REPORTS OF THE COURSE

GROUP 1

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

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I. INTRODUCION

On 22 May 2009, Group 1 commenced its workshop. The Group appointed, by consensus Mr. Florez as its Chairperson, Mr. Suda its Co-Chairperson, Mr. Iomea as its Rapporteur and Ms. Justino da Cruz as its Co-Rapporteur. Lively discussions occurred during the course of the sessions. The Group had its last workshop session on 15 June 2009.

II. SUMMARY OF THE DISCUSSSIONS

A. Alternatives to Pre-Trial Detention

1. Police Power in releasing Suspects on Bail

The powers available to police in fixing bail in some cases and releasing suspects without being indicted varies from one jurisdiction to another. However, in some countries, the discretionary powers of police during investigation appear to be similar in some ways. For instance, in the criminal justice systems of Brazil and the Solomon Islands, police can fix bail in less serious offences, and in Brazil, only the judge has the power to release a suspect on conditions. In Nepal, the police can release a suspect with the consent of the public prosecutor.

One participant from Japan stated that in Japan, police can release suspects but sometimes public prosecutors view this as not proper. The reason is that although police might think that the case is not serious the public prosecutors might think otherwise. Thus, it is believed that police judgments in some cases are not adequate at times.

The above views show that although having power to release suspects by police would contribute to avoiding unnecessary detention and overcrowding in correctional facilities, the objectives and principles of justice must also be carefully observed.

At the close of the discussion, some members support the idea that police should have discretionary powers to release suspects and on the contrary, some participants think that it is not a good idea to give these powers to the police because of the possibility that the powers might be abused.

2. House Arrest or Detention by Police

The first subject of discussion was house arrest or detention by police. In some countries, after a suspect has been arrested, he or she must be referred to a judge who decides whether the suspect should be released or not. In some countries which are represented in the group, if a judge releases a suspect restrictions can often be imposed.

In some jurisdictions, such as Japan, the police arrest and then refer the suspect to public prosecutors (within 48 hours) who then decide whether to seek detention or not. If a prosecutor decides not to ask a court for detention then the suspect can be released without any restrictions. The police sometimes release a suspect to his or her home but no restrictions may be imposed.

In discussing the issue of house arrest, the use of monitoring systems was also touched on. It is understood that this system is used in some countries. Some expressed the view that this system is not appropriate pre-trial because the suspect is yet to be convicted. Also, it might be against human rights principles.

It was pointed out by some members that although house arrest is an effective measure against overcrowding, the rights of the suspect/accused must also be considered. It was also expressed that there should be a balance between the rights of the suspect and the need to protect evidence from destruction. Some participants argued that house arrest is only necessary for serious offences.

In spite of the various views expressed, the group agrees that house detention is an effective measure to alleviate overcrowding. However, the issues such as human rights and costs also need to be considered. These must also be balanced with the need to protect the destruction of evidence, the need to avoid absconding and the need for maintenance of public safety.

3. Submission to Supervision of a Person or an Institution

As far as the countries represented in the group are concerned, this alternative to incarceration is practiced in some countries and not in others.

This supervision is practiced only in relation to juveniles and some participants expressed the view that this is not effective. The importance of the responsibility of supervisors was also discussed. It is a good measure against overcrowding but only if supervision is effective.

4. Electronic Monitoring

As far as the countries represented in the group are concerned, this system is yet to be introduced in their respective systems. Most members commented that the system is hard to implement and would be very expensive. On the contrary, one argued that although the system might be expensive, it is better than keeping innocent persons on remand in jail for a long period of time. Some expressed the view that this system is necessary in some societies, especially in relation to sex-offenders. Others think this system is infringes upon human rights.

5. The Prohibition of the Suspect from Leaving a Particular Area

It appeared from the discussion that this is used in some countries and not in other countries. In countries where this is used, the procedural stage where this is used varies. For example, in Japan the above measure can only be used after indictment, as a condition attached to bail, by a judge. In other countries, this measure is used even before indictment and is often a condition attached to bail. In most countries this measure is applied only in relation to petty offences.

According to the discussion, this is believed to be effective and working well on the presumption that suspects who are released with this condition attached often observe this order because of fear of being detained again for breach of the condition.

In Japan, as in other countries, one reason why suspects are detained during investigation is because of the need to prevent interference with investigation or destruction of evidence. Also, accomplices are sometimes not released during the investigation period because of the possibility that they might conspire to defeat the course of justice.

In conclusion, of the discussion regarding the above subject, it appears that all members of the group agree that this is a good measure, but there is a need for effective supervision to avoid issues such as interference with investigation or the destruction of evidence.

6. Investigation without Arrest

Each member of the group explained the system in their respective countries regarding arrest during and after investigation. In some countries, police can arrest a suspect during investigation; however there are some cases in which the police must obtain a warrant of arrest from a judge before arresting a suspect. In relation to minor offences, suspects can be released within a few hours of arrest.

In Japan and other countries, for minor offences, whether a suspect is arrested or not, the investigation continues and the suspect is usually not detained. In some countries the arrest of the suspect is mandatory, but the decision to release a suspect can only be made by a judge or a prosecutor.

In conclusion, in some countries it is difficult for investigators to investigate without the arrest of the suspect because of the possibility of destruction of evidence, absconding and safety of the suspect, victims and witnesses. The group agrees that police having the discretion to release suspects in minor cases can contribute to alleviating overcrowding. Some participants were quite sceptical about giving that discretion to the police because of the possibility of the abuse of power.

7. Prohibition of the Suspect/Accused from appearing at Identified Places or meeting Named Individuals

Most of the participants indicated during the discussion that prohibiting a suspect or an accused from appearing at identified places or meeting named individuals is an order which courts often impose.

In Japan and the Solomon Islands, this is sometimes imposed as a bail condition when a judge grants bail to a suspect or an accused. The objective is mainly to prevent the destruction of evidence and to prevent accomplices from conspiring to defeat the course of justice.

In Brazil, this is stipulated in the law, with the aim of protecting victims, such as victims of family disputes, but it is not applied as a bail condition.

The group agrees that this is a good alternative to pre-trial detention but sometimes lacks effective supervision. However, some participants argued that this seemed to work well as people often report to Public Prosecutors any breaches or failure to comply with the condition/order by the suspect.

The group accepts that in developing countries, sometimes suspects cannot afford to meet certain bail requirements such as the need to deposit certain amounts of money.

However, this may not be a big problem as one participant from Japan pointed out that in Japan, when a suspect is unable to pay the bail bond required of him or her, an association does exist and can assist in paying the bond.

The group unanimously agrees that the payment of bail bonds is a good measure and it is important for the establishment of associations to assist suspects regarding bail bonds.

8. Confiscation of Passport of the Suspect

This measure is used in most of the countries represented. Some participants also indicated that the courts can also have the discretion to make an order preventing the suspect from applying for a passport if it considers that there is a flight risk.

In Nepal, the investigating authority can make this order in relation to suspects that have been indicted for corruption offences. It is interesting to know that in Nepal, foreigners indicted for offences that carry a maximum penalty of more than six months' imprisonment are not entitled to bail, unless they show exceptional circumstances. This is different from Japan where there is no restriction on bail no matter the severity of the offence. In the Solomon Islands, suspects charged with murder and treason are not entitled to bail unless they show exceptional circumstances. In Brazil, terrorist crimes, practice of torture and drug-related offences, such as drug trafficking, are non-bailable.

Despite the different approaches in applying this measure, the group agrees that this is a good alternative to incarceration and recommends that there should be flexibility in bail to avoid overcrowding.

9. Release with an Order to Pledge Financial or other forms of Property, such as Bail

It is understood that there is criticism of bail because it is believed that it is not applied equally. Some suspects can afford to meet such orders but others cannot.

In concluding this topic, the group agrees that this is a good system however; it is recommended that it is important and necessary for countries that are yet to have associations that can assist suspects with meeting

bail requirements to establish such an association.

B. Diversion from Criminal Justice Procedure

1. Absolute or Conditional Discharge

In most of the countries represented in the group, absolute or conditional discharge is a course applicable by courts and prosecutors.

In Japan, once a case is prosecuted, the prosecution cannot be suspended but withdrawal is possible. In many countries,[1] the decision to suspend or withdraw a matter must be approved by the bosses of the prosecution department and the government. In countries where such a decision is solely made by the prosecutor having carriage of the matter, it was argued that victims who do not agree with any decision to suspend prosecution should be provided with an opportunity to request an independent review of such decision.

2. Decriminalization

Some participants believe that decriminalization of some minor offences is important because it reduces overcrowding and also because judges and prosecutors do not have to be burdened with more cases. One participant however, thinks that decriminalization should not happen because of overcrowding. There are other factors that must be considered before any decision could be made whether to decriminalize or not.

The group seems to agree that the situation differs from one country to another and in some cases, decriminalization of minor offences is effective. However, public opinion must first be ascertained before any decision is made.

3. Restorative Justice

The other topic of discussion was restorative justice. In some countries represented there is no restorative justice. In one or two countries, although there is no requirement under law for restorative justice, it is practiced in the form of reconciliation or compensation. This is often done in minor cases and is used in the criminal justice process.

The participant from Colombia informed the group that Restorative Justice is an alternative mechanism which is practiced in his country. He explained what restorative justice is and its different forms which include:

- Restitution/Compensation;
- Community work;
- Individual reparation;
- Collective reparation;
- He further indicated that the period for completing restorative justice is 60 days. If not completed within this period then prosecutors will proceed with the case in court. Resolving a case through this system prevents a case from entering the criminal justice process. In Colombia more offences are resolved through an established Reconciliation Office. This is an independent office.

In some countries represented, there is no restorative justice and in some countries, there is no strict or formal legal requirement for it but it is used in the criminal justice system, for instance, matters are sometimes resolved by way of reconciliation. Although this is not in a strict sense restorative justice, it is somehow appears to be a form of restorative justice.

The group then identified the merits and demerits of Restorative Justice. The merits are:

- Alleviates overcrowding;
- Saves time and money;
- It lessens the burden or workload on police, public prosecutors and judges;
- It satisfies victims;
- It avoids stigmatization of offenders.

The demerits are:

- Lack of specific and general deterrence;
- Recidivism cannot be avoided;

[1] Countries represented in Group 1.

- Possibility of victim being disadvantaged in the mediation process;
- Possibility of unfair treatment for some offenders (risk of injustice to some offenders);
- Public insecurity.

The group agrees that what may be considered a serious offence in one country may not be a serious offence in another country. What may be seen as minor offences in some countries might be serious offences in other countries.

However, the group tends to agree that Restorative Justice may and should only be applied to offences which are considered to be minor offences in each country.

The group recommends that the establishment of an independent and neutral mediating body in the process is fundamental.

C. Speedy Trial Measures

1. Summary Proceeding and Speedy Trial

Each participant from the countries represented informed the group of the current situation in their countries in relation to speedy trial.

In Japan, there are two processes, one is the summary proceeding and the other is the speedy trial. In a summary proceeding, if the punishment for an offence is equivalent to a fine, trials may not be held. Instead, the evidence documents are sent to the judge after indictment and the judge then makes a decision.

Speedy trial in Japan is used to shorten the time period between indictment and trial and is used mainly in minor drug offences, immigration related offences, etc., where the execution of an imprisonment sentence must be suspended.

It is obvious from what was said by the participants that in most of the countries, there is lack of such a speedy trial procedure. Suspects therefore have to be detained for longer periods of time in prisons.

The group identified some common factors of lack of speedy trials. These include:

- No fixed timeframe for investigation and prosecution;
- Minimum number of judges in some countries;
- Legal frameworks, such as procedures, sometimes unclear and lengthy;
- Behaviour of stakeholders such as defence lawyers (e.g. intentional delaying of cases).

2. Pre-Trial Preparation System

Discussion started with the focus on the new pre-trial preparation system which was introduced in Japan in 2005. The process, as explained by a Japanese participant, allows for the screening of the facts and the legal issues. This is where the public prosecutor, the suspect or his or her lawyer and the judge discuss what evidence would be produced in court. The judge cannot scrutinize the content of the evidence.

It is designed with the aim of reducing the trial period, court sessions and time between conclusion of hearing and the pronouncement of judgment/sentence. One participant from Japan explained that based on his personal experience, some of the cases were finalized within two months, so this system is not disadvantageous for the accused.

The new pre-trial preparation/trial arrangement is similar to pre-trial conference in the Solomon Islands. In the Democratic Republic of Congo, pre-trial preparation is done only for minor offences. This is not practiced in other countries represented.

The group therefore agrees that this is a very good system because it:
- reduces the length of detention (remand period) and reduces the time period for trial;
- reduces and avoids overcrowding;
- avoids wasting of court resources and allows for speedy trials.

III. RECOMMENDATIONS

1. There is a need to fix timeframes for investigation and prosecution; however, the timeframe may be extended depending on the nature of each case;
2. There is a need for flexibility in the recruitment procedure or policies and appointment of sufficient numbers of judges;
3. The use of summary proceedings is recommended to avoid wasting time and resources;
4. There is a need to utilize pre-trial preparations or arrangements.