-Money Laundering Act of B.E. 2542 (1999). The Act creates for the first time a single law enforcement agency called the Anti-Money Laundering Office or AMLO with unprecedented investigatory powers. This law also criminalizes money laundering and related conspiracy and creates a civil forfeiture system for confiscating assets involved in a laundering offence.

The AMLO is Thailand’s anti-money laundering regulatory agency. It is an independent agency empowered to authorize the search of places and vehicles as well as the restraint and seizure of assets. It has also been given the authority to seek court approval for law enforcement to conduct electronic surveillance where there is evidence of a money laundering offence. The AMLO may pursue the forfeiture of assets through civil proceedings, and has the responsibility for the custody, management, and disposal of seized and forfeited property.

II. ANTI-MONEY LAUNDERING ACT B.E. 2542 (1999)**


The Vienna Convention had been drafted among more than 100 UN member countries with the view to strengthen law enforcement on drug trafficking by prosecuting financiers or cutting off their funds. The Convention was resolved on 19 December 1988, at which time 71 countries ratified it.

The Office of the Narcotics Control Board (ONCB), the Thai coordinating body on drug matters, realized the importance of being a party to the Convention. The Office thus set up an ad hoc committee comprising representatives from concerned government agencies which resolved on 16 May 1990 that Thailand should accede to the Convention subject to the completion of certain legislative measures compliant with obligations addressed in the Convention. Two years later, a working group, chaired by a representative from the Office of the Attorney-General, was set up with the mandate to consider whether Thailand had domestic legislative and administrative measures to comply with the Convention.

At that time, the working group was of the view that with the absence of domestic law concerning money-laundering control, Thailand may not be ready to be a party to the Convention. Consequently, the ONCB and relevant government agencies took initiatives to draft the Anti-Money Laundering Bill and forwarded it to the Cabinet and the Parliament for consideration. The Bill passed the Parliament on 19 March 1999, before being gazetted on 21 April 1999 and coming into force on 19 August 1999.

The Anti-Money Laundering Act B.E. 2542 (1999) contains 66 sections with 7 Chapters as follows:

Chapter 1: General Provisions in sections 5-12
Chapter 2: Duties to Report the Required Information in sections 13-23
Chapter 3: Anti-Money Laundering Board in sections 24-31

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Chapter 4: Transaction Committee in sections 32-39  
Chapter 5: Anti-Money Laundering Office (AMLO) in sections 40-47  
Chapter 6: Actions on Assets in sections 48-59  
Chapter 7: Penalties in sections 60-66

A. Section 3

Definition terms are prescribed in section 3 of the Act. Currently, there are eight predicate offences as listed below:

1. Narcotics;
2. Trafficking in or sexual exploitation of children and women in order to gratify the sexual desire of another person;
3. Cheating and fraud on the public;
4. Misappropriation or cheating and fraud under other commercial banks and financial legislation;
5. Malfeasance in office or judicial office;
6. Extortion and blackmail committed by organized criminal association or an unlawful secret society;
7. Customs evasion;
8. Terrorism.

Note

The Thai Government is in the process of amending the AML Act to include the following predicate offences.

1. Exploitation of natural resources
2. Money Exchange Control Act
3. Stock manipulation
4. Illegal gambling
5. Arms smuggling
6. Unfair practice in public procurement
7. Labour fraud
8. Offences relating to the Excise Law

The financial institutions having the legal obligation to report financial transactions to the AMLO consist of commercial banks; finance companies; securities companies; credit financers; insurance and assurance companies; and saving cooperatives, etc. Section 3 also defines “Transaction” and “Suspicious Transaction” as the following:

“Transaction” means any activity relating to a juristic act, contract, or any operation with other persons dealing with finance, business or involving properties.

“Suspicious Transaction” means a transaction that is more complicated than the norm by which that transaction is usually conducted, a transaction that lacks economic rationale; a transaction where there is probable cause to believe that it was conducted for the purpose of avoiding the compliance of this Act; or a transaction related to or possibly related to a commission of any predicate offence, whether the commission of such transaction is conducted once or more.

B. Sections 5 - 9

These sections address the criminal offence of money laundering. In the past decades, it is evident that crimes have become increasingly complicated and sophisticated. Domestic crime has stepped up to transnational organized crime with a large amount of assets involved. The major characteristics of a transnational organized crime can be described as follows.

1. The division of labour: There are specialists, such as lawyers and accountants, involved in these illegal activities so that the criminals can use their expertise to technically conceal or distort money derived from an illegitimate source.
2. Committing several crimes: The transnational criminal tends to commit several crimes at one time that are jointly organized by criminal groups of both local and foreign origin. There is a cooperation and coordination network to support their group activities as well.
3. Maximizing profits: The main aim of any transnational organized crime is to maximize profits or benefits. Mostly money or benefits derived from illegal activities will be transformed for the purpose of concealing their illegitimate source of funds. This fund will be laundered into clean money and then used to support their illegal activities, thus becoming a vicious cycle.
Therefore, special measures are prescribed in these sections to enable more effective law enforcement in tackling transnational crimes. For example: (1) Transferring or transforming or disguising of properties related to an offence shall be deemed as a money laundering offence. (2) Whoever commits a money laundering offence, even if the crime was committed outside the Kingdom, shall receive the penalty within the Kingdom, if: (a) either the offender or co-offender is a Thai national or resides in the Kingdom; (b) the offender is an alien and has taken action to commit an offence in the Kingdom or is intended to have the consequence resulting therefrom in the Kingdom, or the Royal Thai Government is an injured party; or (c) the offender is an alien whose action is considered an offence in the State where the offence is committed under its jurisdiction, and if that individual appears in the Kingdom and is not extradited under the Extradition Act, Section 10 of the Penal Code shall apply mutatis mutandis.

C. Sections 13 - 23

These sections address transaction reporting and the Know Your Customer (KYC) measure. Presently, financial institutions and persons having legal transaction report obligations have to report the following three categories of transaction to the AMLO.

(1) Any cash transaction worth Bt 2 million or more;
(2) Any property transaction, including S.W.I.F.T. and Bahtnet transfers, worth Bt 5 million or more; (A Bahtnet transfer is a domestic money transfer between financial institutions)
(3) Any suspicious transaction for which the KYC principle shall be applied. (An example of a suspicious transaction is any cash transaction worth slightly less than 2 million baht (in order to avoid reporting to the AMLO), being transacted several times a day using the same bank account, or different bank accounts owned by the same person, choosing to make the transactions at the bank closing hour.)

Exemptions to the requirement of transaction reporting are given to the following parties:

(1) Members of the Royal family;
(2) The public sector comprising the government, central government agencies, provincial and local government administrations; state enterprises and public organizations;
(3) The Foundations belonging to members of the Royal family comprising (a) Chaipattana Foundation, (b) H.M. the Queen’s Foundation for the Promotion of Supplementary Occupations and Related Techniques, and (c) Sai Jai Thai Foundation;
(4) Transactions connected with property under the movable category being made with financial institutions except for: (a) transactions by domestic money transfer using the Bahtnet service under the Bank of Thailand rules governing the Bahtnet service or inter-bank cross-country money transfers using the service of the Society for Worldwide Interbank Financial Telecommunication, Limited Liability Co-operative Society (S.W.I.F.T. s.c.); (b) Transactions connected with ships, ships having tonnage from six tons or more, steam ships or motor boats having tonnage from five tons or more, including rafts; (c) Transactions connected with vehicles, instruments or any other mechanical equipment;
(5) The execution of loss insurance contracts except for compensation under the loss insurance contracts expecting to make payments of ten million baht or more;
(6) The registration of rights and juristic acts under the category of transfer to be public benefit land or the obtainment by possession or by prescription under Section 1382 or Section 1401 of the Civil and Commercial Code.

The transaction report forms:
(1) AMLO 1-01: cash transactions reported by financial institutions;
(2) AMLO 1-02: property transactions reported by financial institutions;
(3) AMLO 1-03: suspicious transactions reported by financial institutions;
(4) AMLO 1-04-1: cash transactions reported by insurance or assurance companies;
(5) AMLO 1-04-2: property transactions reported by insurance or assurance companies;
(6) AMLO 1-04-3: suspicious transactions reported by insurance or assurance companies;
(7) AMLO 1-05: suspicious transactions reported by investment consultants.

Any cash or property transactions occurring during the first 15 days and the latter half of the month shall be reported to the AMLO during the periods of the 16th - 22nd day of that month and the 1st - 7th day of the following month, respectively. Any suspicious transaction shall be reported within seven days of having a reasonable suspicion.

Additionally, according to the Know Your Customer (KYC) measure, a citizen identification card or other
identification cards issued by any government agency are required for any transaction with a financial
institution. All the above records have to be maintained for a period of five years from the date that the
account was closed or the termination of relations with the customer, or from the date that such transaction
occurred, whichever is longer, unless the competent official notifies the financial institution in writing to do
otherwise.

D. Section 24
This section addresses the composition of the Anti-Money Laundering Board which acts as the policy
maker on money laundering issues. The number of Board members shall not exceed 27 persons as listed
below.

1. The Prime Minister (Chairman);
2. Minister of Finance (Vice-Chairman);
3. The Permanent Secretary of the Ministry of Justice;
4. The Attorney-General;
5. The Commissioner-General of the Royal Thai Police;
6. The Secretary-General of the Office of the Narcotics Control Board;
7. The Director-General of the Fiscal Policy Office;
8. The Director-General of the Department of Insurance;
9. The Director-General of the Department of Lands;
10. The Director-General of the Customs Department;
11. The Director-General of the Revenue Department;
12. The Director-General of the Department of Treaties and Legal Affairs;
13. The Governor of the Bank of Thailand;
14. The President of the Thai Banking Association;
15. The Secretary-General of the Securities Exchange Commission;
16)-(24) Nine qualified experts appointed by the Cabinet from those who have expertise in economics,
monetary affairs, finance, law or any other related fields beneficial to the execution of this Act
with the consent of the House of Representatives and the Senate respectively as a member of
the Board;
25. The Secretary-General of the AMLO as the Secretary of the Board
26) - (27) Two AMLO officials as the Assistant Secretaries of the Board.

III. EXECUTIVE SUMMARY
Pursuant to the U.N. Security Council Resolutions 1267 (1999), 1269 (1999), 1333 (2001), and 1373
(2001), the Thai government issued instructions to all authorities concerned to comply with these U.N.
resolutions, including the freezing of funds or financial resources belonging to the Taliban and the Al-Qaeda
network. The relevant authorities and the Council of State have considered relevant domestic laws and
regulations in order to make necessary amendments thereto in order to implement the Resolution in full.

In this regard, the amendments on the Penal Code and the Anti-Money Laundering Act, B.E. 2542 (1999)
were initiated to empower the relevant authorities, particularly the Anti-Money Laundering Office (AMLO),
in taking effective countermeasures against money laundering and other illegitimate financing. Moreover,
the amendment of the Penal Code defines the scope of terrorism and prescribes the act of terrorism as a
serious offence with severe punishment under the Thai criminal law. And, the amendment of the Anti-
Money Laundering Act includes terrorism, as defined by the Criminal Code, as a predicate offence according
to the Act. On 5 August 2003, the Thai Cabinet approved the amendments to the Penal Code and to the Anti-
Money Laundering Act to criminalize financing of terrorism which became effective from 11 August 2003.
The Parliament endorsed these two amendments on 9 April 2004.

In addition, the AMLO is now in the process of amending the Act to include an additional 8 predicate
offences relating to 1) the exploitation of natural resources, 2) the Money Exchange Control Act, 3) stock
manipulation, 4) illegal gambling, 5) arms smuggling, 6) unfair practice in public procurement, 7) labour
fraud, and 8) offences relating to the Excise Law.

Meanwhile, the Bank of Thailand and the AMLO have requested all commercial banks and financial
institutions to promptly report their suspicions of any transactions that may be linked, or related to, or are to
be used for terrorism, terrorist acts or by terrorist organizations.
Intelligence and security agencies in Thailand have been on high alert since the 11 September incident. The Thai intelligence agencies, both civilian and military/law enforcement, have placed a high priority on information sharing and networking with their foreign counterparts, especially the U.S. agencies. The AMLO of Thailand has been a member of the EGMONT Group since 2001. The membership has enabled the Office to have access to, and exchange information with 93 other members.

Thailand also has the Mutual Assistance in Criminal Matters Act (1992), which forms a broad basis for cooperation with other countries with regard to criminal matters i.e. taking testimony and statements of persons; providing documents, records and evidence for prosecution and search and forfeiture of property. The law is supplemented by Treaties of Mutual Assistance in Criminal Matters that Thailand has with six countries: namely, the United States, Canada, the United Kingdom, France, Norway and India.

In conclusion, Thailand has adopted a firm policy in condemning terrorism in all forms and manifestations. In practice, all authorities have done their utmost to ensure that Thailand will not be used as a base for the commission of any terrorist acts against any other country and that terrorists will never find a safe haven in Thailand.

IV. ANTI-MONEY LAUNDERING OFFICE (AMLO): ORGANIZATION AND FUNCTIONS

The AMLO was set up under section 40 of the AML Act. The Office was initially under the Office of the Prime Minister. Following the public sector reform on 2 October 2002, the AMLO became an independent agency with the functions and responsibilities as follows:

1. Acting in accordance with the resolutions of the Board and the Transaction Committee, and carrying out other administrative functions;
2. Receiving transaction reports which are delivered in accordance with the requirements in chapter two, and issuing an acknowledgement of such reports;
3. Collecting, tracing, monitoring, studying, and analyzing reports or any other information related to financial transactions;
4. Collecting evidence in order to prosecute any violator under the provisions of this Act;
5. Launching an education programme in order to disseminate information, educate and provide training pertaining to the undertaking of this Act, or assist or support both public and private sectors to launch such programmes; and
6. Carrying out other functions in accordance with the provisions of this Act or other laws.

The AMLO is divided into one Bureau and four Divisions as shown in the chart:

The head of the AMLO is the Secretary-General. There are two Deputy Secretary-Generals to assist the Secretary-General in supervising and administrating the AMLO’s tasks. The Examination and Litigation
Bureau is responsible for investigation and civil legal proceedings. The Information and Analysis Centre acts as the AMLO’s FIU responsible for transaction reports collection and analysis, including the arrangements for the signing of MOU on information exchange regarding money laundering with other foreign FIU counterparts. The Law Enforcement Policy Division is responsible for anti-money laundering policy, training, public relations and foreign affairs. The Asset Management Division is responsible for keeping, maintaining and disposing of seized asset. The General Affairs Division is responsible for personnel and budget management.

V. TRANSACTION REPORTS

Sections 48-59 of the AML Act B.E. 2542 address the process of report examination and procedures concerning assets. The flow chart, starting from obtaining transaction reports through money laundering prosecution, is shown below:
Upon receiving transaction reports, either from financial institutions, land offices, investment consultants, other government agencies or even complaint letters, the AMLO will examine and analyze the reports, followed by an investigation as necessary.

If there are reasonable grounds to believe that the transaction could possibly be related to any predicate offence or money laundering offence, the officer in charge will submit the matter to the Transaction Committee or the AMLO Secretary-General (in case of emergency) for consideration. If the Transaction Committee considers that the transaction may be engaged with predicate offences or money laundering, it has the power to restrain all transactions of involved suspected persons for 3 working days in case of having probable cause, and 10 working days in case of having probable evidence. Furthermore, if there is a believable reason that the asset related to an offence may be transferred, distributed, moved or be transformed, the Transaction Committee has the power to seize the asset for a period not exceeding 90 days. All transaction restraints and temporary asset seizures shall be reported to the AMLO Board.

If the asset seized by the order of the Transaction Committee or the Secretary-General is unsuitable to be kept in custody or burdensome to the Government rather than the utilization thereof for other purposes, the Secretary-General may do the following:

- order those who have a vested right in the asset to maintain and utilize the asset with bail or security;
- issue an order for a sale by auction and then keep cash in the bank account;
- issue an order to utilize such asset for official purposes

The above action is intended to prevent asset devaluation due to depreciation and inappropriate asset maintenance. If the court finally issues an order to return the asset to the owner or holder or the vested interest recipient of the asset in the belief that the person has owned the asset honestly and/or with compensation, this process would also reduce damage occurring to the person in good faith as well.

In case there is evidence to believe that the asset is related to an offence, the Secretary-General will forward the case to the public prosecutor to consider filing a petition to the court for the Government to take ownership of the asset. If the public prosecutor considers that there is insufficient evidence to file a petition to the court, the case will be returned to the Secretary-General upon which he would re-consider and then submit the case to the public prosecutor again. In case the public prosecutor maintains his view that there is not enough evidence, he will inform the AMLO Board via the Secretary-General for a decision. The AMLO Board has to consider the matter within 30 days from the date of receipt. Otherwise, the case shall be in line with the public prosecutor’s opinion.

During processing the case to the court, if there is probable cause to believe that there may be a transfer, distribution or movement of any asset related to an offence, the Secretary-General could pass the subject to the public prosecutor to file the petition to the court for the provisional asset forfeiture.

After receiving the petition to turn over the ownership of the asset to the Government from the public prosecutor, the court will order a notice be posted at the court and to publish in a local well-known newspaper for two consecutive days so that individuals who may claim ownership or have vested interest in the asset may file an objection to the petition to the court prior to the issuance of the court order. In case the court believes that the asset named in the petition is related to an offence and the petition of the claimant has no merit, the court will give the confiscation order to turn over the ownership of the asset to the Government. However, if the court believes that the petition of the claimant has merit, the court may issue an order to protect the rights of the recipient claimant with or without conditions.

The petition for asset return shall be filed with the court within one year from the date of the final court confiscation order. If the claimant does not file the petition within one year, he must prove that he honestly was not aware of the notification or written notice of the Secretary-General. In case an owner or holder or a vested interest recipient of the asset can establish the validity of the claim to the satisfaction of the court, the court may order the return of the asset or may set any condition for claimant rights’ protection.

Although the Anti-Money Laundering Act B.E. 2542 (1999) has been effective since 19 August 1999, the
AMLO began its operations from 27 October 2000 onwards, pending the issuance of concerned Ministerial Regulations.

During the period of 27 October 2000 - 31 July 2004, the AMLO handled 294 cases, 140 of which have been ruled on by the court. The rest are being considered by the court. Details are shown in the following Figure.

Of the total 294 cases, 266 cases were drug offences, accounting for 90.48%. Customs evasion offences ranked second totalling 9 cases, accounting for 3.06%. At the time of this report, there are no cases concerning blackmail and terrorism. Details are illustrated in the following Figure.
During the period of 27 October 2000 - 31 July 2004, the AMLO seized assets pertaining to predicate offences and money laundering amounting to approximately Bt 3,575 million. According to the following Figure, most of the assets were land and premises accounting for 43.12%, followed by the attached bank accounts 30.67%.

### VI. PENALTIES

The penalties imposed on those who violate or are non-compliant with the AML Act pursuant to sections 60-66 are summarized below:

1. Whoever is found guilty of money laundering activities will receive a jail term of 1-10 years and/or be fined from Bt 20,000 to Bt 200,000 (540 - 5,400 USD) in case of an individual; from Bt 200,000 to Bt 1 million (5,400 - 27,000 USD) in case of a juristic person;
2. If a person having a legal transaction reporting obligation fails to report, he/she will receive a jail term not exceeding 2 years and/or be fined from Bt 50,000 - Bt 500,000 (13,500 USD);
3. Whoever discloses any official secret concerning the proceedings according to the AML Act without authorized legal power will receive a jail term not exceeding 5 years and/or be fined not more than Bt 100,000 (2,700 USD).

Penalties will be doubled for public officials, politicians at any level, and employees of any state enterprise, members of a board, managers, any individual who is responsible for the management of a financial institution, or members of any organizations under the Constitution.

Penalties will be tripled for any member of the AMLO Board, member of the Sub-Committee Board, member of the Transaction Committee, AMLO Secretary-General, Deputy Secretary-General and competent public and judicial officials empowered to act in accordance with this Act, who commit any malfeasance in office.

### VII. FINANCIAL INTELLIGENCE UNIT (FIU)

In Thailand, the Financial Intelligence Unit (FIU) is a part of the AMLO with the Information and Analysis Centre acting as the Thai FIU. Its main responsibilities can be described as the following:

1. To receive and to keep electronic transaction reports derived from financial institutions and other sources.
2. To preliminarily examine and analyze transaction reports, particularly suspicious transaction reports, and information concerned.
3. To act as the central authority of Thailand in exchanging of financial information, including signing the Memorandum of Understanding (MOU) on financial information exchange, with other foreign FIUs.
(4) To set up and to maintain the AMLO database, computer and communication systems.

Most transaction reports are sent to the AMLO in the form of an electronic file. There were 2,045,131 reports from 27 October 2000 - 31 July 2004 accounting for about Bt 395 trillion. At the end of 31 July 2004, 52.87% of all reports dealt with property; 41.40% were cash reports; and 5.73% were suspicious transaction reports. As shown in the following Figure, the proportions remained steady. Only after November 2003, did the proportions of the cash transaction and property transaction reports moderately fluctuate.

Presently, the Information and Analysis Centre (Thailand FIU) has 22 staff that can be divided into two groups: the first group is responsible for financial transaction analysis and information exchange; the second for the installation and maintenance of a database and computer systems.
VIII. INTERNATIONAL COOPERATION

Thailand became a member of the APG (Asia/Pacific Group on Money Laundering) in 2001. The APG annual meeting provides a platform for discussing the practical issues associated with the implementation of money laundering and terrorist financing countermeasures. Thailand is also a member of the Egmont Group of Financial Intelligence Units, which is an informal group consisting of Financial Intelligence Units from 94 jurisdictions. Besides that, the AMLO has also communicated information to a corresponding authority of foreign states. The cabinet has given authority for the AMLO Secretary-General to enter into arrangements with the AMLO’s corresponding authorities. To date, the AMLO has signed the “Memorandum of Understanding Concerning Co-operation in the Exchange of Financial Intelligence Related to Money Laundering” with 11 countries for the exchange of financial intelligence as listed below:

2. Brazil effective on 29 January 2003.
5. Romania effective on 24 March 2003.
7. Finland effective on 22 April 2004.

In addition, several countries are in the stage of negotiation, namely Japan, the Philippines, Malaysia, and the Dominican Republic, etc. As for those countries that have not signed the MOU with the AMLO, an exchange of information is undertaken on a reciprocal basis.
AMENDMENTS TO THE PENAL CODE AND ANTI-MONEY LAUNDERING ACT

To comply with UN Resolution 1373, on August 5, 2003, Thailand passed two major Executive Decrees to amend the Penal Code and the Anti-Money Laundering Act being effective from August 11, 2003 onwards.

A. The Amendments to the Penal Code Section 135

Section 135/1
Any person, committing any of the criminal offences stated below:

1. using force to cause death, damage, or serious injury to the life and freedom of an individual;
2. causing serious damage to a public transportation system, a telecommunication system, or an infrastructure facility of public use; or
3. causing damage to property, places, facilities or systems belonging to a State or government, a person or an environment system, resulting or likely to result in major economic loss;

who causes serious damages, evokes public fear, or raises civil unrest with the intention to intimidate a population, to threaten or compel the Royal Thai Government, or any government or an international organization to do or abstain from doing any act; that person shall be deemed to have committed an act of terrorism and shall receive a sentence of either the death penalty, life imprisonment, or imprisonment from three to twenty years. The person shall also pay a fine of 60,000 - 1,000,000 baht.

Any demonstration, gathering, protest, or movement that calls for the government’s assistance or for fair treatment, which under the Thai Constitution are legal exercises, shall not be regarded as a terrorist offence.

Section 135/2
Any person who:

1. threatens to commit a terrorist act and shows behaviour convincing enough to believe that the person will do as said;
2. collects manpower or stockpiles weapons, provides or compiles any property, or organizes any preparation or conspires for the purpose of committing a terrorist act; or commits any offence which is part of a terrorist plan; or abets persons to participate in the commission of terrorism; or is aware of the act of terrorism and conceals such act; that person shall receive a sentence of imprisonment from two to ten years and shall pay a fine of 40,000 - 200,000 baht.

Section 135/3
Any person who is involved or collaborates with the offender as stated in 135/1 or 135/2 shall receive identical punishment.

Section 135/4
Any person who is a member of a group of people classified as a terrorist organization by either a United Nations Security Council resolution or declaration, which Thailand has endorsed; that person shall be deemed to have committed an act of terrorism. The person shall receive a sentence of imprisonment not exceeding seven years and shall pay a fine not exceeding 140,000 baht.

B. The Amendments to the Anti-Money Laundering Act (2542/1999) Section 3

Section 3/8

Offences relating to terrorism under the Penal Code
Once the offences involving terrorist acts having been enacted, suspicious activity reporting [SAR] will automatically extend to this new offence.
In addition to the International Convention for the suppression of the Financing of Terrorism 1999, the United Nations Security Council passed Resolution 1373, which requires all UN member States to prevent and suppress the financing of terrorist acts and to freeze all assets linked to terrorists. Moreover, on October 2001, an emergency meeting was convened by the Financial Action Task Force [FATF] in Washington, D.C. FATF is an independent international body comprised of 29 country members and 18 regional bodies and observer organizations, which has set the international standards for anti-money laundering efforts through its issuance of the 40 Recommendations. Thailand participates in FATF through its membership in the Asia Pacific Group [APG]. At this extraordinary meeting, the FATF considered what the worldwide response should be to combat terrorist financing. On October 31, 2001, the FATF announced a special set of 8 Recommendations on Terrorist Financing to supplement the existing 40 Recommendations.

The new framework announced by FATF to assist in detecting, preventing, and suppressing the financing of terrorism and terrorists acts, in which Thailand has completed the self-assessment against the FATF’s 8 Special Recommendations above, is as follows:

I. SUMMARY

Pursuant to the U.N. Security Council Resolutions 1267 (1999), 1269 (1999), 1333 (2001), and 1373 (2001), the Thai government issued instructions to all authorities concerned to comply with these U.N. resolutions, including the freezing of funds or financial resources belonging to the Taliban and the Al-Qaida network. The relevant authorities and the Council of State have considered relevant domestic laws and regulations in order to make necessary amendments thereto in order to implement the Resolution in full.

On 5 August 2003, the Thai Cabinet approved the two draft amendments being effective 11 August 2003 onwards of the Penal Code and the Anti-Money Laundering Act to prescribe financing of terrorism as a serious offence under the Thai criminal law and to empower the AMLO to freeze terrorist funds as mandated by the UNSC Resolution 1373.

In effect, all financial institutions in accordance with the Anti-Money Laundering Act are required to promptly report their suspicions of any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

Intelligence and security agencies in Thailand have been on high alert since the 11 September incident. The Thai intelligence agencies, both civilian and military/law enforcement, have placed high priority on information sharing and networking with their foreign counterparts, especially the U.S. agencies. The Anti-Money Laundering Office of Thailand has become a member of the EGMONT Group since 2001. The membership has enabled the Office to have access to and exchange information with other members.

Thailand also has the Mutual Assistance in Criminal Matters Act (1992), which forms a broad basis for cooperation with other countries with regard to criminal matters i.e. taking testimony and statements of persons; providing documents, records and evidence for prosecution and search and forfeiture of property. The law is supplemented by Treaties of Mutual Assistance in Criminal Matters that Thailand has with six countries: namely, the United States, Canada, the United Kingdom, France, Norway and India.

In conclusion, Thailand has adopted a firm policy in condemning terrorism in all forms and manifestations. In practice, all authorities have done their utmost to ensure that Thailand will not be used as a base for the commission of any terrorist acts against any other country and that terrorists will never find a safe haven in Thailand.

II. THAILAND ASSESSMENT: EIGHT SPECIAL RECOMMENDATIONS

The framework announced by FATF to assist in detecting, preventing, and suppressing the financing of terrorism and terrorists acts in which Thailand has completed the self-assessment against the FATF’s 8
Special Recommendations above is as follows:

A. Ratification and Implementation of UN Instruments

In complying with the related U.N. resolutions concerning actions taken on Taliban Groups in particular resolutions 1267/1999, 1269/1999, the Thai Cabinet issued an instruction on 21 December 1999 to all authorities concerned to comply with these U.N. resolutions, including the freezing of transfer funds or financial resources belonging to the Taliban.

On 5 August 2003, the Thai Cabinet approved the two draft amendments being effective 11 August 2003 onwards of the Penal Code and the Anti-Money Laundering Act to prescribe financing of terrorism as a serious offence under the Thai criminal law and to empower the AMLO to freeze terrorist funds as mandated by the UNSC Resolution 1373.

In effect, all financial institutions in accordance with the Anti-Money Laundering Act are required to promptly report their suspicions of any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

Thailand has been party to four conventions and a protocol relating to terrorism concluded in the framework of the International Civil Aviation Organization (ICAO); namely, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988).

The Minister of Foreign Affairs of Thailand signed the International Convention for the Suppression of the Financing of Terrorism on 18 December 2001. As for the other 7 conventions, the Cabinet resolved on 11 December 2001 to endorse, in principle, for Thailand to be a party to all the remaining conventions relating to terrorism pending the necessary amendments of domestic laws to enable full compliance with each convention.

On 25 February 2002, the Cabinet resolved to set up the National Committee on Consideration of Becoming a Party to International Conventions relating to Terrorism as proposed by the Ministry of Foreign Affairs. This National Committee is empowered: to consider details of the remaining 8 related international conventions and to enact or amend relevant domestic laws in order to implement all obligations under those conventions.

B. Criminalizing the Financing of Terrorism and Associated Money Laundering

In 1999, Thailand established the Anti-Money Laundering Office to take effective countermeasures against money laundering and other illegitimate financing. According to the resolution of the Cabinet on 2 October 2001, the Council of State proposed the two draft amendments of the Penal Code and the Money Laundering Act. The draft amendment of the Penal Code defines the scope of terrorism and prescribes the act of terrorism as a serious offence with severe punishments under the Thai criminal law.

On 5 August 2003, the Thai Cabinet approved the two draft amendments being effective 11 August 2003 onwards.

C. Freezing and Confiscating Terrorist Assets

At present, the existing domestic laws provide a legal basis for the Anti-Money Laundering Office, to freeze the transfer of funds or financial resources of persons or entities suspected of committing or facilitating the commission of terrorist acts. The amendments to the Penal Code and to the Money Laundering Act are to make terrorist acts under the Penal Code an offence under the Money Laundering Act. Accordingly, the laws empower the Anti-Money Laundering Office to freeze the transfer of funds or financial resources of alleged terrorists and their accomplices.

D. Reporting Suspicious Transactions related to Terrorism

All financial institutions in accordance with the Anti-Money Laundering Act are required to promptly
report their suspicions of any transactions that may be linked, or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations.

E. International Co-operation

Intelligence and security agencies in Thailand have been on high alert since the 11 September incident. Thai intelligence agencies, both civilian and military/law enforcement, have placed a high priority on information sharing and networking with their foreign counterparts, especially the U.S. agencies. The Anti-Money Laundering Office of Thailand has become a member of the EGMONT Group since 2001. The membership has enabled the Office to have access to and exchange information with other members on the memorandum of understanding (MOU) basis.

Thailand also has the Mutual Assistance in Criminal Matters Act (1992), which forms a broad basis for cooperation with other countries with regard to criminal matters i.e. taking testimony and statements of persons; and providing documents, records and evidence for prosecution and search and forfeiture of property. The law is supplemented by Treaties of Mutual Assistance in Criminal Matters that Thailand has with six countries: namely, the United States, Canada, the United Kingdom, France, Norway and India.

At the regional level, Thailand has strengthened its counter-terrorism cooperation within the framework of ASEAN in accordance with the ASEAN leaders’ Declaration on Joint Action to Counter Terrorism of November 2001. The Terrorism component of the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime was adopted at the Special ASEAN Ministerial Meeting on Terrorism, held in Kuala Lumpur on 20-21 May 2002. In addition, Thailand has expressed its willingness to accede to the Trilateral Agreement on Information exchange and Establishment of Communication Procedures between Indonesia, Malaysia and the Philippines, which was signed on 7 May 2002.

F. Alternative Remittance

Under the Exchange Control Act, all person or legal entities that provide services for the transmission of money or value must be approved by the Minister of Finance under the recommendation of the Bank of Thailand. Any persons or legal entities that carry out this service illegally are subject to civil or criminal sanctions under this law. Commercial banks are required to report all outgoing foreign transfers within 3 days of the transaction date. Any suspicious ones will be reported to the Anti-Money Laundering Office. A number of laws and regulations have been enacted to curb informal activities. Education as well as measures such as a reduction of registered capital for money changers have been provided to encourage informal agents to enter the system.

In addition, as a countermeasure against alternative means of cash transactions by remittance agents, Thailand is to enact a Ministerial attach to the Exchange Control Act in regard to cash transactions of foreign currency equivalent to or over USD 10,000.

G. Wire Transfers

Under the current Anti Money Laundering Act B.E. 2542, any person or legal entity that has the approval to provide services for the transmission of money must require their customers to provide accurate and meaningful originator information. Furthermore, the Anti-Money Laundering Office imposes legal obligations for such persons or entities to report certain kinds of transactions namely: (1) a transaction involving cash in an amount equal to or exceeding two million baht (2) a transaction involving an asset equal to or exceeding five million baht; or (3) any suspicious transaction. If the money transmission service-providers fail to follow these instructions, they are subject to substantial penalty fines (Bt 300,000).

H. Non-Profit Organizations

The amendments to the Penal Code and the Anti-Money Laundering Act prevent the possible misuse of non-profit organizations by terrorists, and empower the relevant Thai authorities to effectively impede terrorist activities and financing.

The legal regime of entities, particularly non-profit organizations under the supervision of the Office of the National Cultural Commission, Ministry of Culture, would be reviewed to prevent any misuse for terrorist financing purposes.
I. INTRODUCTION

When studying anything from an individual case to the development of an entire field of law, in order to understand the present we have to know something about the past and how the law has developed.

Before the development of a national system of criminal courts in the 14th century in England and Wales the court system - if it can be described as a system at all - was within the control of the citizen who wished to bring a case and the local lord who tried it or appointed someone or a jury of citizens to do so. There was no distinction between civil and criminal wrongs and of course no coherent, let alone national, system of sentencing. It was therefore possible for a citizen who had been wronged to obtain redress both in the form of compensation or restitution and in the form of some punishment pour encourager les autres.

It is ironic that the separation of civil from criminal law and procedure which developed over the following centuries is now seen as having created huge problems in the field with which we are concerned - and in others such as family law in which, to this day, criminal and civil proceedings concerning some of the same facts are separated.

Although the creation of Justices of the Peace, Quarter Sessions and Assize Courts did not lead at once to the separation of civil law with its powers of recovery restitution, etc. from criminal law, over the centuries which followed it became increasingly the case that the criminal law and procedure - within statutory national sanctions of death or imprisonment or fine imposed by the King’s judges who travelled the country to impose the King’s justice - focused increasingly on the crime itself, the actus reus, to the exclusion of the rights of the citizen who had been wronged or of the need to remove the profits of crime. There were of course exceptions. Those convicted of treason or similar crimes had all their property forfeited to the Crown. This was not so much an attempt to remove the proceeds of crime as to mark the seriousness of the crime and - incidentally - to raise revenue for the Crown. Increasingly the citizen who wished to recover money or property or damages for injury, whether civil or criminal, had to go through the civil process in order to obtain it.

Of course taxation, as I have hinted above, was never far from the minds of the King and Parliament and so from the earliest times His/Her Majesty’s Customs and Excise have had the power to penalise those who attempt to evade the duty payable on imported goods and more recently the power to bring such persons before the criminal courts. This function, important in all countries but particularly so perhaps in an island trading state like the UK, has had an important influence on the development of the law on proceeds of crime. One of the biggest issues in this field today is the vast illegal profit made from the trafficking of illegal drugs. Most of the illegal drugs consumed in England and Wales are imported from abroad and Customs and Excise assumed the lead role in investigating and prosecuting such crimes since they are the service with the most experience of policing frontiers and liaising with foreign counterparts, etc. Because their focus has been historically upon the collection of revenue on goods, which are dutiable but not prohibited rather than simply upon the punishment of individual crimes and criminals, they have been proactive in recent years when successive governments have tried to pass laws which, if properly and firmly enforced, will help to take the profit motive away from crime and to focus more on the money or property than the punishment or rehabilitation of the individual offender.

In the thirty five years in which I have practised in criminal law I have seen enormous changes.
The Second Half of the Twentieth Century

In the 1950's and 60's there were few ways in which the criminal courts of England and Wales were able to go beyond the process of trying and sentencing the offender for the individual criminal act he had committed. Of course it is right to say that one attack had been made on the proceeds of crime in that in the 18th century the crime of handling stolen goods - punishable by death if the property was of more than trivial value - had been devised to try to combat the proliferation of those familiar to readers of Charles Dickens’ Oliver Twist - thereby enabling the criminal law to punish not just the thief but the handler. To this day the maximum punishment in England and Wales for handling stolen goods is higher than that for theft. In addition the crime of “living off immoral earnings” was created to discourage pimps exploiting prostitutes. There were also some ways in which the sentencer could act beyond immediate punishment for the crime.

Here are some of them

- Confiscation/forfeiture of the means by which the crime was committed - e.g. the knife, gun, counterfeiting equipment, etc.
- Restitution of the actual property - though not proceeds from its sale - stolen from the victim.
- Destruction of certain criminal equipment - drugs in particular.
- Restrictions on the future behaviour of the accused by disqualification from driving, etc.

In the 1970’s four potentially important steps were taken

The updating of the law concerning illegal drugs, which, among many other measures, criminalised the possession of drugs with intent to supply. However it was still difficult to prise the proceeds of such crimes from the grasp of the criminal.1

The introduction of the “criminal bankruptcy” order. If an offender (economic crime only) was shown to have benefited to a particular amount - £10,000 in those days - he could be made “criminally bankrupt” and sufficient of his assets realised to repay those he had defrauded. I had limited direct experience of such orders but I believe that they were cumbersome and time-consuming to enforce and often failed to produce the assets sought.

The introduction of “compensation orders”. These were orders to compensate the victim of crime in order to save him from having to pursue a separate claim in the civil courts. However they were only made in the clearest cases in which the amount could not realistically be disputed. They were intended to cover physical as well as financial injury. In addition many criminal judges, then under enormous pressure of work with a rapid increase in crime which was not matched by a corresponding increase in resources, disliked them and found it easy to decide that the issues were too complicated for a criminal court. This meant that the legislation did not have the hoped for effect. They also had in mind the ability of victims to use the third new invention of the decade. This was the setting up of a Criminal Injuries Compensation Board which provided a cheap and reasonably quick way for a victim to obtain compensation from the state for the crime committed against him/her. It was (and still is) limited to compensation for physical/mental injury rather than financial. It did/does not require that an offender be convicted of the crime - merely proof that the crime has been committed and the injury suffered as a result.

In the 1980’s further measures were introduced. Sentencing courts were required to consider compensation in all “victim” cases and to give reasons why, if they did not order compensation, they had not done so. Frequently the reason given was that the sentence was one of imprisonment and therefore the accused could not be expected to earn the money necessary to compensate the victim of the crime. As will be seen the present government is not attracted by that argument.

The Drug Trafficking Offenders Act - confined, as its name suggests, to drug offences. This revolutionised the theory and practice of the criminal law and its relationship with the proceeds of crime. For the first time the burden shifted to the convicted person to prove on the balance of probabilities that his assets - or any gifts he had made - were not from the proceeds of his drug trafficking. Briefly the court was required to work out how much profit the accused had made from the offences for which he had been

1 I well remember a case in which I was involved in which the offender was fined some £150,000 in an attempt to relieve him of the profit he had made from drug dealing. In the alternative he was to serve twelve months in prison, then the maximum default sentence. When he learned that the fine reduced according to the days he spent in prison he chose to surrender to custody so that he could lose a few kilos in weight and save the money necessary for his daughters’ dowries.
convicted, to decide what assets were available, and to order that the lower of the two sums be paid to the state. The default terms of imprisonment for non-payment were greatly increased. The legislation was once again unpopular with criminal judges.

Many were unfamiliar with the tracing exercises normally performed by civil judges. Many felt that they were wasting time and causing delay to other “proper” criminal work such as murders, robberies, etc. Many felt that the shift in the burden of proof was somehow “unfair” - “not cricket” is the English expression - and looked for ways of avoiding the issue. Others thought that the weight of this sanction fell more upon the innocent wives and children, etc. than upon the accused who was usually spending a long time behind bars. However, gradually the courts got used the idea. Further legislation was passed requiring the drug trafficking matter to be dealt with in advance of the substantive sentence.

A real difficulty lay with the diversity of criminal endeavour. If the money or property had in fact been the proceeds of some crime other than that for which the accused had been convicted, then it fell outside the remit of the Act. This difficulty persisted when the first attempts were made later to criminalise money-laundering.

In the late 80’s and 90’s the struggle continued

- A new Drug Trafficking Act was passed and
- A new Act in similar but not identical terms was introduced to deal with financial crime at the point of sentence.
- An offence of money-laundering was created. It still required proof that a particular predicate criminal offence or offences had been committed so that if the offender could show that actually he was simply a tax-fiddler or had amassed the wealth by committing crimes which were not within the statute he could escape. If the court (jury) could not decide whether the illegal profit stemmed from drugs or financial crime they could not convict of either. Likewise the sentencing judge when considering confiscation.

II. THE 21ST CENTURY

Fed up with the mixed success of the preceding thirty years or more the new government in 1997 announced early that it was taking two important but closely related steps.

First we were at last to incorporate into English law the European Convention on Human Rights (ECHR) - a Convention largely drafted by English lawyers! The Human Rights Act 1998 came into force in 2000.

Second a new a far-reaching law would be passed to enable the profits of all crime from the most serious to the most humble, including tax evasion, to be made the subject of criminal sanction either as a discrete crime - of money-laundering - or as a tough weapon in the hands of the sentencer. In the absence of criminal proceedings for lack of sufficient evidence to satisfy the high standard of proof, a structure whereby a new agency, the Assets Recovery Agency (ARA), can institute civil proceedings or refer the case to the Inland Revenue for it to recover tax upon suspiciously derived income was to be introduced. The scale of the problem was huge. The proceeds of crime were estimated in 2000 to amount to £18 billion or 2% of Gross Domestic Product. Before the passing of the Act the average funds recovered amounted to less than 1/1000th of this - £17 million. As Director of Public Prosecutions for England and Wales from 1998 to 2003 I was involved in the consultations which led to the enactment of the legislation and the setting up of the ARA. By now a number of jurisdictions closely related to our own had enacted tough laws of their own with the aim of removing dirty profits and deterring future offenders. We had excellent examples from common law jurisdictions such as the US, Ireland and Hong Kong. The Act was finally passed as the Proceeds of Crime Act 2002 (The Act) and came into full force in April of 2003.

Why do I juxtapose the Human Rights Act 1998 (HRA) with the Act? As the years passed the law on this topic had become, as I have described, gradually more severe and weighted against the launderer of suspect money. Grave concerns had been expressed about the fairness of the law and its potential to trap the innocent as well as the guilty. The government saw the enactment of the HRA as an opportunity to create an independent scrutiny of legislation on this and other fronts - e.g. anti-terrorist legislation - by giving the High Court, Court of Appeal and House of Lords sitting in its judicial capacity, the ability to declare that a
law or a particular aspect of it was either incompatible with the ECHR or needed to be interpreted in a particular way in order for it to be compatible. It therefore felt more comfortable devising legislation which undoubtedly shifts the balance away from the accused and in favour of the prosecutor secure in the knowledge that if it went too far the courts would intervene. Many of the still unanswered questions arising from the passing of the new Act are directly related to the compatibility or otherwise of particular Sections of the Act with the ECHR.

III. THE PROCEEDS OF CRIME ACT 2002

The General Scheme of the Act

The first thing to say is that it is very long. Twelve Parts and 462 Sections. Even discounting the fact that it has to deal with criminal and civil procedure in Scotland and Northern Ireland there is still a great deal for the police officer, investigator, prosecutor, judge and defence lawyer to grasp.

Part One (ss1-5) deals with the setting up of the ARA and the powers and functions of its Director.

Part Two (ss 6-91) deals with confiscation orders to be made following conviction of a defendant and the enforcement of such orders. It also deals with restraint orders to be made during an investigation or at any time up to conviction and sets out the possible appeal routes for a defendant or prosecutor in connexion with these orders. I shall deal with this Part in more detail later.

Part Three and Part Four (ss 92-239) deal with criminal jurisdiction in Scotland and Northern Ireland respectively and do not concern me.

Part Five (ss 240-316) deals with Civil Recovery in both England and Scotland.

Part Six (ss 317-326) deals with the ARA Director’s Revenue (Tax) functions.

Part Seven (ss 327-340) deals with the creation of new money-laundering offences. Again I shall deal with these in more detail later.

Part Eight (ss 341-416) deals with investigations and the orders - production of documents, search and seizure, disclosure, customer information, account monitoring, and overseas evidence, etc. - which may be obtained in pursuance of investigations. I shall deal with aspects of this later.

Part Nine (ss 417-434) deals with such property of a bankrupt person as may be subject to the provisions of the Act.

Part Ten (ss 435-442) deals with the degree to which information which comes to the knowledge of the ARA may be shared with other bodies such as the Police, the Director of Public Prosecutions, etc. This is an important Part because too often in England and Wales, and, I believe, other jurisdictions information held by one agency is not shared with others who need it.

Part Eleven (ss 443-447) deals with “internal” jurisdictional matters - England & Wales, Scotland, Northern Ireland, etc.

Part 12 (ss 448-462) deals with miscellaneous matters.

It will be clear from the scheme that I have outlined that so far as the criminal law is concerned the Act works backwards from conviction through investigation to the creation of new offences. I shall deal with the topics in chronological order. I do so in the hope that this latest attempt of a leading Western economy to combat economic crime without unduly injuring the private rights of individuals may be of interest to you.

I do not present the legislation as the perfect solution. Indeed there are parts of it against which I argued before the legislation was finalised and there is often a substantial gap between the intention of legislation and its implementation by those responsible for so doing. I am, however, certain that on the one hand, the publicity given to it and the fear of leading firms and companies that they may fall foul of the money-laundering provisions, and on the other, the huge effort which has gone into training prosecutors and
investigators has already had a salutary effect on the behaviours of those who may have allowed their respectable businesses to be used as the washing machine for dirty money.

IV. THE NEW OFFENCES.

Four weapons have been deployed to combat money laundering:

• The creation of new criminal offences of money laundering.
• Regulation of financial institutions and others to put systems in place to detect and prevent money laundering.
• Legislation to require reporting of known or suspected instances of money laundering to the authorities.
• Criminalising the disclosure of information which might undermine a money laundering investigation.

Five types of offence are created. The mental element required is similar though not identical for each group of offences. It is sufficient for the prosecution to prove that the defendant suspected, or, in the case of some offences, had reasonable grounds for suspicion.

Concealing, etc. (Section 327)
A person commits an offence if he conceals, disguises, converts, or transfers “criminal property”, or removes it from England & Wales. Concealment and disguise are widely defined and may concern any aspect of the property. The only defence surrounds the possibility that the accused has made an authorised disclosure to an appropriate authority and has been allowed to perform the act which would otherwise have amounted to an offence. “Criminal property” is defined as property of all kinds and wherever situated which constitutes or represents in whole or in part a person’s benefit from “criminal conduct” and which the defendant knows or suspects to be such a benefit. “Criminal conduct” is any conduct which if committed in England and Wales would constitute a crime. The Act is retrospective so far as the criminal conduct is concerned so that it does not matter if the crime which generated the property occurred before the Act was passed.

Acquiring, etc. (Section 329)
This section penalises the acquisition, use or possession of “criminal property”. To this offence there is an additional defence that the defendant acquired, used or possessed the property for “adequate consideration”.

Arrangements, etc. (Section 328)
This Section penalises those who make arrangements they know or suspect may facilitate the acquisition, use or possession of “criminal property”. The only defence available is the one under Section 327 above. The maximum penalties for offences under these three sections are tough. 14 years imprisonment. This is twice the maximum sentence for theft and four years longer than the maximum for receiving/handling stolen goods. Of course many of the offences described above would in fact amount to offences of handling stolen goods.

Disclosure Offences
Regulated Sector. Section 330. Failure by a person in the “regulated sector” to disclose to a “nominated officer” knowledge, suspicion, or reasonable grounds for suspicion, that another person is engaging in money-laundering. The regulated sector is defined in considerable detail in a Schedule to the Act but roughly speaking it covers banking, money lending and investment businesses. “Nominated officers” are persons nominated by the company or business concerned.

Regulated Sector. Section 331. Failure by a “nominated officer” to disclose to an “authorised person” - within the National Criminal Intelligence Service or someone nominated by it to receive disclosures - knowledge, suspicion, or reasonable grounds for suspicion, that another person is engaging in money-laundering based upon a disclosure to him by a person within his company’s or business’ employment. The only defence is if the defendant has a “reasonable excuse “ for not having made the disclosure.

Non-regulated sector. Section 332. Failure by a “nominated officer” to disclose to an “authorised person”
knowledge or suspicion (NB not reasonable grounds for suspicion as in the two earlier sections) that another person is engaging in money-laundering based upon a disclosure to him by a person within his company’s or business’ employment. The only defence is if the defendant has a “reasonable excuse “ for not having made the disclosure.

_Tipping off (Section 333)_

A person who knows or suspects that a disclosure has been made to a nominated officer or direct to the authorities and makes a disclosure which _is likely to prejudice_ any investigation which might be conducted following the original disclosure commits an offence. Here the defences include

- not knowing or suspecting that his disclosure was likely to be prejudicial
- being done by a legal adviser in the course of giving legal advice or conducting legal proceedings.

The maximum penalty for offences under these Sections is five years imprisonment.

It should perhaps be noted that many countries have underpinned their preventative anti-money laundering regimes with purely administrative sanctions. The UK government has chosen to underpin them with criminal sanctions in order to emphasise the seriousness with which it views the importance of proper systems of control. Even failure to comply with some of the procedural requirements can be prosecuted in the criminal courts.

**Comments**

The scheme seems to be admirable in theory. In particular the doing away with the distinction between different crimes as the sources of criminal property.²

My one serious reservation is that in setting the standard of “guilty mind” so low - mere _suspicion_ - there is a risk that most offenders will be able to plead that they should be sentenced on the basis of suspicion rather than knowledge or even belief and sentences at the top end of the range will be rare. In contrast the mental element for the closely related offences of handling or dealing in stolen goods is “knowledge or _belief_” that the goods in question were stolen.

All the “defences” to which I have referred require proof by the accused on the balance of probabilities in order for them to succeed. Since the old legislation had similar provisions, which survived challenges on ECHR grounds, it is unlikely that this feature will cause problems.

In short I believe that the prosecutor now has some formidable weapons in the shape of Sections 327-329 and the supporting Sections and those enterprises which are likely to be used as washing machines for dirty money have a strong incentive to be vigilant in the way in which they deal with customers and clients.

**V. INVESTIGATIONS**

Once again some brief history to illustrate how the process of investigation has developed over the years. Historically criminal proceedings were brought upon “information” being laid before the local magistrates by a citizen that so-and-so had committed a particular crime. The magistrates were the investigators and summoned witnesses and the accused before them to hear the evidence. If they believed that there was sufficient evidence to place the accused before a court he was committed to trial before the local quarter sessions (now Crown Court), or in more serious cases the assize (now Crown Court) presided over by one of the King’s judges. Over the years the magistrates were given powers to order witnesses to bring documents or other exhibits to court. All prosecutions started as private prosecutions and only if committed for trial did they become public prosecutions. Even then it was up to the wronged victim to instruct and pay for a lawyer to prosecute the case if he wished. In the late 18th century in London and more particularly in the early nineteenth century police forces began to be created - the most famous being the Metropolitan Police - “Scotland Yard”. This was in response to the poverty and lawlessness which accompanied the beginning of the industrial revolution, together with the return from many years of soldiering in the wars

² Another personal experience. I am currently engaged in the prosecution of a number of defendants for money laundering offences. We allege that during the material time the principal accused were engaging in three different forms of criminal activity all of which generated criminal property. We cannot however trace a particular car or house purchase or deposit of cash at a bank to any particular offence or type of offence. Prior to the enactment we would have been unable to prosecute.
against France of thousands of men with no skills and no money.

Gradually the police began to wear the shoes of the private citizen informant. Although the criminal process was still started by the information of a citizen that citizen was more and more often a police officer.

Of course the police soon started to press for ways in which they could better investigate and secure evidence. Interestingly, and it has coloured the development of the English system to this day, the police came on the scene long before any form of local or national prosecutor. The police themselves were - and still are - not under national but local control. It was not until the late 19th century that the office of Director of Public Prosecutions was established. Even then his office was responsible only for the prosecution of a tiny fraction of the most important cases and crimes. The vast majority - until 1986 - were dealt with by the police, who gradually began to employ lawyers of their own to prepare and present cases to court.

This has meant that in England and Wales the driving force for change in the way in which cases are investigated and prosecuted has been the police service, rather than the prosecutor who in most countries has the power to direct the police and - even as close to us as Scotland - has been around a lot longer than the police. The Home Office, which has responsibility for overseeing the police, but not the Crown Prosecution Service, is responsible for promoting new criminal justice legislation. Hardly surprising then that much of it has been designed to make the police’s rather than anyone else’s job easier.

Over the years, powers, of search of the person and premises, to require intimate samples with an adverse inference to be drawn from refusal, to question suspects under caution, to allow a adverse inference from silence when questioned, to allow pre-charge detention for longer than 24 hours, etc. have been introduced. They have been balanced by increased safeguards for the suspect such as the automatic right to a lawyer from the moment of arrest, tape-recording of interviews of suspects, the right to disclosure of all relevant material gathered in the course of an investigation. The most recent legislation and in one sense that which provides the framework for the changes introduced by the Act was the Police and Criminal Evidence Act 1984. This effectively introduced the principle into English law that the defendant/suspect has a duty to assist like all citizens in the investigation of crime and that if he fails to do so a court may hold that fact against him if he is later brought to trial. Without these reforms I doubt whether the changes, which I am about to describe both in the investigation process and later when we come to deal with sentence, could have been effected.

Two further developments since 1984 are worth recording. In 1986 the Crown Prosecution Service was created. For the first time there was a national prosecution agency independent of the police and responsible for the prosecution of all offences investigated by the police. This has led to a healthier relationship between prosecutor and investigator and has allowed the prosecutor’s voice to be heard independently when government policy is being worked out.

And in 1987 the Criminal Justice Act created the Serious Fraud Office (SFO). This is an independent free-standing agency set up to investigate and prosecute - as its name suggests - the most serious cases of fraud. For the first time police officers and lawyers work together to investigate and prosecute such cases. They have unique powers to require witnesses to provide statements and special procedures were devised to expedite the trial of their cases once the decision to prosecute has been taken. In particular, for the first time the defendant was required in such cases to set out in writing the nature of his defence to the charges in the same way that the prosecution is required to state its case in detail so that the defendant knows what he has to answer. In 1996 this requirement was extended to all cases tried in the Crown Court.

Thus, by 1997, when the new government decided to embark upon the creation of the Act, there were already changes which had been seen to make a significant and beneficial difference to the prosecution of crime.

**VI. THE ASSETS RECOVERY AGENCY (ARA)**

The first change is the setting up of another new agency - the ARA - which has a single focus and three key functions. These are:

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3 These statements cannot generally be used in evidence against their makers at trial.
The conduct of investigations with a view to confiscation of assets
The conduct of investigations with a view to civil recovery of assets
The training, accreditation and monitoring of private financial investigators

The Director is required to carry out his - actually the first Director is a woman - functions “in the way which he considers is best calculated to contribute to the reduction of crime”. He and his staff will operate under a Code devised by the Home Secretary. The Code - an extensive document with more than 200 paragraphs - is admissible in criminal proceedings, and serious breaches of its provisions may lead to the exclusion of evidence at trial. Officers are required under the Code to consider whether a less intrusive method may be appropriate, to consider the HRA and the proportionality of action and its effect on the right to privacy. There is a duty to take reasonable steps to check information. Information provided anonymously must be corroborated.

At this stage before looking at the details of the various orders available under the Act it is worth dwelling for a moment on the new “accredited investigators”. This development will be closely watched by those concerned at the possible abuses of power, opportunities for corruption and lack of day-to-day accountability of such investigators. The police themselves have always been suspicious of developments which substitute sworn constables with private citizens however regulated. However, the SFO has long used the services of leading accountancy firms with forensic divisions, albeit they have usually been used in a supporting role rather than in the “front line”. Provided these investigators remain true to the provisions of the Code and there are no early headline cases involving malpractice I believe that the initiative is worthwhile, since the expertise necessary to do the job properly is not sufficiently broadly developed within the current cadre of police or Customs investigators.

VII. ORDERS AVAILABLE UNDER THE ACT

It should be stressed that these orders are only available to investigators and prosecutors carrying out confiscation or money laundering investigations. A “confiscation investigation” is an investigation into whether a person has benefited from his criminal conduct or into the extent and whereabouts of such benefit. A “money laundering investigation” is an investigation into whether a person has committed an offence under Sections 327 - 329 (see above 4.2.1- 4.2.3).

Most of the orders under the Act can be obtained ex parte by the applicant, that is to say without giving notice in advance to the person against whom the order is sought. The decision to apply ex parte needs to be carefully thought through so as to survive any challenge later.

It is also important to note that the Act (Section 342) creates specific offences of prejudicing an investigation. The first is a “tipping off” offence identical to that mentioned earlier in connexion with disclosures (Section 333). The second is an offence - which could already be prosecuted as the common law offence of attempting to pervert the course of justice - of “falsifying, concealing, destroying or otherwise disposing of, or causing or permitting falsification ... of documents relevant to an investigation”. The maximum sentence is five years imprisonment.

There are seven orders. Many of these existed in some form or another but they have never before been consolidated into a coherent scheme and there are some new features which make them easier to use and - it is hoped - therefore more effective.

A. Restraint Orders (Section 41 - 47, 58)

These may be obtained by application (ex parte if necessary) to a Crown Court judge in five different circumstances.

1) When a criminal investigation has started and there is “reasonable cause to believe” that the alleged offender has benefited from his criminal conduct.

2) When criminal proceedings have started but not concluded and there is “reasonable cause to believe” that the alleged offender has benefited from his criminal conduct and provided there has been no undue delay in continuing the proceedings.
3) Following a conviction after which no confiscation order (see later) was made. If within 6 years of conviction evidence comes to light which suggests that a confiscation order should after all be made, then a restraint order can be made pending the decision.

4) Following a conviction after which a confiscation order was made but subsequently fresh material comes to light which causes the prosecutor to apply to reopen the question of the amount to which the defendant has benefited from his criminal activities. In these circumstances once again a restraint order can be made pending the decision.

5) Following a conviction after which a confiscation order was made but subsequently fresh material comes to light which causes the prosecutor to apply to reopen the question of the available assets of the defendant. In these circumstances once again a restraint order can be made pending the decision.

The order may be made against any person - not just the suspect, accused or convicted person - and applied to any form of property. The order prevents the person named from “dealing with any realisable property” held by him. Exceptions to the order may be made:

- for reasonable living costs;
- legal expenses - though only for the purpose of the instant proceedings;
- or for the purpose of enabling any person to carry on any trade, business, profession or occupation.

The accused/suspect or any other person affected by the order may apply to vary or discharge the order.

The court may appoint management receivers (Section 48 et seq) to manage the property concerned during the life of the order. The Court may give the receiver wide powers to deal with it including selling, entering into contracts, suing, etc. He must take steps to ensure that there is no diminution in the value of the property and that innocent parties who may have an interest in particular property can retain that interest.

Either party may appeal to the Court of Appeal against the refusal or the grant of a restraint order.

B. Production Orders (Section 345-351)

This order may be made against any person by a Crown Court judge on the application (ex parte if necessary) of the prosecutor or other authorised person. It must be complied with within 7 days unless the judge orders otherwise. It may apply to all material other than legally privileged material or “excluded” material. Government Departments may be subject to orders. There are the same powers to vary, discharge or appeal such orders as for Restraint Orders.

C. Search and Seizure Warrants (Sections 352-356)

These can be granted on application if:

- A person has failed to comply with a production order, or
- It is not considered practical to seek such an order or
- It is not practicable to secure agreed entry to premises for the purpose of production.

The latter two conditions implicitly, though surprisingly not explicitly, allow for the application to be made ex parte.

Obviously this is a more intrusive order than the others and investigators need to be sure that they are justified in applying for it rather than a less intrusive order. Strict requirements are set down for those who wish to apply under the last two sub-headings above.

D. Customer Information Orders (Sections 363-369)

These may be obtained (ex parte if necessary) in order to discover the existence of accounts held at financial institutions. They do not extend to the statements of account, etc. merely to such details as the identity of the account holder, the number of the account, the date the account was opened (and closed if necessary), his/her most recent address, and any information which the institution gathered for the purposes of carrying out its own responsibilities concerning money laundering. If the account holder is a company or business like details as above but also the country of incorporation, registered office, and the identity of all signatories to the account. If, following the receipt of the information, evidence is sought as to the running of
the account such as bank statements, correspondence, etc. then a production order (see above) has to be obtained.

Criminal offences carrying a sentence of an unlimited fine are committed by an institution which either fails to comply with a Customer Information Order or knowingly or recklessly makes a statement which is false or misleading.

Subject to the last paragraph statements made by financial institutions in pursuance of a Customer Information Order may not be used in evidence in criminal proceedings against the institution itself.

Either party may apply to vary or discharge the order.

E. Account Monitoring Orders (Sections 370-375)

This order may be obtained on application (ex parte if necessary) to a Crown Court Judge. It is the only one of the orders which is entirely new, although the others have been modified and the new law makes them easier to obtain than before. It is perhaps for that reason that its operation has been limited. The order requires a financial institution to supply ongoing account information for a maximum period of 90 days (which will need to be justified in the application) following the order. Hitherto it was only historical information which could be obtained.

This welcome change does mark another move away from the strictly adversarial system which I described briefly earlier and back to the old system which was so much closer to the “Civil Code” systems which apply in most countries outside the so-called common law countries. Here is the judge, who may one day try the case if a prosecution is brought, making orders which are directly relevant to the ongoing investigation as opposed simply to allowing investigators access to already created material. This may seem unsurprising to most of you but for us it is a big change.

F. Disclosure Orders (Sections 357-362)

I have left this power and the following power until last since the two powers can only be exercised upon the application (ex parte if necessary) of the Director of the ARA rather than by a police officer or other authorised person. If made it can allow the Director to require a person to answer questions or provide information or documents. As with the Customer Information Order criminal offences are committed by those who fail to comply or provide, knowingly or recklessly, false information, and statements made cannot generally be used in evidence against the person who made them otherwise than in such prosecutions.

Comment

This power mirrors the power I described earlier when I referred to the setting up in 1987 of the Serious Fraud Office. It is not a power available to ordinary prosecutors even in cases of treason, terrorism, murder, etc. I would be surprised if this situation were to survive for long.

G. Application for Letter of Request for Assistance in Obtaining Outside the United Kingdom Evidence for Use in a Confiscation Investigation

This does no more than extend the power already available to prosecutors in other forms of crime to the investigation stage of matters under this Act. Some countries are more willing than others to comply with requests at this early stage when it is not certain that a charge will ever be brought in connexion with the investigation.

However, I believe that gradually the, to me, old-fashioned attitudes to assisting foreign investigations based either on the concept of “national sovereignty” or on a xenophobic belief that other countries are incapable of behaving fairly or of using information supplied appropriately, are gradually giving way to the urgent need to cooperate as fully as possible to combat crime and criminals who know no such restrictions.

VIII. CONFISCATION

This is the last but also the most important and controversial area covered by the Act. As I explained earlier, since the 1970’s attempts have been made by successive governments to pass laws which enabled the criminal courts to relieve criminals of their dishonest gains. Most recently we have followed the route of
other countries in forcing convicted persons to prove, if they can, that their assets and those they have disposed of have been honestly acquired. These attempts have been challenged in the courts and the position even under the old law was not entirely clear. What is clear is that the Act significantly extends the degree to which the defendant is “on the back foot” and it is likely that there will be challenges to it both in domestic courts and before the European Court of Human Rights.

The Act creates two types of confiscation order.

1) Confiscation of the assets of those proved to have a “criminal lifestyle”
2) Confiscation of the benefit obtained by a defendant’s “particular criminal conduct”

A number of conditions have to be met.

The person has to qualify as a candidate for an order - of either kind.

He does so if he has been convicted of an offence in the Crown Court or committed by the magistrates’ court to the Crown Court for sentence generally or specifically for consideration of a confiscation order. And if he does so the court must proceed under the Section (10). Sections 27 and 28 allow the court to proceed if the defendant has absconded after (Section 27) or even before (Section 28) conviction.

The prosecutor or the ARA asks, or the court of its own motion decides, to bring confiscation proceedings.

Does the nature of his offence or series of offences show that he has a “criminal lifestyle?” (More of this below).

(If the answer to 3 is Yes). Has he been proved to have benefited from his general criminal conduct? In answering this question the court must make the assumptions about property in the possession of the person or gifts, etc. he has made in the relevant period which the Act requires. I will deal with them later.

(If the answer to 3 is No). Has he been proved to have benefited from the particular criminal offences for which he has been convicted?

(In the event of the answer Yes to either 4 or 5). How much has he benefited either from his general criminal conduct or from the particular criminal offences for which he has been convicted?

Has the defendant shown that the available amount is less than the benefit?

If Yes then the order must be made in the lesser sum. If No then in the full amount of the benefit (subject to a deduction for sums in respect of which a victim has already or is likely to obtain in civil proceedings against the defendant).

There are a number of terms which are new to the English Criminal Law. The most obvious is the term “criminal lifestyle” hitherto confined to the pages of the popular press or detective novels. It was a concept for which the police pushed hard. The term is defined in Section 75.

A person has a criminal lifestyle if (and only if) . . . . One or more of his offences is set out in Schedule 2 to the Act. Briefly these are:

- Drug trafficking offences
- Fraudulent importation or exportation of other prohibited goods
- Money laundering offences (Sections 327 and 328 only)
- Directing terrorism
- People trafficking
- Arms trafficking
- Counterfeiting (money only)
- Copyright offences
- Profiting from prostitution
- Blackmail
- Attempting, conspiring, etc. to commit any of the above.
Or,
The offence constitutes conduct forming part of a course of criminal activity.

Such conduct is defined as follows:
- Conduct from which the defendant has benefited, and
- In the proceedings on which he was convicted he was convicted of three or more other offences each of three or more of which constitute conduct from which he has benefited, or
- In the period of 6 years from the day the proceedings started he was convicted on at least two separate occasions of an offence from which he has benefited.
- The total benefit must be at least £5000
- Relevant benefit includes

Benefit from the offences of which he was convicted.

Benefit from any other conduct which forms part of the criminal activity and which constitutes an offence of the same kind as one of those of which the defendant has been convicted. (If a defendant has committed a long series of similar offences - for instance fraud on the Social Security system the prosecution will only charge a sample of the offences on the indictment and will lead the evidence, if the defendant contests his guilt, of the remaining offences as evidence of "system". This provision allows the court to take these other offences into account when calculating the benefit).

Benefit from such conduct which has been listed in a list of offences “to be taken into consideration” by the court. (This applies to a similar situation as above when the defendant has pleaded guilty to a sample of his offending and the rest is placed on a list of offences which he agrees. It prevents the prosecution from bringing further proceedings against him.)

Or,
The offence is one which was committed over a period of at least six months and the defendant has benefited to at least £5000. Relevant benefit is similar to the relevant benefit defined above.

As I warned this is quite a lot to take in. Even reducing it to its most basic it is still a complicated scheme requiring sound and detailed information as to previous record, etc. and a careful consideration by the prosecutor in advance of trial as to how to frame the charges and by the defence lawyer as to how to run the defence.

The complications do not end there. How to calculate the benefit and the recoverable amount, which, as I said earlier, may be - usually are - different. In assessing benefit certain deductions must be made. These include property already the subject of court orders for forfeiture, compensation, etc.

If the court has found that the defendant has a criminal lifestyle then certain assumptions must be made by the court for the purpose of deciding both whether the defendant has benefited from his general criminal conduct and the extent of his benefit. These are the assumptions. I put them in italic type because of their importance and controversiality. They are that:

Any property transferred to the defendant after a date six years before the start of the proceedings was obtained as the result of his general criminal conduct.

Any property obtained by the defendant after his conviction was obtained as the result of his general criminal conduct.

Any expenditure of the defendant after a date six years before the start of the proceedings was met from property obtained by the defendant as the result of his general criminal conduct.

For the purpose of valuing any property obtained or assumed to have been obtained that the defendant obtained it free of other interests.

If the defendant shows that a particular assumption is incorrect or that there would be a serious risk of injustice if the assumption were made then and only then may the court not make the particular assumption.
The court must give reasons for any such decision.

In assessing the available amount the court must aggregate the total of all free property held by the defendant together with the total value of tainted gifts, less “priority” obligations such as court fines and “preferential debts” in a bankruptcy. Free property is all property except property subject to court orders in other proceedings. Tainted gifts are transfers of property for significantly less than its real value. If some money was paid for the property then that is deducted from the value of the tainted gift.

If the court decides that the defendant does not have a criminal lifestyle but has benefited from his particular criminal conduct then certain assumptions may be made as to tainted gifts made after the first of the two of more offences from which he has benefited.

Complicated provisions enable the court to value the gift or, if it has been disposed of, the proceeds of disposal by reference to market value plus inflation, etc.

There are of course many other provisions which set out how the procedure will operate. I shall summarise them because the way in which the procedure operates may have a bearing on the fairness or otherwise of the Act and its operation.

**Procedure and Enforcement (Sections 14-39, 50-57, Etc.)**

Once the court has embarked upon confiscation proceedings they may be adjourned for up to two years - or longer in exceptional cases. In particular the substantive sentence may be passed before the question of a confiscation order or its amount has been decided. However, no other sentence of a financial nature may be passed before the decision on the confiscation order.

The prosecutor serves a Statement of Information on the Court and the defence setting out the reason why he contends that:
- the defendant has a criminal lifestyle, (if he so contends);
- the defendant has benefited from general criminal conduct;
- the benefit is so much;
- there are matters which engage the statutory assumptions.

He must also include matters which operate against the application of the statutory assumptions if any.

If the prosecutor does not contend that the defendant has a criminal lifestyle but contends that he has benefited from particular criminal conduct he must produce a similar Statement of Information setting out the reasons why.

Once the prosecutor has served his Statement of Information the defendant is required to indicate the extent to which any allegation is accepted, and the particulars of any matters upon which he proposes to rely to rebut any allegation in whole or in part. The court may also order the defendant to supply information - usually information which only he can know. If the defendant fails to supply it the court may draw an adverse inference against him. Acceptance by either side of an allegation or contention is treated as conclusive proof of the allegation or contention for the purpose of the proceedings.

If the defendant absconds during the proceedings or after conviction the court may make a confiscation order in his absence. In the case of an unconvicted absconder the court must wait two years before embarking on the process. Any person other than the defendant who may be affected by the order may make representations to the court in these cases. If the absconder returns and is acquitted any order will cease to have effect. If he returns following conviction he has the right - as does the prosecutor - to reopen the question of the order or its amount.

Orders should be complied with when they are made. Six months, and exceptionally 12 months may be allowed. Interest is payable if the order is complied with late.

The enforcement process is similar but more sophisticated than the process for enforcement of ordinary fines. Periods of imprisonment in default range from 7 days in the case of an order below £200 to 10 years in the case of an order over £1,000,000. Once fixed by the court it is reduced by the amount by which the amount has been paid. If the Director of the ARA is not appointed to enforce payment the magistrates’ court
will be responsible for enforcement. I expect - and hope - that in the majority of cases the ARA will be appointed since the magistrates’ record in collecting fines is far from perfect.

A fundamental purpose behind the Act, which changes the previous situation, is that service of the default term of imprisonment does not extinguish the order. Thus, my client in the case I referred to earlier could not now use the money he had left after serving his term in default to provide dowries for his daughters! In order to ensure payment the Act provides for the appointment of enforcement receivers. I referred to management receivers some time ago in the context of restraint orders. Enforcement receivers have a similar mandate. They are appointed on the application either of the prosecutor or the ARA when an order is not complied with. Rules are provided to guide receivers in the order in which moneys recovered must be applied. The Act also provides for the prosecutor to ask the Home Secretary to request the assistance of foreign states to prevent disposal of assets and to secure their realisation. There is a right of appeal against the order to the Court of Appeal since the order is part of the sentence.

IX. HUMAN RIGHTS ISSUES

Many of the potential human rights issues which this legislation throws up had been considered in some way as the result of earlier legislation.

The first challenge was based on the premise that, since the judge was looking in confiscation proceedings beyond the actual offences of which the accused had been convicted to others, he was in fact trying and convicting the accused without the normal safeguards of the trial process. In other words it was alleged that there was a breach of Article 6(2) of the ECHR which requires “criminal charges” to be decided according to the presumption of innocence.

Are confiscation proceedings criminal proceedings? The first case decided by the English Court of Appeal held that they are but that the shift in the burden of proof is legitimate in certain criminal proceedings of which this was one. The next case was decided by the Privy Council on appeal from Scotland where there was parallel legislation. The Privy Council held that confiscation proceedings are not criminal proceedings and that the process involved no enquiry into whether the accused had committed specific crimes. Accordingly Article 6(2) of the ECHR was not engaged. The Privy Council did go on to consider the position on the basis that they were wrong and came to the same conclusion as the court in Benjafield. A further case came before the European Court of Human Rights. The Court decided that the proceedings were not criminal proceedings. But having done so they held that Article 6(1) did apply because the general right to a fair trial in Article 6(1) included the presumption of innocence. This is - to me and others - a surprising conclusion since it seems to render Article 6(2) redundant. However, the court looked at the individual elements of the procedure - to remind you, the pre-Act procedure - and identified a number of features which in its estimation rendered the proceedings fair. These were there was no finding of guilt or innocence within the proceedings.

The hearing was public. There was advance disclosure of the prosecution case. The judge had discretion not to apply the assumptions if serious injustice would result. The defendant could give and call evidence. The order could be tailored to meet the actual resources of the accused.

In the given case all the facts found by the judge were underpinned by evidence or admitted by the accused. In any event the actual amount ordered was fair. If the defendant’s account were true it would have been easy for him to demonstrate this independently.

More recently still the matter was considered again by the House of Lords in two consolidated appeals, one from Benjafield to which I have referred. Their Lordships found that the proceedings were not criminal and that Article 6 was satisfied in general by the safeguards outlined in Phillips.

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4 R v Benjafield & Others [2001] 3 WLR 75.
5 McIntosh v HM Advocate [2001] 3 WLR 107.
7 R v Rezvi, R v Benjafield [2002] 1 All ER 801.
There are a number of ways in which the Act, or more particularly its operation in a particular case or type of case may be open to challenge.

The European Court, in this and in other instances when UK legislation has been under scrutiny, has looked at what happened in the individual case rather than, as the English courts do, the general principle of whether a piece of legislation is ECHR compliant or not. The judgement in Phillips did not give prosecutors and judges a free hand to use the old legislation as they pleased. It merely said that in the case before it the way in which that legislation had been applied was compliant. Even the then current regime which applied the assumptions only in cases of drug trafficking, it implied, could be non-compliant if unfairly applied.

The new Act goes wider, both in the scope of the assumptions but, also, more importantly, in the breadth of offending which may come within its remit. As well as the Schedule 2 offences which I summarised earlier, most of which are serious crimes (about which there can be little argument as to the necessity for tough measures to protect the human rights of the public at large), any offence or series of offences which benefits the offender to the value (£5000) of a second hand car is brought within its remit. It will be crucial to the success of the legislation for prosecutors, investigators and judges to have regard in the first place to the Code which places strong emphasis on proportionality and the ECHR in the individual decision-making processes required and to the need for the judicial discretion to be properly applied.

There is another potential ground for challenge which will diminish and eventually disappear. The legislation extends back six years - and therefore in most current cases to before the passing of the Act - and so it may be argued that an accused is now being subjected to a greater penalty than he would have been at the time that he committed the offence. If a confiscation order is to be regarded as analogous to a fine - and it is enforceable in much the same way - this could infringe his right under Article 7 of the ECHR which prohibits retrospectivity in the matter of penalty. If it is interpreted as simply the recovery of a civil debt which would be open to the victim, or society as victim, to recover, then this challenge will probably fail.

X. CIVIL RECOVERY, BANKRUPTCY AND REVENUE FUNCTIONS

I will say little about these since I have already said a great deal about the criminal process. It is however important to remember that these powers exist and it will be interesting to see when the ARA is working at full stretch what the division of work between criminal, civil and revenue work is. The intention is that criminal proceedings will be the priority for the ARA and the Code makes this clear.

The relationship between bankruptcy proceedings and confiscation orders is complicated and perhaps confusing. I believe the purpose of the legislation was to give confiscation orders primacy over bankruptcy proceedings but the effect of the provisions taken together seems to be that if bankruptcy proceedings were under way before the confiscation investigation began, the bankruptcy proceedings have priority, but if the bankruptcy proceedings post-date the confiscation investigation the confiscation proceedings oust the bankruptcy in respect of relevant property. The Act deals with this at Sections 417 et seq.

Two tough regimes are put in place to enable
- the recovery by High Court proceedings of property which is, or which represents, property obtained through unlawful conduct
- forfeiture of cash by civil proceedings in the magistrates’ court which is or which represents, or is intended to be used in unlawful conduct.

These processes can be used in the absence of criminal proceedings in respect of the property or those in possession of it. They may even be brought if there has been an acquittal of the defendant in the Crown Court since the standard of proof in civil proceedings is lower than that in criminal. Property in such proceedings can be “traced” in the same way as in ordinary commercial cases. There are parallel regimes to those I have described in criminal proceedings for restraint and management of assets restrained, and a parallel discretion in the court not to act if to do so would cause injustice to the person affected. There are complicated provisions relating to jointly owned property which are designed to assist the ARA in obtaining the maximum benefit while protecting the rights of innocent spouses and others who have an innocent interest in such property. There is obvious scope for lengthy legal battles over such property.
As with the criminal confiscation regime there are likely to be ECHR challenges on the basis that these are criminal proceedings masquerading as civil and invoking fair trial rights under Article 6 and 7, and in the case of, say, a family home, Article 8 the right to respect for family and private life.

Until now income tax has been the exclusive preserve of the Inland Revenue. For the first time this new agency - the ARA - will be able if it is unable to pursue suspicious funds by the criminal confiscation route or the civil recovery route, to levy tax upon monies which it discovers in the course of an investigation. It may use information gained during a criminal or civil investigation to inform its decision on revenue. It can raise taxes of most kinds from income tax to student loans, etc. The money sought to be taxed must be "chargeable from the criminal conduct of himself or another". Unlike the Revenue it does not have to prove the source of the income - merely that it exists. (If it was able to prove the source he would be able to take civil or criminal remedies to recover the sums in full). Appeal against such orders lies to the Commissioners of Inland Revenue.

XI. CONCLUSION

I hope I have been able to show how the law in England and Wales has developed over the years and how this latest attempt to codify the law and to focus the minds of investigators, prosecutors and judges, not just on issues of guilt or innocence and the length of the prison term or probation order, but on the reduction or elimination of the motive for the commission of the vast majority of crimes in a society in which economic well-being is for most people the ultimate aim in life and which offers infinite opportunities to those who would achieve that well-being through dishonest or other illegal means. Much will depend, as I have said, upon the way in which the courts accept the new legislation and interpret it.

Much more will depend on the care, enthusiasm and effectiveness with which it is implemented. My function as Director of Public Prosecutions was to try, by organising seminars and training events, by the appointment of specialists in each area of the country, and by personally stressing the message whenever I could, to ensure that prosecutors played their full part in trying to implement the legislation fully and firmly but without the sort of heavy-handedness which may provoke a legitimate challenge in the courts. In short I urged all prosecutors to have an automatic "default" button in their heads when considering a case to check whether a confiscation order would be possible and to draft charges and advise the police with that in mind. Only then will confiscation become part of the "culture" of our criminal process.
WHITE-COLLAR CRIME AND MAJOR FINANCIAL DEBACLES IN THE UNITED STATES

Henry N. Pontell, Ph.D.*

I. INTRODUCTION

Until rather recently, many persons around the world have not been very comfortable with the term white-collar crime. It often has been a designation that arouses great controversy. Following its introduction by the American sociologist Edwin Sutherland1 more than sixty years ago, social scientists began to debate its usefulness as a criminological concept. Sociologist/lawyer Paul Tappan, for example, called the term loose, derogatory, and doctrinaire, and argued that criminologists should confine themselves to the study of those adjudicated by the legal system and found guilty of a particular offence. He argued further, “White collar crime is the conduct of one who wears a white collar who indulges in occupational behaviour to which some particular criminologist takes exception”.2 Not relying on the criminal justice system to determine criminality, he claimed, would allow value judgments to dominate social inquiry on the topic.

Sutherland responded to this charge by emphasizing that if studies were grounded in the well-documented biases of the criminal justice system, researchers would lose all claims to science. More recently, Gilbert Geis notes, “Sutherland got much the better of the debate by arguing that it was what the person had actually done in terms of the mandate of the... law, not on how the criminal justice system responded to what they had done, that was essential to whether they should be regarded as criminal offenders”.3

Today, there is little debate regarding the existence of various forms of white-collar crime, and the fact that they can cause widespread harm and loss. There remains, however, considerable disagreement regarding the role of such economic crimes in major financial debacles that have occurred in recent years in the U.S. This current controversy reaches far beyond traditional criminological and law enforcement concerns, and entails fundamental questions of finance, economics, politics, law making, as well as the interplay among them. The stakes in this debate are quite high; the sheer scales of such crises have far-reaching consequences that transcend national boundaries and affect economic conditions worldwide.

The “fraud minimalist” position, influenced by ideas from the law and economics literature on corporate governance theory, represents one side of this question. Beginning in the 1930s, its emphasis was on the separation of ownership and control in publicly traded corporations to avoid exploitation of shareholders by officers.4 It has since been replaced by a new-old paradigm5 that sees market mechanisms combining to act as an “invisible hand” that purportedly brings harmony to the interests of investors and officers by providing natural governance provisions that are “optimal for society”.6

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This “free market” law and economics movement, influenced by the work of Frank Easterbrook and Daniel Fischel, trivializes the notion of fraud, as the markets, it is claimed, can readily identify and correct fraud. In fact, it goes so far as to declare that the markets are so successful in accomplishing this that “a rule against fraud is not an essential or even necessarily an important ingredient of securities markets”.7

This corporate governance framework not only denies that there is any significant degree of fraud in economic markets, but accounts for major financial scandals, when they do occur, in terms of larger structural disorders, mismanagement and incompetence, government and regulatory interference, overzealous enforcement efforts, and the “risky business” that is a natural feature of free markets.8

This view stands in direct opposition to the major tenets of almost all white-collar and corporate crime theorizing and research conducted over the past fifty years. Such research focuses largely on organizational structures that prevent or encourage fraud, motivational mechanisms, regulatory regimes, criminogenic industry environments, inadequate laws, enforcement capacity, and the like.9 Wheeler and Rothman’s classic conceptualization of the “organization as weapon”, for example, emphasizes that organizations can become vehicles for fraud, and that insiders in control may use a company as both a sword and a shield.10 Acting as a sword, an organization can steal from another entity. As a shield, it can use its resources and legitimacy to avert detection and negative sanctions. In other words, those who run organizations can effectively neutralize both internal and external controls and thus optimize the firm for fraud.11 When such “control frauds,” or frauds perpetrated by controlling insiders exist in organizations with large assets, the results can be devastating.

For a number of reasons it is important to examine the question of how much fraud - especially control fraud - has played a role in producing the enormous losses in recent financial debacles in the United States. First, and perhaps foremost, assessing the role of fraud accurately portrays history without political or ideological colourings. Identifying the significance of fraud can also inform theories regarding both corporate crime and corporate governance. For another, acknowledging the role of fraud is essential for effective policymaking, law enforcement responses, and the prevention of future abuses.

This paper addresses the question of the significance of fraud by presenting both fraud minimalist and criminological explanations of two major debacles that represent unprecedented financial failures in the United States. They are the 1980s savings and loan crisis, which at the time produced the largest single industry failure in history, and the recent corporate and accounting scandals which have set a new record for monetary losses and have affected financial markets worldwide.

II. THE SAVINGS AND LOAN CRISIS

A. A Brief History of the Industry and Conditions Leading to the Crisis

The federally insured savings and loan system was created in the 1930s, primarily to encourage the construction and sale of new homes during the Great Depression and to protect savings institutions from the kind of disaster that followed the collapse of the American economy in 1929. The Federal Home Loan Bank Act of 193212 established the Federal Home Loan Bank Board, designed to provide a credit system to ensure the availability of mortgage money for home financing and to oversee federally chartered savings and loans (S&Ls, also known as “thrifts”). Two years later, the National Housing Act13 created the Federal Savings and Loan Insurance Corporation (FSLIC) to insure thrift deposits. Until the broad reforms enacted by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Federal Home Loan Bank Board was the primary regulatory agency responsible for federally chartered savings and loans.

7 Easterbrook and Fischel, op. cit., p. 283.
8 Ibid.
12 12 U.S.C. 1421 et seq.
Economic conditions of the 1970s substantially undermined the health of the S&L industry and contributed to the dismantling of the traditional boundaries within which they had operated for decades. Perhaps most important, high interest rates and slow growth squeezed the industry at both ends. Locked into low-interest mortgages from previous eras, prohibited by regulation from paying more than 5.5 percent interest on new deposits, and with inflation reaching 13.3 percent by 1979, the industry suffered steep losses. As inflation outpaced the small return on their deposits, thrifts found it increasingly difficult to attract new funds.

Along with these economic forces a new ideological era had begun. Though policymakers had been considering further loosening the restraints on savings and loans since the early 1970s, it was not until the deregulatory fervour of the Reagan administration years that this approach gained widespread support as a “solution” to the thrift crisis. Policymakers dismantled most of the regulatory infrastructure that had held the industry together for over 40 years.14 The deregulators were convinced that the free enterprise system worked best when left alone, unhampered by perhaps well-meaning but ultimately counterproductive government regulations. In 1980 the Depository Institutions Deregulation and Monetary Control Act15 phased out restrictions on interest rates paid by savings and loans. At the same time, in a move that seemed to contradict a free market ideology, the law increased FSLIC deposit insurance (and correspondingly, the government’s risk) from a maximum of $40,000 to $100,000 per individual account.

In 1982, the Garn-St. Germain Depository Institutions Act16 accelerated the phase out on interest rate ceilings initiated in 1980. More importantly, however, it expanded the investment powers of thrifts, authorizing them to make consumer loans up to a total of 30 percent of their assets; make commercial, corporate, or business loans; and invest in non-residential real estate worth up to 40 percent of their assets. The new law also allowed for 100 percent financing, which required no down payment from the borrower. Federal regulators also dropped the requirement that thrifts have at least 400 stockholders, which allowed for a single entrepreneur to own and operate a federally insured savings and loan.

Federal and state governments - whose state-chartered thrifts’ deposits were, by and large, insured by federal funds - had created an industry environment that encouraged lawbreaking. Martin Mayer, former member of the President’s Commission on Housing under the Reagan administration, describes these deregulatory years:

What happened to create the disgusting and expensive spectacle of a diseased industry was that the government confronted with a difficult problem, found a false solution that made the problem worse. This false solution then acquired a supportive constituency that remained vigorous and effective for almost five years after everybody with the slightest expertise in the subject knew that terrible things were happening everywhere. Some of the supporters were true believers, some were simply lazy, and most were making money - lots of money - from the government's mistake.17

B. The Crimes

The S&L crisis eventually cost American Taxpayers over $150 billion.18 Numerous accounts of crime, especially expensive insider or control frauds, were brought to light in media accounts, government hearings and reports, and academic research. According to the most authoritative criminological studies, three major categories of white-collar crime contributed to the savings and loan debacle; unlawful risk-taking, collective embezzlement, and covering up.19 Unlawful risk-taking involved what some have termed “gambling for resurrection” whereby thrift owners struggled to turn their institutions around and make them profitable again. In the case of unlawful risk taking they broke the law while doing so. Examples included violations of

15 Pub.L. 96-221.
17 Mayer, op. cit., p. 8.
19 Ibid.
loans-to-one borrower limits, inadequate or sometimes non-existent underwriting of loans, and other unsafe practices that were illegal. Collective embezzlement, or “looting” entailed the siphoning off of funds for personal gain. This self-interested fraud has been shown to be the most costly category of thrift crime. As one high-ranking government official has noted, “The best way to rob a bank is to own one”.20 Unlike traditional embezzlement, which is usually committed by a low level employee,21 collective embezzlement is perpetrated by those in charge of the organization. It is a crime by the organization against the organization, which, in the case of thrifts, was made possible in part by government insured deposits, lax regulation, and transactions that involved other peoples’ money. The real (as opposed to formal) goals of management were to provide owners and insiders with a personal money machine. It is a prime example of what Wheeler and Rothman have referred to as the “organization as weapon”, whereby the thrift was merely a tool to steal money, just as a knife or gun would be used by a common criminal. The principal difference here was that the organization was both weapon and victim, as the crime was also against the organization’s best interest in the long run, and would eventually lead to financial ruin through insolvency. The third major category of thrift fraud, covering up, involved attempts to hide both the thrift’s insolvency from regulators, and the fraudulent transactions that led to the insolvency. File stuffing was one common form of covering up whereby false post-dated documents were put into files to deceive regulators regarding the underwriting and status of loans as well as other business transactions.22 This manipulation of books and records was also made possible by accounting schemes that misrepresented the true financial health of the institution.

These basic categories of insider economic crimes were pervasive during the thrift crisis, and as will be shown, also surfaced in the recent corporate and accounting scandals in the United States. Together, these crimes can be seen as part of a more general category of what has recently been labelled “control fraud”. Control frauds involve major economic crimes for personal gain that are committed by controlling insiders of large organizations.

C. The Report of the National Commission

In 1993 The National Commission of Financial Institution Reform, Recovery and Enforcement issued its report to the President and Congress entitled “Origins and Causes of the S&L Debacle: A Blueprint for Reform.”23 The Report analyzed the history of the crisis, documenting the collapse of the S&L industry, and makes numerous policy recommendations. The Report noted the perverse incentives of the time, and the role of government insured deposits that presented severe moral hazard during the crisis, but at the same time notes that such moral hazard may exist in situations without deposit insurance.

“‘Moral hazard’ — that is, adverse incentive — can exist even when deposit insurance is absent, because with limited liability, borrowers obtain the gains while losses are shared with lenders. Private, uninsured creditors handle the problem by insisting that borrowers have a substantial equity stake to lose (i.e., they impose net worth standards)....With deposit insurance, private creditors (depositors) have no obvious incentive to impose discipline. Instead the burden is shifted to the government, which is why the latter must regulate and examine insured institutions.”24


24 Ibid., p. 62.
The Commission also related how the perverse environment within which thrifts operated could encourage fraud and lawbreaking, noting that “fraud and misconduct were important elements in the S&L debacle” (emphasis added). The report goes on to note:

“The S&Ls were tempting vehicles for abuses and fraud, greatly increasing the risk of losses from those sources. Insured schemes combined with non-existent net worth requirements allowed massive growth to keep Ponzi-schemes going and to maintain access to additional sums to prevent collapse. Cash could be easily withdrawn from an institution either directly through salaries, bonuses, perks, and dividends, or indirectly through nominee loans, kickbacks, and other devices. Moreover, S&Ls were cheap to acquire. It was easy to get approval to control the entity and easy to dominate it. The regulatory laxity introduced as a part of forbearance provided the ideal fraud environment. It allowed the fraudulent to report financial strength and disguise losses while S&Ls were being looted. It required no financial risk from those engaged in the fraud, and offered little chance of fraud being discovered, proved, and punished.”

The Report concluded that the incidence of fraud was high among insolvent institutions, or those that were taken over by the government. “For example the GAO studied 26 S&Ls that failed from 1985 to 1987, and which accounted for about 60 percent of the FSLIC’s estimated losses....While the GAO found few cases of fraud and insider abuse in solvent institutions, it found evidence of fraud and insider abuse in every failed S&L...” The report then, and in fact quite mysteriously, goes on to note that fraud did not necessarily cause the failures of thrifts, and explains other potential sources of insolvency. It arrives at a figure of 10-15% of total net losses due to fraud, without explanation, or any specific data to back up this estimate. For some reason that is not explained in the Report itself, it appears that this figure is quite low, and may in fact represent a compromise between those on both sides of the material fraud debate. The report simply explains the low estimate in the following way:

“The high incidence of fraud among failed institutions does not imply that fraud caused the failures or even contributed greatly to them. There were many other sources of failure. Estimates of the dollar losses due to fraud and misconduct differ widely - in part because the terms mean different things to different investigators, and because it is hard to measure the role of fraud, however defined, as distinct from other causes that were at work. These estimates range from a low of 3 percent to a high of 33 percent of total losses. While strong methodological reasons favour discounting the low estimate, the Commission cannot determine with precision actual losses due to fraud. We are convinced, however, that taxpayer losses due to fraud were large, probably amounting to 10 to 15 percent of total net losses. While losses of this magnitude are significant, it is important to realize that fraud was not a cause of the S & L debacle.”

The Report may be correct in that fraud did not cause the debacle, but the question remains as to its role in causing the massive losses that resulted. A dissenting view by Commissioner Elliot H. Levitas followed, which noted that he felt strongly enough, based on the evidence presented to the Commission, that fraud played a much larger role than stated in the Report.

“While I realize some Commissioners believe to the contrary, I believe the effect of fraud and abuse, or, more generally, misconduct is understated in the Report. There is reason to suspect the indirect losses from misconduct are greater than the 15 percent stated in the Report. A GAO study of 26 failed S & Ls “found evidence of fraud and insider abuse in each and every [one]”. The Report states further that: “[o]ther case studies have found a similar high incidence of fraud and abuse among failed S & Ls.” Therefore it is highly likely that the impact of misconduct goes far beyond the direct financial losses attributed to it. The coincidence of misconduct and failure is startling. The impact of the wrongdoers was likely pervasive. Most S&L managers resisted the temptations, but where the bad actors did their mischief, financial ruin seems to have resulted. That a number of excuses have been presented as to why more criminal charges were not brought (e.g., regulators and prosecutors were unqualified and inadequately staffed, and the S & Ls had top legal talent and the crooks did not look like hooligans) is
even more reason to believe that the amount of fraud and abuse is underestimated. Just because a 
criminal is not caught does not mean that a crime has not been committed (emphasis added).”

This last sentence harkens back to the yet seemingly unresolved debate engaged in by Sutherland and 
Tappan over a half-century ago that was mentioned earlier.

D. The Debate over the Significance of Fraud in the S&L Debacle

Much of the fraud minimalist position regarding the S&L crisis maintains that moral hazard, brought on 
by economic circumstances and government deposit insurance combined with ineffective regulation, led 
thrift owners to (legally) take risks and gamble for resurrection. The central issue is not actual criminal 
adjudication, but of the intent of those involved in the complex financial deals that led to insolvent thrifts. 
Even if fraud minimalists concede that criminal adjudication provides an erroneous measure of the true 
extent of thrift fraud, they still maintain that the deals that thrusts entered into and which caused mass 
insolvency and losses in the industry do not necessarily represent fraud. Rather, they were behaviours by 
honest thrift owners acting as rational economic persons faced with extreme moral hazard who desperately 
gambled in a vain attempt to save their institutions. The “gambling for resurrection” model represents the 
conventional economic wisdom regarding the catastrophic losses resulting from the S&L crisis, and in large 
part, the official history of the debacle.

The general argument that fraud did not cause the economic or regulatory environments within which 
the debacle occurred is well taken. The economic environment resulted largely from social structural forces, 
while the regulatory environment was due to a mix of political ideology, heavy lobbying by the thrift industry, 
and disastrous public policy choices based on the prevailing politics and economic wisdom of the era. None of 
this necessarily implies, however, as fraud minimalists have argued, that fraud, and more specifically, control 
fraud, did not play a significant role in producing catastrophic failure in the industry. On the contrary, there is 
much evidence that shows that ineffective regulatory policies that ignored the potential for control fraud 
allowed it to proliferate and concentrate in the particular institutions that underwent massive insolvencies 
during the crisis.

Numerous accounts of massive control frauds appeared in media accounts, government hearings and 
reports, and academic research. The major federally funded study on S&L fraud and the response of the 
government to the ensuing debacle concluded, among other things, that fraud played a material role in the 
crisis, that government agencies were swamped with cases, and that significant amounts of fraud would 
remain undetected. Some have gone so far to claim, that the financial losses directly attributable to white-
collar crimes that were discovered and recorded in official statistics represent only “the tip of the iceberg.”

Finally, some government reports estimated that fraud played a central role in 70-80 percent of all thrift 
failures. A study by Nobel economist George Akerlof and his colleague, Paul Romer found that deliberate 
insider looting of institutions accounted for 21 percent of government resolution costs, and that this was 
“likely to be an underestimate”. Some regulators claimed that when indirect and direct costs of S&L fraud 
were considered that they would add up to virtually 100 percent of resolution costs.

29 Ibid., p. 86.
30 Pontell, Henry N., Calavita, Kitty and Robert Tillman. “Fraud in the Savings and Loan Industry”, op. cit.; Calavita, Kitty, 
Pontell, Henry N. and Robert Tillman, Big Money Crime: Fraud and Politics in the Savings and Loan Crisis. Berkeley: 
University of California Press, 1997. One high-ranking official put the enforcement response to the S&L crisis in particularly 
graphic terms when he compared the financial damage to a major environmental disaster, too enormous to be cleaned up 
effectively: “I feel like it’s the Alaskan oil spill. I feel like I’m out here with a roll of paper towels. The task is so huge, and 
what I’m worrying about is where can I get some more paper towels? I stand out there with my roll and I look at a sea of oil 
coming at me, and it’s so colossal!” Quoted in Pontell, Henry N., Calavita, Kitty and Robert Tillman, “Corporate Crime and 
Criminal Justice System Capacity: Government Response to Financial Institution Fraud.” Justice Quarterly 11, September, 
1994: 400.
34 Personal interview.
In contrast to these views regarding the role of material fraud in the S&L debacle, others claim that fraud costs were minimal, exaggerated by the press, enforcement personnel, and others who were looking to find scapegoats for the government’s own mishandling of the problems that beset the industry. Made up mostly of economists and thrift industry consultants, this group of individuals claim that fraud did not play a material role in the crisis, and that it had only minor effects. Factors such as falling oil prices, the collapse of the Texas real estate market, and excessive risk taking and mismanagement were the primary sources of insolvencies and the resulting costs to government and taxpayers.35 Noted economist Lawrence White devotes less than three pages of his book on the crisis to fraud and crime, and claims that the “fraud factor” was greatly exaggerated in popular depictions. His argument, unsupported by any in-depth analysis of quantitative data, reflects the conventional economic wisdom on the subject.

The bulk of the insolvent thrifts’ problems...did not stem from...fraudulent or criminal activities. These thrifts largely failed because of an amalgam of deliberately high-risk strategies, poor business judgments...excessive optimism, and sloppy and careless underwriting, compounded by deteriorating real estate markets36 (emphasis in the original).

Other researchers, however, found that the variety of criminal activity uncovered in the S&L debacle was seemingly endless. These researchers employed not only historical evidence, but qualitative and quantitative data, criminological concepts and theories, and scientific reasoning based upon patterns of insolvency and financial loss in order to examine the nature, extent, and role of fraud in the debacle. The most costly form of control fraud they discovered, and one that was previously not recognized by legal and criminological scholars was “collective embezzlement”37. Such embezzlement ranges from an outright looting of an institution’s cash or other resources to business practices where the sole purpose is the generation of personal profits for management, despite the negative effect on the health of the organization. One way embezzlers robbed their own banks was to go on “shopping sprees” with thrift funds.38 Thrift operators around the country spent huge sums on personal luxuries,39 throwing lavish parties, travelling around the world in private jets, and buying expensive antiques, cars and yachts. Less outright forms of embezzlement included schemes to obtain excessive compensation for directors and officers.40 Transactions were fabricated in order to receive fees and commissions; profits were inflated to extract additional dividends.41

An empirically based study42 of 686 failed thrifts analyzing federal data on organizational characteristics and criminal referrals found that various S&L practices were significantly related to levels of fraud, and not

36 White, op. cit., p. 117.
41 Another important distinction, and one which leads to the importance of recognizing control fraud as a new and insidious phenomenon brought into play by the perverse economic incentives present during the S&L crisis, is that previous studies have differentiated between corporate crime, in which the corporation perpetrates fraud on its own behalf, and embezzlement, in which crime is committed against the corporation. Wheeler and Rothman (op. cit.) note that “[e]ither the individual gains at the organization’s expense, as in embezzlement, or the organization profits regardless of individual advantage, as in price-fixing”. Similarly, Coleman argues, “The distinction between organizational crimes committed with the support from an organization that is, at least in part, furthering its own ends, and occupational crimes committed for the benefit of individual criminals without organizational support, provides an especially powerful way of classifying different kinds of white-collar crime” (Coleman, James William, “Toward an Integrated Theory of White-Collar Crime.” American Journal of Sociology 93, 1987: 407). These categories neglect, however, the possibility of organizational crime in which the organization is a vehicle for perpetrating crime against itself, as in the case of savings and loan fraud (and the more recent corporate scandals). Collective embezzlement in the thrift industry used organizational support to loot the organization. It thus represents a hybrid: “crime by the corporation against the corporation”. The incentives for such crime were greatly heightened during the S&L crisis (Calavita and Pontell, 1991, op. cit.).
merely to insolvency. This study suggested that many of the factors shown in previous research to have been linked to insolvency were also predictive of criminality in failed institutions. Practices such as direct investments and high asset growth, for example, were found not only to be indicators of “reckless and sloppy management”, as they have frequently been described in the S&L literature, but also to be related to fraudulent schemes that ultimately led to the downfall of the institutions. The study notes “[F]or those observers who see mismanagement, declining regional economies, deposit insurance, and faulty regulatory schemes at the root of the S&L crisis, and who assign little significance to fraud and misconduct the study findings suggest at a minimum that these two sets of factors cannot be separated so easily”.47

The study also notes that the conventional economic wisdom of characterizing practices such as taking in large amounts of brokered deposits or making large numbers of direct investments as “reckless” implies a lack of attention (and rationality) by the organizational insiders who do such things. The study concludes that these practices were often the mechanisms by which control frauds were perpetrated, and that perpetrators were well aware of this. Indeed, they profited greatly from such practices while having little if any concern for the long-term survival of the financial institution, which served, in Wheeler and Rothman’s terms as a tool, or “weapon” in the commission of their crimes. S&Ls were ideal vehicles for the commission of fraud and insider looting.

Finally, another study takes the issue one step further by testing three rival hypotheses to account for the catastrophic losses in the S&L crisis. Two of the hypotheses are based explicitly on the fraud minimalist arguments of excessive risk taking (“gambling for resurrection”) influenced by moral hazard, and

46 Tillman and Pontell, 1995, op. cit., p. 1458. The results of this study showed that those institutions that were the sites and vehicles for the most frequent, the most costly, and the most complex amounts of white-collar crime were those that: (1) were stock owned; (2) were less involved in the home mortgage market; (3) had committed a greater proportion of their assets to direct investments; and (4) undertook strategies that led to a dramatic growth in assets.
47 Ibid.
48 Another analysis (Black, William K., and Henry N. Pontell, “Regulatory and Economic Incentives for White Collar Crime: The U.S. Savings and Loan and Insurance Crises of the 1980s”. Paper presented at the 22nd Seminar of the European Group of Risk and Insurance Economists, University of Geneva, Switzerland, September 20, 1995) characterizes the conventional economic wisdom on the S&L crisis as constituting the following essential points. S&Ls faced moral hazard as they were exposed to systemic interest rate risk by government limits on their asset powers. The regulators then compounded the problem by failing to close insolvent S&Ls. This, combined with federal deposit insurance and a relaxing of regulatory and accounting oversight provided a significant incentive to “gamble for resurrection” on high risk assets. These gambles often failed, leading to the debacle. Fraud did not play a material role in the crisis. The contrasting view of government regulators, enforcement personnel, criminologists, and some economists is that these factors also provided an optimal environment for control fraud and other crimes. A criminogenic environment is one that facilitates the commission of criminal activity. In the case of the S&L crisis, the environment allowed for the following conditions that would encourage the proliferation of control fraud: (1) complete insider domination (“The best way to rob a bank is to own one.”); (2) plentiful liquid assets relative to liabilities (the larger the amount, the more that can be looted, and/or spent on political intervention to fend off regulators); (3) the ability to grow quickly (growth implies success and garners positive attention as well as increased liquid assets); (4) the ability to convert corporate assets to personal gain (creating phoney income that appears to warrant extra bonuses, “perks,” and stock dividends); (5) the ability to hide losses and create phoney income (investing in assets that have no readily ascertainable market value so they can be overstated and losses hidden); (6) the ability to impede detection and prosecution of fraud (diffuse victimization, and making fraudulent business transactions appear “normal”); and (7) minimal ethical barriers to insider fraud, i.e., an ethos that considers greed a virtue, and government regulation as unnecessary provides a lethal combination of factors that can only weaken if not ultimately destroy fiduciary standards.
mismanagement, while the third derives from the material fraud model.

The first hypothesis, based on excessive risk taking, which entailed “gambling for resurrection”, considered the following arguments of the minimal fraud school:

**Thrift owners and managers were rational profit maximizers.** Given the state of their insolvent institutions in the early 1980s, managers took on technically legal, but very risky investments in the hopes of extraordinary returns that could rescue their thrifts from bankruptcy. The thrift debacle of the 1980s resulted from the collapse of these excessively risky investments.51

The managerial incompetence model (hypothesis two) was stated as follows:

**Thrift failures in the 1980s were primarily due to managerial incompetence.** Deregulation permitted individuals with no previous banking experience to buy and operate thrifts, at the same time allowing them to make a wide variety of risky investments with which they had little or no prior experience. The epidemic of thrift failures was the predictable result of this lack of experience. 52

The material fraud model (hypothesis three) posited the following:

**Fraud and deliberate abuse were central factors in the thrift crisis of the mid-1980s.** Not only did

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51 Ibid., p. 33. This explanation is related directly to the concept of “moral hazard”. There were perverse economic incentives for behaviour, and individuals benefited with little to no personal risk by engaging in activities that were inefficient or counter-productive at the organizational level. According to this gambling for resurrection hypothesis, the bulk of the losses associated with the thrift crisis resulted from potentially high yield investments in extremely risky assets that had very high default rates. Thrift owners, acting as rational economic actors trying to resurrect their institutions, engaged in high-risk gambles, which if they paid off, would save their S&Ls from insolvency. For insolvent thrifts, the perverse incentive for such gambling was clear: “Heads I win and tails you (FSLIC) lose”. An insolvent thrift had nothing to lose and everything to gain by engaging in such long-shot gambles. If this excessive risk taking explanation is correct, the study argues that one would predict the following historical artifacts in the S&L crisis using both logical deduction and an extension of the underlying economic paradigm: (1) Thrift owners most influenced by such moral hazard would be those whose institutions were the most deeply insolvent, and they should be at stock owned thrifts rather than at mutuals, since according to finance theory, mutual managers tend to be more risk averse, and because shareholders of stock associations would stand to gain the most through stock appreciation and dividends if the gambles succeeded. For insolvent institutions this would be an entirely rational approach, since shareholders had already lost their capital investment unless some long-shot gambles saved them; (2) Losses would be concentrated in thrifts where managers made high-risk investments, because of the higher likelihood of failure of these investments. In addition, one would expect to see faster growth in these thrifts through increased high-risk investments, and according to portfolio diversification theory, greater diversification of portfolios, as rational economic actors would seek to increase potential returns. Only a few “plungers” would concentrate their portfolios in relatively few assets, as this would limit their chances for a successful return on their investment; (3) Exceedingly careful underwriting would be present. Thrift owners who were trying to make their high-risk investments succeed, and bring their institutions back to solvency, would have employed excellent underwriting practices, since the only chance for resurrection would be picking successful high-risk investments, which, by their very nature require increased scrutiny by rational economic actors; and (4) At the aggregate level, thrifts should have had a significant level of success in gambling for resurrection in the 1980s. While they started from a deficit (i.e., they were market value insolvent), interest rates dropped sharply by 1982 and by the mid-1980s most unrealized market losses were eliminated. Many markets such as real estate and junk bonds produced fine returns throughout most of the 1980s. Had rational thrift owners enjoyed even a minimum level of success in a diversified portfolio of investments with adequate underwriting, they should not have failed. On the contrary, one would expect to see a reasonable number of highly successful gambles. Moreover, among those institutions that did fail, one would expect to see a wide range of failures, including relatively minor losses and much greater ones.

52 Ibid. p. 37. This model predicts the following: (1) Stock associations would have a much greater incentive to secure expert management, and thus failures would be concentrated among mutual associations. Failures should also be disproportionate among institutions that had a change in ownership; (2) Poor asset diversification and non-traditional investment strategies; (3) Although inexperienced and incompetent managers might have engaged in inadequate underwriting, one would reasonably expect that even they would be able to understand the most basic aspects of the procedure, and improve internal controls over time. Moreover, one would expect that they would be responsive to regulatory concerns about underwriting, potential violations, and the soundness of their investments. Well-intentioned, rational, yet inexperienced managers should have welcomed such free advice; (4) Regarding patterns of failure, one would expect to see insolvencies following the entrance into the industry of such managers, and that these should have decreased with time as managers gained greater experience.
fraud contribute to many of the insolvencies of the period, but it was a key ingredient in the most costly thrift failures.\textsuperscript{53}

Using government reports and a wide consensus among experts on all sides of the fraud debate regarding the worst thrift failures, the study concluded that when the predicted patterns of the excessive risk taking, managerial incompetence, and material fraud models are compared to these facts, the data are most consistent with the material fraud hypothesis. “If we assume that thrift managers are rational economic actors, deliberate insider abuse is the only viable explanation for the behaviour of insiders at the worst failures.”\textsuperscript{54} The study also explains that clearly not all failures were due to fraud, and that there was certainly overlap among these categories. Some thrift managers convicted of fraud were also incompetent. “However, these cases did not produce the worst failures and the catastrophic losses associated with the thrift debacle. Nor, as we have seen, can they account for the pattern of thrift failures that together comprise this financial disaster.”\textsuperscript{55}

III. THE UNITED STATES CORPORATE AND ACCOUNTING SCANDALS

A. Enron: A Case Study in Control Fraud

Another example of the destructive power of control fraud, and the denial by fraud minimalists that it is a concrete social phenomenon is found in the recent corporate and accounting meltdowns in the United States. While events, indictments, prosecutions, and new legislation are still underway, the news is quite disconcerting not only because of the unprecedented losses throughout the world, but because virtually no lessons were learned from the example of the savings and loan industry regarding effective regulation, assets that have no clear value, accounting abuses, or control frauds. After the fall of Enron, Fortune, one of the media bastions of corporate capitalism and which for six years in a row hailed Enron as the most innovative company in America, changed its stance, and not only ran an unprecedented cover story on white-collar crime and the need for punishing corporate offenders, but in later issues depicted corporate officers as pigs in suits on both its cover and throughout the magazine.

The bankruptcy of Enron in late 2002, which was the first in a wave of major business failures in the U.S., provides a telling example of what was happening in many large corporations during that time. The company, which was one of the largest in the world, has been described as everything from a corporation that sold price stability, to a hedge fund selling peace of mind, to a merchant bank selling energy.\textsuperscript{56} While some of this may be true, it was later discovered that Enron was nothing more than a giant sham. It combined the worst elements of both classic and modern frauds. It was a Ponzi scheme, in which the top executives who ran the company became rich at the expense of those at the bottom (employees and investors). That is, with the help of the (now bankrupt) major accounting firm of Arthur Anderson, it has become clear that Enron was mainly in the business of selling stock, which in fact was its only consistently profitable business activity. Enron was also a pump and dump, in which shareholder value and stock prices were grossly inflated through phoney earning statements and false announcements about the company’s health so that corporate insiders

\textsuperscript{53} Ibid. p. 38. It predicts that: (1) Greater failures in deregulated states that allowed for non-traditional investments, concentrated in thrifts that were insolvent on a market basis, and that were tightly-held stock associations. Failures and losses would also be disproportionate at thrifts that experienced a change of ownership immediately before increased non-traditional investment activity, especially where the recent entrants had substantial conflicts of interest, e.g., real estate developers; (2) Ideal vehicles for fraud entail non-traditional investments, such as ADC loans, and other direct investments where losses should be concentrated. Such investments would entail little portfolio diversification, and many loans would be at or exceeding the loans-to-one-borrower limit. Thrifts would also be experiencing rapid growth, not only to increase the value of the fraud, but because the large development loans, if they provided the vehicles for such fraud, would require a rapidly growing portfolio of reported assets to camouflage such criminality; (3) Underwriting would be weak to non-existent, as the frauds would be more readily exposed to regulators. Internal managers engaged in control fraud would have both the ability and incentive to undo any internal controls that would interfere with the commission of their crimes. Such managers would also have an incentive to deceive regulators, and to cover up the financial transactions that would reveal the failing health of their institutions; (4) Material insider fraud would almost inevitably lead to insolvency, frequently with very large losses. Such failures and losses would surpass the intrinsic (non-fraud) risks of the institutions high-risk assets.

\textsuperscript{54} Ibid., p. 44.

\textsuperscript{55} Ibid.

\textsuperscript{56} Platt’s Energy Economist, January 30, 2002.
could sell their shares at high prices while other investors were wiped out. Enron was also an insider trading scandal, where damaging information was kept from the public so that executives and others could profit on stock trading. And finally, in terms of the thousands of limited partnerships that were created in order to keep massive company losses off the books, and keep stock prices high, Enron was nothing more than a giant con game.57

Yet in order to fully understand what happened at Enron, a simple question needs to be asked: How did Enron actually make money? The truth now seems obvious: Almost no one seems to know. The strength and profitability of the company was largely a matter of faith. This raises another fundamental question, which is: Why were so many people willing to believe in something that so few actually understood258 The simple answer is that, like Enron’s management, investors cared only about the stock price. The truth that the company didn’t make much money was lost inside a maze of offshore limited partnerships within partnerships. That truth may have been hard to find, but at the same time, no one was looking very hard. “If a few analysts thought there might be something fishy about what they called “subjective accounting”, investors didn’t particularly care as long as the profits rolled in.”59

Other factors cited as allowing for the massive fraud perpetrated at Enron included the rise of a “culture of arrogance” within the organization, and an almost unprecedented tension among employees brought about by a “cutting edge and cut-throat” competitive environment.60 In such a climate of stress and fear, it becomes easier to understand why and how negative information would never surface within the company. The failure of the board of directors, which was primarily responsible for protecting the interests of shareholders has also been seen as a contributing factor in allowing for the frauds perpetrated at Enron. Some directors had financial ties with companies and organizations affiliated with Enron, and thus had major conflicts of interest.61 Their vigilance and independence was harshly criticized in a U.S. Senate report that also noted that their compensation was about double the industry average for persons serving on boards of publicly traded companies.62

B. Accounting, Control Fraud and Corporate Governance

The fact that the accounting firm of Arthur Anderson was allowed to both consult with Enron (helping to set up financial records that disguised company losses), and then audit the company’s financial statements (certifying that the company was financially sound) enabled the fraud that eventually led to collapse of the company. This corporate-accounting relationship was also found in the failures and losses experienced at other companies such as WorldCom, Adelphia, Rite-Aid, Global Crossing, Xerox, and many others.63 These relationships between accounting firms and companies that were found to be engaging in fraud totally negate a basic tenet of corporate governance theory upon which many regulatory policies in modern capitalist countries are based. The classic textbook The Economic Structure of Corporate Law states that only honest companies can pass the inspection of experienced outside auditors because the reputational cost of false certification to accounting firms is greater than any gains to be made.64 Criminologist William K. Black has called this contention a “myth”, and points out that during the savings and loan crisis, every fraudulent savings and loan received a clean bill of health from a reputable accounting firm.65 This same exact pattern can be found in the recent corporate and accounting scandals in the United States.

C. Fraud Denial: Blaming the Victim and Relying on the Invisible Hand

At a fraud conference held at the University of Texas, Austin in the spring of 2003, a finance professor offered what appeared to be the prevailing view of a good number of his colleagues when he argued that lack

60 Ibid., p. 174.
63 Rosoff, Pontell, and Tillman, op. cit.
64 Easterbrook and Fischel, op. cit.
of investor vigilance played a significant role in the run-up of stock prices that helped fuel the incredible losses and bankruptcy filings that resulted at Enron, WorldCom, and other companies. Without willing investors, he argued, such events could not have taken place. What this argument neglects is the fact that Enron employees and investors would have gained nothing by doing their homework and reviewing cooked corporate financials and complex business deals designed to hide the underlying fraud engaged in by the company. Even the usually vigilant financial press, upon which many investors heavily rely, was completely fooled for years by false profit reports. Blaming those who were victimized not only avoids the central issue of insider fraud, but, taken to its logical extreme, produces the incredible conclusion that there is no such thing as crime, or at least offender culpability. If investors and loyal employees who represent the most immediate victims are to be held responsible for allowing insiders to loot their organizations, than anyone can be blamed for their own victimization. Would fraud minimalist similarly argue that if you don’t want to be robbed, you shouldn’t carry money or go out at night? One would certainly hope not. Blaming the victim is one of the major fallacious inconsistencies in the fraud minimalist’s position regarding the recent corporate scandals.

Another is that the only apparent “hand,” invisible or otherwise, produced by free market mechanisms was one of “infectious greed”, as U.S. Federal Reserve Chairman Alan Greenspan later decried, that pick-pocketed employees and investors, and deposited their funds into the offshore bank accounts of corporate officers who paid accounting firms to do the dirty work of structuring such transactions, and then had them audit and certify their books. This hand existed in opportunity structures provided by the free market itself, where companies grossly inflated their earnings. The strength of such free market forces on behaviour is undeniable, and in this case could be demonstrated by the fact that in those same days that rescuers searched for survivors from the 9-11 attack on the World Trade Center, Enron executives were also in their own race against time to dump their stock before it lost almost all value, and their control frauds were finally exposed.

IV. CONCLUSION

It often can be extraordinarily difficult to distinguish white-collar crime, and especially control fraud, from ordinary business transactions. As the well-known British criminologist, Michael Levi notes: “Since the aim of the more sophisticated fraudster is to manufacture the appearance of an ordinary business loss or at worst, of the ‘slippery slope’ rather than deliberate fraud...the actual allocation of any given business ‘failure’ to any of these categories is highly problematic”.67

This brings us right back to Tappan’s insistence that the search for the “true” level of crime must be guided by official definitions and criminal convictions. While minimal fraud proponents appear to take this view, most criminologists who study white-collar crime have abandoned it for the scientific reasons noted earlier. Given the evidence compiled by researchers, individual case studies, regional analyses, and from the investigative front, it is quite clear that much fraud remains shielded behind complex business transactions that are designed to hide it. As criminological study has shown, the volume and complexity of insider frauds can easily overwhelm prosecutorial resources, necessitating declinations of some criminal cases, and lesser charges for those that remain.

This being said, the fact remains that the official histories of the two financial debacles described here adopt the positions of fraud minimalists, and in no way reflect the significant role of material fraud in each disaster. Ignoring the potential for control fraud as an outcome of free market forces, or even the best-intended regulatory policies, can apparently lead to catastrophic financial events. Moreover, the failure to acknowledge control fraud as a social phenomenon can only encourage those seeking to take advantage in at least two ways. First, the fact that there are no effective mechanisms to prevent control fraud allows actors to engage in various crimes. Second, failing to recognize the possibilities for control fraud until an episode is well underway encourages lawbreaking, as formal control systems will be overwhelmed by massive enforcement workloads. Perpetrators will be able to escape the vast bulk of legal sanctions because of

resulting strains in criminal justice capacity.\textsuperscript{68}

There is a difference between “risky business” and white-collar crime that is defined by statutory law, if not always by the law in action. Despite the arguments of fraud minimalists, it was the ability to grow rapidly using assets that had no clear market value and that could produce phoney income that was the key in the S&L scandals. Similarly, the recent corporate and accounting scandals provided a new and infamous group of corporate executives and others who, as of this writing, await indictment and criminal adjudication. While this newest set of scandals still unfolds, well-known patterns of financial loss and fraud are already apparent. As one account puts it:

Phoney earnings, inflated revenues, doctored financial statements, and an assortment of other crimes, old and new, pushed a healthy economy into intensive care. A cadre of elite executives looted their failing companies and became astonishingly wealthy by cashing in billions of dollars worth of overvalued stock on an unsuspecting market. In many cases, this was stock that they never even bought in the customary way. It had been “handed to them via risk-free options”.\textsuperscript{69} When the dust settled, shareholders had lost most or all of their investments. Employees had watched their retirement funds swirl down the drain, along with their jobs. It has been estimated by consumer groups and labour unions that the recent corporate scandals have cost Americans more than $200 billion in jobs, tax revenues, lost investment savings, and lost pensions.\textsuperscript{70}

The seemingly inescapable yet oftentimes ignored policy lesson provided by these financial debacles is that any proposals for reform and prevention, whether directed at deposit insurance, financial institutions, accounting, securities markets, or corporate governance, cannot assume away the problems of assets that have no clear values, accounting abuses, or control frauds. Public policies based on analyses that “white-wash white-collar crime” and that do not explicitly recognize the potential devastation of control fraud, will not only be ineffective, but will serve as virtual blueprints for future financial disasters.

\textsuperscript{68} This, of course is true of common crime as well, and the phenomenon has been empirically demonstrated in terms of the system capacity model of criminal justice, but is exacerbated in the case of white-collar crimes given the legal complexities and intricacies involved, the legal resources of perpetrators whether they be individuals or organizations, and the hidden nature of the crimes themselves. Thus, the major tenets of deterrence and prevention are essentially denied. The legal system simply cannot respond effectively to such massive economic crime after it occurs. 68 Pontell, Calavita, and Tillman, “Corporate Crime and Criminal Justice System Capacity”, 1994, op. cit.; Calavita, Pontell, and Tillman, Big Money Crime, 1997, op. cit.


I. INTRODUCTION

In the past the Criminal Code of Ghana Act 29 of 1960 was extensively used to protect individuals in the Country against the acts of aggression of others in relation to their person or their property, to maintain security of the State itself and to maintain peace and order within the territorial boundaries. However, in recent times the Criminal Law has been used to enforce the demands of the economy, for example, by the enactment of the Securities Industry Law of Ghana, PNDCL 333 of 1993 and the Finance Lease Law of Ghana, PNDCL 331 of 1993 in consonance with the changing economic philosophy of Ghana. Currently, there is also the tendency of criminalising acts that aim at destroying the general economic interest of the country as these acts have economic consequences which adversely affect the economic development of the whole country. Supplementary offences have been inserted in the Criminal Code of Ghana to deal with Public Officials and others whose acts cause financial loss, damage or injury to the property of the State.

In line with the international concept of providing measures to combat international crime, the Government of the Republic of Ghana is on the warpath to fight such crimes by promulgating laws to fight corruption, money laundering, and other economic crimes as well as the control of the international narcotic drug trade. In this way, the activities of the individual that hinder economic development can be seen and dealt with by the Criminal Law. Formerly, the nature of economic crime took the form of activities of Government officials and agents who handled other people’s money or other economic resources. The offences were mostly of a financial nature such as embezzlement, fraud by agents, fraud by false pretences, counterfeiting, forgery, issuance of false prospectus and so on. Additionally, the range of offences was limited in sphere because one had to be a custodian or a trustee of the property before the crime could be committed.

Nowadays, many opportunities have been offered by technological advancement and globalization, improvement in communications, computers as well as developments in the financial markets, credit financing and the scope of international trade. These developments have opened up the possibilities for criminal economic activities so much so that there is a wide range of such crimes these days. The categories of fraud have opened up widely, so have the modus operandi of the perpetrators which has changed from pen and paperwork to telephone, facsimile and computer or internet communication, such that the activities of the perpetrators permeate the entire economy.

The measures for control and the prosecutions of economic crime are important to Ghana as a developing nation. Apart from providing protection and redress at the interpersonal level, there are also responsibilities at the national level to grapple with. In Ghana, the Government is still the largest employer, and as a result any breach of trust or any criminal act of a Public Servant will have direct repercussions on the fragile national economy. For instance, if a high government official allows a foreign investor to swindle a colossal amount of money from Government coffers and bolt with it in exchange for personal reward, on the face of it, it might seem to be a small favour done, but in terms of the effect on the economy, it would hamper economic development, because not only would the State lose that money but the social and economic benefits of the investment would have been lost completely to the citizenry.

It is therefore important for the Government of the Republic of Ghana to put measurers in place to discourage such conduct among public officials by swift prosecution and imposition of heavy penalties on those who engage themselves in such criminal activities. With the growth of new technology and the opportunities that it offers to the perpetrators of economic crime, it is imperative for the criminal justice system in Ghana to provide the legal framework for preventive measures as well as curative measures to deal with these economic crimes. It has been recognised that even the types of offences which the law must take cognizance of have changed greatly. For instances, at the moment there is no law dealing with economic crime involving the illegal movement or sale of confidential information belonging to an individual.

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The Criminal Code, of Ghana gives the definition of illegal movement of property stipulated in section 122 (2) as follows: “Any moving, taking, obtaining, carrying away, or dealing with the intent that some person may be deprived of the benefit of his ownership, or of the benefit of his right or interest in the thing, or in its value or proceeds, or any part thereof”. A close look at the provision will show that it aims at handling someone’s object or article physically and transferring its content to oneself. In the circumstance, taking the content of somebody’s document and passing it on without destroying the document or browsing a computer and taking information from it without tampering with it would be impossible to successfully prosecute under this provision of the Ghana Criminal Code. The system therefore needs some changes to make it possible to prosecute such crimes.

Ghana’s criminal justice system therefore needs vigorous and aggressive changes to meet squarely the new crimes that the world is witnessing today otherwise, as it is currently, any effort to deal with economic crime within the criminal law “would be pitiful” as one Professor of law puts it. At this juncture, it is appropriate to examine some of the economic crimes engulfing society in these days of technological advancement. The obvious starting point is fraud, one of the conventional economic crimes which has traditionally been provided for in all legal systems.

II. FRAUD

Under the Criminal Code of Ghana there is a long list of types of fraud, provided in sections 131-145. They include fraud by false pretences, stamp offences, falsification of accounts, fraud in sale or mortgage of land, fraud as to boundaries of documents, fraud as to a thing pledged or taken in execution, fraud in removing goods to evade legal process and fraud by agents. Though the list is long it does not exhaust in any way the types of fraud that the world is witnessing these days. Section 132 of the code defines fraud by false pretences as follows: “A person is guilty of defrauding by false pretences if, by means of any false pretence or by impersonation he obtains the consent of another person to part with or transfer the ownership of anything”.

A. Fraud by False Pretences

From the foregoing definition it is clear that fraud is about obtaining a financial or other benefit in terms of money at the detriment of another person. All of these frauds contain an element of dishonesty since the intent of the fraudster is to use dubious means to do an act which benefits him or her at the expense of the interest of the victim.

Fraud by false pretence occurs if a person misrepresents an existing state of facts such that the misrepresentation induces another to consent to parting with the ownership of a thing. The essence of this offence is that the false representation induces the victim to consent to part with or give the fraudster access to his or her property. A case in point is how a Ghanaian defrauded a French national in Ghana. He was arrested and brought to court for trial. The perpetrator of this crime is a Managing Director of a company in Accra, known as Diamond Motors and Enterprise Limited. In 2002 he met the French national in London and informed him that he dealt in gold and therefore had in his possession, 250 kilograms of gold ore valued at 51,562 million. The fraudster told his victim to test a sample of the ore to verify its genuineness in Switzerland, to which he complied. The victim who agreed to buy the consignment after a successful test, was assured by the fraudster it would be exported to him in Switzerland and that payment should be made after five days of export. The fraudster sent a pro forma invoice to his victim but failed to deliver the consignment on the appointed day. When he was confronted, he explained that the chiefs and elders of the town, where the ore was to be obtained had filed a writ in the High Court, restraining him from exporting the consignment. Meanwhile the fraudster had already collected $156,250 which represented ten percent (10%) of the total amount from his victim, with the excuse that he was going to use it to influence the chiefs and elders to withdraw the legal suit. This turned out to be false. There is the need for an efficient mechanism for the verification of claims of people. Prospective investors should also be educated on the need to be careful who they do business with.

B. Revenue Related Fraud

One other fraud that relates to State revenue is the one which involves altering and falsification of bills of lading and invoices, receipt or other documents showing evidence of quantity, character or condition of any property or the receipt and disposition of or the title of any person to any property as provided under the
Criminal Code of Ghana in section 142 (b). This provision is so wide that customs and Excise Duties as well as Value Added Tax (VAT) depend on the provision. The Value Added Tax of Ghana, 1998, Act 546 provides provisions that deal sections 57, 59 and 70 under part XII of the Act. These offences and penalties have been made available in the Act because as the Act provides for refunds for exported goods, there is bound to be increased attraction for fictitious documents to show such transfers.

C. Fraud by Agents

There is also Fraud by Agents, who may be Government officials or the employees of private businessmen. This is an area with great potential for abuse of power and corruption. Under the Criminal Code of Ghana, section 145 (a) deals with financial inducements offered by third parties to agents so that they might show favour in dealing with them. The provision states as follows; “any agent who dishonestly accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business, he shall be guilty of a misdemeanour”.

Consequently, a Civil Servant who demands or takes a bribe in order to perform his duty is guilty under this provision. Section 145 (b) of the Code also makes provision for those who dishonestly give or agree to give any gift to any agent as an inducement or reward. Any person found to have committed such a crime can be prosecuted and consequently convicted.

As a measure against fraudulent deals by public officers and corruption by Government officials, or any other person, there has been the inclusion in the Criminal Code of Ghana, of “Special Offences”. These offences, which are largely economic in nature, were created as a result of the increasingly complex nature of economic crime. They are provided in section 179A (1)-(3) as follows:

1. “Any person who by a wilful act or omission causes loss, damage or injury to the property of any public good or agency of the state commits an offence.
2. Any person who in the cause of any transaction or business with a public body or agency of the state intentionally causes damage or loss whether economic or otherwise to the body or agency commits an offence.
3. Any person through whose wilful action or commission, malicious or fraudulent
   (a) The state incurs financial loss; or
   (b) The security of the State is endangered, commits an offence”.

It can be clearly seen that the provisions cover areas of fraud attributed to any person whether Government officials or private individuals. Perhaps these offences were created to cover the economic crimes that were emerging which could not be catered for by the existing legislation in the fight against economic crime.

D. Securities Market Fraud

The securities market has its own kind of fraud relating to economic crime. With the growth of the securities market in an emerging market like Ghana, market manipulation associated with the securities industry is bound to occur. Market manipulation is where the price of securities is controlled or artificially affected by the wilful conduct of officials to deceive or defraud investors. This kind of crime causes a lot of pain and hardship to people who invest their earnings in the hope of improving their resources. The Securities Industry Law of Ghana, 1993, PNDCL 333 makes provisions and penalties for such offences relating to investment fraud. Thus the acts of officials involving the creation of a false impression of price appreciation of shares is made punishable in section 122 as false trading as follows: “A person who creates or causes to be created, or does anything that is calculated to create a false and misleading appearance of active trading in securities on a stock exchange in Ghana or a false or misleading appearance with respect to the market for, or the price of such securities commits an offence”.

In the same vein, the Securities Industry Law can punish any person who distorts the market either by artificially inflating a price or lowering the price or even keeping a stable price when the market price would have dictated otherwise. While the law creates offences, at the same time it provides for defences in a situation where a person’s act, which is alleged to amount to false trading on the stock market, may not have
been done with the intention to create a false picture of active trading, but for some other legitimate purpose. In such circumstances the person will be exonerated, if he is able to prove that his action was for a legitimate purpose and not to defraud anyone.

In the securities industries, there is what is known as insider trading where persons who are involved in the industry or management of companies occasionally use information that they have to obtain financial rewards by using such information to buy or sell securities. This conduct is generally prohibited because it distorts the market and enables those with such information of the companies to act at the expense of the investing public. The Securities Industry Law prohibits this conduct under section 128. The reason for the prohibition is to allow the price of the securities to be determined by the interplay of the forces of demand and supply in a free atmosphere without any interferences or artificial mechanism. The law also provides offences for those who obtain information from people who have any association or dealings with the companies trading on the stock market for their own benefit.

E. Advance Fee Fraud
There is yet another type of fraud known as Advance Fee Fraud (a.k.a - 419). The use of modern communication equipment all over the world enables businessmen to communicate and enter into business negotiations without physical contact. This system has bred a type of economic crime where goods ordered are not paid for because of false contact addresses or forged letters of credit, etc. This type of fraud throws a real challenge to the commercial world since quite often those who engage in international commercial transactions may not be able to check the background of their clients who may be separated by distances of thousand of miles. Such an offence comes under section 131 of the Criminal Code.

F. Intellectual Property Fraud
There is also copyright of intellectual property fraud where the infringement of intellectual property has achieved new dimensions in view of international and domestic trade. The imitation of goods ranges from pharmaceutical products to food and pirated works such as music. In the past copyright owners only had to fight for their rights against their infringement in the civil courts. However, by the promulgation of the Copyright Law, which recognised the problem associated with the enforcement and the prosecution of rights of authors and music makers, the Copyright Law of Ghana, PNDCL 110 of 1985 made the infringement of copyright a criminal offence. Studies have shown that even though the Copyright Law has stringent provisions for infringement of copyright, prosecutions have been minimal.

The punishment which the Copyright Law provides is nothing to talk about. Sections 44-48 of the law provide that any person who infringes any copyright or neighbouring right shall be liable on summary conviction to a fine ranging from c10,000.00 to c1,000,000 (i.e. $1. to $100) and a term of imprisonment of up to two years. In addition to this, the courts may order seizure and disposal of all infringing material and equipment involved in the infringement of the copyright. The statute therefore needs to be amended so as to impose a heavy penalty on those who infringe the law.

G. Abuse of the Financial System
Banking and non-banking institutions are not left out - with frauds in the form of abuse of the financial system. Frauds in the banking system can be stated as misappropriation of assets or intentional misrepresentation of financial information by one or more individuals among management, employees or third parties. This kind of fraud takes the form of manipulation, falsification or alteration of records or documents, suppression or omission of the effects of transactions from records or documents, recording of transactions without substance and sometimes misapplication of accounting policies. Computer fraud in the banks is on the ascendancy and it takes the form of manipulation of electronic data to facilitate and cover up the fraud.

The introduction of Automated Teller Machines (ATM) in the banking system has come with its own type of economic crime with the use of fake ATM cards by unscrupulous employees of the banks for the withdrawal of money from customers' accounts. As Ghana is trying to catch up with the fast developing electronic technology of this age, electronic fraud of such a nature, where most bank employees can obtain internal records to produce additional bank ATM cards for themselves or customers, will become rampant. With the use of these fake but functional cards, an employee or his accomplice can withdraw funds from any ATM. The negative aspect of the operation of the ATM system should be identified so that measures can be
put in place to check its occurrence. A case in point is the case of Tsegah v. Standard Chartered Bank (Gh.) Ltd. No.C602/99, where a customer of the Bank sued the Bank for a refund of monies withdrawn from his bank account apparently through the use of a fake ATM card. A whopping sum of c13.1 million. ($1,360) was fraudulently withdrawn from the customer’s account. It was found that the plaintiff’s pleading did not indicate the area of Law the action was founded on. This is indicative of the fact that the legal system of Ghana has not made inroads into such a new economic crime pervading the banking system.


In the area of electronic payments, Ghana did not have legislation that regulated electronic transfer of funds or cheque abuses, even though computer related frauds abound in both domestic and international payments. The Evidence Decree of Ghana, 1975, NRCD. 323 is silent on the admissibility of electronically stored information as evidence in Law. Although section 51 of the Evidence Decree gives direction to the court to accept relevant evidence. A payment Act should remove any doubt surrounding the admissibility of electronically stored information as evidence. It could be seen that the law did not take cognizance of the opportunities that were opened up for criminals’ technological advancement, therefore there was the need to protect society particularly users of the payment systems.

Having seen the need for new legislation to deal with the payment system, the Parliament of Ghana has recently passed into Law a modern Payment Systems Bill known as the Payment Systems Act of 2003. (Act 662). The Law provides the statutory framework for electronic banking in Ghana and prevents the manipulation of the bank accounts of customers.

III. MONEY LAUNDERING

The concept of money laundering has been in existence for a long time and it is principally tied down to monies and assets acquired from illicit trade (e.g. illicit drug trade) by criminals. This laundering involves not just individuals, but sometimes major banks. The money the criminals obtain is transferred into various accounts or invested in legal businesses to disguise the origin of their criminal money so they can avoid detection and the risk of prosecution when they use it. Invariably, the criminals invest such monies by purchasing real estate or establishing big projects, especially in countries with legislation in support of secrecy of bank accounts. The launderers usually deceive the governments concerned with employment creation for their nationals and a contribution to national revenue. Through these processes, a criminal tries to transform the monetary proceeds derived from illicit activities into funds with an apparently legal source.

Money Laundering can have devastating economic and social consequences for countries, especially those in the process of development and those with a fragile economy like Ghana. It has been observed that the economy, society and ultimately the security of the countries used as money laundering platforms are all at risk. This is due to the fact that laundered money from criminal mining and exploitation of natural resources are known to have been used to buy weapons used in various civil wars in Africa. The civil conflicts have dislocated the economy and caused widespread disease and the death of millions of people.

Before 1990 the term money laundering did not feature frequently in discussions of offences we know as money laundering today. Ghana therefore, showed a limited response to money laundering when it enacted the Narcotics Drug (Control, Enforcement and Sanctions) Law, 1990, PNDCL 236. Section 12 of this Law criminalised money laundering in the area of narcotic drugs. Ghana began to take a serious look at money laundering in 1997 when the Bank of Ghana, and the Inspector General of Police, with the support of the Government, formed a Committee for co-operation between Law Enforcement Agencies and the Banking Communities (COCLAB) to provide a platform for members to exchange ideas, knowledge and information about criminal syndicates and the process of obtaining evidence to track down and find culprits involved in money laundering. The committee has influenced Ghana’s anti-money laundering programme by identifying illegal activities, contributing to a draft statutory framework for the prohibition of money laundering (now pending before Parliament) and organizing seminars on money laundering, and other economic crimes, to sensitise the banking and non-banking financial community and the law enforcement agencies.
In spite of the fact that Ghana currently has no legislation to deal effectively with the offence of money laundering, it has put in place institutional arrangements to combat money laundering. The law enforcement agencies, the Attorney-General’s Department and the courts on one side, and the financial regulators on the other, are the established institutions involved in the monitoring, investigating and prosecution of suspicious transactions.

Ghana’s position is that the attention given to the issue of money laundering should now move beyond a comprehensive anti-laundering programme, hence the drafting of the Money Laundering (Proceeds of Crime) Bill, which when passed into Law will deal effectively with this socio-economic menace.

IV. INSTITUTIONS AND MEASURES SET UP TO DEAL WITH ECONOMIC CRIME IN GHANA.

A. Police

The Police are the most effective antidote or barrier for all types of crime. Traditionally it has operated in areas where its activities are useful for the detection and investigation of criminal activities. It has been found that given the wealth and resources at the disposal of modern economic criminals, the quality of criminal investigations need to be improved so as to equip them with the necessary skills to deal effectively with the sophisticated modern criminals. In order to be abreast with operations of the modern criminals, Ghana Police personnel are constantly undergoing training in the areas of modern economic crime. To catch up with the modern trend of crime, especially in the areas of the abuse of the financial system, the Ghana Police need a sound understanding of financial operations as well as accounting and other forms of expertise and the requisite equipment for investigations.

Currently pending before the Parliament of Ghana is the whistleblower Bill which seeks to provide a way in which individuals may in the interest of the public disclose information that relates to, corruption or other illegal conduct or practices of others in society and to make sure that the persons who make the disclosures are not subjected to victimization. In Ghana where impropriety in both public and private sectors, as well as society in general is common, the need for such legislation is paramount. Under the Bill, written copies of the disclosure of information about criminal activities of persons should be submitted to the Attorney-General who in turn causes investigations to be conducted into the cases, for prosecution if the need arises.

B. Serious Fraud Office

In Ghana, the Serious Fraud Office (SFO) was set up in 1993 by the Serious Fraud Office Act, 1993 (Act 466) as an investigative agency to investigate, monitor, and on the authority of the Attorney-General, prosecute any offence involving serious financial or economic loss to the state. Before the Serious Fraud Office (SFO) was set up, there was no particular state agency with the sole mandate to deal with Commercial and other economic crimes. Its establishment took into account the increasing sophistication of crimes committed by individuals in society, resulting from modern information technology, communications and complexity in economic crimes. The traditional mechanism of existing law, the police, and other institutions for fighting complex and serious economic crimes were found to be inadequate to cope with the modus operandi of modern criminals. The Serious Fraud Office has been framed to take advantage of skilled professionals in the areas of law, accounting, banking, taxation, etc, and to use their expertise and resourcefulness to counter the developing trends of sophistication in the commission of economic crimes.

C. Bank of Ghana

The Bank of Ghana has the Statutory Power to licence financial institutions. Its functions cover those who seek to operate as banks by taking in deposits and lending out money, such deposit taking being a potential route for investment fraud, the work of the Bank is to see to it that depositors are not deceived into putting money into a financial scam. It also ensures that operations in the financial sector are not conducted in a manner that harm the economy.

The Bank has supervisory authority over all the commercial banks and the non-banking financial institutions in Ghana. Its supervisory activities are carried out within the framework of Laws, Regulations and Conventions in force at any particular time. The Bank of Ghana Law, 1992, PNDCL 291 establishes the Banking Supervision and Research Department in section 51 of the Law. It provides in part as follows: “...be responsible for the supervision and examination of all banking institutions in the country”.

207
With this tool in hand, the Bank was able to investigate the operations of the “Pyram” and “Resource 5” schemes. These are two companies which emerged on the financial scene in Ghana with investment schemes that promised about 30% interest a month on any sum invested. Their operations turned out to be one of the biggest financial scams in Ghana in 1995. During the Bank’s investigations into their operations, the companies folded up because they could not comply with the Bank’s regulations. People who invested their money in these schemes lost it when the schemes collapsed. In order to protect the depositors and investors and to maintain public confidence in the financial sector, the Bank has intensified its supervisory activities over the financial institutions in Ghana.

D. Courts
The Courts are the institutions that must come down hard on the fraudsters and other economic criminals who engage themselves in economic crimes, including money laundering. There should be more diligent prosecutions and aggressive sentencing on the part of the court in order to deter those whose intentions are to defraud and launder their ill-gotten money. It is the Attorney-General who has been given the mandate under Article 88 (3) of the 1992 Constitutions of Ghana to initiate and conduct all criminal cases in Ghana. The Attorney-General and his cohort of attorneys who have full control of the prosecution of criminals should therefore marshal resources to fight aggressively against the perpetrators of economic crime and money laundering in Ghana. In the circumstances, the trial of economic crimes should be swift and more aggressive.

It has been noted that economic crime inflicts loss on the victims and at the same time it provides unjustifiable economic gain to the perpetrator. Therefore the courts should switch from the traditional criminal law system of monetary penalties and imprisonment, which are not adequate to restore the loss of the victim, to confiscation of properties of the criminals which are gotten from the proceeds of their illegal activities, to enable the courts to make restitution orders in favour of the victims.

Efforts are being made to equip the courts in Ghana with modern equipment like computers, etc. and to train judges so as to become familiar with the intricacies of high finance to enable them to appreciate the importance of the issues involved in the prosecution of economic crime and money laundering. This has culminated in the setting up of the Automated Courts or the Fast Track Courts in Ghana to deal with cases, especially commercial and economic crime, so as to reduce long and slow methods of adjudication.

IV. CONCLUSION
Ghana shares the concerns of international organizations and governments on economic crime and money laundering. There is therefore the need for assistance, including the training of officials of law enforcement agencies and authorities from the financial and other related sectors. There is also the need for provision of financial and technical backup for the justice system and the Police and State Attorneys who handle criminal cases.

The criminal justice system of Ghana is in a battle against crimes on all fronts. The globalization of crime has come to stay with us and it is a great task for the criminal law and criminal justice system of Ghana to put themselves up in the fight against economic crime and money laundering. Ghana therefore needs the co-operation and support of the international community to address the challenges posed by economic criminals and money launderers.
LEGISLATIVE MEASURES TO DEAL WITH ECONOMIC CRIMES IN INDIA

Animesh Bharti*

I. INTRODUCTION

Economic Offences form a separate category of criminal offences. Economic Offences not only victimize individuals with pecuniary loss but can also have serious repercussions on the national economy. Economic offences, such as counterfeiting of currency, financial scams, fraud, money laundering, etc. are crimes which evoke serious concern and impact on the Nation’s security and governance. This paper seeks to present a perspective on the trend of economic crimes and legislative measures to deal with such crimes in India. The paper is divided into four sections. The first section gives an overview of economic crimes and relevant legislation and the enforcing agency in India. The second section deals with economic crimes covered under the Indian Penal Code. The third section explains the law on money laundering and the fourth section focuses upon cyber crimes, which is expanding rapidly with the growing use of the Internet.

II. ECONOMIC CRIMES: AN OVERVIEW

A table listing various economic offences, the relevant legislation and the enforcing authorities in India is given below:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Economic Crimes</th>
<th>Acts of Legislation</th>
<th>Enforcement Authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Tax Evasion</td>
<td>Income Tax Act</td>
<td>Central Board of Direct Taxes</td>
</tr>
<tr>
<td>2.</td>
<td>Illicit Trafficking in Contraband Goods (Smuggling)</td>
<td>Customs Act 1962</td>
<td>Collectors of Customs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>COFEPOSA, 1974</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Evasion of Excise Duty</td>
<td>Central Excise and Salt Act, 1944</td>
<td>Collectors of Central Excise</td>
</tr>
<tr>
<td>4.</td>
<td>Cultural Object’s Theft</td>
<td>Antiquity and Art Treasures Act, 1972</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>7.</td>
<td>Land Hijacking/Real Estate Fraud</td>
<td>IPC</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>8.</td>
<td>Trade in Human Body parts</td>
<td>Transplantation of Human Organs</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>10.</td>
<td>Fraudulent Bankruptcy</td>
<td>Banking Regulation Act, 1949</td>
<td>CBI</td>
</tr>
<tr>
<td>12.</td>
<td>Bank Fraud</td>
<td>IPC</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>13.</td>
<td>Insurance Fraud</td>
<td>IPC</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>14.</td>
<td>Racketeering in Employment</td>
<td>IPC</td>
<td>Police/CBI</td>
</tr>
<tr>
<td>15.</td>
<td>Illegal Foreign Trade</td>
<td>Import &amp; Export (Control) Act, 1947</td>
<td>Directorate General of Foreign Trade/CBI</td>
</tr>
<tr>
<td>16.</td>
<td>Racketeering in False Travel Documents</td>
<td>Passport Act, 1920/IPC</td>
<td>Police/CBI</td>
</tr>
</tbody>
</table>

* Deputy Secretary (Crime Monitoring), Ministry of Home Affairs, Government of India.
1 Central Bureau of Investigation.
2 Narcotics Control Bureau.
III. ECONOMIC CRIMES UNDER THE INDIAN PENAL CODE (IPC)

The Indian Penal Code contains provisions to check economic crimes such as Bank Fraud, Insurance fraud, Credit card fraud, stock market manipulation, etc. The local police deal with the IPC crimes falling under the broad categories of ‘Cheating’ (Section 415-424), ‘Counterfeiting’ (Coins & Stamps Section 230-263A and Currency Section 489A-489E) and ‘Criminal Breach of Trust’ (Section 405-409).

A. Serious/Major Fraud

Statistics on the serious/major frauds reported and registered under the Criminal Breach of Trust (CBT) cases and cheating cases for the years 2000-2002 is given in the table below.

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Value of Property lost/defrauded (in Rs. Crore)</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total CBT Cheating</td>
<td>CBT Cheating</td>
<td>CBT Cheating</td>
<td>CBT Cheating</td>
</tr>
<tr>
<td>1.</td>
<td>1-10</td>
<td>430</td>
<td>1192</td>
<td>246</td>
</tr>
<tr>
<td>2.</td>
<td>20-25</td>
<td>2</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>3.</td>
<td>25-50</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>4.</td>
<td>50-100</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>5.</td>
<td>Above 100</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>433</td>
<td>1199</td>
<td>248</td>
</tr>
</tbody>
</table>

The number of serious fraud cases registered under the Criminal Breach of Trust and Cheating cases was lower in 2002 as compared to 2001.

IV. MONEY LAUNDERING

Money laundering is the process of cleaning dirty money with the objective of hiding its source and enabling it to be used later in a legal form. This process creates a web to hide the origin/true nature of these funds. Prior to the enactment of the Prevention of Money Laundering Act, 2002 this crime was covered under the violation of foreign exchange rules under the Foreign Exchange Regulation Act (FERA) and later under the Foreign Exchange Management Act (FEMA).

Statistics on cases under FERA for the year 1998-2002 are given below.
Money Laundering (1998-2002) (Cases under FERA)

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Year</th>
<th>No. of Searches/Raids</th>
<th>Seizures/Recoveries</th>
<th>Currency Seized (In Indian Rs. in crore)</th>
<th>Currency Confiscated (In Indian Rs. in crore)</th>
<th>Fines (in Indian Rs. in Crore)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Indian</td>
<td>Foreign</td>
<td>Imposed</td>
</tr>
<tr>
<td>1.</td>
<td>1998</td>
<td>544</td>
<td>361</td>
<td>7.1</td>
<td>2.3</td>
<td>4.6</td>
</tr>
<tr>
<td>2.</td>
<td>1999</td>
<td>387</td>
<td>299</td>
<td>4.9</td>
<td>0.8</td>
<td>4.2</td>
</tr>
<tr>
<td>3.</td>
<td>2000</td>
<td>330</td>
<td>262</td>
<td>3.6</td>
<td>2.2</td>
<td>5.7</td>
</tr>
<tr>
<td>4.</td>
<td>2001</td>
<td>295</td>
<td>207</td>
<td>1.2</td>
<td>2.7</td>
<td>2.7</td>
</tr>
<tr>
<td>5.</td>
<td>2002</td>
<td>417</td>
<td>303</td>
<td>0.8</td>
<td>1.2</td>
<td>1.0</td>
</tr>
</tbody>
</table>

In 2002, 417 searches/raids were conducted in money laundering cases as against 295 in 2001. Though there has been a declining trend in the number of seizures/recoveries during 1998 to 2001, an increase was observed in 2002.

In 2002, the recoveries, seizures made under FERA violations, yielded Rs. 0.8 crore of Indian currency and Rs.1.2 crore Indian equivalent of foreign currency. The value of confiscated currencies i.e. both Indian and foreign had decreased over the previous year.

A. Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act (PML), 2002 was passed by the Parliament of India in December 2003. This Act is applicable to all States/Union Territories of India including Jammu & Kashmir and overrides the provisions of any other statute in force. The Legislation is effective from the date the Rules under the PML Act are prescribed.

The PML Act seeks to combat money laundering in India and has three main objectives:

- To prevent, combat and control money laundering
- To confiscate and seize the property obtained from the laundered money; and
- To deal with any other issue connected with money laundering in India.

In brief, the important provisions of the PML Act are as follows:

- Any person, who directly/indirectly indulges in any activity/process connected with the proceeds of crime and projects it as untainted property, shall be guilty of money laundering.

- The term ‘proceeds of crime’ means any property that has been derived, directly/indirectly by a person from a criminal activity relating to a scheduled offence in the Act.

- There is a Schedule annexed to the Act which carries a list of the offences, the proceeds derived from the commission of which can be treated as the proceeds of crime. This list is exhaustive in nature and any property derived from an offence other than these activities cannot be brought under this Statute. The Schedule includes offences under:
  - The Indian Penal Code
  - The Narcotic Drugs and Psychotropic Substances Act, 1985
  - The Arms Act, 1959
  - The Wild Life (Protection) Act, 1972
  - The Immoral Traffic (Prevention) Act, 1956
  - The Prevention of Corruption Act, 1988

- The term ‘proceeds of crime’ is intrinsically linked with the term ‘property’ since any conversion of the original proceeds that is in monetary form will result in the creation of an asset. Any person who indulges in a criminal activity listed in Para 2.3.3 above shall be liable under the Act and the asset
derived from this activity shall be treated as the proceeds of crime. All assets of any nature and any
description will fall within the ambit of the terms ‘property’.

- The minimum penalty for committing an offence under the Act is rigorous imprisonment for three
years along with a fine that may extend to Rs.5 lakh. The maximum imprisonment is 7 years for
general offences. However, if the person is convicted of a specific offence under the NDPS Act, he
may be imprisoned for a period of 10 years.

- Filling of a criminal complaint is a pre-requisite to the initiation of civil proceedings. Thereafter, the
special court will take the complaint into cognizance. If the person is acquitted by the special court,
all civil proceeding shall stand vacated.

- Further, the activity of laundering money is a separate crime from the activity from which the money
was sourced. For instance, drug peddling would be a separate crime from the crime of laundering its
proceeds.

- The Act provides for provisional attachment/seizure of any property if the adjudicating authority has
reason to believe that the said property is involved in money laundering. The property is confiscated
when the attachment gets confirmed after conviction of the accused and such property vests in the
Central Government.

- The Act prescribes various mandatory procedures to be followed by the banking institutions for
maintaining records of all transactions and informing of such transactions within a prescribed time
limit. Obligation has also been cast on these institutions to verify and maintain the record of the
identity of its clients. These records must be maintained for a period of 10 years.

- When any authority has any reason to believe that any person is in possession of or has acquired any
property from a criminal activity under the Act, he has the power to make enquiries/conduct
surveys/searches.

- The authorities designated under this Act are authorized to arrest a person if they have reasons to
believe that he has committed an act, which constitutes the offence of money laundering under this
Act.

- Any person who is aggrieved by the order of the adjudicating authority has the right to appeal before
the Appellate Tribunal.

- Special Courts shall be set up by the Central Government to conduct the trial of the offences of
money laundering. The authorities under the Act like the Director, Adjudicating Authority and the
Appellate Tribunal have been constituted to carry out the proceedings related to attachment and
confiscation of any property derived from money laundering.

- In order to enlarge the scope of this Act and to achieve the desired objectives, the Act provides for
bilateral agreements between countries to cooperate with each other and curb the menace of money
laundering. These agreements are for the purpose of either enforcing the provisions of this Act or
the exchange of information that will help in the prevention of the commission of an offence under
this Act or the corresponding laws in that foreign state.

- In certain cases the Central Government may seek/provide assistance from/to a contracting State for
any investigation or forwarding of evidence collected during the course of such investigation.

- The Act provides for reciprocal arrangements for processes/assistance with regard to accused
persons.
B. Steps Taken by the Government to Curb Money Laundering

• Several steps have been taken by the Government of India to tackle the problem of money laundering effectively. The Reserve Bank of India, which is the Central Bank for the country, has issued directions to be strictly followed by the Banks regarding the standard practices under the ‘Know Your Customer’ (KYC) guidelines. The banks are required to obtain all information necessary to establish the identity/legal existence of each new customer. These guidelines are to be scrupulously followed by the overseas branches of Indian banks also.

• The PMLA makes it mandatory for every banking company, financial institution and intermediary to maintain records of transactions for a period of ten years. In case of any violation of this legal obligation, these institutions have to face penal consequences.

• The PMLA also provides for reciprocal arrangements between India and other countries for enforcing the provisions of this Act and for exchange of information for prevention of any offence under this Act or under the corresponding law in force in that country for investigation of cases relating to any offence under this Act.

V. MEASURES TO COMBAT COMPUTER RELATED CRIMES

Information Technology has reduced the world into a small village with no respect for geographical boundaries. The advent of information technology has not only introduced new forms of crimes but new variants of already existing criminal action as well. During the last decade, India has faced a new challenge tackling a new and sophisticated form of crime in the form of cyber crime.

The most common forms of computer crimes reported are:
• Intrusions/Hacking in computer networks for the purpose of defacing a web site, theft of password to gain an unauthorized access, theft of personal information like credit card numbers, etc.
• Espionage
• Frauds/cheating

Cases registered in this category of crimes in the year 2002 are given below:

<table>
<thead>
<tr>
<th>Sl. No</th>
<th>Description</th>
<th>Cases Registered</th>
<th>Persons Arrested</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Tampering with Source Documents</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>2.</td>
<td>Hacking of Computer Systems</td>
<td></td>
<td></td>
</tr>
<tr>
<td>i)</td>
<td>Loss/Damage to Computer Resource/Utility</td>
<td>15</td>
<td>9</td>
</tr>
<tr>
<td>ii)</td>
<td>Hacking</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>3.</td>
<td>Obscene Publication/Transmission in Electronic Form</td>
<td>33</td>
<td>38</td>
</tr>
<tr>
<td>4.</td>
<td>Digital Signature Fraud</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>5.</td>
<td>Breach of Confidentiality/Privacy</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>6.</td>
<td>Others</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>70</strong></td>
<td><strong>65</strong></td>
</tr>
</tbody>
</table>

Of the 70 cases registered under the IT Act 2000, around 47 percent of cases pertain to obscene publication/transmission in electronic form, normally known as cases of cyber pornography. Thirty-eight persons were taken into custody for such offences during 2002. There were 26 cases of Hacking of computer systems wherein 21 persons were arrested in 2002. Of the total (26) Hacking cases, the cases relating to Loss/Damage to computer resource/utility under Sec 66(1) of the IT Act were to the tune of 58 percent and that related to Hacking under Section 66(2) of the IT Act were 42 percent (11 cases).
Cyber Crimes/Cases Registered and Persons Arrested Under IPC During 2002

<table>
<thead>
<tr>
<th>Sl. No</th>
<th>Description</th>
<th>Cases Registered</th>
<th>Persons Arrested</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Fake Electronic Evidence</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>2.</td>
<td>Destruction of Electronic Evidence</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>3.</td>
<td>Forgery</td>
<td>167</td>
<td>357</td>
</tr>
<tr>
<td>4.</td>
<td>Criminal Breach of Trust/Fraud</td>
<td>510</td>
<td>785</td>
</tr>
<tr>
<td>5.</td>
<td>Counterfeiting</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>i) Property Mark</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>ii) Tampering</td>
<td>10</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>iii) Currency/Stamps</td>
<td>49</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>738</strong></td>
<td><strong>1310</strong></td>
</tr>
</tbody>
</table>

Of the 738 cases registered for Cyber Crimes under IPC, the majority of the crimes fall under 3 categories viz. Criminal Breach of Trust or Fraud (510), Forgery (167) and Counterfeiting (59). Though these offences fall under the traditional IPC crimes, the cases had cyber undertones wherein computers, the Internet or its related aspects were present in the crime and hence they were categorized as Cyber Crimes under IPC. Interestingly, the number of cases under Cyber Crimes relating to Counterfeiting of currency/stamps stood at 49 wherein 124 persons were arrested during 2002. Of the 46,271 cases reported under cheating, Cyber Forgery (167) accounted for 0.4 percent. Of the total Criminal Breach of Trust cases (14,027), the Cyber Frauds (510) accounted for 3.6 percent while under the Counterfeiting offences (1522), Cyber Counterfeiting (59 out of 1522) offences accounted for 3.9 percent.

In order to tackle the acrimonious relationship between the law and crime caused by information technology, the Government of India has adopted some of the provisions of the Model Law on Electronic Commerce by the United Nations Commission on International Trade Law (UNCITRAL) and enacted the Information Technology Act, 2000. This Act has been enacted for according legal recognition to the authentication of information exchanged in respect of commercial transactions conducted by means of Electronic Communications Technology. The main focus of this Act is on the following areas:

I. Legal recognition of:
   (a) Digital signatures, which include
       - Acceptance in lieu of hand written signatures
       - Authentication
       - Security
   (b) Electronic Records, which includes
       - Retention
       - Attribution, Acknowledgment and Dispatch
       - Security
       • Creation of an infrastructure for issuance and regulation of digital signature certificates.
       • Creation of a cyber regulations appellate tribunal.
       • Amendments in existing laws to give recognition to electronic documents.
       • Offences and penalties for cyber crimes.
       • This Act defines two kinds of liabilities, civil and criminal, for various cyber crimes. The Civil liabilities are in the form of penalties for example:

Section 43 & 44 of this Act prescribes the penalty for the following offences:
• Unauthorised copying of an extract from any data/database.
• Unauthorised access and downloading of files.
• Introduction of viruses/malicious programmes.
• Damage to a computer system and computer network.
• Denial of access to an authorised person to a computer system.
• Providing assistance to any person to facilitate unauthorised access to a computer.
• Charging the service availed by a person to an account of another person by tampering and manipulation of a computer/computer system.
The criminal liabilities are dealt with in a separate chapter under ‘offences’. Section 65 to 75 of this Act provide for different forms of imprisonment according to the offence, so far as criminal liabilities are concerned. They cover:

- Tempering with computer source documents.
- Hacking of computer systems.
- Electronic forgery i.e. preparing of false electronic records, affixing of false digital signatures, etc.
- Electronic forgery for the purpose of cheating.
- Electronic forgery for the purpose of harming reputation.
- Using as genuine a forged electronic record.
- Publication of digital signature certificate for a fraudulent purpose.
- Unauthorised access to protected systems.
- Publication of information in an electronic form, which is obscene in nature.

With the amendment of the definition of document by providing authenticity to electronic documents in the existing Indian Penal Code, Indian Evidence Act, Bankers Book of Evidence, etc. the Act has also facilitated use of the existing criminal laws for tackling the conventional crimes committed using computer technology like forgery of documents, cheating, impersonation, stalking, theft, etc.

**Actions Proposed at the International Level are as Follows**

1. Uniform international model laws may be developed for defining the various facets of crimes committed in a computerized environment.
2. The international law for cooperation between different countries may be standardized in order to enhance the possibilities of tackling trans-national crimes with provisions for a faster mode of cooperation of the existing procedure related to letters of request.
3. The interaction between the law enforcement agencies of different countries at formal and informal levels should be increased in order to increase the flow of information related to the crimes committed and technology developed for anticipating, tackling and enforcement of the law.
AN OVERVIEW OF THE MEASURES TO COMBAT ECONOMIC CRIME INCLUDING MONEY LAUNDERING IN THE CONTEXT OF NEPAL

Suryanath Prakash Adhikari*

I. INTRODUCTION

The impact of globalization in the economic and information technology field has brought all the nations of the world together. There is a direct impact of good and bad happening in one part of the world to another part. This interdependent system has enabled the countries to share the profits of globalization as well as distribute the suffering. The dark side of globalization is that there are many less crimes of a local nature. Most of the crimes are committed by nexuses of criminals residing in different parts of the world. The attempt of any single country to punish them is almost impossible. It is difficult to catch the big fish in the net. Only one part of the gang may be held responsible but the criminal activities move smoothly. Thus, it is necessary to strengthen the links between countries to tackle crimes of an international nature.

This paper is intended to highlight the measures to combat economic crime, including money laundering, in the context of Nepal. This will enable the course participants to have a general look into the criminal justice system of Nepal and measures under the system to combat economic crime.

II. WHAT ARE ECONOMIC CRIMES?

Acquiring easy money is one of the important objectives that induce a person to act in his life in different ways than the socially accepted norms. Where the acts accord with accepted social norms and the law permits them there is encouragement from all sides to make good money from good activities. When the activities are outside the accepted social norms, the law tries to prevent them, and then the activities are illegal and ultimately a crime. There are various motivating factors for one to commit crime. Those factors may be classified in various ways. Now it is suffice to say that the main motivating factor of crimes from which one wants to receive money, are regarded as financial crime. A financial criminal not only attempts to accumulate money from illegal sources. It is threatening to the world economic order and creates a hurdle for national development. In Nepal financial crimes, especially corruption and money laundering have been adversely affecting national development.

Financial crimes are contributing to the degradation of social norms. This crime causes further chaos and disorder in society by creating wider gaps between the hard money earners and easy money earners.

From the very beginning of the development of the Kingdom of Nepal as a nation state, financial crimes were regarded as the most heinous crimes. The great king Prithwinarayan Shaha who unified the Kingdom declared that the bribe takers and bribe givers are the greatest enemy of the nation and they deserve the death penalty.

Broadly speaking crimes committed with the motive of getting money may be classified as financial crimes. In addition, the socio-economic impact of the crime is also taken into consideration for such classification. Keeping in mind the socio-economic effect of the crime the following crimes are regarded as the most serious financial crimes. The foregoing paragraphs discuss in detail these crimes and measures taken to combat them.

1. Corruption
2. Fraud
3. Tax Evasion
4. Counterfeiting
5. Trafficking of Human Beings
6. Drugs Trafficking
7. Money Laundering

III. CORRUPTION

Corruption has been regarded as a heinous crime in Nepal for a very long time. But the problem of corruption is still rampant in the Kingdom. Various counter corruption measures are being implemented in the Kingdom. The framers of the Constitution were aware of the problem and the Constitution of the Kingdom of Nepal, 1990 has established a Constitutional Commission (Commission for Investigation of Abuse of Authority) to investigate and prosecute corruption and misuse of authority. The King, on the recommendation of the Constitutional Council, appoints the Chief Commissioner and other Commissioners and their tenure is fixed for six years. The Commission independently discharges the functions of investigation and prosecution of corruption cases filed by the public officials.

In addition to the constitutional status of the Commission the anti-corruption law was revamped in 2002 to make the Commission able to tackle the problem in the context of rampant corruption in the Kingdom. The Prevention of Corruption Act, 2002 has criminalized various activities where there is illegal benefit taken by a public official in the course of exercising his authority. It has further classified the crimes on the ground of financial benefit. One main change brought to the existing system by the new act is the establishment of a crime of corruption on the basis of accumulation of property or high expenses that is not in consonance with the known source of income of a public officer.

In the same way the Government has been committed to expedite corruption cases and it was felt that it was difficult to cope with the problem with the existing legal framework. Thus a special judicial tribunal has been established under the authority of the Special Court Act, 2002. It was established one and half years ago. It tries the cases of corruption committed throughout the Kingdom. Direct appeal lies in the Supreme Court against the decision of the special court. There are three members all of whom are designated from amongst the sitting judges of the Court of Appeal. The speed of trial of cases and rate of conviction in those cases is satisfactory and very high in comparison to the prosecution of other criminal cases. The functioning of the cases is represented in the following table.

| The Statistical Presentation of the Cases Tried by the Corruption Special Court |
|---|---|---|---|---|---|---|
| Registered Cases | Disposal | Fully Convicted | Acquitted | Partially Convicted | Total Convictions |
| Registered | Pending | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| 363 | 216 | 147 | 40.41 | 113 | 76.87 | 23 | 1.85 | 11 | 7.48 | 1.34 | 84.35 |

The conviction rate of 84.35 percent is most satisfactory in the Nepalese criminal justice administration system. It is now necessary to undertake detailed research and find out what factors are responsible for such success. If those factors are verifiable they may be applied to other criminal cases too. It is further necessary to collect data on the ratio of convictions of the Special Court upheld or quashed by the Supreme Court. And find out the reasons for quashing the convictions and improve the law and procedures to strengthen the weakness in the system expressed by the Supreme Court.

IV. FRAUD

Fraud represents a very old traditional economic crime. In Nepal Muluki Ain defined it as a crime from the very beginning. In fraud the element of deception is included. The injured party is misrepresented by the criminal intention of the culprit to get illegal financial benefit. Under ordinary Nepalese law one who commits fraud is punished by imprisonment for up to five years and a fine equal to the amount gained from the fraudulent act. In addition to these traditional fraudulent activities fraud in connection with foreign employment and bank fraud are also common in the Kingdom of Nepal. Fraud committed in the name of paramedical membership is also common in Nepal. This scheme is punished under the ordinary law against fraud. Some employment agencies, or individuals, defraud their customers by charging them a fee in return for foreign employment that never materializes or employment with wages that are lower than promised.

2 No. 3 of the Chapter on Fraud of the Muluki Ain.
The Foreign Employment Act, 1998 prescribes punishment for such fraudulent activities. In such cases the perpetrator will be punished by a fine of at least fifty thousand Rupees but not exceeding Rupees two lakh and a term of imprisonment of at least one year but not exceeding five years. And the victimized person is reimbursed the expenses made in connection with the foreign employment.

V. TAX EVASION

Payment of tax imposed by the prevailing law and the procedure prescribed by the same is one of the fundamental duties of a citizen. Similarly the state has power to tax the transactions within the territory of the state and non-citizens are also subject to tax in a state other than their nationality. There are two methods of lowering the tax liability of a person. First is the application of the rules, which lower the tax liability of the person among the different methods of calculating the tax payable. There may be a difference in interpretation of law between the taxpayer and the tax authorities. In this situation the difference is solved by the judicial interpretation of the case. In case of high liability found by the judiciary, there is monetary compensation only to the state revenue. Where a person intentionally uses different methods for tax evasion the consequences are serious. It causes adverse effects on the economy because the state may not be in position to implement the desired activities due to a shortfall of revenue. Similarly tax evasion prompts money laundering. The tax evaders employ money-laundering procedures to bring the black money back in the system. Thus the taxing statutes employ stringent measures on tax evasion and the person is subject to criminal liability. In Nepal the important taxing statutes are the Income Tax Act, 2002, the Excise Duties Act, 2002; and the Value Added Tax Act, 1993. These acts have made stringent provisions for tax evasion but there are few cases initiated on the grounds of tax evasion.

VI. COUNTERFEITING

Coins are not counterfeited in Nepal; although it has been reported that there is counterfeiting of Nepali banknotes. Similarly the Indian Rupee and US dollar are other foreign currencies that are counterfeited. The Nepalese law addressed this problem from its early period and it has criminalized illegal minting of government coins. The chapter on Counterfeiting in the Muluki Ain defines the crime and prescribes punishment for that crime. A person engaged in counterfeiting of banknotes or coins shall be punished by a term of imprisonment of ten years and fine of an equal amount of the forged notes or coins. This provision is very sparingly used because there are few occurrences of this type of offence. And it has not posed a serious danger. Another type of counterfeiting defined by the law is counterfeiting of government stamps. To the best of my knowledge there is no need to apply this provision because there have been no reports of this crime being committed.

VII. TRAFFICKING IN HUMAN BEINGS

Trafficking in human beings, especially of women and children, is the most heinous insult to the human civilization. In all civilized society this act is highly condemned. In this era of globalization the movement of human beings has increased rapidly, basically in search of better economic opportunities. The increased mobility of individuals has facilitated the trafficking of women and children who are vulnerable. Although there is in-country trafficking of women and children in the Kingdom, Nepal is regarded as a source country and India and Arab countries are receiving countries in the course of trafficking. Due to an open border with the neighbouring country of India, there is no verified data on the exact number of people trafficked. The main method of trafficking used is in the name of employment. The agent pretends that they are going to arrange lawful employment with better pay. The victim doesn’t know they are being trafficked until he/she reaches the destination place of trafficking. In such circumstances it is very difficult to rescue the victim from Nepal without the help and co-operation of the host country. Another common method is pseudo-marriage. In this case the trafficking agent wins the affection of the victim first. Then proposes marriage and gets married with the victim secretly without fulfilment of legal formalities and customary proceedings. After marriage he takes his wife out of the country and sells her when the situation is appropriate. It has recently been discovered that a substantial number of Nepalese children are illegally forced to work in Indian circus industries. They are deprived from their guardian and taken to the circus operators. They are not allowed to see their parents and denied basic needs and work in harsh conditions. With the help of an Indian NGO some of them have been rescued recently.

The legal framework against trafficking is very stringent in Nepal. A chapter on *Muluki Ain* is devoted to
the fight against the trafficking of human beings. The Chapter on *Trafficking of Human Beings* prohibits trafficking of human beings outside the country and prohibits movement of people within the country for the purpose of trafficking. It has prescribed punishment of imprisonment for a term of twenty years for the sale of a person and ten years imprisonment for attempted sale. This general law has been found inadequate to tackle the problem of trafficking and a special act *The Trafficking of Human Beings (Control) Act, 1980* has been enacted.

The *Trafficking of Human Beings (Control) Act, 1980* has brought some fundamental changes in the legal regime against trafficking. The important feature is the shifting of the onus of proof to the accused person from the prosecution side. When a person is accused of trafficking a person or a person is found taking a woman outside the Kingdom the person has to prove that he is innocent. The Act has recognized the international nature of trafficking of human beings and given the Act extra-territorial effect. It states any act, defined as a crime under the Act, if committed outside the Kingdom shall be punishable and the act will be deemed to have been committed within the Kingdom. The other characteristic of the Act is that when a victim claims that someone has sold her, her statement is to be registered immediately and authenticated by the District Court. It has made stringent provisions for punishment too. A person who sells an individual is punished by imprisonment for a term of ten to twenty years. A person who takes an individual outside the Kingdom for the purpose of sale is subject to imprisonment for a term of five to ten years. One who forcefully engages a woman in prostitution is punished by imprisonment for a term of ten to fifteen years. An accomplice or someone who attempts trafficking in human beings is punished by imprisonment for a term of up to five years. This Act unfortunately has been found to not sufficiently address the problems of trafficking and a new bill to replace it was tabled in Parliament and was in the committee stage of discussion. Due to the dissolution of Parliament the proposed bill has not been enacted. It is hoped that this will happen when the House is revived after a general election.

### Cases of Trafficking in Human Beings Heard by Trial Courts
**During the Last Four Years**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Number of Cases</th>
<th>Number Disposed of</th>
<th>Pending</th>
<th>Rate of conviction (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Of the previous year</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Of the year</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conviction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Partial Conviction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Acquittal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>56/57</td>
<td>192</td>
<td>66</td>
<td>49</td>
<td>51</td>
</tr>
<tr>
<td>57/58</td>
<td>144</td>
<td>55</td>
<td>36</td>
<td>43</td>
</tr>
<tr>
<td>58/59</td>
<td>110</td>
<td>29</td>
<td>17</td>
<td>26</td>
</tr>
<tr>
<td>59/60</td>
<td>64</td>
<td>22</td>
<td>10</td>
<td>18</td>
</tr>
</tbody>
</table>

The above table shows the comparative statistics of cases tried by the trial courts in the case of trafficking in human beings. It shows that the rate of conviction is increasing. In the year 56/57 the conviction rate was 39.76% and the rate of conviction in the year 59/60 was 44.00%. The other positive sign is that the number of cases is surprisingly decreasing. There were 129 registered cases in the year 56/57 and only 89, 26 and 69 respectively in the years 57/58, 58/59 and 59/60. Increasing the rate of conviction and lowering the rate of commission of crime are positive signs for both preventive as well as punitive approaches of criminological thought. But the number of cases and their analysis only are not enough to represent the true social picture. Unless other empirical research shows that the commission of crime has really been decreasing we should view these figures with doubt. There is enough room to see why cases of trafficking have not been registered and prosecuted.

### VIII. DRUG TRAFFICKING

The problem of drug abuse and trafficking is not of recent origin. Only the gravity of the problem has been felt more in recent times due to many factors, particularly drug trafficking with an international link and illicit production. The adverse effects of drug addiction have caused degradation of a new generation in

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one way and in another way the fatal disease HIV-AIDS has been transferred from one drug abuser to another through the sharing of needles. In the international area the problem was felt in the early 1900s. The evil effects of narcotic drugs in Nepal have a direct link to the hippies. The hippies entered Nepal as tourists in the 1970s and Nepal’s young generation came into contact with them and they learned the habit of drug addiction. The problems of drug addiction caused national concern and a severe penal measure to curb the evil was necessary. The Narcotic Drugs (Control) Act, 2033 was enacted for the purpose of fighting drug abuse and trafficking. The adverse effects of drug addiction opened and widened the market of such drugs. Naturally, illicit production and trafficking was needed to fulfil the demand of the market. To supply the market international smugglers became active and Nepal, among other countries, was seriously concerned to curb such activities. Among other measures the revision of previous penal policy also became necessary to curb the evil. For that purpose Nepal has also changed its penal policy through three amendments of that Act.

The Narcotic Drugs (Control) Act, 2033 (1976) is the fundamental law against the trafficking and misuse of narcotic drugs. This Act was the first attempt to control narcotic drugs; before the Act there was no specific law dealing with the subject. The Intoxicating Substance Act, 1917 was in effect but it was not directly related to narcotic drugs. The Act has extra-territorial and stringent provisions of punishment. The Act has been amended three times to tackle the changing situation. The scheme of penalties under the Act is presented in the following table.

<table>
<thead>
<tr>
<th>Nature of Narcotic Drug</th>
<th>Penal Section</th>
<th>Prohibited Act</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marijuana</td>
<td>14(1)(a)</td>
<td>Consumption of marijuana</td>
<td>Imprisonment up to one month or fine up to two thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(b)</td>
<td>Farming of marijuana up to 25 plants</td>
<td>Imprisonment up to three months and fine up to three thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(c)</td>
<td>Farming of marijuana more than 25 plants</td>
<td>Imprisonment up to three years and fine up to twenty five thousand Rupees but not less than five thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(d)</td>
<td>Production, preparation, sale and purchase, import-export and storage of marijuana up to 50 grams</td>
<td>Imprisonment up to three months and fine up to three thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(d)(1)</td>
<td>Consumption of marijuana</td>
<td>Imprisonment up to one year but not less than one month and fine up to five thousand Rupees but not less than one thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(d)(2)</td>
<td>Farming of marijuana up to 25 plants</td>
<td>Imprisonment up to two years but not less than six months and fine up to ten thousand Rupees but not less than two thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(d)(3)</td>
<td>Consumption of opium, coca and other narcotic drugs made of opium and coca</td>
<td>Imprisonment up to five years but not less than one year and fine up to twenty five thousand Rupees but not less than five thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(d)(4)</td>
<td>Farming of opium and coca up to 25 plants</td>
<td>Imprisonment up to ten years and fine one lakh Rupees but not less than fifteen thousand Rupees</td>
</tr>
</tbody>
</table>

Opium, coca and other narcotic drugs made of opium and coca

<table>
<thead>
<tr>
<th>Nature of Narcotic Drug</th>
<th>Penal Section</th>
<th>Prohibited Act</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>14(1)(e)</td>
<td>Consumption of opium, coca and other narcotic drugs made of opium and coca</td>
<td>Imprisonment up to one year and fine up to ten thousand Rupees</td>
</tr>
<tr>
<td></td>
<td>14(1)(f)(1)</td>
<td>Farming of opium and coca up to 25 plants</td>
<td>Imprisonment up to three years but not less than one year and fine up to twenty five thousand Rupees but not less than five thousand Rupees</td>
</tr>
</tbody>
</table>
To enforce the Act effectively HMG has established a special investigation branch - the Narcotic Drugs Law Enforcement Unit - under the Ministry of Internal Affairs. It has a special investigative team to tackle the problem looking after drug trafficking within the capital valley. Outside the valley the local police officers investigate the case.

The Cases of Trafficking of Narcotic Drugs Heard by Trial Courts During the Last Four Years

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Number of Cases</th>
<th>Disposal</th>
<th>Pending</th>
<th>Rate of Conviction (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Of the previous year</td>
<td>Of the year</td>
<td>Total</td>
<td>Conviction</td>
</tr>
<tr>
<td>56/57</td>
<td>406</td>
<td>418</td>
<td>824</td>
<td>217</td>
</tr>
<tr>
<td>57/58</td>
<td>361</td>
<td>227</td>
<td>588</td>
<td>183</td>
</tr>
<tr>
<td>58/59</td>
<td>204</td>
<td>96</td>
<td>300</td>
<td>101</td>
</tr>
<tr>
<td>59/60</td>
<td>97</td>
<td>248</td>
<td>345</td>
<td>68</td>
</tr>
</tbody>
</table>

IX. MONEY LAUNDERING

Money laundering is not only a crime that violates the legal rules of a state but it helps to conceal the illegal proceeds of the most heinous crimes and brings the ill-gotten money ultimately back in the economy causing various adverse effects to the system. The corrupt officials, illegal drug dealers and human traffickers are the potential users of this vicious cycle of money. The easier it is to launder the money the higher the rate of those organized international crimes.

There are various modes of money laundering in the world. In all modes three stages are common. First, the money earned through the illegal source is placed in a bank, electronic money or monetary instrument or in highly priced goods. Secondly, the money is layered through a series of transfers and transactions to sufficiently hide its illegal connection. Lastly, the money is integrated into the system. Then the criminals

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can use the money as if it were legally earned money.

_Hawala_ is a common method of money laundering in Nepal. The Hawala people have their network almost all over the world. They can take money at any place and provide it anywhere in the world. They do not carry the money but the agent of the particular place is ordered to pay the amount to the person who carries a secret order. The increase of Nepalese people in foreign employment has provided a better opportunity for the Hawala people. The remittances of Nepalese working in the Gulf and South-East Asian countries received through the Hawala system is higher than that from the legal banking channels. Another method of money laundering is intermingling illegal proceeds with legal source money and treating them earned through the legal source. In a case of corruption of an ex-Minister it was found that the inventory of his property did not match the known source of his income; it was extremely high. The accused Minister claimed that the property was earned through a trekking business of his son. But the income of his son did not support the huge amount of property and was very much higher than he declared in his income tax returns. Recently the Corruption Special Court found the Minister guilty of illegally accumulating money on the ground that his known source of property did not support the income of the property so declared. The Minister was imprisoned for a term of two and half years and fined Rupees about three crore in addition to confiscating the property of three crore rupees illegally earned. It may be assumed that there are a number of such illegal activities linked with legal businesses and the illegal money is mixed with the legal money and that is laundered. There are national and international measures devised to counter money laundering.

One of the necessary elements for facilitating money laundering is bank secrecy laws. Bank secrecy laws allow the safe deposit of illegal money because there is a guarantee that the person is not required to show how he/she received the money. In Nepal, in the financial Year 53/54, the Finance Minister declared a policy of requiring disclosure of the source of money amounting to more than Rupees five lakh that is deposited into a bank account. But the policy has not yet been implemented. And there is no necessity of disclosure while depositing money in a bank in the local currency. But it is mandatory in Nepal to disclose foreign currency deposited in a Nepalese Bank.

The bank secrecy law is not available in case of investigation of corruption cases to the amount, and other valuables, deposited in a bank. There were no clear provisions what to do in case of a corruption case because the banking law provided that it is the duty of a bank to maintain the secrecy of the accounts of their clients. On this basis a bank used to refuse to disclose the details of their customers' bank accounts. The newly enacted Prevention of Corruption Act, 2002 provides that notwithstanding anything mentioned in any law in force, if it appears from a source during the course of investigation that there has been a financial transaction or the operation of a bank account in the name of any person in a bank or financial institution within the Kingdom or abroad, the investigating authority may order the account frozen. Similarly, the law authorizes the investigating authority to impose a fine of up to fifty thousand Rupees on a bank or financial institution if they do not freeze the account or fail to furnish the details.

There is no specific legislation enacted intending to address the problem of money laundering. The Foreign Exchange (Regulation) Act, 1962 has tried _inter alia_ to address the problem of money laundering to some extent. It regulates the transactions of foreign exchange to and from the Kingdom and within the Kingdom. Nepal Rastra Bank (the Central Bank) is the chief regulating authority of the Act. It has further authorized the Bank to issue various directives to regulate the foreign exchange of the import and export business. In addition, the Bank is the licensing authority that grants permission to money changers within the Kingdom. The value of transactions in foreign currency contrary to those Regulations is confiscated and the perpetrator punished by a fine of three times the amount of the transaction.

The Authority for investigation of the violation of the Foreign Exchange Regulations committed within the Kathmandu Valley is given to the Department of Revenue Investigation and in other remaining jurisdictions of the Kingdom the local police authority has power to investigate such cases. In Addition, the Department has authority to investigate the cases of revenue evasion throughout the Kingdom of Nepal.
Foreign Exchange Regulations Violations and Revenue Leakage Investigated and Prosecuted by the Revenue Leakage Investigation Authority in FY 59/60

<table>
<thead>
<tr>
<th>Nature of Crime</th>
<th>Total Number of Cases</th>
<th>Decision to Prosecute</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Of the previous year</td>
<td>Of the year</td>
</tr>
<tr>
<td>Illegal transactions of Forex</td>
<td>9</td>
<td>23</td>
</tr>
<tr>
<td>Revenue leakage/evasion</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Violation of Forex transactions regulation</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td>16</td>
<td>32</td>
</tr>
</tbody>
</table>

The above table shows the statistics relating to the cases investigated by the Department of Revenue Investigation. There is no categorical mention of details of cases after the decision to prosecute. It only states prosecution or non-prosecution. It is very clear from the table that the cases of tax evasion are nominal in Nepal. But I am of the view that there are rampant tax evasions in Nepal. The situation is that they are not investigated properly. A strong and practical strategy is required for that purpose.

The following table shows the number of cases related to violations of the foreign exchange regulations tried by trial courts. This includes both those prosecuted after investigation by the Department of Revenue Investigation as well as those by the local police authorities throughout the Kingdom of Nepal. In comparison to other crimes it seems that there are a higher number of crimes committed violating the foreign exchange regulations. On the other hand the ratio of conviction of suspects also is not satisfactory and needs improvement in the implementation process.

Foreign Exchange Regulations Violations Heard by Trial Courts During the Last Four Years

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Number of Cases</th>
<th>Disposal</th>
<th>Pending</th>
<th>Rate of Conviction (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Of the previous year</td>
<td>Of the year</td>
<td>Total</td>
<td>Conviction</td>
</tr>
<tr>
<td>56/57</td>
<td>29</td>
<td>37</td>
<td>66</td>
<td>18</td>
</tr>
<tr>
<td>57/58</td>
<td>34</td>
<td>26</td>
<td>60</td>
<td>22</td>
</tr>
<tr>
<td>58/59</td>
<td>29</td>
<td>21</td>
<td>50</td>
<td>8</td>
</tr>
<tr>
<td>59/60</td>
<td>32</td>
<td>26</td>
<td>58</td>
<td>3</td>
</tr>
</tbody>
</table>

X. CONCLUSION

Legislation dealing with economic crimes is enacted in Nepal. But this legislation is not adequate to cope with the complexity of the problems that have arisen by the globalization of economic activities, facilitated by modern information technology. All of them are somehow outdated and need revamping and there are some areas where no law is in existence. Laws against drug trafficking, trafficking in human beings, and counterfeiting are in existence but they need modification. There is no separate legislation for fighting money laundering. Some segments of the anti-trafficking laws are included in the anti-corruption law, narcotic drugs law and banking laws, which are not sufficient. Similarly there are no laws regulating computer crimes and cyber crimes. Now it is necessary to enact legislation intending to target the crime of money laundering. Similarly, like other crimes the ratio of convictions for economic crime is not very satisfactory and we need an improvement after diagnosing the problems of economic crimes empirically.

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6 Revenue Investigation Authority.
MEASURES TO COMBAT ECONOMIC CRIME

Erasmus Makodza*

I. INTRODUCTION

The Land Reform Programme adopted by the Zimbabwe Government in the year 2000 and the subsequent smart sanctions imposed by the Western countries has resulted in the mushrooming of various forms of serious economic crimes.

The most notable forms of economic crimes manifest themselves in money laundering, fraud, corruption, insider trading in the stock/financial markets, externalization of foreign currency and embezzlement of funds both in the private and public sector.

In Zimbabwe, policing of economic crimes is done by the Police and the Anti-Corruption Commission.

II. THE CURRENT SITUATION OF ECONOMIC CRIME INCLUDING MONEY LAUNDERING IN ZIMBABWE

Reflecting back to my introduction, the Land Reform Programme in Zimbabwe brought about both positive and negative aspects to the country. The economy is agro-based and thus the Land Reform Programme affected the growth of the economy.

The few whites who owned the land and supported by masters of industry and multinational companies were not supportive of the reforms. As a result, they worked in cahoots to derail the reforms and at the same time, involved themselves in all forms of economic plunder. Thus today, in Zimbabwe, there is a serious problem of high inflation and unemployment rates. The scenario tends to promote economic crime.

As can be shown in the statistics (see Appendix A), serious economic crime was on the increase in 2002 while it decreased in the year 2003.

Serious economic crimes in Zimbabwe:

1. Fraud
2. Money Laundering
3. Corruption
4. Externalisation of Foreign Currency
5. Forgery
7. Tax Evasion

The modus operandi for economic crimes mentioned above is as follows.

A. Fraud
   Cheque Fraud, Insurance Fraud and Master Card Fraud.

B. Money Laundering
   Money stolen is taken to asset management firms and financial institutions where it is deposited to earn interest or alternatively the money is used to buy assets.

C. Corruption
   Public officers misuse their offices by accepting rewards and corruptly doing some undue favours, also some violate the Tender Board procedures by offering tenders to their friends or relatives.

D. Externalisation of Foreign Currency
   Foreign currency is telegraphically transferred to offshore accounts. Some buy assets abroad with the foreign currency they acquire in Zimbabwe. An example is that of the Minister of Finance and Economic

* Superintendent, Zimbabwe Republic Police, Zimbabwe.
Development, Dr. Chris Kuruneri who siphoned foreign currency from Zimbabwe to South Africa where he bought his properties (see Statutory Instrument 109/96 Exchange Control Regulations 1996, Zimbabwe).

E. Insider Trading In the Financial Markets
Money market shares are sold privately without public knowledge.

F. Tax Evasion
Some companies avoid paying tax to the government or they understate their business transactions.

III. EFFECTIVE METHODS FOR INVESTIGATION, PROSECUTION AND TRIAL OF ECONOMIC CRIMES

In Zimbabwe, the Police are constitutionally mandated to investigate all criminal matters and bring the cases before the courts for prosecution. When investigating economic crimes, we involve other specialised units, that is, officers from the Central Bank (Reserve Bank of Zimbabwe), National Economic Conduct Inspectorate, Forensic Scientists and investigators from Zimbabwe Revenue Authority and the Comptroller and Auditor General.

Prosecutors are qualified law officers from the Attorney General’s Office who have undergone specialised training programmes in prosecuting economic crimes.

The Police work hand in glove with financial institutions when investigating economic crimes because proceeds from these crimes are usually deposited within these financial houses and also they are directly or indirectly involved (In cases of externalization of foreign currency, the banks are used to transfer the externalised funds telegraphically).

Economic crimes trials take place in the following courts depending on the magnitude or value of the amounts involved.
- Magistrate’s Court
- Provincial Court
- Regional Court
- High Court

Magistrates and Judges who preside over these economic crimes receive specialised training.

A. Measures for Ensuring the Effectiveness of Investigative Agencies
The Police recruit informers who provide them with information of a criminal nature. They are given an allowance depending on the nature of information supplied. The Police also plant suggestion boxes in places where the public have access. Information is written and placed in these suggestion boxes.

We also have hotlines, which are telephone lines which the public can use to contact the Police and supply information.

The Police in Zimbabwe also practice community policing. In this scenario, the Police and the community are involved in policing and detecting crime.

Criminals also supply information on other criminals. Syndicates are usually aware of what other groups are doing and if approached, they are sometimes helpful in supplying valuable information in order to “fix” their criminal counterparts.

B. Effective Utilisation of Traditional Investigative Methods
Although we have modern investigative methods, we still practice our traditional investigative methods. In all our investigations, we use our Criminal Records Office. This Office keeps the data of all criminal records, that is, modus operandi of how the crime was committed, who committed the crime, time and place of occurrence and how the case was finalized. Officers are also trained on the job by experienced fellow officers.

C. Measures for Ensuring Effective Investigation of Banks
The Zimbabwe Republic Police, when investigating banks, usually involve officers from the Central Bank.
(Reserve Bank of Zimbabwe), which is the controller of all financial institutions. The Central bank has an Investigation Department. This Department is composed of mainly retired Police officers who would have undergone specialised courses in the operations of banks. We also have informers inside banks. These are normally employees of the bank, so they are able to provide detailed information inside the bank.

D. Utilisation of New Investigative Methods

Police officers are attached to banks for three months learning banking systems. In Zimbabwe, all Police officers are sent for computer training and this helps when investigating these economic crimes since information is stored on computers and computer discs.

The Police also conduct electronic surveillance using camcorders on all known criminals. We get extracts of all telephone print-outs to monitor the criminals’ associates and communications.

We have officers from the Criminal Intelligence Unit who do undercover operations in hotels and night clubs where criminals spend their proceeds of crime.

In Zimbabwe, only the President is immune from prosecution, however, where an accused person is a competent witness in a case in which he will testify against his accomplices, the Attorney General’s Office and the Investigating Officer may forego prosecuting such a witness provided that he/she does not turn a hostile witness.

E. Protection of Witnesses

In Zimbabwe, witnesses are protected both at the investigative and the trial stage. In cases where the witnesses use transport to visit the Investigator and the court, the government pays for both transport and food for the witness.

The witnesses are also informed of their right to give evidence in court and are also encouraged to report any interference from the accused to the Police.

IV. LEGAL FRAMEWORK FOR CONTROLLING ECONOMIC CRIMES

There are a number of regulations in place to control economic criminal activities. These are:

1. Prevention of Corruption Act, Chapter 9:16
2. Serious Offences Act, Chapter 9:17
3. Exchange Control Act, Chapter 22:05
4. Insurance Act, Chapter 24:07
5. Banking Act, Chapter 24:01
6. Reserve Bank Act, Chapter 22:15
7. Criminal Procedure and Evidence Act, Chapter 9:07
8. Postal and Telecommunications Services Act, Chapter 12:02
9. Sales Tax Act, Chapter 23:08
10. Audit and Exchequer Act, Chapter 22:03
11. Companies Act, Chapter 24:03
12. Public Accountants and Auditors Act, Chapter 27:03
13. Building Societies Act, Chapter 24:02
14. Bank Use Promotion and Suppression of Money Laundering Act, Chapter 24:24

These Acts are very effective and complimented by the common law offences of Fraud, Forgery and Theft by False Pretences. Criminals also try to circumvent the provisions of the Acts in order to enhance their criminal activities.

To complement these activities, the Police have put in place a number of strategies to fight economic crimes as mentioned earlier on.

Zimbabwe is also a member of the Eastern and Southern African Anti-Money Laundering Group of countries (ESAAMLG) (Reference the Protocol against Corruption). The Group was established to take effective measures against money laundering.
V. PUNISHMENT AND SANCTIONS

Punishments for criminals involved in economic crimes are imposed by the presiding magistrate or judge. The convicted person can either pay a fine or be incarcerated in prison depending on the gravity of the case. However, in most cases where the accused fails to pay back what he or she has stolen, the alternative is imprisonment. Suspended sentences can also be imposed.

VI. ESTABLISHMENT OF THE SUSPICIOUS TRANSACTIONS REPORTING SYSTEM

In Zimbabwe, most banks have security departments. The security departments receive all reports of criminal activities and the department keeps the Police telephone numbers and they in turn contact the Police.

Co-Operation by Banks and Non-Bank Financial Institutions

The Police in Zimbabwe enjoy very supportive co-operation from banks and financial institutions when carrying out investigations.

VII. CLASSIFICATION OF PROCEEDS AND ASSETS DERIVED FROM CRIMES, FORFEITURE, FREEZING SYSTEMS AND COLLECTION OF THE VALUE OF PROCEEDS

The Bank Use Promotion and Suppression of Money Laundering Act, Chapter 24:24 empower Police to recover proceeds of crime in whatever form (cash or assets). When freezing money, the Police apply for a subpoena through the courts and the court issues the subpoena instructing the bank or finance house to freeze the money involved.

The assets are kept by the Police until the case is finalised by the courts. The courts usually make a determination on how to dispose of the assets or money recovered. Assets out-flowed to foreign countries are recovered under the terms of the Mutual Assistance Act.

VIII. SHIFTING THE BURDEN OF PROOF OF THE DEFENDANT

The burden of proof in most cases, as provided for by section 18 of the Zimbabwe Constitution, is upon the State, however section 15 of the Prevention of Corruption Act shifts the burden of proof to the accused person where he or she deliberately omits a procedure that must be followed. In such cases, the State would have proved part of the elements of a crime and the accused must prove his innocence (See Appendix B).

IX. OTHER ANTI-MONEY LAUNDERING SYSTEMS

As previously stated, the Zimbabwe government has set up an Anti-Corruption Unit and the government also passed the Bank Use Promotion and Anti-Money Laundering Act. This Act regulates the operations of financial institutions.

X. PREVENTATIVE MEASURES AGAINST ECONOMIC CRIMES

The Zimbabwe government has put in place some administrative regulations of economic activities like the National Economic Conduct Inspectorate, Zimbabwe Revenue Authority and the Anti-Corruption Commission.

XI. DISCLOSURE SYSTEMS

Bank employees are governed by the Bank Act not to disclose bank secrecy, that is, if any account is under investigation. The Central Bank (Reserve Bank of Zimbabwe) plays a central role in monitoring economic activities with the help of the Police and the Anti-Corruption Commission.

XII. PUBLIC AWARENESS AND OTHER EDUCATIVE MEASURES

The media and television programmes are being used in public awareness. The Police has a department namely Community Relations which educates the community about crime prevention. Financial institutions also issue pamphlets to the public about economic crime awareness.
XIII. CONCLUSION

Concerted efforts to put mechanisms in place to control economic crimes are being made by the Zimbabwe national policies and regional protocols and international conventions have been entered into by Zimbabwe. In this global village, both regional and international co-operation is required to control all forms of crime. Results of the efforts are pleasing, though remarkable results could have been achieved had it not been for the inadequate resources provided for the fight against crime.
## Crime Statistics for 2002 and 2003

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<th>Offence</th>
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<td>98</td>
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<tr>
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<td>261</td>
</tr>
<tr>
<td>Fraud</td>
<td>4174</td>
<td>3815</td>
</tr>
<tr>
<td>Exchange Control</td>
<td>399</td>
<td>567</td>
</tr>
<tr>
<td>Prevention of Corruption</td>
<td>323</td>
<td>413</td>
</tr>
<tr>
<td>Tax Evasion</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
APPENDIX B

Case

2

Upon the application of establishing his innocence, he could not properly have been miscarried of the charge.

The presumption of innocence conferred by s 18(1)(a) of the Constitution of Zimbabwe upon every person charged with an offence is at the very heart of criminal law. It finds expression in the fundamental and hallmark principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities). This principle, which is reflected in the maxim "e pluribus unum, scientia est incertiora esse prescriptiva" (in favor of life, liberty and innocence all possible presumptions are made), was affirmed by DAVIES AJA in R v Mubiru 1985 AD 369 at 366.

The only exception to this is where the evidence is of such a nature as to create that the burden of proof rests on the accused. See R v Zondo 1969 (3) SA 533 (ALJ) at 539; S v Tsebani 1987 (1) SASR 52 (S) at 53P; and generally, Hoffman and Zeffler, The South African Law of Evidence, 4 ed at pp 513-515.

There, however, qualified by s 18(1)(b) of the Constitution, it reads:

"Nothing contained in or done under the authority of any law shall be held to be in contravention of -

(6) presumption (as defined in the Act) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts." (This is a common feature of all the various laws of the Commonwealth.)

The intermediate question is: How far does this presumption go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should be drawn.

3. S.C. MAAS

be drawn. Yet what is clear is that, even in the context of the presumption of innocence, a 18(1)(b) cannot be construed as holding with a statutory provision that in substance imposes upon the accused the burden of proving his innocence or discharging his guilt.

In the resolution of these questions I have encountered many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as "reverse onus presumptions", against an accused. From them the following guidelines emerge:

1. The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be thrust upon him to prove his defense. See S v Broughton's Jewellers (Pty) Ltd 1971 (2) BSR 276 (ASC) at 292 E-D; S v Marchant 1992 (2) SA 575 (A) at 576H-J.

2. The presumption may relate to a state of mind, that is, an intention, where the element of the crime is a fact exclusively or predominantly within the knowledge of the accused. See Re & Khan v Postmaster General 1970 TPD 373 at 374; Ex parte Minister of Justice: In Re R v Johnson and Levy 1981 AD 466 at 470-471. The proposition that a state of mind in a fact has never been deemed a fact of the government v Plummer (1889) 29 Ch 450 (CA) at 453.

3. S.C. MAAS

The state of a man's mind as a particular fact is, but if it can be established in so much as an amiss thing?

See also, Circle Bakery v Government and Aver 1943 CWH 531 at 540; V v Blackmore and Ann 1956 (4) SA 460 (TSC) at 491H; S v Pistora 1950 (2) SACR 417 (N) at 418A.

3. A presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a fact is a matter of impossibility of difficulty, whereas such fact is well known to the accused. See R v Champion 1991 CPD 338 at 341; S v Mbelihebe 1993 AD 10 at 12; R v Mbelihebe 1994 TPD 130 at 132; R v Mbelihebe 1984 TPD 265 at 266; R v Rubanzwa and Om 1950 SH 77 at 79, 1950 (2) SA 274 (BD) at 274H; S v Schonfeld 1963 (4) SA 177 (T) at 181 H; Pi v Pheula, supra at 419H.

4. The presumption must not be irrefutable. R v Rubanzwa and Om supra at 80 and 282 D-B respectively; S v Schonfeld supra at 815D.

Under s 40(1) of the Prevention of Corruption Act no offence is committed when

(i) a public officer;
(ii) in the course of employment;
(iii) done anything contrary to or inconsistent with his duty
(iv) for the purpose of allowing favour or disfavor to any person.
It is apparent, then, that before the State can rely on the presumption of the 152(9a) of the Act, it must establish beyond a reasonable doubt the following factual preludes:

(a) that the accused is a public officer
(b) that he is in breach of his duty under the Act
(c) that he is found guilty of the offence
(d) that the accused is in breach of his duty under the Act
(e) that the accused is in breach of his duty under the Act
(f) that the accused is in breach of his duty under the Act

This leaves the decision of the State to prove the accused to be guilty of the offence. It is an element that may be described as:

(a) a particular fact (a fact of fact)
(b) a manner in which the accused should be shown to be guilty
(c) a matter difficult for the State to prove.

The presumption does not have the effect of requiring the accused to prove the contrary. A strong suspicion will have been created on the face of the evidence adduced by the State from which a reasonable inference could be drawn that the accused was guilty. This is simply a case of the onus of proof on the State.

As I have mentioned, the exception to the presumption of innocence in s 114(5)(d) of the Constitution does not debar the courts from proving the accused to be guilty. It does not mean that the accused was not guilty or that the State has failed to prove his guilt. This is simply a case of the onus of proof on the State.
degree of probability implicit in Act 1/4(1) of the Hong Kong Bill of Rights. He went on to say at 950 p.b.-

"There are situations where it is clearly possible and reasonably probable that the accused is guilty. The question is whether the evidence is such as to be considered sufficient to support the conclusion of guilt beyond reasonable doubt. The obvious answer is that it is.

Some exceptions will be justified, others not. Whether they are justified will be in the end determined upon whether it is reasonably probable that the accused is guilty. If the accused is guilty, the question is whether the evidence is such as to be considered sufficient to support the conclusion of guilt beyond reasonable doubt. The obvious answer is that it is.

As 912 in note 291A of the second Lundy of Appeal in Ordinary remanded that there was error in the conclusions of the justices, that error should be limited to the part of the judgment which has been identified in Croll's case. In fact, however, there is no reason not to apply it here, as no justice was called upon to consider the case. The justice should be limited to the conclusion of innocence, and not the conclusion of guilt.

The view is taken with the evidence in a nutshell, 1955, that there is no reason not to apply it here, as no justice was called upon to consider the case. The justice should be limited to the conclusion of innocence, and not the conclusion of guilt.

Viewed against the caveats, the law limits and against the possibility set out, as well as the failure to refer to the Attorney-General's Office in Hong Kong v Lee, 1972, 294, 295.

After a two months period he was assigned as prosecutor in court six at the Supreme Court of Hong Kong. The duties of the prosecutor's office include the duties of the attorney-general's office. The attorney-general's office is in charge of the prosecution of all criminal cases.

During the last few days of each year and the first day of each year, the attorney-general's office is involved in the preparation of the budget. The budget is prepared by the attorney-general's office and presented to the Legislative Council for approval. The budget is then submitted to the Governor for approval.

The budget includes the funding for the attorney-general's office and the prosecution of all criminal cases. The budget also includes the funding for the operation of the Superior Court of Hong Kong, the Court of Final Appeal, and the Court of First Instance. The budget is presented to the Governor for approval and is then submitted to the Legislative Council for approval.

The budget is also used to fund the operation of the Supreme Court of Hong Kong, the Court of Final Appeal, and the Court of First Instance. The budget includes the funding for the operation of the Supreme Court of Hong Kong, the Court of Final Appeal, and the Court of First Instance. The budget is submitted to the Governor for approval and is then submitted to the Legislative Council for approval.

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On 3 September 1992, the applicant, who by then was prosecuting mainly in court one but still trying sentenced, when required, to Midwifery in court two, appeared before the magistrate in that court. He announced his intention to challenge and Kanyemba being admitted to bail on conditions that each appeared to the police three days a week and deposited the sum of $5,000 in cash. The magistrate made the order required. In asking me if the applicant desired to be submitted to the Attorney-General’s Office, or she was the Senate Permanent Secretary of his interest. He did not contest the investigating officer to determine if the doch out, unprocessed. He did not even inform Mr Drury that he was now of the opinion that his client should be admitted to bail and it was prepared to withdraw his preliminary application. Furthermore, after their substantial bail for the applicant failed to tell Mr Drury of what he had done.

A day or so later Mr Drury, having prepared the appeal papers in draft, went to the Harare magistrate’s court to ascertain whether the record of the proceedings of 28 August 1992 had been ascertained and was available for the High Court hearing. Partially he has informed me that the accused had been granted bail (Midwifery may be bail conditions) and Kanyemba on 17 September. This surprised Mr Drury. He went to the police to ascertain what had happened. After some hesitation the application explained that he had been approached by a relative of the accused with information that the tiles found in the house could be suggested to the police as security for their standing trial. This, he said, had caused him to change his mind and unconsent to bail. Mr Drury was prepared at the application for the availability of the tile deeds was one of the propositions he had advanced to the magistrate on 28 August 1992 in the presence of the applicant, yet bail had been applied.

In short the applicant, in the circumstances prevailing, was not contrary to his duty as a public officer and dental esteem to the two accused. No other conclusion is possible from his mandatory conclusion in not informing the Attorney-General, the Senate permanent secretary, the investigating officer and especially Mr Drury, that he had altered his mind and unconsent to bail. It is, moreover, incomprehensible that the applicant, being totally unsuited by the offer to surrender the title deeds made by Mr Drury on 28 August 1992, would have been persuaded by precisely the same offer just two weeks later; and then have certified to recommend to the magistrate that the tile deeds be surrendered as one of the conditions of bail.

The author of the article entitled 

*The author of the article entitled*...
Corrupt practices resorted to by public prosecutors, who play a crucial role in the administration of justice, are particularly serious. Prosecutors are placed in positions of authority. It is their duty to ensure that accused persons are dealt with properly and in accordance with the law. An officer of the court, their bounden obligation is to uphold the law and by their conduct set an example of impeccable honesty and integrity. A failure to do so will lead to a erosion of confidence in the integrity of the public.

The applicant nearly abused the trust reposed in him. That by disgracing the good standing of his fellow prosecutors by corrupting the system of justice cannot be ignored. He acted for personal gain and in so doing knowingly afforded the two accused the opportunity of fleeing the jurisdiction. One of them succeeded in doing so.

I am satisfied that the punishment imposed upon the applicant represents nothing more than he deserved. There is no more for this Court to interfere with it.

In the result, the appeal must be dismissed in its entirety.

McDULLY JA: I agree.

KORISH JA: I agree.

BERANIM JA: I agree.

BAHARKHUTIJA JA: I agree.

Chanderjee & Associates, applicant's legal practitioners
GROUP 1

MEASURES TO COMBAT ECONOMIC CRIME, INCLUDING MONEY LAUNDERING

Chairperson
Mr. Alfred Kofi Asiama-Sampong (Ghana)

Co-Chairperson
Mr. Kazuya Tonoike (Japan)

Rapporteur
Mr. Titawat Udornpim (Thailand)

Co-Rapporteur
Mr. Yasuharu Kawase (Japan)

Members
Mr. Kiyohiro Tanaka (Japan)
Mr. Khamphet Ouanheane (Laos)
Mr. Khin Maung Win (Myanmar)
Mr. Ronald Bei Talasasa (Solomon Islands)

Advisers
Dep. Dir. Tomoko Akane (UNAFEI)
Prof. Motoo Noguchi (UNAFEI)
Prof. Tamaki Yokochi (UNAFEI)

I. INTRODUCTION

The members of Group 1 unanimously agreed that economic crimes including money laundering may cause a devastating effect on the economies of nations, as they increase in scope, intensity and sophistication. It was noted that economic crimes impede a country’s economic, social and political development, especially that of developing countries that are more vulnerable to money laundering.

It was further observed that, in recent years, globalization has provided organized criminal syndicates with an environment to significantly broaden the range of their illegal activities. In addition, there is a link between economic crimes, money laundering, and organized crimes. Economic crimes and organized crimes often involve money laundering, causing bad effects on business, development, governance and the rule of law.

The Group made discussions based on the understanding that the objective of money launderers is to disguise the illegal origin of criminal proceeds so that they can be used as if from legitimate sources.

Considerations were also given to forms and methods of economic crimes and money laundering as they occur in individual countries, and problems they present to respective criminal justice systems. An increased threat of these crimes, coupled with the globalization and the explosion of communication technology, requires each country to put in place effective legislative measures to combat it.

The following sections briefly illustrate the situation of each country of the group members. Each section was initially drafted by the member(s) from that country with discretion as to the area to be focused on, depending on varying situations from country to country.

II. THE SITUATION OF GHANA

A. The Current Economic Crime, Including Money Laundering

In Ghana different types of economic crimes occur: They include embezzlement, drug trafficking, bribery, corruption, counterfeiting, fraud by false pretences, bank fraud, internet fraud, insider trading, and stock manipulation. The following three actual cases will illustrate the modus operandi of these crimes.

1. Impersonation

The victim received a phone call allegedly from the Embassy of country A in Ghana, claiming that the Ambassador agreed to assist the victim and his family in entering country A. Then the victim received another call from the same person stating that the cost of visa and flight tickets had already been paid and the travel arrangements for the victim and his family had been confirmed. The victim agreed to pay $20,000 as a part of the travel cost. The police, after being consulted by the victim, arrested the accused who had pretended to be the head of the Visa Approval Section of the Embassy of country A for fraud.
2. Bank Fraud
Two men attempted to conduct fraud against the Central Bank using its fake letterheads. They designed the letterheads at an internet cafe and forged the signature of the Deputy Governor of the Bank. Then they informed the Bank that the said amount had been transferred from two foreign banks into an account and requested that the money be disbursed to the account holder. The bank had a tip off and the police arrested the two men.

3. Internet Fraud
Two men used a credit card that belonged to a foreign businessman to order goods in the amount of $4,000 from abroad through the Internet. After the goods had been delivered, it was found that the credit card was a stolen card. When the goods arrived, the Criminal Investigation Department collaborated with FEDEX and arrested the criminals.

B. Problems
In Ghana, the weak capacity of law enforcement offices and their inaccessibility to relevant information are serious problems, and they greatly hamper the detection and investigation of crimes. Traditionally, crimes were investigated by conventional law enforcement agencies such as the Police, Customs, Narcotic Control Board, and Immigration offices. However, because of the occurrence of a wide range of economic crimes these days, the functions of these traditional agencies are impeded by:

- lack of expertise, modern equipment and modern methods of investigation;
- high cost of proactive investigation of crimes;
- lack of independence in initiating and conducting an investigation; and
- lack of logistic supplies to law enforcement agencies.

C. Legal Framework
In Ghana, the Criminal Code 1960, Act 29 is the main legal provision on this matter, although some other laws deal with certain economic crimes. The Government is preparing laws to deal with cyber crimes and other modern economic crimes.

One of the existing problems is that a criminal court cannot enforce its order for recovery of property or value unless the victim brings a civil suit against the offender.

In conformity with the 1988 UN Convention (Vienna Convention), Ghana enacted the Narcotic Drug (Control, Enforcement, and Sanctions) Law 1990, Provisional National Defence Council Law 236 and criminalized laundering of proceeds from narcotic drugs. When the money is laundered through fraud or some other offences, it is punishable under the Criminal Code.

Currently, the Money Laundering (Proceeds of Crime) Bill, 2005 is before the Parliament. Some of the features of this Bill include the establishment of a financial intelligence unit (FIU), customer identification, record keeping, monitoring of suspicious transactions, procedures for seizure and confiscation, and restraining orders. These conform to the UN Transnational Organized Crime Convention and the FATF Recommendations. The Bill makes money laundering an extraditable offence and includes provisions on the seizure of property in relation to foreign offences where there is a mutual legal assistance agreement.

Also before Parliament is the Whistleblower Bill to provide a way that individuals, for the public interest, can disclose information that relates to corruption, or other illegal conduct or practices, to investigative authorities while protecting the individuals who reported it.

D. Institutional Measures to Combat Economic Crime
Apart from the existing legal framework for combating economic crime including money laundering, the following bodies contribute significantly to reduce crimes in Ghana:

1. Courts;
2. Bank of Ghana;
3. Serious Fraud Office (SFO);
4. The Police;
5. The Attorney General’s Department;
6. Securities Regulatory Commission;
7. Narcotics Control Board;
8. Immigration Service;
9. Customs, Excise and Preventive Service (CEPS); and

E. Other Measures to Combat Economic Crime
In addition, the Government of Ghana provides the following measures to fight against economic crimes:
1. The reward system;
2. Modern information system (Geographic Information System - a functional database of criminals to monitor their movement);
3. Security training institutions;
4. Special tribunals for Government officials to deal with those who are involved in malpractice and corruption in public sector institutions;
5. Public awareness programmes in the mass media; and
6. A courts inspection unit, under the judiciary, is to be set up to inspect judges’ records and examine the fiscal situations of the judiciary.

III. THE SITUATION OF JAPAN
A. Current Situation of Economic Crimes, including Money Laundering
In Japan, various kinds of economic crimes occur everyday as a result of economic activities, including many large-scale ones that use a corporation as a vehicle. For example, under the recent economic recession, there have been fraud cases where companies sold non-existent financial products to customers, promising high returns. There were also cases of breach of trust by directors of financial institutions who extended bad loans without sufficient collateral, knowing the borrower was in a difficult financial situation.

However, the economic crimes that are bringing about particularly serious social problems recently are those abusing bank accounts. Especially, loan sharking, the “it’s me” scam and fictitious billing which are collectively known as “the three major types of abuse of bank accounts”.

Loan sharking is a loan with an illegally high interest rate often accompanied by a threat if the loan is not paid back.

The “It’s me” scam is a fraud using telephone calls pretending to be the receiver’s close relatives such as a son or grandson, and requesting money. The offender deceives the victim by a false story such as “I’ve been involved in a car accident, and I need money to settle the trouble. Please transfer the money to the bank account of the other party”.

Fictitious billing is also a fraud that charges fees for non-existent services. In this fraud, letters requesting non-existing charges such as “you have not paid the Internet fee for visiting a site with a fee,” are sent to people at random, and addressees are requested to transfer money to the designated bank account if they call the cell phone number indicated in the letter.

These economic crimes are committed by groups led by Japanese gangsters. They launder the proceeds of crime by purchasing bearer securities or transferring the money to bank accounts in foreign countries.

B. Legal System
In Japan, there are laws to punish economic crimes, and there are laws to prevent and punish money laundering as follows:

The Anti-Drug Special Law came into effect in July 1992, creating the suspicious transactions reporting system for drug crime offences.

The Anti-organized Crime Law came into effect in February 2000, establishing a FIU. This law expanded the scope of predicate offences to other serious crimes.

The Law on Customer Identification and Retention of Records on Transactions by Financial Institutions...
came into effect in January 2003. This law requests financial institutions to conduct customer identification and keep records of their transactions.

The number of suspicious transaction reports exceeded 40,000 in 2003. Financial institutions can close the bank account when the account is suspected of being used for crimes.

C. Problems

There is no law to punish the crime of conspiracy in Japan. The predicate offences are in principle crimes with five years imprisonment or more as the maximum penalty.

Japanese investigators can not use controlled delivery except for cases of drug crimes, and wiretapping except for certain serious crimes such as murder or illegal drug trafficking for the purpose of profit. Judicial bargaining is also not allowed in Japan. When a crime such as loan sharking or an “it’s me” scam is investigated, it is often difficult to identify the criminal as cellular phones are often used. It is also difficult to arrest criminals higher up in the group’s hierarchy.

There is no procedure to confiscate proceeds of crime in civil proceedings, and as a result, it is sometimes difficult to recover the victim’s damages.

Japan has laws to punish money laundering, but there have not been many cases that have led to the arrest and prosecution of the offenders. This is because of the difficulty in proving that there was knowledge that the money was the proceeds of crime as a mental element.

D. Solutions

In order to become a party to the UN Transnational Organized Crime Convention, Japan needs to criminalize conspiracy and expand the scope of predicate offences. The Diet is discussing the revision of the Penal Code and other laws.

The introduction of wiretapping and judicial bargaining need to be examined, as well as the reversal of the burden of proof relating to the mental element of crimes.

Procedures to confiscate proceeds of crime in civil proceeding and provide access to compensation and restitution for victims should be established.

It is also important that investigators make much more efforts to punish the crime of money laundering.

IV. THE SITUATION OF LAOS

A. Introduction

Economic crime, including money laundering is a part of the major transnational organized crime that needs cooperation among regional, national, and international law enforcement bodies.

B. Current Situation of Economic Crime, Including Money Laundering

Laos started to develop the present legal system in 1989. Currently, Laos does not have laws to regulate all aspects of society. For instance, it does not have an anti-money laundering law yet.

At present, economic crimes, including money laundering in Laos are increasing, including the violation of the Environment and Resources Law, Finance Bank Law, Enterprise and Commerce Law, Industry and Labour Law, Science and Technologies Law, and Public Administrative Law.

C. Legal System

The United Nations Development Programme (UNDP) has assisted legal reform in Laos since 1982. The Swedish International Development Cooperation Agency (SIDA) has provided financial and technical assistance to the Ministry of Justice since 1990. Japan International Cooperation Agency (JICA) also assisted in drafting new laws. These institutions often invite foreign experts to hold workshops to introduce basic legal principles and assist in drafting laws.
Laos legal reform is closely linked to international assistance and conditions of loan agreements that the Government has signed with international financial institutions such as the World Bank, International Monetary Fund, and the Asian Development Bank.

The government of Laos has adopted a medium term national legal development plan.

The plan is expected to be a road map for further development of the Laos legal system. In addition, the Government had to enact five implementing regulations or Prime Minister’s Decrees in relation to accounting law, budget law, business law, law on the promotion and management of foreign investment, and a decree on arbitration.

D. Problems

Economic crimes in Laos are increasing, especially in big cities. In addition, there are new types of economic crimes arising. In the past, most economic crimes were smuggling of traditional goods across the border, but now there is illegal smuggling of cars, trucks, and cement. There are also offenses against national resources such as illegal logging and forest destruction. In addition, there are black markets for foreign currency exchange.

E. Solutions

In order to control economic crimes, including money laundering, effectively, anti-money laundering laws need to be made. The Government should issue a legal instrument to direct concerned ministries and agencies on how to deal with these crimes. The Government should make a lot of effort to train law enforcement officers to carry out their tasks effectively. Until the anti-money laundering law is made, the Government needs to instruct concerned Government agencies as to how to carry out their tasks to cope with the crime at each stage of the combating process.

V. THE SITUATION OF MYANMAR

A. Introduction

Economic crime is one of the most serious problems facing the international community. Economic crime includes a broad range of illegal activities: conventional types of crimes such as fraud, embezzlement, breach of trust and corruption; offenses that abuse financial systems or offenses against free and fair trade such as fraudulent price manipulation and insider trading in the stock/financial markets; and money laundering.

A market economy system has been practiced in Myanmar since 1989. Businesses have to be registered at the Ministry of Commerce. There are at present more than 15,000 businesses registered in Myanmar, but most of them are not operating for various reasons. At present, various kinds of economic crimes are occurring in Myanmar.

B. Current Situation of Economic Crime, Including Money Laundering In Myanmar

In Myanmar, most economic crimes are investigated by the Myanmar Police Force and Bureau of Special Investigation (BSI). The BSI is specially formed for investigating economic crimes and malpractices of public servants. Economic crimes prevalent in Myanmar are: counterfeiting, fraud, crimes against intellectual property rights, smuggling, foreign currency related crime, and manipulation of market price. These are prosecuted under relevant laws.

Myanmar is a state party to the 1988 UN Drug Convention (Vienna Convention) and 2000 UN Transnational Organized Crime Convention. To be in line with the resolutions of the 1998 UN General Assembly, Myanmar enacted the Control of Money Laundering Law (CMLL) on 17 June 2002, and the Rules for CMLL on 5 December 2003.

The Myanmar Government formed the Central Control Board (CCB) and Financial Intelligence Unit (FIU) in line with the CMLL and its Rules. The CCB prescribed the threshold amount so that banks, financial institutions, and the Land Records Department can report transactions above the threshold and suspicious and unusual transactions of cash/property to the FIU. The FIU received and analyzed 1,554 cash transaction reports and eight property transaction reports during the first seven months, but, up to date, there have been no confirmed suspicious and unusual transactions.
C. Legal System

Most of the drug-related money laundering cases were investigated, prosecuted and the proceeds confiscated under the 1993 Narcotic Drug and Psychotropic Substance Law before the enactment of the CMLL.

Whoever commits money laundering offences contained in the Narcotic Drug and Psychotropic Substance Law is liable on conviction to be punished with imprisonment for a minimum of 10 years and a maximum unlimited period. The predicate offences, except those contained in the Drug Law, on conviction are liable to be punished with imprisonment for a maximum of 10 years and a fine.

The CCB formed an investigative body to conduct enquiries into two private banks (Asia-Wealth Bank and Myanmar May Flower Bank) that were allegedly involved in money laundering. The Investigative body consists of eight members, headed by an experienced auditor who, however, does not have the technical knowledge and skill for a money laundering investigation.

The CCB and FIU have held two local workshops and four training courses on money laundering for staff of relevant departments and agencies, especially on matters related to the FIU’s cooperation with relevant authorities in the investigation of transnational drug crimes and seizure of assets in collaboration with the Drug Enforcement Administration of the United States and Australian Federal Police.

D. Problems

Anti money laundering tasks and enforcement measures to be implemented are all unfamiliar to Myanmar. Therefore, it is necessary to enhance the technical expertise and knowledge of the investigative authorities, banks and financial institutions, and the judiciary, by holding training courses and workshops. As for reports on suspicious and unusual transactions, it is necessary for officers and the staff of bank and financial institutions to receive appropriate training so that they can differentiate the suspicious transactions. Nowadays some personnel are being trained under the arrangements of the Central Bank of Myanmar. The personnel from the FIU discussed money laundering activities, suspicious transaction reporting, banks’ due diligence, and the “know your customer” rule.

Investigators (the police) can get some information to trace money laundering from banks and financial institutions, but most of the public are using underground banking systems (Hundi) for the transfer of cash.

E. Solution

Myanmar has committed to cooperate with the international community in the fight against money laundering. Myanmar enacted the CMLL and its Rules, and the Mutual Assistance in Criminal Matters Law was enacted very recently in order to cooperate more easily with the international community.

However, due to the lack of knowledge and experience on money laundering and financial investigation in general, education of the staff and officials of banks, private sectors and government agencies is needed.

VI. THE SITUATION OF THE SOLOMON ISLANDS

A. Introduction

It is interesting to note that when one talks about economic crime or money laundering in the Solomon Islands, the first reaction will be, “it has nothing to do with us as yet, we are not at risk,” or, “we do not have the resources to deal with the issue.” Whether it is deliberately misconceived or by pure ignorance on the part of our criminal justice officials, the burning truth is that, there is no room for complacency. Crime, as is widely known, does not respect society, cultural identity or territorial sovereignty. Its’ aim is to gain from its activity and gain at any cost, leaving trails of bitterness, anguish and fear on the part of its victims. On that basis, the challenges facing authorities responsible for enforcing the “Money Laundering and Proceeds of Crime Act 2002”, are more pressing than ever before.

The objective of money launderers is to disguise the illicit origin of profits generated by criminal activities, so that the profits can be used as if they were derived from legitimate sources. (see UNAFEI, Annual Report for 2000 and Resource Material Series no. 59, pp. 625, 657).
B. Current position
Solomon has had its fair share of economic crime, ranging from ordinary misdemeanours, such as simple larceny or theft, embezzlement, conversion, to serious felonies as forgery, fraudulent representations and conspiracy to commit a felony.

The following are summaries of two cases that almost decapitated the Solomon economy.

1. Family Charity Fund
A woman who claimed to be a medical doctor lured people to believe that she could pay millions in returns if they would join her money making scheme. She successfully convinced some credible people in society who assisted her in defrauding thousands of clients. The clients paid $250 each and were promised a hundred fold after three months. The three months waiting period turned into another three months and the waiting continued. It became apparent that the scheme was a scam, only benefiting the directors of the scheme. The directors travelled overseas and continued to promise the returns to the clients. But there were no returns. The directors began blaming the Prime Minister and the Governor of the Central Bank for withholding the payments. The clients were so convinced that they threatened to burn down the Central Bank and the Prime Minister’s office. The Governor and the Office of the Prime Minister had to make public explanations that there was no money for returns and that the scheme was a scam. The clients were not convinced and continued to believe the directors. The directors were finally arrested and sentenced to five years imprisonment. Some clients still believe that the directors will pay them after they are released from prison.

2. Raonk - Government Deal
The National Government was approached by a person from neighbouring Bougainville who lured Government officials into believing that if the Government pays $10,000,000 to his money making scheme, he would pay millions of dollars in return.

The Government was convinced and finally signed a contractual agreement with Raonk. The Government was yet to fulfil its part of the obligation when it was alerted to the failure of the deal. It is not clear whether investigations were carried out on this matter.

3. Other Suspicious Deals
   (i) Medical University
An academic from India colluded with one or two Government Ministers and some business entrepreneurs, and introduced a programme that offers Medical Degree Courses. About 15 students from overseas enrolled. They advertised the programme on the Internet portraying a medical campus by showing government buildings that accommodate government offices that had nothing to do with the medical programme. This case is under investigation. However, there’s no law that clearly defines this type of activity as a crime.

   (ii) Solomon Mutual Insurance
This is an insurance company, a joint venture of the national provident fund (workers savings scheme) and a company in Papua New Guinea. It is suspected that no capital was invested from an overseas partner but most of the money that met the cost of the operation might have come from the savings scheme. The Director of Public Prosecutions and the Comptroller of Insurance took up a case in the High Court against SMI but were unsuccessful. It appears that the legal regime against money laundering would be a suitable recourse.

C. Legal System
The Penal Code, including the Drugs Act, provides for the criminalization of general crime, including those referred to above.

The Money Laundering and Proceeds of Crime Act 2002 was passed by Parliament but is yet to enter into force.

D. Problems
The problems facing the Solomon Islands are quite immense, such as limited resources and expertise...
both in the investigative and prosecutorial parts of the criminal justice agencies. Another factor is mere ignorance and lack of knowledge on the subject.

E. Solutions
It is now time to think seriously about the likely consequences of an ongoing evil of being complacent over many issues. As no one can guarantee that there are no money laundering activities ongoing in the Solomon Islands, no one should pay half-hearted attention to this global issue. It is recommended therefore that the Money Laundering Act 2002 should be enacted without delay. In addition to that, there should be regular intensive training courses for investigators and prosecutors.

VII. THE SITUATION OF THAILAND

A. Current Situation of Economic Crime in Thailand
Thailand has faced many large-scale cases such as financial and securities fraud (fraudulent activities and malpractice in financial institutions and the stock market), price manipulation in the stock market, and insider trading. Consumer fraud using a pyramid scheme is also common.

Illegal gambling, mostly on football and the underground lottery, and pirated goods permeate daily life. Drug Trafficking has been the most serious crime in Thailand for decades. Especially methamphetamine or “Ya-Baar”.

In the past, these wrongdoers mostly established shell companies in Caribbean nations and kept the money in shell companies’ bank accounts. Nowadays they keep their proceeds in cash and hide it somewhere. Another widely used method is buying expensive cars or stocks, reselling them, and keeping the cash in another person’s bank account. Some bought high cash-flow businesses such as hotels or restaurants. Buying and selling of real estate, precious stones, Buddha Images (some are worth more than $1 million USD), and antique items have also been used for laundering money.

B. Law
The Securities and Exchange Act B.E. 2535 (1992) empowered the Office of the Securities and Exchange Commission of Thailand to supervise the capital market. It also has power to examine unfair securities trading, i.e. insider trading, price manipulation, etc.

The Anti-Money Laundering Act (AMLA) of Thailand poses duties on financial institutions to require customer identification. It requires financial institutions, the Office of Land and Real Estate and service-providers of investment and capital movement to report any suspicious transactions or any transaction that is for a significant amount of money or a high value asset.

Thailand’s AMLA has eight predicate offences (revised on 11 August 2003).

C. Problems
To request a customer’s identification and report suspicious transactions are not enough because it cannot track beneficial owners.

The scope of predicate offences is limited. Some main crimes such as gambling and intellectual property offences are not included. These would not fulfil the objective of the Act to discourage a criminal’s incentive in economic value.

Investigators lack manpower and budget to detect crime all over the country.

D. Solutions
It is beyond question that economic crime causes great harm to society. This type of crime is usually committed by well-organized groups with good management and wise use of communications technology. Moreover, they spread their criminal activities by cooperating with other organized criminal groups beyond national borders. With sophisticated methods, they can conceal their proceeds, reinvest in both legal and illegal businesses and gain more profits. For conventional laws that were designed to deal mainly with individual crimes, it is difficult to detect and prevent crimes caused by organized groups. Each country has its own methods to deal with transnational organized crimes, but the methods need to be synchronized to
enable cooperation with other countries. To make it possible, each country should accept various UN Conventions and adjust domestic laws to comply with the requirements.

Not only financial institutions but also corporations in securities and the stock exchange market should take the Customer Due Diligence (CCD) measures. The same applies to dealers in precious items, real estate agents, lawyers, and accountants. Furthermore, the Government should request them to take a fit and proper test to create good corporate governance.

Full measures for CCD should be introduced to the AMLA such as measures to identify the beneficial owner and measures to understand the ownership and control structure of the customer as a legal person.

By taking a threshold approach, all serious crimes should be predicate offences of money laundering. Criminals move very fast in laundering their proceeds and the State should act proactively and respond quickly to tackle their criminal proceeds.

Whistleblowers and informants should be protected by law, or incorporated in the AMLA, in order to encourage them to report any economically unreasonable transactions to investigators.

VIII. CASE STUDY

The group held further discussions using a hypothetical case that can be summarized as follows:

Mr. A, a manager of Bank F, granted a loan to Mr. B, president of Company K who is an old friend of Mr. A, knowing that there was a possibility that the loan would not be paid back. Ms. C, a mistress of Mr. B, who was asked by Mr. B to find a way to repay the loan, established a shell company and conducted a consumer fraud using a part of the loan. Mr. A, Mr. B and Ms. C all received proceeds from the fraud.

Subsequently, the criminal proceeds of the fraud was put into country Z’s bank accounts, then withdrawn by ATMs, and then used to pay back the loan, purchasing real estate and bearer securities, or distributed as personal gains among the fraud group. Ms. D, an accountant in country Z, played a key role in a series of money laundering activities.

The interpretation of Mr. A’s act of granting the loan differs from country to country. In Japan and Ghana, Mr. A’s act can be prosecuted for breach of trust. In Japan, Mr. B may be prosecuted as an accomplice of the breach of trust depending on the situation. While in Thailand, Myanmar, Laos and Solomon Islands, Mr. A’s act does not constitute a crime and should be handled through civil proceedings.

It was noted that, in the latter group of countries, the loan proceeds are not themselves criminal proceeds and therefore, their laundering does not constitute the crime of money laundering. This may be regarded as insufficient by some other countries in view of an international trend to make money laundering punishable in as many situations as possible.

Despite differences of systems among countries, Mr. A’s act is at least considered to be a violation of the internal code of his bank in all the countries. Some participants noted the need for strict supervision of financial institutions, especially in developing countries where Mr. A’s act does not constitute a crime.

All participants agreed that Ms. C should be charged for fraud, but there were different opinions as to who should be tried as a principal(s) of this crime. Some thought that Ms. C is the principal, and Mr. B and Mr. A are both accessories. Some thought that Mr. B and Ms C are both principals and Mr. A is an accessory. Others thought that all of the three should be categorized as principals. However, all agreed that the criminal responsibilities of Mr. B and Ms. C are greater than that of Mr. A.

It was reported that, in Ghana, the occurrence of fraud has been decreasing since the introduction of a reward system for informants. The group agreed that the introduction of a mechanism to encourage and protect informants in relation to certain corporate crimes, such as a whistleblower system, would be necessary.
In relation to an issue related to money laundering in this case, the group members agreed that customer identification before opening a bank account is critical to prevent it from being used for illegal purposes. It was discussed that awareness raising and training of financial institutions, who are to actually conduct customer identification and customer due diligence, are particularly important, especially in the initial stage of the enactment of relevant laws or introduction of these systems. It was also noted that the recently revised FATF 40 Recommendations request financial institutions to identify the true ownership of bank accounts.

The Japanese participants explained the introduction of the Customer Identification Law enacted in January 2003. Before that, customer identification was encouraged in guidelines issued by bankers associations, but it was not mandatory. The new law made it a legal obligation of financial institutions. It was reported that the Japanese Government made a great effort to make the new law known to financial institutions. Seminars were held and pamphlets were distributed to bankers associations and financial institutions, both on legal aspects and actual day-to-day practice. Financial institutions are also instructed to review the appropriateness of customer identification procedures for existing bank accounts that were created before the enactment of the law. If a particular account is found suspicious in this regard, the account holder will be requested to submit additional documents, and upon its failure, the account will be subject to more stringent supervision, and in some cases the bank may eventually close the account. Bearer securities mentioned in the case study are also subject to customer identification under the new law at the time of purchasing and selling, but there is a tendency for banks to hesitate to implement it strictly when customers who purchased bearer securities before the enactment of the law want to sell them.

The group examined possible approaches and challenges of the investigation of this case, based on an example using the Japanese legal system. The group agreed that the investigation of Ms. D, who conducted most of the money laundering activities, is critical for the success of the investigation and prosecution of this case. However, it is not clear if the investigative authorities of Country Z initiate investigation of this case by themselves. Neither the original crime of the breach of trust in relation to the loan by Bank F to Company K, nor the subsequent consumer fraud in another country, was committed in Country Z. In addition, bank accounts opened in country Z that were used for money laundering were under the name of individuals who were irrelevant to this criminal group, as the information on these individuals was collected in a criminal way in another country. Under this situation, it may not always be the case that Country Z recognizes the existence of Ms. D’s money laundering activities on its own and will start an investigation. Then, requests for mutual legal assistance to Country Z would be key to move things forward.

The group discussed the issue of alternative remittance systems as a possible obstacle for investigative authorities, as alternative remittance providers usually do not conduct customer identification and leave no transaction records. The group members revisited the revised FATF 40 Recommendations that changed the definition of financial institutions to include all types of money or value transfer services, including informal or alternative remittance systems. As a result, these are also subject to the requirements of FATF 40 Recommendations now.

**IX. OBSERVATIONS**

The group did not intend to reach certain conclusions on the subject matter as it placed more significance on brainstorming type discussions, learning from different systems in other countries. Through this process, all the members of the group reconfirmed their belief that each country’s criminal justice system must be based firmly on its historical, economic, cultural, and social environment. However, the group members also renewed the sense of urgency about the need to establish an effective mechanism to cope with developing typologies of economic crimes, including money laundering. The following are some of the observations shared among the group members:

1) Economic crimes are mostly committed by organized criminal groups. Moreover, these crimes are often committed beyond national borders and therefore pose difficulties to investigative authorities that are based on the traditional notion of a sovereign country. A number of UN Conventions were intended to work as the key instruments to overcome such difficulties. It is fortunate that many countries in the world have realized the significance to catch up with these international initiatives and made efforts to adjust their national legal systems.
2) As money launderers continue to move from countries where there are stringent legal and institutional regimes to combat money laundering to countries where such regimes are non-existent or lax, collective efforts by countries that do not allow loopholes for criminals are important.

3) Each country is also requested to provide mutual assistance to foreign counterparts in the course of investigation, indictment and trials to the extent possible, and to closely cooperate among law enforcement authorities within the country.

4) Information sharing among investigative authorities is central to the successful and effective investigation of complex economic crimes, including money laundering. This should be enhanced at the national, regional, and international level. International forums such as the Egmont Group of FIU provide immense technical information, knowledge, and a network and each country is strongly encouraged to make the best use of these resources.

5) The use of informal channels to obtain information or evidence from foreign countries is strongly recommended. This applies to cases where a mutual legal assistance treaty does not exist between the countries in question, and to cases where such a treaty exists but speedy provision of information or evidence is critical. As official procedures stipulated in mutual legal assistance treaties often use diplomatic channels that take time, it is recommended that informal channels be also used to obtain necessary information and evidence, simultaneously or before the diplomatic channels. In this connection, investigators should always bear in mind the issue of admissibility of evidence in criminal courts.

6) Attendance on UNAFEI training courses is also useful in enriching their participants' professional networks. After spending one month together, a participant will be comfortable about sending an email to his UNAFEI classmate, who is his counterpart in another country, to discuss an appropriate way of informal mutual legal assistance.
I. INTRODUCTION

There is a strong belief among the members of Group 2 that economic crimes, including money laundering constitute a serious threat to national economies, and respective governments. Economic crimes can have a devastating effect on a national economy since potential victims of such crimes are far more numerous than those in other forms of crime. Economic crimes also have the potential of adversely affecting people who do not, prima-facie, seem to be the victims of the crime. For example, tax evasion results in loss of government revenue, thus affecting the potential of the government to spend on development schemes thereby affecting a large section of the population who could have benefited from such government expenditure. A company fraud not only results in cheating of the people who have invested in that company but may also adversely impact investors’ confidence thereby affecting the growth of the economy. There have also been instances of manipulation of stock markets resulting in the loss of a substantial amount of assets of the small investors. Corruption not only results in loss of citizens’ rights but also has the potential of ruining the moral fabric of the society. Therefore, economic crimes constitute a serious threat to the national economy and system of governance.

Therefore, our Group sees as vital the clear identification of incentives of economic crime on a national and international scale. There is a potential need on behalf of our members to seriously look at the efficiency and transparency of the legal systems adopted.

Being aware of the incessant increase and rich variety of forms of economic crime, the impressive sophistication of money laundering operations and techniques, the Group deems as necessary the acknowledgment of each governmental strategy, so far pursued, in order to counter the offensive of organized economic crime.

II. THE MAJOR FORMS OF ECONOMIC CRIME

The participating countries in Group 2, demonstrate various levels of performance in the criminalization of economic offences, depending on the legal systems adopted. In addition to traditional forms of economic crimes, new schemes to defraud people and governments are used incessantly by criminals to challenge the law enforcement mechanism. They are aided in their efforts by the ongoing revolution in the area of information technology. Generally speaking the fraud schemes, embezzlement, breach of trust, loan sharkling, tax evasion or crimes in the fiscal area, trafficking in goods and humans, counterfeiting of currency and other securities prevail in most countries.

Some countries are faced with predominant criminal offences, like in Albania, where the law enforcement authorities need to deal mainly with tax evasion offences. In Albania, these forms of crimes are developed, due to clear deficiencies in fiscal legislation and a series of cumbersome bureaucratic procedures.

The major commercial companies that operate in oil, fuel and the construction area in this country are
illegally favoured, thanks to their consistent ties with decision-making political groupings.

The key people that work on a day-to-day basis in the fiscal and customs authorities are sometimes politically appointed, facilitating the functioning of tax evasion.

The money evaded is used to invest and expand other illegal activities or strengthen the existing ones.

Some other countries like Bangladesh or Laos have the problem of trafficking in human beings and smuggling of various commodities. In Laos, while the traditional economic offences were smuggling of goods along the borders, now there is a tendency of illegal smuggling of vehicles and other construction goods such as cars, trucks, cement, steel and so on.

Vanuatu is considered a tax heaven, and criminals cunningly use it as a base for shell companies and offshore financial centres for their illicit funds.

In Japan, in addition to corruption and corporate crimes, seemingly the situation favours the fraud scheme and loan sharking that make up the largest portion of economic crime occurring in this country. Concerning fraud, three types of crime prevail: investment fraud promising high returns, “ore ore” (it’s me, it’s me) frauds and fictitious billing. Due to technological advancement “ore ore” frauds and fictitious billing are committed using mobile phones, the internet and fictitious bank accounts.

Apart from the traditional economic offences, India has been witnessing highly organized criminal acts of counterfeiting of currency and other government securities such as registration stamps, postal stamps, etc.

III. MONEY LAUNDERING AND ITS MODUS OPERANDI

It is widely accepted that money laundering can be defined as the process of legitimizing “ill-gotten wealth”. It is an act which follows the commission of a predicate crime so as to use the proceeds of crime as if derived from a legitimate source. Thus, the process of money laundering involves disguising of illegal assets, converting them into legal gains, and removing them from access by the criminal justice system while retaining their economic value.

With the globalization of economies, the act of money laundering often involves complicated financial transactions in multiple jurisdictions; thus making it virtually impossible to trace the origin of such funds.

With the growing activities of trans-national organized crime syndicates, the laundering of criminally derived gains is fast becoming a lucrative and sophisticated business across the globe involving lawyers, accountants, bankers, etc.

The need for criminalizing the act of money laundering stems from the fact that hitting at the flow of proceeds of crime is an important instrument in hurting the criminals, especially those engaged in organized crime. People who engage in criminal activity, with the motive of seeking huge financial gains, are found to be highly vulnerable to attack on the proceeds of crime.

Criminalization of money laundering activities is, therefore, perceived to work as a threat to criminal gains, thus acting as a deterrent to criminal activities.

In some countries, which lack the respective legislation, this mechanism of money laundering moves more quickly and smoothly.

In countries like Albania, the major part of illegal proceeds is derived from trafficking in drugs and human beings at the transnational level. The huge gains profited are invested by formal means in legitimate businesses, such as construction companies and in the lubricants trade.

In Japan, a money laundering scheme is implemented through the purchasing of bearer securities, use of fictitious accounts and remittance to foreign bank account for the purpose of concealing the true ownership and origin of the money.
In countries like India, money laundering takes place through over invoicing of exports, under invoicing of imports, investment through shell companies and extensive use of hawala channels in the transmission of money.

Obviously, the process of money laundering goes through a consolidated three-tier mechanism, like placing, layering and integrating of illegal proceeds. The first stage is the introduction of money, obtained by illegal activities, into the financial system. The second stage is the conversion of money in as many banks as possible, especially abroad. The third stage is the reinvesting or integrating of this money into the economy, taking the shape of legitimate businesses.

IV. CRIMINALIZATION OF MONEY LAUNDERING AND ITS ENFORCEMENT AS A PRESSING NEED

By a thorough inspection and examination of respective local criminal legislation and the legal means at the disposal of governments to suppress organized crime, it would be reasonable to acknowledge that the legal system to counter money laundering needs considerable strengthening at the global level and a lot of work is required to tackle the menace of the effects of money laundering.

In addition, the legal structures on money laundering differ greatly from one country to another since criminalization of money laundering is dependant upon the economic, social, political and psychological backgrounds that these countries offer.

Actually, we may group countries, based on a three tier assessment device, with regard to the scope of concerns expressed by them on money laundering.

First tier countries, such as Japan and Albania, have well-defined laws against money laundering. They have also set up FIUs which provides and shares relevant information on money laundering with investigative authorities.

In Japan, the Anti-Organized Crime Law came into force in February 2000. This law expanded the scope of predicate offences of money laundering, from traditional drug crime to various serious crimes.

In Japan, the Anti-Organized Crime Law came into force in February 2000. This law expanded the scope of predicate offences of money laundering, from traditional drug crime to various serious crimes.

Second tier countries are those who have enacted or are in the process of enacting legislation to counter-money laundering. India and Bangladesh can be placed in this category since they have enacted legislation on money laundering which defines predicate offences; a suspicious transaction, etc. and seeks to put a Financial Intelligence Unit in place. However, the specialized system, to be put in place to combat money-laundering operations, will take time to bear fruit.

The third tier are countries like Laos, which are yet to give their full attention to this matter.

The enforcement of law on economic crime, especially on money laundering is becoming a serious handicap or impediment to the normal functioning of the rule of law. The level of law enforcement differs greatly among countries.

More specifically in Albania, there is challenging legislation, when it comes to the compliance with standards of major international treaties and conventions that universally cover the issues of transnational organized crime, including money laundering, but the level of law enforcement is still modest.

Several perpetrators of economic crime may be considered as “untouchable”, because they manage to waive their appearance in courts of law, thanks to their consistent relations with ruling corrupt political clans.
We have to bear in mind that the money laundering operations are obviously facilitated through loopholes in our legal systems. The whole process of placing, layering and integrating of the illegal proceeds in money laundering poses a serious threat to the integrity of national and international financial institutions. Weak central banks, existence of illegal non-banking institutions and the failure on behalf of intergovernmental structures responsible within FIU to perform adequately and professionally their vital responsibilities in detecting and preventing suspicious transactions are some of the issues which need to be addressed to make the detection of money laundering more effective.

Eventually, each country needs to seriously revise their local legal policies, in the light of relevant international engagements, in order to invoke more efficient money laundering deterrent devices.

V. THE EFFICIENCY OF NATIONAL LEGISLATION IN THE LIGHT OF THE UN TOC CONVENTION

The establishment of a reliable legal system composed of deterrent measures against organized crime, including money laundering, marks a major step forward, which many countries should take in defining their viable national strategies.

The most serious obstacles which these countries encounter in their attempts to mitigate the negative impact of organized crime on respective economies, is the lack of substantially effective legislation capable of confronting the complex nature of various crimes, including money laundering.

The legislative body in each respective country should pay full attention to enact laws that are up-dated with the latest tendencies of organized crime and the most recent developments on modi operandi in money laundering. This is to say; at least countries should define a long list of predicate offences that are likely to put in motion the money laundering process.

Confiscation and seizure instruments should be in place as an effective instrument to dismantle the substance of such offences. In addition to that, the countries should be aware that without an appropriate international cooperation mechanism and mutual assistance instruments, no positive result, in the fight against organized crime, will be yielded.

Therefore, it is imperative for all countries to further encourage the instalment of a system of norms which operates in a dynamic way in the common interest of the states sharing the same concerns and problems.

VI. THE PREDICATE OFFENCES

Generally speaking, the countries share different approaches with regard to the legislation on predicate offences. The long list approach is the predominant thesis. The countries that advocate the long list approach reason that if the threshold approach is taken the scope of predicate offences will be too wide. Therefore the offences that have a possibility of generating illegal proceeds should be listed.

The sources of law that cover the list of predicate offences are different in the countries. Albania exposes this list of predicate offences through the Penal Code. Six sections in this Code deal with the various legal nature of predicate offences. There is a severe penalization strategy for the commission of these predicate offences considered as serious offences, where the minimum level of punishment is 5 years. The money laundering offence is foreseen in this code as an offence with different levels of punishment, depending on seriousness, the level of cooperation and the danger to the economy and society this offence entails.

India follows the list approach for identifying the predicate offences for money laundering. The list includes offences committed under the Indian Penal Code and covers offences committed against the State, body and property; The Narcotics Drugs and Psychotropic Substances Act 1985; The Arms Act 1959; The Wild Life (Protection) Act 1972; The Immoral Traffic (Prevention) Act 1956; and The Prevention of Corruption Act 1988. The Indian law on money laundering broadly covers the predicate crimes identified in the UN Convention on Trans-national Organized Crimes.

In Japan, predicate crimes, other than traditional drug related offences which are listed in a special law on
drugs, are defined in the Anti-Organized Crime Law, Article 2. Predicate crimes are certain crimes provided under approximately 70 different laws including the criminal law, stimulant drug control law, and immigration-control and refugee-recognition law. For example, murder, fraud, counterfeit of currency, crimes related to firearms, habitual gambling, robbery, distribution of indecent materials and collective illegal immigration are some of the predicate crimes.

In Bangladesh, the predicate crimes are defined in Penal Code-1860. For example, cheating conduct, such as cheating by impersonation, etc. Bangladesh backs the idea of a long list of predicate offences.

Laos has no money-laundering Act. The traditional forms of economic crimes, such as fraud, embezzlement and breach of trust are taken care of in the Penal Code. The Laos government is currently drafting a money laundering law and will submit it to the next National Assembly. This law will be in conformity with the UN conventions which Laos has already ratified such as: The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances and The United Nations Convention against Transnational Organized Crime.

VII. CONFISCATION AND SEIZURE MEASURES

Confiscation and seizure instruments are a potential means in the hands of the prosecution authorities to suppress the substance of crime. However, to make them effective, it is imperative that broad powers are stipulated in the laws so as to effectively deal with the incidence of proceeds of crime.

In Albania confiscation and seizure procedures are in place in their Civil Code. The spirit of this procedural law doesn’t give full and lengthy powers to the prosecution office in this matter. In such cases a heavy onus of proof lies with the prosecution to satisfy the necessity of granting confiscation and seizure orders by the court, even the guilt of the subject must be proved- i.e. the convicted person has played an active role in achieving the common goals (laundering the illegal proceedings) in a structured organized group.

In India, the Prevention of Money Laundering Act 2002 empowers the Enforcement Directorate to investigate crimes of money laundering. The Director or other officers of the Directorate can attach property, believed to be proceeds of crime as per the schedule, for a period not exceeding ninety days. Similarly, these officers can search premises, break open lockers, etc., seize records or property and search and arrest persons.

The Act provides for setting up of Adjudicating Authorities for adjudicating cases related with money laundering. If after a hearing the Adjudicating Authority decides that any property is involved in money laundering, it will confirm the attachment pending proceedings relating to the predicate crime before a court. Once the guilt of the person is proved in the trial, an order confiscating the property shall be made. When a person is accused of having committed the offence of money laundering, the burden of proving that proceeds of crime are untainted property is on the accused. An appeal against the order of the Adjudicating Authority will lie with the Appellate Tribunal.

Japan has an advanced system of confiscation and seizure measures. In addition to the Penal Code provisions which provide for confiscation measures, the Anti-Organized Crime Law stipulates that confiscation and collection of equivalent value orders will be made at the same time as the sentence for the main conviction is given.

In addition, the law allows confiscation of not only tangible items and financial credits but also proceeds derived from criminal acts and this law allows attachment of the above stated items in order to ensure confiscation and collection of the equivalent value.

According to the Criminal and Criminal Procedure Law of Lao PDR, the prosecuting and investigative authorities can issue an order seizing illegal proceeds during the investigation of economic crimes, including Money Laundering.

In Bangladesh, it is the authority of the Court to order confiscation, freezing or forfeiture of proceeds of

In Vanuatu, The Serious Offences (Confiscation of Proceeds) Act 1989 deals with confiscation and seizure of the proceeds of crime.

VIII. MUTUAL LEGAL ASSISTANCE

International cooperation is essential in identification, tracking and prosecuting of illegal proceeds of crime.

Albania has implemented Reciprocity Treaties with neighbouring countries, like Greece, Italy and Macedonia, for exchanging vital information on matters related to the dynamic conversion of illegal proceeds.

The Prevention of Money Laundering Act 2002 provides for mutual legal assistance in India by making enabling provisions for agreements with foreign countries to enforce this Act, assistance to a contracting State in the investigation of an offence, reciprocal arrangements for processes and assistance for transfer of accused persons and attachment, seizure and confiscation of property in a contracting State or India.

In the case of Japan, the basic law covering mutual legal assistance is the Law on Mutual Legal Assistance in Criminal Matters. In addition, the Anti-Organized Crime Law stipulates mutual assistance in the execution of court orders for confiscation, collection of equivalent value and securance in criminal cases occurring in foreign countries and this law also stipulates the provision of information regarding suspicious transactions to foreign authorities.

Lao PDR made extradition treaties with Vietnam in 1999, Thailand in 2000, and China and Cambodia in 2001. To tackle crime, including Money Laundering, it is necessary to build cooperative relationships with other countries, as well as to enact laws regarding mutual legal assistance in criminal matters.

In Bangladesh, The Money Laundering Prevention Act 2002 provides for mutual legal cooperation to other countries upon request.


IX. ISSUES UNDER SCRUTINY

The members of Group 2 consider that the extent of problems encountered with economic crime, including money laundering, has grown in recent years.

There is a general consensus on the sources and nature of problems that organized economic crime, including money laundering, expose each country.

The trend of increasing scale of organized economic crime, including money laundering, is strongly believed to be a direct consequence of the following major causes.

1. The failure of national legislation to meet the up-dated standards and norms on fighting organized economic crime, including money laundering.

2. Inadequate level of local legislation to resist the offensive nature of organized economic crime, including money laundering.

3. The lack of preparedness of the present financial - institutional framework in many countries and ineffective investigative practices to deal effectively with the complexity of the nature of money laundering.

4. The poor performance of law enforcement agencies, on account of the low level of authority and means provided to them.
5. An ineffective system of mutual legal assistance has been found to be another factor hindering the tackling of transnational organized economic crime, including money laundering.

6. Fictitious bank accounts are often used as tools to commit fraud and money laundering, and cell phones and the internet are frequently used for committing fraud and drug offences. Therefore, such tools that are often used to commit the above crimes need to be controlled properly. In addition, financial institutions, telephone carriers and internet service providers should take responsibility for preventing their services from being misused as criminal tools.

X. FUTURE CHALLENGES

Group 2 concludes that joint efforts made by each country, in developing a reliable strategy of a vigorous domestic enforcement of law as well as international cooperation, is the most effective means to cope with problems related to economic crime, including money laundering. It would also be beneficial to adopt some of the following measures:

1. First and foremost it is important that the number of state parties to the TOC convention should be increased.

2. Given the fact that the TOC convention gives due consideration to diversities of the legal and financial system of member states and allows each state party to exercise discretionary power to a certain degree, it is feared that those committing economic crimes, including money laundering, may target countries with lenient legal provisions and international criminal organizations may end up setting a strong foothold in these countries, even if every State accedes to the Convention. In order to dispel such concerns States Parties should be encouraged to apply article 34 paragraph 3 of the TOC convention which stipulates “each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime”, since a thorough revision of the convention, increasing the mandatory provisions, is not possible in the near future.

3. Borderless criminal justice is essential in order to deal with borderless economic crimes including money laundering. Group 2 considers it necessary that any sense of turfdom embedded in the criminal justice system of each country be removed.

4. It should be recognized that information sharing is important in order to suppress cross-border crimes. Items of information to be shared are as follows: suspicious transaction reports; information relating to offences and suspects modus operandi and others. Despite some countries’ efforts to exchange information on economic crimes, including money laundering, it has become more evident that “information sharing” instead of information exchange is more necessary.

5. To have a unified standard for Criminalization of common criminal offences occurring in each country. Grant authority for universal jurisdiction on the above offences to all countries.

6. The adaptation in local legislation of legal criteria applicable to an increase in scope of predicate offences, which would enable the successful combating of organized economic crime, including money laundering.

7. The establishment of viable practices on confiscation and seizure measures, through the renewed legal concepts that enhance the powers of prosecuting authorities.

8. The financial institutions, telephone carriers and internet service providers should take responsibility for preventing their services from being misused as criminal tools. In view of this, the following will be in order:
   (a) Reinforce personal identification in financial institutions through know your customer identification norms. Impose sanctions on financial institutions when this is neglected. Criminalize the selling, purchasing and transferring of bank accounts in the case of Japan.
   (b) Create regulations to prevent the use of cell phones for criminal acts. Impose sanctions on cell phone companies when the above regulations are violated.
   (c) Create regulations to prevent the use of the Internet for criminal acts. Impose sanctions on Internet service providers when these regulations are violated.
9. The proper attention should be given to the establishment of mutual legal assistance practices, through the means of legal and political instruments. Frequent informal correspondence between officials in charge should be encouraged.

10. The development of high expertise within each FIU is crucial in fighting economic crime, including money laundering.

11. Conducting academic workshops at the local and broader level, in addressing the interactive and interrelated matters exposed in the routine activity of the responsible financial and non-financial institutions and independent professions.

12. Intensive publication through the mass-media or other sources of the issues and concerns, relating to the personality and dynamic of organized economic crime, including money laundering.

A strong commitment to the goal of establishing a regime of measures incorporating the above will go a long way in building a society free of crime.
GROUP 3

MEASURES TO COMBAT ECONOMIC CRIME
INCLUDING MONEY LAUNDERING

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I. INTRODUCTION

Economic crime including money laundering is a part of the major transnational organized crime. In order to combat economic crime, domestic, regional, and international law enforcement cooperation is required.

Owing to the generally recognized difficulty of giving an exact definition of economic crime, we agreed that we should simply define economic crime as “offences which cause or risk causing substantial loss” for purposes of the discussions in our Group Workshop (See Council of Europe, “Report of the European Committee on Crime Problems on Economic Crime”, 1981, p.16). Money laundering is the processing of criminal proceeds, generated as a result of predicate offences, including economic crime, to disguise their illegal origin, or to “legitimize” ill-gotten gains by disguising the sources or changing the form (See Asian Development Bank, “Manual on Countering Money Laundering and the Financing of Terrorism”, March 2003, p.4. See also the United Nations Convention against Transnational Organized Crime (2000 UN TOC Convention), Article 2 (h)).

It appears that the trend with economic crime of this generation is to launder all the proceeds at the end of the day; therefore, there is a need to investigate economic crime focusing also on the possibility of money laundering.

Banks and other financial institutions can be major target in laundering operations because they provide a variety of services and instruments that can be used to conceal or disguise the source of money.

Money laundering damages the reputation for integrity of financial institutions, and frightens away honest investors. Money launderers are criminals and, if the proceeds of crime are successfully laundered, will cause or risk causing further substantial loss to the financial sector and other large sectors of the economy. It is therefore important for each government to institute a comprehensive domestic regulatory and supervisory regime for bank and non-bank financial institutions, and to do everything possible to prevent and detect economic crime within its system. It is also important for all financial institutions to do their best in strengthening their cooperation with respective governments, especially with law enforcement agencies or prosecutors.

Since virtually all the members of our group are experienced investigators or prosecutors, we decided to compile our report on the basis of concrete economic crime cases in each country, rather than on the basis of the hypothetical case scenario prepared and provided by UNAFEI, although we used it in order to facilitate our discussions.
II. ANALYSIS IN THE TRENDS AND MODUS OPERANDI OF ECONOMIC CRIME INCLUDING MONEY LAUNDERING IN EACH PARTICIPANT’S COUNTRY

Although from the group discussions that we held it appears that economic crime is common in the respective countries, the variance that was observed was the modus operandi of economic crime.

A good example is Pakistan, the type of economic crime that they have experienced includes embezzlement, counterfeiting, kickbacks, tax evasion, banking and investment frauds, telephone fraud and smuggling.

The modus operandi of most economic crimes shows that there is connivance amongst members of legitimate organizations; sometimes including bank officials and government officials and monetary reward is offered to them for illegal services rendered. Sometimes bogus securities are offered to the banks when criminals get loans from the bank. Criminals forge payment orders, cheques and other financial instruments. Criminals also acquire false identity cards for their criminal activities. There are also organized criminal groups who print forged documents to facilitate fraudulent transactions. There are also criminals specializing in forging signatures. It is interesting to note that sometimes not all the criminals know each other within their syndicates while committing crimes.

The prevalent forms of economic crime in Japan are loan sharking, the “It’s me” scam and fictitious bills. In the “it’s me scam”, elderly people who live apart from their children or grandchildren often become victims. Criminals call a victim pretending that they are the child or grandchild of the victim and say that they are in urgent need of money because they are being held responsible for a car accident or they are chased by creditors for repayment of a loan. The victims often pay the money into the designated account believing that the caller is their real child or grandchild.

In fictitious billing, offenders send fictitious bills to many people using postcards and e-mails arguing that the fee for a pay web site is due. Offenders say “Non-payment is on our record and there is no room for argument. Unless you make the payment immediately, we will visit your house or office to collect the money” and make the victims transfer the money to the designated account without giving them enough time to check the legitimacy of the charge.

Lists of prospective victims who are vulnerable to this type of crime, such as the elderly who live alone or Internet users, are distributed among criminals. Based on this list, criminals select victims to commit these crimes against.

Fictitious bank accounts and cell phones are used to contact victims or transfer and receive money in these crimes, including loan sharking. Fictitious accounts are also used to conceal proceeds of crime.

These crimes are professionally conducted by organized groups comprising multiple members. Organized criminal groups called Boryokudan (Yakuza) are often involved. It is believed that they make up a large scale organization with members playing different roles such as acquiring fictitious accounts and cell phones.

Zimbabwe is also experiencing various forms of economic crime including money laundering. The major forms of economic crime are fraud, forgery, theft by conversion (common law crime), violation of the Prevention of the Corruption Act and tax evasion. The modus operandi in the fraud is that suspects connive to purport that some goods have been supplied to a company or government department. A fictitious invoice is made to facilitate payment. When a payment is effected, then the suspects share the crime proceeds. Usually this money is invested with asset management companies to hide their ill-gotten money. The other form of fraud is that suspects alter figures on bank instruments like cheques, demand drafts, payment orders and traveller’s cheques.

The common economic crimes in Nepal are tax evasion, human trafficking and money laundering. In tax evasion cases, real business transactions are not shown to the income tax authorities. To evade VAT (Value Added Tax) excise duty the businessman undervalues their production and is involved in the practice of non-billing. In the import trade the businessman commonly uses under invoicing of goods; their incorrect
declaration of imported goods enables them to evade custom duties. In Nepal, when human trafficking takes place victims are normally informed that they are being taken for employment abroad. Another common method is pseudo-marriage. In this case, a trafficking agent gets married with a victim without fulfilment of legal or customary proceedings, and takes his “wife” out of the country and sells her.

Hundi/Hawala (an illegal underground banking system) is a common method of money laundering in Nepal. The Hundi people have their network almost all over the world. Instead of transferring money through official financial institutions money is transferred by individuals to different countries. The increase of Nepalese people in foreign employment has provided an opportunity to the Hundi people.

In Indonesia there are many forms of economic crime like smuggling, tax evasion, drug trafficking, human trafficking, violation of copyrights, bank frauds, embezzlement, credit card fraud and fraud of certificates of bills of lading. Indonesia has criminalized money laundering but they are facing many difficulties in implementing the laws.

In Myanmar, the following offences relating to economic crimes are occurring like forgery, misappropriation, cheating, misuse of communications technologies, illegal export and import, offences relating to the investment law, offences relating to trade, banking frauds and offences relating to foreign exchange. The modus operandi of forgery is as follows: Criminals imitate letterheads and documents and they use these documents for the company concerned to do business transactions pretending to be real owners. Criminals also forge documents to get import and export licenses. In bank fraud criminals get loans from the banks using bogus securities. Criminals are involved in trading of foreign currency on the black market without permission of the Controller.

In Afghanistan although they are experiencing economic crime including human trafficking, counterfeiting of money and money laundering, enforcing relevant laws is very difficult because of the volatile post war situation and instability in the country.

It is interesting to note that the modus operandi of economic crime is similar in many developing countries.

III. CURRENT LEGAL SYSTEMS, LAWS AND PRACTICES IN EACH PARTICIPANT’S COUNTRY

All countries of our group members are party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 UN Vienna Convention). Afghanistan and Myanmar are party to the 2000 UN TOC Convention whilst Pakistan, Zimbabwe, Japan, Indonesia and Nepal are signatories to this Convention. All our group member countries are signatories to the 2003 United Nations Convention against Corruption except, Myanmar.

In Afghanistan, although they have laws which control economic crime including embezzlement, human trafficking, counterfeiting of money and bribery, these laws are not effectively enforced due to the above-mentioned reasons. A Commission of Law has been constituted to amend the laws.

In Indonesia there are laws controlling economic crime relating to banking, copyright, trade and service marks, and there is a provision in Law No. 15 of 2002 which criminalizes money laundering (amended by law No. 25 of 2003).

In Pakistan, there is a legal framework for the prevention of economic crime, which has various penalties under the provisions of the Pakistan penal code, Foreign Exchange Regulation Act, 1947, the Customs Act, 1969, Import and Export (Control) Act, 1950, and the Banking Companies Ordinance, 1962.

In Pakistan they are in the process of enacting Anti-Money Laundering Law, however, the Government of Pakistan is taking various legal measures to curb the menace of economic crime including money laundering. For example, fund raising and its laundering for terrorism is an offence under the Anti-Terrorist Act, 1997. The control of Narcotic Substances Act, 1997 also provides for forfeiture of assets derived from trafficking in narcotic substances. Under the National Accountability Bureau Ordinance 2000, all banks and financial
institutions are required to report all unusual transactions that could relate to illegal activities to the National Accountability Bureau forthwith. Thus, Pakistan is combating economic crimes, including money laundering, using the above mentioned laws.

In Japan, there is a legal framework for the prevention of economic crime, which has various penalties under the provisions of the Penal Code, Commercial Code, Anti-Monopoly Law, Securities and Exchange Law, Patent Law, Trademark Law, Copyright Law, Unfair Competition Law, Income Tax Law, Corporation Tax Law, Money lending Business Law, etc.

The Anti-Drug Special Law 1992 criminalized money laundering and established the suspicious transaction reporting system for drug crime. The Anti-Organized Crime Law 2000 expands the scope of predicate offences to other serious crimes. The Japan Financial Intelligence Office (JAFIO) was established in February 2000, which collects and analyzes suspicious transaction reports and disseminates the information to law enforcement agencies. The Law on Customer Identification and Retention of Records on Transactions by Financial Institutions came into effect in 2003. This law obligates financial institutions to perform customer identification procedures and keep records of their transactions.

In Zimbabwe they have the legal systems and laws for combating economic crime, including money laundering. For economic crime they have the Exchange Control Act, Prevention of Corruption Act, Serious Offences Act, Insurance Act, Banking Act, Reserve Bank Act, Criminal Procedure and Evidence Act, Postal and Telecommunications Services Act, Sales Tax Act, Audit and Exchange Act, Companies Act, Public Accountants and Auditors Act and Building Societies Act. In addition, there is the Bank Use Promotion and Suppression of Money Laundering Act for combating money laundering. They also use the Serious Offences Act for combating money laundering. The criminal system is separate from the civil system; however, criminal cases and civil cases can take place at the same time.

The Nepalese law has addressed economic crime from its early period by criminalizing such crimes. There is the Trafficking of Human Beings Control Act 1980, Prevention of Corruption Act 2002, Narcotic Drug Control Act 1996 and Foreign Exchange Regulation Act 1962. In Nepal important tax statutes including the Income Tax Act 2002, the Excise Duties Act 2002 and Value Added Tax Act 1993 have stringent provisions for tax evasion. In corruption cases one main change has been recently brought to the existing system by a new act, which introduced the crime of corruption on the basis of accumulation of property or high expenses not in consonance with the known source of income of a public officer.

Money laundering in Nepal is carried out through bank services. Money launderers receive a letter of credit (L/C) by the bank to import goods. The importer is required to submit a copy of the bill of entry within a specific period from the date of issuance of the L/C. But a forged bill of entry is presented to the bank to transfer the foreign currency against a non-existent import. The L/C scandal is one of the examples of money laundering. In cases detected by the L/C commission 92 firms transferred US 35 million to third countries. The investigation revealed that in many cases no import had taken place, the parties of the L/C also could not be traced. The money deposited in the bank at the time of the issuance of the L/C was in cash. The bank secrecy law is not applicable to the investigation of corruption and money laundering cases.

Myanmar has a legal system and laws for combating economic crime, which are the Control of Imports and Exports Act, Foreign Exchange Regulation Act, Suppression of Corruption Act, Revenue Law, Central Bank Law, Monetary Enterprises Law, Insurance Law, Overseas Employment Act and Investment Law. The Control of Money Laundering Law and rules on suppression of money laundering and the Law on Mutual Assistance in Criminal Matters were enacted, and Myanmar has recently become a party to the 2000 UN TOC Convention.

Most of the countries of our group have laws to curb economic crime; however, we found that some countries have not yet criminalized money laundering, although they have some laws to control criminal activities relating to money laundering.
IV. PROBLEMS OR CHALLENGES FACED BY THE PARTICIPANT’S COUNTRIES AND THE INTERNATIONAL COMMUNITY

We realized that, in most developing countries, our problems and challenges are more or less the same. However, we also realized that the use of bank accounts opened using fictitious or fraudulent identification by criminals occurs in most of our countries, including Japan.

In Japan, organized criminal groups called Boryokudan (Yakuza), with members exceeding 44,000, are suspected of being involved in various forms of economic crime including the “it’s me” scam, fictitious bill scam and loan sharking. In these criminal acts, cell phones and the Internet are used to contact fellow criminals or victims, in which case, electronic surveillance and undercover operations may be effective. These special investigative techniques, however, are very limited in Japan due to various constraints such as the protection of human rights of suspects. Wiretapping has been used only a few times since the Communication Interception Law came into force in 2000, and undercover operations have been used in very limited occasions, namely investigations into drugs or firearms trafficking.

Nepal and Pakistan do not have specific anti-money laundering laws, although steps are being taken by both governments to enact the laws, and they are using other economic crime laws to combat money laundering.

In Nepal, authorities are combating money laundering by enforcing other economic crime laws such as the Drug Control Act, Anti-Corruption Act, Foreign Currency Act and Tax Evasion Act.

Some developing countries are facing the problems of extradition of suspects from other countries. A good example is that of Zimbabwe where suspects externalized (exported) foreign currency and defrauded investors of large volumes of money and fled to the United Kingdom. Zimbabwe is not receiving cooperation from the United Kingdom to extradite these suspects because the United Kingdom government takes the word of the suspects that they are political refugees.

Member countries found that, in some instances, there is little or no mutual legal assistance rendered because some countries do not cooperate with foreign investigations.

Members of this Group agreed that the public were not being sufficiently informed about economic crime including money laundering.

The sentences for economic crimes including money laundering are not proportionate to the gravity of these crimes; therefore, they do not sufficiently serve as a deterrent for these crimes. For example, in Japan and Zimbabwe, although some criminals are involved in defrauding huge sums of money they get away with light sentences.

There is no global uniformity in combating economic crime including money laundering, since in developing countries they lack the resources like computers and camcorders for surveillance, they also lack training in learning effective methods for combating economic crime including money laundering. Thus, the developing countries need technological assistance to upgrade their systems.

V. A SUITABLE AND EFFECTIVE LEGAL SYSTEM, LAWS AND PRACTICES TO COMBAT ECONOMIC CRIME INCLUDING MONEY LAUNDERING AT THE NATIONAL AND INTERNATIONAL LEVEL

A. International Standards

Since most serious forms of economic crime often involves transnational organized criminal groups and international transactions, international standards prescribed in the 2000 UN TOC Convention should be the fundamental basis on which we explore effective measures to combat economic crime including money laundering. All countries should be strongly encouraged to ratify or accede to this Convention as soon as possible. In order to do so, they should enact or amend their domestic laws and regulations in accordance with the articles of the TOC Convention. State parties to the TOC Convention should properly and effectively implement their obligations under the Convention. We also would like to emphasize that the 40 Recommendations adopted by the FATF in June 2003 should be respected by all governments, although we
did not have enough time to compile our report on the basis of extensive discussions on the Recommendations. In this context, it should be noted that the FATF 40 Recommendations have been endorsed by FATF Style Regional Bodies including the Asia/Pacific Group on Money Laundering (APG), of which Indonesia, Japan, Myanmar, Nepal and Pakistan are members or an observer, and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), of which Zimbabwe is a member.

B. Criminalization of the Laundering of Proceeds of Crime

Countries must have anti-money laundering laws in place. In criminalizing money laundering, countries should seek to apply such laws to the widest range of predicate offences and should include as predicate offences all serious crimes as in conformity with the TOC Convention Article 6 and Article 2(b).

C. Regulatory and Supervisory Regime

Each state should enact laws to institute a comprehensive domestic regulatory and supervisory regime for financial institutions, including banks, in accordance with Article 7 of the TOC Convention. Financial regulatory authorities in each country should play a pivotal role in the supervision of banks and non-bank financial institutions. A regulatory and supervisory regime should ensure that these institutions are complying with customer identification procedures, record-keeping, reporting of suspicious transactions and making efforts to prevent criminal’s use of their channels for the purpose of money laundering and other unlawful transactions. Financial regulatory authorities should be encouraged to have their own administrative regulations in line with the government laws. These regulations must be able to safeguard loopholes against economic crime including money laundering.

D. Investigation, Prosecution, Adjudication and Sanctions

We need to explore ways to improve laws and practices in investigation, prosecution, adjudication and sanctions in order to combat economic crime including money laundering more effectively. Each state should take, or at least should consider taking, the necessary measures to allow for the appropriate use of special investigative techniques such as electronic surveillance and undercover operations by its competent authorities for the purpose of effectively combating economic crime committed or suspected of being committed by an organized criminal group in accordance with Article 20 of the TOC Convention.

Records of all known economic criminals should be kept; this will assist in sentencing them once they are arrested for repeatedly committing these economic crimes. Each individual country should be able to maintain data on statistics for and trends in economic crime, in line with Article 28 of the TOC Convention in order to assist in designing and implementing policing strategies. Investigative agencies and prosecutors must make every effort so that the courts impose stiffer sentences on criminals who have committed serious economic crime including money laundering, taking into account the gravity of such offence (see the TOC Convention Article 11).

E. International Cooperation

Paragraph 14 of Article 16 of the TOC Convention provides the safeguard against the extradition of a person for the purpose of prosecuting or punishing the person on account of his/her “political opinions”. However, such safeguard should be applicable only when the requested State has “substantial grounds” for believing that that is the case, and should not be misappropriated, taking into account the gravity of economic crime which causes or risks causing substantial loss.

Each country should afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to economic crime including money laundering in accordance with Paragraph 1 of Article 18 of the TOC Convention. Each state should also consider the possibility of concluding bilateral or multilateral agreements or arrangements as provided in Paragraph 30 of this Article. In case where a country does not have such agreements or arrangements, the law enforcement authorities of that country should endeavour to explore all possible measures, including using diplomatic channels, to request and obtain assistance from a foreign country. As investigators or prosecutors, we have to make every effort to explore better ways to ensure that effective and rapid assistance may be extended to one another. We should note that we have to make every effort to assist foreign authorities when properly requested, since mutual legal assistance is provided on a reciprocal basis.

In accordance with Article 27 of the TOC Convention, each country should cooperate closely with one
another to enhance the effectiveness of law enforcement action to combat economic crime including money laundering and should, in particular, adopt effective measures to enhance and establish channels of communication between law enforcement authorities in order to facilitate the secure and rapid exchange of information concerning all aspects of economic crime including money laundering. Novel modus operandi of or trends in economic crime would be worth sharing internationally.

F. Other Measures
As provided in Article 29 of the TOC Convention, each country should initiate, develop or improve specific training programmes for its law enforcement personnel in order to keep them updated on the rapid evolution of economic crime including money laundering.

In accordance with Article 40 of the TOC Convention, all countries should make concrete efforts in coordination with each other and with international and regional organizations to enhance their cooperation with developing countries, with a view to strengthening their capacity to prevent and combat economic crime. Enhancing financial, material and technical assistance to support the efforts of developing countries to implement the TOC Convention is also essential.

With regard to measures against corruption, in line with Article 7 of the United Nations Convention against Corruption, each country should endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants that promote adequate remuneration and pay scales, in order to feasibly ensure that they are not corrupted.

It is important to educate employees of financial institutions in order to strengthen their cooperation with law enforcement agencies (See Paragraph 2 of Article 31 of the TOC Convention). To promote public awareness on the modus operandi of economic crime is also essential in order to warn people who are vulnerable to economic crime.

VI. CONCLUSION
It is clear that economic crime including money laundering is an international menace - that being the case, all countries should put their heads together and establish laws that conform to the 2000 UN TOC Convention and respect FATF 40 recommendations. The few countries that have not yet criminalized money laundering must ensure that they have criminalized this monster because all the proceeds of economic crime are laundered at the end of the day. Developed countries must support developing countries in their training programmes and allocation of resources because without expertise and without resources, these developing countries will not be able to tackle modern forms of sophisticated economic crime including money laundering.
APPENDIX

COMMEMORATIVE PHOTOGRAPHS

• 127th International Training Course
• 128th International Training Course

UNAFEI
The 127th International Training Course

Left to Right:
Above:
    Prof. Yokochi, Prof. Uchida, Mr. Law (Hong Kong)

5th Row:
    Mr. Koyama (Staff), Mr. Yamagami (Staff), Ms. Fujimura (Staff), Mr. Miyakawa (Staff)

4th Row:
    Ms. Yamashita (Staff), Mr. Tatsuda (Staff), Ms. Ishikawa (Staff), Ms. Aruga (Staff), Ms. Yanagisawa (Staff), Mr. Tada (Staff), Mr. Ringang (Palau), Mr. Ambarita (Indonesia), Ms. Miyagawa (Staff), Ms. Nakajima (JICA)

3rd Row:
    Mr. Fukugaki (Japan), Mr. Aoki (Japan), Mr. Ichinose (Japan), Mr. Garae (Vanuatu), Mr. Katonibau (Fiji), Mr. Takano (Japan), Ms. Alvor (Philippines), Ms. Tokuda (Japan), Ms. Kim (Korea), Ms. Matsushita (Japan), Mr. Okuno (Japan)

2nd Row:
    Mr. Aziz (Malaysia), Mr. Janoudom (Thailand), Ms. Matsubayashi (Japan), Mr. Gabr (Egypt), Mr. Sugawara (Japan), Mr. Pale (Tonga), Mr. Mewerimbe (Papua New Guinea), Mr. Saidov (Tajikistan), Mr. Grande (Philippines), Mr. Singh (Malaysia), Mr. Tomoi (Japan), Ms. Shibata (Japan), Mr. Rujjanavet (Thailand), Mr. Nakamura (Japan), Mr. Muzambi (Zimbabwe)

1st Row:
    Mr. Iida (Staff), Prof. Someda, Prof. Uryu, Prof. Shinkai, Dep. Director Akane, Mr. Spurr (UK), Ms. Rojas Rodriguez (Costa Rica), Director Sakai, Prof. Christie (Norway), Ms. Kamal, (Singapore), Prof. Senta, Prof. Sato, Prof. Sakata, Mr. Edura (Staff), Mr. Cornell (L.A.)
The 128th International Training Course

Left to Right:
Above:
Sir David Calvert Smith (U.K.), Mr. Pontell (U.S.), Prof. Yokochi, Prof. Shinkai, Prof. Uchida

4th Row:
Mr. Tatsuda (Staff), Mr. Saito (Chef), Mr. Lazimi (Albania), Mr. Kobayashi (Japan), Mr. Dai (Staff), Mr. Yamagami (Staff), Mr. Miyake (Staff), Mr. Miyakawa (Staff), Mr. Sano (Staff), Ms. Yanagisawa (Staff), Ms. Fujimura (Staff), Ms. Aruga (Staff), Ms. Miyagawa (Staff), Ms. Ishikawa (Staff), Mr. Koyama (Staff)

3rd Row:
Ms. Yamashita (Staff), Mr. Tada (Staff), Mr. Ounheune (Laos), Mr. Ishijima (Japan), Mr. Shibayama (Japan), Mr. Kawase (Staff), Mr. Htin (Myanmar), Mr. Yamato (Japan), Mr. Tonoike (Japan), Mr. Tanaka (Japan), Mr. Himeda (Japan), Mr. Thomas (Vanuatu), Mr. Talasasa (Solomon Islands)

2nd Row:
Mr. Asiama-Sampong (Ghana), Mr. Win (Myanmar), Mr. Udornpim (Thailand), Mr. Mollakheh (Afghanistan), Mr. Suwetra (Indonesia), Mr. Kashem (Bangladesh), Mr. Adhikari (Nepal), Mr. Makodza (Zimbabwe), Mr. Khan (Pakistan), Mr. Bharti (India), Mr. Ponsanith (Laos)

1st Row:
Mr. Cornell (L.A.), Mr. Ezura (Staff), Prof. Sakata, Prof. Sato, Dep. Director Akane, Mr. Nilsson (E.U.), Director Sakai, Mr. Peeraphan (Thailand), Prof. Senta, Prof. Noguchi, Prof. Someda, Mr. Iida (Staff)