

GROUP 2

SENTENCING AND ALTERNATIVE PUNISHMENT

Chairperson	Ms. Sumithra Rahubaddhe	(Sri Lanka)
Co-chairperson	Mr. Masaya Yamamoto	(Japan)
Rapporteur	Ms. Vanna Lawrence	(Jamaica)
Co-rapporteur	Mr. Kentaro Hirate	(Japan)
Members	Ms. Marta Raquel Flores Ramirez	(Guatemala)
	Ms. Misae Kato	(Japan)
	Mr. Ritendra Thapa	(Nepal)
	Mr. Salim Qawariq	(Palestine)
	Prof. Dr. Dr. h.c. Hans-Jörg Albrecht	(Germany)
Visiting Expert Advisers	Deputy Director Takeshi Seto	(UNAFEI)
	Professor Jun Oshino	(UNAFEI)
	Professor Junichi Watanabe	(UNAFEI)

I. INTRODUCTION

It was agreed that as the members all represent countries at various stages of development, consideration will be given to the diverse cultural, political and socio-economic backgrounds of each country. Recommendations will take into consideration each country's readiness for change. The Tokyo Rules 8.1 and 8.2 give a sample of the alternative sentences which should be implemented by countries according to need.

The group agreed that overcrowding exists in the correctional facilities of each country represented. Measures to reduce overcrowding should begin even at the sentencing of an offender, with judges or magistrates utilizing alternatives to imprisonment. Utilizing alternatives to imprisonment is a sustainable way of effecting behavioural change within the community, and serves the interest of both the offender and the society.

II. ALTERNATIVE PUNISHMENTS TO CUSTODIAL SANCTIONS

A. Types of Non-Custodial Sanctions

Sanctions applied to offenders differ among countries based on the legal provisions and powers conferred on the various authorities. A verbal sanction such as an admonition, reprimand or warning may be used by the judge as a settlement for any minor offence in one country, even in a criminal case, while this same sanction is only given to a juvenile in other countries. A verbal sanction is not currently used in Japan. However in the case of Japan, the prosecutor has the power to resolve a case by means of a suspension of prosecution, which is often accompanied by an informal admonition.

Status penalties are however utilized in a diverse manner. The sanction is indirectly seen in the fact that inmates in most countries except Nepal are not permitted to vote and thus lose the right of adult suffrage. In Japan, however, even offenders who are not imprisoned may have this right suspended based upon the offence committed.

Fines are used as a sanction in every participant's country. All represented countries also have laws which permit confiscation or an expropriation order. Confiscation or an expropriation order is however used as an additional sentence in many countries, but in some countries it depends on proof of guilt in another case. As a result, it complicates the execution of this sanction and is seldom used.

Criminal offences are regarded as an act against the state, thus in some countries, like Japan, a compensation order is not used as a sanction for criminal cases. Thus the victim can only be compensated through civil proceedings. In Jamaica, however a figure may be paid if the matter is settled through mediation. The agreed conditions are made a part of the sanction.

Probation of offenders and suspended or deferred sentences are commonly used in most of the countries

represented. Although the methods and agencies of supervision differ, it was agreed that many offenders benefit from these sentences.

The group agreed that house arrest could contribute greatly to an offender's rehabilitation within society. Representatives from developing countries however pointed out that this may be hard to implement with immediacy based on the cost related to surveillance systems. It was noted however that Guatemala has already implemented house arrest, but it seems to be limited to some offenders. It was also pointed out that it could reduce overcrowding in Nepal since some offenders could be released for the pre-trial process, and it may serve well for political purposes in other parts of Asia. Whilst it was agreed that it could be useful in Jamaica it was clarified that its use may be limited by the high incidence of domestic-related crimes.

B. Prioritization of Sanctions

As for which alternative punishments are effective countermeasures against overcrowding, priority order should be given based on each country's own situation, like the development of the economy or the historical, social or cultural ideology behind sentencing. Whether an alternative sanction is effective or not depends on the individual case.

C. Functions and Dysfunctions of Non-Custodial Sanctions

Verbal sanction like admonition is simple and easily introduced, but this is suitable only for minor cases because of its appearance of leniency. For example, in one country an advertisement is made that alerts the community when an offender is to be verbally sanctioned. The group agreed that verbal sanction should not be used for public shaming.

Community service orders are economical and a good option to allow first time offenders who have committed minimal crimes an opportunity to pay back to society and to learn from their mistakes. It is necessary to set up proper services or mechanisms and to gain co-operation from the community before this is introduced.

Fines are easily used, but this is not effective for the poor. It would increase the overcrowding in institutions since fine defaulters may be imprisoned. Other more affluent citizens would be able to pay for their offences when committed. The government's expenditure on prisons would also be increased as the prison population increases.

Probation is used by itself as a sanction or connected to a suspended sentence. In the former case, when probation conditions are broken, the subject person would need to be re-sentenced; in the latter case, sentence would be executed automatically. It has been noted that some judges apply longer periods of imprisonment when attached to suspended sentences, and as a result defaulters' punishments will differ from their counterparts. This situation could prove to increase overcrowding.

House arrest would be an effective alternative where there is an effective monitoring system. In Jamaica, electric-monitoring was piloted but it may be too expensive to be introduced for some countries. However, in Guatemala's relatively small city, the fact that police have information about those who are under house arrest makes monitoring effective because the police know and can monitor residents.

D. Administrative or Other Structures that Support Alternative Punishments

The group agreed that without the proper legislative structures, human resources, support systems, necessary infrastructure, etc., legal reform efforts to support alternative sentences can be ineffective.

Power is usually vested in the respective Ministry of Justice, Ministry of National Security, Ministry of Home Affairs, etc. It was felt that non-governmental agencies themselves could effect change. All agencies who can effect change in policies and their administration should work together to ensure that alternative sentences are adopted and implemented as appropriate for the country.

There should be a link between the courts, police, probation officers, etc., so that when sentences are given the conditions are clear and are obeyed by the offender.

The budget is usually requested according to need but is never allocated to cover the exact figures requested in many countries. Therefore more needs to be spent in the area of security.

As for fines, it is necessary to set up a proper fine collection system through co-operation with the monetary bureau to prevent corruption and to ensure collected money is delivered to the government. The system should also make allowances for remission on fines. In cases where confinement is the alternative punishment for being unable to pay a fine, a daily value should be calculated and the offender should be allowed to reduce the time spent by paying in instalments.

As for probation, to set up a system establishing and training probation officers is important.

When introducing community service orders, it is important to prohibit employers from utilizing offenders' labour for their private interests. Thus, a monitoring system that supervises the employers should be prepared. In Japan the implementation of Community Service Orders may be difficult, especially in urban areas, owing to there being less community cohesion. In Guatemala the system may be less effective based on the shortage of resources.

Especially for drug cases, the drug abuse prevention centre should be established. For this, the mass media would have an important role in enhancing public understanding.

E. Sentencing Policy

1. How to Apply the Scale or Criteria of Existing Penal Value

Almost all countries have different systems for adult cases and juvenile cases. Some countries, like Jamaica, have a social inquiry/investigation report before judges make a decision of sentence. Other countries like Japan and Palestine, do not have social inquiry reports for adult cases, so sentences are decided based mainly on the importance of the case. Having such a report to assist with sentencing is more easily utilized within those systems that separate the stages of finding of guilt from the decision on sentencing. There should however also be a scale or criteria that ensure fairness among cases of a similar nature.

In Japan judges research the precedents in how a particular offence was dealt with before an offender is sentenced. In countries like Nepal the law outlines the priorities of sentencing and provides a range of possible sentences but leaves the particular choice to the judge.

Fairness is however a procedural principle. There appears to be the possibility of sentencing disparity in cases where community orders are widely used instead of imprisonment. However, this will always be hard to compare because of the sentencing range available to judges; thus, sentencing will inevitably seem to be subjective. Also if the public has no way of deciding how community sentences are equal to prison sentences, there will also be a problem of perceived disparity. Having a hierarchy of sentences that appear to be proportional to the crime and the criminal could reduce this effect.

The group agreed that if punishment is too light or too heavy it may not deter offenders and it may not convince the society that justice has been served. Also, in countries where public officials are not paid a high salary, this may undermine the efforts to use alternative sanctions since these officials may yield to corruption and utilize the system for private gain. Although fines may be used effectively, if they are set so high that they prevent offenders from meeting other basic needs this may add to the situation of overcrowding of correctional facilities.

2. Difficulties in Utilizing Non-custodial Sanctions and Practical Methods to Overcome the Difficulties

Non-custodial sanctions have a merit in that they prevent first-time offenders' contact with and being affected by gangsters in prisons. But in some countries, the number of serious crimes is increasing and the society seeks severe punishment. Therefore, non-custodial sentences might be considered too lenient. This may lead to the victim feeling the need to exact revenge on the offender or judges being threatened.

There is a concern about net-widening: do alternative sentences cause an increase in the punishment for offences which were previously considered too minor to be punished? If there are some kinds of guidelines

that the court or other related officials can follow/refer to, then there will be a lesser chance of misuse of these options.

III. ALTERNATIVE PUNISHMENTS AND OTHER INTERESTS

A. Victim's Rights and Alternative Punishments

The victim's opinion should not be ignored when deciding what kind of punishment is suitable for a particular case. If the offender is granted alternative punishment that the victim is against, it might seem to violate the victim's right to recovery from the effect of crime. Considering this, a compensation order could be helpful.

As for the definition of "a victim", it should not be limited to one person but should also include all those who are affected by the crime. In several countries, there is a system wherein the judge or the court receives the victim's opinion regarding the offender and the punishment directly in a trial or through a social report or prosecutor's activity. These are worthwhile to ensure the victim's rights.

Should victims have the right to withdraw a case after the indictment? Should society's rights receive greater consideration in these cases? It was agreed that there should be a balance between the victim's and the society's rights based upon the particular case.

B. Social Security and Alternative Punishments

It is also important to ensure social security. Therefore, some kind of dangerous cases, such as shooting, or highly-dangerous offenders, like gangsters or recidivists, may not be the best persons to be granted alternatives to imprisonment, even if the victim agrees not to take an action against the offender or there is no victim.

C. Penal Function and Alternative Punishments

Penal functions are intended to give retribution to the offender, deter people from committing a crime and educate the offender not to reoffend. Through these functions we can control crime and protect our societies. We should pay attention to whether these functions are maintained by imposing alternative punishments. As for fining, it would likely deter property crime by imposing the amount of money that exceeds the gain from property crime. However, it would not likely deter violent crimes like murder because these kinds of crimes are not always committed for financial reasons.

D. Offender's Human Rights and Alternative Punishments

Every human being has rights. If an offender's human rights are withheld, he or she may consider him or herself to be less human and may be more willing to commit other offences. Because alternative sentences are still punishments, some restriction of an offender's human rights is unavoidable considering the rights of the victim and the society. Every country that ratifies UN conventions relating to human rights should ensure that at least the minimal standard of human rights for all categories of people are observed.

It is important to maintain offenders' dignity as human beings. Therefore, it is not necessary for offenders who are serving community service orders to wear a uniform, which may bring about stigmatization and double punishment.

Family relationships have an important role for offenders' reintegration to the society. Under house arrest, there would be conditions that restrict the offender from contacting or visiting a particular person, however, restricting family contact should be avoided as much as possible. If an offender's risk decreases, restrictions for him or her should be also diminished.

IV. OTHER ISSUES RELATIVE TO JUSTICE POLICY

A. Speedy Trial

In some countries speedy trial is affected by prevailing conditions such as shortage of judicial staff, lack of training/knowledge in some court officials, the power of the defence attorney to retard the process by using stalling tactics, and other resource constraints. As such, an offender may spend up to five years or more in the pre-trial process. In Sri Lanka, for example, approximately 80% of the total inmate population consists of

detainees. In this case, speedy trial would significantly reduce overcrowding.

Establishing a law that prohibits lengthy detention could be one solution to this situation in some countries. It would force some judges, prosecutors and other public officials to be more interested in resolving cases. Moreover, the offenders should have a right to appeal against a judge's detention order to avoid unreasonable and/or too-long detention.

Japan has achieved speedy trial by screening and separating offences according to how serious they are. There is summary trial for small offences and more formal trial for more serious offences. This comes from the standpoint that offenders are firstly presumed innocent, thus the period of detention should be as short as possible. This practice could be used by other countries that have a similar justice system.

B. Decriminalization

Some countries have decided that certain offences warrant rehabilitative treatment instead of punishment. Referral centres should be therefore used as treatment.

The group agreed that culture plays an important role in deciding on whether a country is ready for this move. Timing is also a major factor as some developed countries may be at an advanced stage of readiness based on the educational level of the population, etc. Decriminalization should however be limited to situations where it does not offend against cultural norms and where it serves the purpose of improving the offenders' behaviour.

This topic is important under the conditions of globalization. However, because of differing customs, religions and cultural norms, decriminalization cannot go beyond geographic boundaries. It therefore makes the transfer of prisoners between some countries more difficult as criminal conduct in one country may not have the same status in another. A good criminal policy should however seek aftercare treatment for people who will only be harmed by imprisonment.

It is also necessary to consider whether decriminalization of offences will lead to increasing undesirable behaviour.

C. Restorative Justice

Particular countries (e.g. New Zealand and Canada) have chosen to adopt a justice system which considers the impact of crime on the victim, the society and the offender. These countries have sought to ensure that sentences given consider these three parties, and have facilitated mediation as one means of settling some cases.

This concept of restorative justice can be used in a combination of various methods and at various stages, some of which can be used as countermeasures against overcrowding. Compensation would play an important role in this restoration. Yet, it should be pointed out that money cannot solve all problems and the victim's participation should be voluntary.

The group agreed that the idea sounded interesting and is already being used in some cases in Sri Lanka and Jamaica that utilize mediation. For some cultures that still favour retributive justice, however, this new idea may be difficult to implement.

It was agreed that this concept is not perfect, but can be utilized, especially for minor crimes like motor vehicular accidents.

V. CONCLUSIONS AND RECOMMENDATIONS

1. Each non-custodial sentence has its own merits and demerits, the most appropriate sentence should be imposed on an individual case basis with comparison and consideration to the level of criminality, the victim's feeling and balance between the crime committed and punishment given;
2. There are many related agencies within criminal justice systems, including non-governmental organizations. All should collaborate in order to ensure the system works smoothly and seamlessly

when implementing and utilizing non-custodial sentences;

3. There should be open dialogue through public fora to allow the public to understand the functions and dysfunctions and advantages and disadvantages of both custodial and non-custodial sentences. Individuals who believe that punishment is the most effective way of changing an offender could be made to see that offenders deserve a second opportunity;
4. Imprisonment has been proven to be more expensive than non-custodial sanctions. This fact should be calculated and made public in every country. This would serve to change the mindset of some systems which have adopted a more retributive justice policy;
5. Countries that cannot immediately establish a large probation service should utilize the services of reputable people as Voluntary Probation Officers, with a core of professional advisers;
6. There should be a system of assessing an offender's ability to pay a fine at the sentencing stage. If the offender is found to be unable to pay a fine, the order should allow the offender to pay the fine in instalments;
7. Social enquiry reports can be an important tool for deciding the sentence that an offender should receive;
8. Certain offences should be decriminalized; thus these persons would be sent to rehabilitation centres and not to prison;
9. Speedy trial should be implemented as a feature of the law as it is the most important step to prevent unnecessary detention;
10. Administrative changes and legislative reform are required in many systems to facilitate the introduction of alternative sanctions.