
REPORTS OF THE SEMINAR

GROUP 1

THE USE OF COMMUNITY-BASED ALTERNATIVES AT THE PRE-TRIAL AND TRIAL STAGES TO REDUCE OVERCROWDING IN PRISONS

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|-----------------------|--------------------------------|------------------------------|
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I. INTRODUCTION

On 26 January, Group One held a meeting in the Conference Hall. Ms. Clarke nominated Mr. Jagath for the post of Chairperson and as the participants expressed consensus, he was so elected. Similarly, Ms. Clarke was elected Co-chairperson. Next, Messers. Ali and Nguyen were elected Rapporteur and Co-rapporteur, respectively.

Group One was tasked to discuss and recommend effective measures to improve the treatment of offenders and reduce overcrowding in prisons, through the enhancement of community-based alternatives to imprisonment at the pre-trial and trial stages.

On the first day, the main discussion of the group centered on the subject of bail. The participants who acknowledged that the granting of bail is present in the criminal justice systems of their respective countries, also opined that the number of beneficiaries of the bail system is not very high. It was revealed that in some countries, the conditions for bail are stringent and in other countries the procedure is lengthy. Moreover, in their cases, judges hold very conservative mindsets and are generally reluctant to grant bail to offenders/defendants. Almost all the participants agreed that the granting of bail on a larger scale can avoid over-crowding in prisons.

Following an animated discussion, different types of bail were then discussed. To begin with, the granting of pre-arrest or anticipatory bail was hotly debated. It was argued that pre-arrest bail is of great value to a defendant who may need time to establish his or her innocence. It was expressed that in many developing countries, innocent persons are sometimes falsely implicated in criminal cases. In such cases, being granted pre-arrest bail is welcomed.

Later the discussion was focussed mainly on the power of the police to grant bail. Participants from Bangladesh, Pakistan, Sri Lanka, Guyana and Papua New Guinea said that the police in their countries play an extremely important role in the criminal justice system and they also have the authority to grant bail in cases of minor gravity. However, another participant stated that in Indonesia, the police have the power to release some suspects on the basis of a personal guarantee. In the case of Guyana, this is referred to as being placed on 'Self Bail'. Moreover, the participant from Indonesia further stated that although the Police in that country have the power to grant bail to suspects, they rarely exercise this discretion. Participants from Japan stated that while their police have no power to grant bail, they do have power to release a suspect within 48 hours, and that they frequently exercise that power. Meanwhile, the participant from Vietnam held the firm view that only the Prosecution Office should have the final role in granting bail.

II. POLICE DISCRETION

Discretionary powers and practices of the police were discussed to examine the present status in terms of alternatives to incarceration at the pre-trial stage. Discussions focused on the power of the police to make an arrest, release/bail, close the case and also their role in restorative justice measures, mediation, settlement or alternate dispute resolution.

It was learned that in all the countries representing Group I, excluding Japan, the police can make an arrest in a significant number of cases without a warrant. Usually the police can arrest a person on the grounds of prevention and suspicion, for detention within a stipulated timeframe (which varies from 24-48 hours in most jurisdictions). However in Indonesia after an initial detention period of 20 days, a request must be sent to the prosecutor's office for an extension of further detention. If such extension is granted, the suspect's cumulative detention period cannot exceed 50 days. After an arrest, the police are required to produce the arrestee before either the court or the prosecutor. In Vietnam, it is mandatory that all cases be referred to the prosecutor's office for approval.

In terms of the power of the police to release or bail a person arrested, the police have this authority in all participating countries with the exception of Japan and Vietnam. This means if it is revealed that there is insufficient evidence to detain an arrested person the police can release the person without obtaining permission from the court or prosecutor's office. Furthermore, in Bangladesh, Guyana, Pakistan, Sri Lanka, Indonesia and PNG, the police can release the arrestee on bail with some conditions (such as reporting daily to the police), if the offence committed is minor in nature and there is no substantial evidence against the accused.

During the discussions, it became clear that the police played roles at the pre-trial stage in areas which could be considered facets of restorative justice, mediation, settlement and alternative dispute resolution. This was specifically so in Guyana, Sri Lanka and Papua New Guinea. In some countries, the use of these measures are not in the legal framework but is done unofficially, as in the case of Bangladesh. In Japan where it is also done occasionally by Koban or Community Policing officers, the use of restorative justice, mediation and settlement (among others), will be formalized with the implementation of the *Saiban-in* court system. However, in some countries, there still remains the need for legislative approval for police involvement in such initiatives.

A. Recommendations

- That the police should exercise their powers of arrest with due care and any discretion used should be within clear, legal guidelines;
- That the police should play a facilitating role in mediating settlements and or dispute resolutions, for minor offences, as they are the first point of contact for both parties involved after a crime is committed. Settlements should however be subjected to proper legal supervision;
- That the police should complete investigations without delay, to minimize the detention period at the pre-trial stage.

B. Note

With regard to the use of police discretion at pre-trial stages, the details of the content and procedure of any agreement between two or more disputing parties should be clearly enunciated, and the community and oversight body must be informed accordingly. This measure is to provide a basis for further redress in the event that one or more parties break the agreement.

III. SUMMARY OF DISCUSSION OF PROSECUTORIAL DISCRETION

In Bangladesh, Pakistan, Guyana and Papua New Guinea the prosecution office prosecutes cases in the Judge, High and Supreme Courts. At the Magistrate's Court, the police perform the function of the prosecutor. In the nations of Bangladesh, Guyana and Pakistan, the prosecutor's office starts functioning after receiving a complete investigative report from the police, but they can request the Police to collect more evidence if they still feel there is scope to acquire more evidence. The prosecutor can not close any case nor release any person on bail or guarantee.

The participant from Papua New Guinea stated that the Police Prosecutor prosecutes all Summary cases at the Magistrate's Court. The public prosecutor assists the police during the prosecution of serious crimes at the national court and with cases concerning constitutional office holders who are cited for breaches, either by the Ombudsman's Commission or other relevant authorities. The police, before making an arrest, or the prosecutor, during the trial process, may make a discretionary disposition because of lack of evidence. Serious cases of corruption and fraud are also referred directly to the prosecutors by relevant authorities such as the Fraud and Anti-Corruption Unit. There is a close relationship between the police prosecutor, investigator and public prosecutor.

Participants from Sri Lanka, Vietnam and Indonesia stated that public prosecutors in their countries have discretionary powers to prosecute cases and to supervise the police in the investigative process. Public prosecutors in some countries have power to suspend prosecution because of lack of evidence and can instruct the police to arrest or release people if they feel that the police did not complete a thorough investigation. The participant from Indonesia claimed that formerly in her country, only the public prosecutor could prosecute all cases at all court levels, but since the activation of the Anti Corruption Commission in 2000, prosecutors can also prosecute corruption cases in their own court. Some government departments also have legal authority to investigate cases related to their functions. For example, tax crimes by the Tax Directorate General, illegal fishing by the Department of Fisheries and Seas, Customs, etc. However, after completing their initial investigations, the files must go to the public prosecutor who can conduct any investigation of corruption and human rights violations. They can seize or confiscate assets or bank accounts of a suspect and have discretionary power to prosecute or to withdraw a case and to execute the judges' decisions. There is a close relationship between the police, prosecutor, judge, and other related agencies.

Some participants from Japan stated that the police can arrest and detain a suspect for up to 48 hours, following which the prosecutor will decide whether he or she will apply for a Detention Order from a judge. If there is a reasonable ground to believe that the suspect will leave the jurisdiction or destroy evidence, the judge would issue a detention order. In Japan, after ten days the prosecutor may apply for an extension of the detention order. The prosecutor analyses the case and makes the decision whether or not to prosecute the suspect; even if he or she finds that the suspect is likely guilty, he or she can suspend the prosecution, considering the character, age, environment of the suspect, and gravity, circumstances or situation of the offence. In Japan, there is no mediation or settlement system at the pre-trial stage but if the prosecutor thinks that the case could be dropped on condition that an agreement between the suspect and the victim is reached, he or she suggests to the civil attorney at law, that efforts should be made to reach such an agreement. If an agreement is reached, the prosecutor suspends the prosecution. It was also stated that in several countries, the police and prosecutor have regular meetings.

IV. SUMMARY OF INTERVENTIONS AT THE ADJUDICATION STAGE

Community-based alternatives to incarcerations which some countries apply at the adjudication stage include verbal sanctions, suspension of sentences (suspended sentence), suspension of execution of sentences (conditionally suspended sentences), fines, probation, and community service orders. Appendix One illustrates the results of a "Survey of Participating Countries" and their use of various strategies which contribute to reduced levels of custodial sentencing. Appendix Two describes the various means by which the police may exercise discretionary power at the pre-trial stage. The table in Appendix One shows that fines are used in all the participating countries, while many countries apply the method of suspended sentences. Meanwhile, there are some countries which apply both suspended sentence and suspension of the execution of sentence (conditional sentence). Probation is used in several countries but community service orders are not used frequently, mainly because the society rejects such decisions and their judges therefore rarely use this intervention.

Each country should promote community-based alternatives to incarceration as much as possible under its own legal system, so as to decrease overcrowding in prisons. In addition, we considered that since the pre-trial stage offers the best opportunity to provide a greater impact on possible interventions to reduce overcrowding, increased focus should be directed to that area. One suggestion was that mediation be more extensively considered at the police and community policing levels. While this generated some animated and slightly heated discourse, the consensus was that the guidelines for such use must be clearly outlined in law.

V. RECOMMENDATIONS

1. That stringent efforts be made to use alternative dispute resolution, diversion, settlement and restorative justice practices at pre, mid and adjudication stages;
2. That alternative 'court systems' such as Traffic Courts, Family Courts, Minor Damage Courts, etc. be implemented where applicable, which could free the judiciary to address indictable matters in a speedy manner;
3. That all phases of the process in respect of the investigation, prosecution and trial be executed more efficiently;
4. That the discretionary power for the closing and/or suspension of criminal cases exercised by the police and prosecution should be clearly given oversight by appropriate bodies to ensure accountability and transparency to prevent corruption;
5. That creative public awareness campaigns be undertaken to sensitize the public about the benefits of community-based alternatives to custodial sentencing;
6. That strategies (training, increased sensitization, societal awareness, etc.) be developed to encourage every sphere of the judiciary to make greater use of the legally provided mechanisms permitting the use of community-based alternatives to custodial sentencing in their sentencing practices;
7. That international co-operation for the provision of technical assistance and capacity building to be pursued.

ANNEX I

Survey of Countries' use of Various Strategies to reduce Custodial Sentencing

| | SUSPENSION OF SENTENCE (SUSPENDED SENTENCE) | SUSPENSION OF EXECUTION OF SENTENCE (CONDITIONAL SENTENCE) | FINE | PROBATION | COMMUNITY SERVICE ORDER | JURY SYSTEM |
|------------|---|---|-------------------|---|---|-------------|
| Bangladesh | × | ○ | ○ | Only for Juveniles | × | × |
| Guyana | ○ | ○ | ○ | After 1/3 sentence served | × | ○ |
| Indonesia | ○ | ○ | ○ | Before and after trial Police and Prosecutor discretion | Community service provided only for juveniles and women | × |
| Pakistan | ○ | × | Fine and sentence | ○ | × | × |
| P.N.G | ○ | After sometime spent in jail | ○ | ○ | In effect and supervised by Elders of villages and issued by village courts | × |
| Sri Lanka | ○ | President can suspend a death sentence but death sentence is rarely used! | Minor offences | ○ | Although in law, not preferable choice of judges | ○ |
| Vietnam | ○ | In effect, but minimal usage | ○ | × | × | × |
| Japan | × | ○ | ○ | ○ | × | × |

The meaning of the symbols used in the Table are as follows:

- × Not applicable to that country
- Applicable to that country

ANNEX II

STATUS OF POLICE DISCRETION

| COUNTRY | ARREST | RELEASE/BAIL | INITIATE INVESTIGATION | CLOSE A CASE | CHECK & BALANCE | COMMENT |
|------------------|--------|--------------|------------------------|--------------|-----------------|---|
| BANGLADESH | √ | √ | √ | √ | √ | In some cases, the police can arrest, conduct a search without a warrant and initiate investigations. To close cases, they send all documents to the Magistrate to take the final decision. |
| GUYANA | √ | √ | √ | √ | √ | In some cases, the police can arrest and conduct searches without warrants. To close some cases, they send all documents to the public prosecutor for advice before making a final decision. |
| INDONESIA | √ | √ | √ | √ | √ | For some cases, the police can arrest, conduct searches without warrants and also close cases of less gravity. For cases of higher gravity, the public prosecutor has authority. |
| JAPAN | × | √ | √ | × | √ | The police need a warrant to arrest a person or to conduct search; they can initiate investigations and release a suspect, but decisions for detention and closing a case are taken by the prosecutor. |
| PAKISTAN | √ | √ | √ | √ | √ | For some cases the police can arrest and conduct searches without warrants. To close a case, they send all documents to the magistrate and prosecutor for a final decision. If any arrest is made in connection with a specific case, only the prosecutor can close the case. |
| PAPUA NEW GUIENA | √ | √ | √ | √ | √ | For most of cases, the police can arrest but cannot conduct a search without a warrant. To close a case, the police must send all documents to the magistrate for a final decision. |
| SRI LANKA | √ | √ | √ | √ | √ | For some cases police can arrest or conduct searches without a warrant; they can initiate investigations and close some cases as mentioned in law and for other cases, the police send all documents to the magistrate for a final decision. |
| VIETNAM | √ | √ | √ | × | √ | For some cases the police can arrest, conduct searches without warrants but the prosecutor's office can ratify such decisions later on. The public prosecutor takes the decision to close a case. |

The meaning of the symbols used in the table above are as follows:

- ×
 - √
- Not applicable in that country
Applicable in that country