INNOVATIONS IN CRIMINAL JUSTICE

IN ASIA AND THE PACIFIC

Edited by William Clifford
Assisted by S.D. Gokhale

INNOVATIONS IN CRIMINAL JUSTICE

IN ASIA AND THE PACIFIC

edited by William Clifford
assisted by S. D. Gokhale

Australian Institute of Criminology · Canberra 1979

Published and printed by the Australian Institute of Criminology,
10-18 Colbee Court, Phillip, A.C.T., Australia. 2606.

First published 1979

The J.V. Barry Memorial Library has catalogued this work as follows:

364.959

INNOVATIONS in criminal justice in Asia and the Pacific, ed. by William Clifford, assisted by S.D. Gokhale. Canberra, Australian Institute of Criminology, 1979.

viii, 291p.; 21cm.

1. Criminal justice, Administration of – Asia. 2. Criminal justice, Administration of – Oceania. 3. Criminal Justice, Administration of – Asia, South eastern. 4. Underdeveloped areas – Criminal justice, Administration of. I. Clifford, William. II. Gokhale, S.D.

ISBN 0 642 90958 X

Contents

The Authors

William Clifford
Director, Australian Institute of Criminology. Formerly, Director, United Nations Crime Prevention and Criminal Justice Programs; Executive Secretary, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Kyoto, Japan) and a Vice President of the Fifth Congress (Geneva); Senior Adviser to the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders (Tokyo, Japan); Director, Social Development, Cyprus and Zambia; Senior United Nations Consultant for Social Affairs in the Congo.

S.D. Gokhale
Assistant Secretary-General (Regional Officer for Asia and Western Pacific) International Council on Social Welfare. Formerly, Executive Secretary of the Indian Council of Social Welfare.

V.N. Pillai
Formerly, Director, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Tokyo, Japan; Commissioner of Prisons, Sri Lanka; Consultant for various United Nations congresses and conferences.

N.D. Oram
Senior Lecturer, Division of Prehistory, Department of History, La Trobe University, Melbourne, Australia. Has held administrative posts and done research in Africa and Papua New Guinea.

Dhavee Choosup
Director-General, Department of Correctional Services, Thailand. Chairman, United Nations Asian Regional Meeting for Fourth United Nations Congress Bangkok 1969; expert for the United

Nations Interregional Course on Social Defence Planning, Sydney, November 1975.

Oemar Seno Adji
Chief Justice, Supreme Court, Republic of Indonesia. Head of Indonesia's delegation to the Fifth United Nations Congress for the Prevention of Crime and the Treatment of Offenders, Geneva, 1975.

S. Balakrishnan
Formerly, Joint Secretary, Ministry of Home Affairs, Government of India. Member Law Commission of India. Led Indian delegation to the Fifth United Nations Congress on the Prevention of Crime, Geneva, 1975.

A.W. Ghows
Solicitor General, Singapore. Expert to the United Nations Asian Regional Meeting for Fifth United Nations Congress, Tokyo, Japan. 1973. Visiting expert for Australian Institute of Criminology, November, 1976.

H.S.D. Jamy
Director, (Special Investigation Team) Federal Investigation Agency, Islamabad, Pakistan. Author of papers for United Nations publications.

P.P. Solis
Senior Official of National Bureau of Investigation, Department of Justice. Manila, Philippines. Expert for various United Nations meetings.

Minoru Shikita
Director, General Affairs, Public Prosecutor's Office, Tokyo. Formerly, Deputy Director, United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, Tokyo, Japan. Officer-in-charge, United Nations Social Defence Section, New York. Deputy Executive Secretary, Fourth United Nations Congress on the Prevention of Crime and Treatment of Offenders.

1 Adaptations in Asia and the Pacific

William Clifford

The turbulent twentieth century is drawing to a close in a climate of vexation with crime and its traditional treatment. On the one hand, crime (by whatever standards it is measured) seems to be growing in many countries, not only in the streets but in the higher reaches of government – it is now conspicuous in the bureaucracy and in the long and sometimes rather shady corridors of commerce, whether national or multi-national.

On the other hand, there is mounting disenchantment with the established methods of dealing with crime. The police seem to be less rather than more efficient than they were, their rates of detection and prosecution are typically falling. The prisons are looking less effective than before and are now stigmatised as creating rather than curing crime, hardening rather than reforming offenders, alienating rather than reintegrating offenders. Even the new, enlightened methods such as probation, open institutions, half-way houses, parole, work-release programs, community work orders and suspended sentences, however hopeful and justifiable or humane, are less convincing in their total affect on the problem as the numbers of crimes and criminals rise progressively, as violent crimes become more ruthless, more bold, and more contemptuous of authority in their execution, and as the streets, parks and public places become insecure.

This is a picture which is painted far more clearly in the West, however, than it is in the Communist countries or in many of the developing areas. In world perspective, the above picture is painted on a limited canvas, coloured by the increasing flow of publications on the subject from those Western countries which not only have the greatest crime problems but also have the greatest capacity to write about them in European languages and the greatest opportunity of being published commercially.

As the experts in Europe and America have signally failed to make any real impact on crime, they have vented their frustration on the criminal justice system and even on the established precepts of criminology itself. It seems that when those who have set themselves up as specialists in this field have been confronted with their own limitations they have sought to escape the disgrace of failing to find answers by seeking to redefine the problem. There is in some countries a dangerous polarisation of those who want to return to more primitive remedies, to execute, discipline and extend control of all behaviour, and those who see the whole thing as a pseudo-problem to be solved by removing all controls allowing any and every form of deviation in a general drive for total permissiveness.

In an age of human rights and humanitarianism it is less threatening to attack the establishment than the unfortunates who are caught – if only because of the larger number who are not caught. Some of this is attributable to a healthy and commendable introspection. It is salutary to turn, from time to time, the searchlight from the data onto those who collect it: from the criminals onto those who define criminals and who prosecute selectively; and from the offence and the offender to the system which labels both. It is appropriate to look, at times, behind the scapegoats at the society which loads them with its own faults and shortcomings.

At the same time the influence on all this of the West's own political and philosophical dilemmas cannot be discounted. The attack on established systems and institutions is an offshoot of the conflicts of values and of the mounting sense of revolt within the social system itself, torn by dissent and by the struggle for power and advantage. The unfortunates in prison have become the new oppressed, the new underprivileged, the new repressed.

In such societies it is the political and social climate which disturbs the criminal justice system more than any physical, administrative, technical or intellectual shortcomings in the system itself. No matter how bad the conditions are where there is an outcry, they are not so bad as in some other parts of the world where there is no outcry. It is significant that the demands for change are more vociferious where there has been the most change.

Improvements are needed and standards must be set to protect human rights. But these are necessary in any system, good or bad by any criteria. Nor should it be overlooked that the growing

weight of criticism and castigation of criminal justice systems can be self-fulfilling. The search for public scapegoats often serves to make a system worse than it was before. When, because of heightened debate or reduced discretion, a crime prevention service has become more negative than constructive, the more enlightened personnel employed in the administration of the law tend to seek the shelter of other jobs which have status and which are far less exposed to cynicism. This leaves a service manned by those least qualified to do so.

Also, as official sensitivity is strictly honed to increasing public reproach, it naturally retreats, exercises far less discretion, takes fewer chances and institutionalises the practice of 'playing safe', even at the expense of offenders or the public interest. In striving to become more correct it may also become either less adaptive or too changeable for consistency. More seriously, those who feel threatened and less appreciated in the criminal justice system – the police and correctional workers – may, as they already have in some places, organise themselves internally for their own protection. Unions may then develop a resistance to change and combine to maintain privileges or to consolidate and demand for themselves the rights they see others promoting successfully.

The West is in trouble then, to no small extent because of the increasing variety of value systems. It suffers from its own divisiveness. When we are no longer clear about what we consider to be good or bad, desirable or undesirable, it follows that systems developed to serve a past consensus will be seriously challenged. As we become less rooted in the past however, there may be a tendency to seek change for its own sake. It is for these reasons that we need to look at the experience being gathered in other areas.

Asia and the Pacific have been moving more slowly. Few of the countries represented in the chapters which follow have yet felt in any deep sense the crisis in the criminal justice systems so blatantly expounded in the West. There is a less profound argument about what the law should be. Offenders are less politicised and the authorities still enjoy a confidence which has been seriously eroded in more economically developed countries. Sometimes there have been profound political, economic or social changes which have strengthened rather than weakened the criminal justice services.

Yet the countries of Asia and the Pacific have their own dilemmas. They do not want the crime problems of the West, but they feel exposed to the danger of culture flow and the imitation of trends elsewhere, especially by younger people. Many of these nations are deeply concerned with the apparent inability of the criminal justice systems which they have inherited from colonial times to deal with some of the more fundamental local issues. Countries like India, the Philippines and Singapore have taken drastic measures to deal with crime in a broader context of national discipline.

Such departures from the Western liberal norm will always give rise to differences in political interpretation. It depends which political side one supports. The attempt in this book can only be to present the situation as each writer sees it. Some of the difficulties faced by the Asian and Pacific countries are problems of long standing. They are rooted in customs and cultures relatively untouched by the superficial overlay of modern law. Others are shared with countries everywhere – for example, corruption, drug trafficking and exploitation by multi-national corporations. A few have developed from the political divisions of the countries concerned.

To meet these problems, the newly independent nations of Asia and the Pacific have not hesitated to adapt imported criminal justice systems to their own needs and circumstances. They have not been inhibited by principle or precept if only because the Eastern approach has more to do with justice in the individual case than with justice in the abstract. It is traditionally more concerned with a mutually supportive system of reciprocal obligations than with any code of individual rights unrelated to community settings. Corners have sometimes been cut and values imposed with far less hesitation than there would have been in the West.

The need for change in several countries was first declared by the attainment of independence. The vast movements of people between India and Pakistan changed the conditions for which the original laws had been drafted. The Indian Penal Code had been a model of its type but it was Western in inspiration and made few concessions to established formal controls. Indonesia faced the problem of national unity and was less prepared to allow cultural separativism to continue in the courts. Singapore had to deal *inter alia* with the outgrowths of Triad societies and the inappropriate-

ness of the jury trial. Ceylon moved to use new forms of rural courts to reform the system of dealing with minor cases.

The need to depend at lower levels of the civil service on staff not yet educated to the level of the junior expatriate staff who were leaving, and the impatience with a legal system which did not readily respond to the new climate of change and renewal, also helped to create a need to bring the criminal justice systems into line with realities as they were seen by the new governments. Both India and Pakistan went for measures to expedite the administration of justice and streamline the old Code of Criminal Procedure. This became a target not only for India and Pakistan but also for Singapore, Indonesia and eventually other countries.

However, the basic realignment of penal law and practice is always time-consuming and usually controversial. Also, what sometimes poses as fundamental revision may amount to no more than a redistribution of injustice. It is essential for those demanding rapid and drastic change to study not the rhetoric but the effects of radical law and law enforcement reform wherever this has occurred in the world.

Often the countries which have undergone the most far-reaching and profound political, social and economic revolution, have changed the roles and populations of the criminal justice system without improving much upon the system itself. The judges may be a new breed, and the types or social backgrounds of the people in prison may have changed, but often the courts and prisons and even police practices look remarkably similar. In such nations it is significant how the older procedures and practices ultimately reappear under new names and styles after a period of mass trials, kangaroo courts and courts martial. As the arbitrariness of sudden change abates there is a recourse to known forms and patterns of trial. The law may sound different but it looks the same in much of its procedure and even in its application.

Generally speaking, the Asian and Pacific countries have chosen evolution rather than wholesale revision. Those represented here have set about reform and readaptation more slowly and more deliberately. Having adopted temporary expedients to deal with immediate post-independence problems, they have embarked upon a more considered reorganisation of their legal and judicial systems.

This closer alignment with tradition has been entirely approp-

riate in regions with ancient religious and ethical roots which have experienced an overlay of cultures and which have required the art of adaptation and assimilation. Unlike in the West, law in Asia and the Pacific is not yet completely divorced from ethics and has reference to the social context of behaviour. In India, *Dharma* was law in the sense of religious duty and derived from supernatural sources which bound both rulers and ruled. *Dand* or punishment had to be applied with discretion.

At a time when Western thinkers in the 17th and 18th centuries were postulating natural rights, the East was tightly bound to ideals of loyalty and filial piety. While Western legal theorists of the 19th and 20th centuries were drawing distinctions between law and ethics, Asia had developed a style of fusing politics and ethics greatly emphasised by Confucianism. The law of Manu extended its influence beyond India just as Buddhist detachment and respect for life spread across the Pacific, and China carried Confucianism and Taoism to other nations. Across this in many areas was laid the mantle of Mohammedanism and later some Christian influence. Shinto was peculiar to Japan but Shinto as a natural or animistic religion had its counterpart in other areas before the permeation of more philosophical, ethical and universal systems.

There is a long tradition in the Asia and Pacific region of religious and ethical codes of behaviour: from Manu and Confucius through Asoka and the Koran. Japanese law was codified eight or nine hundred years ago. The Jushichigo Kempo of the Empress Suiko (604 AD), Japan's first written law, was ethical, providing a rubric of conduct for people and officials.

Western systems were then openly and deliberately adopted (as in the case of Thailand and Japan which were not colonised) or else imported and conferred by the colonisers. Either way, they were superimpositions which did not obliterate the older values and patterns of behaviour so that a conflict of the older and newer precepts often persisted.

Moreover, with the succession of overlapping cultures, the Asian peoples (many of whom penetrated the Pacific carrying their lifestyles and value systems with them) became adept at the adaptation and gradual assimilation of newer codes to older patterns of conduct. Thus, an alien law might look the same and appear to be implemented in the same way as in the country from

which it came but in practice it was often different – conceived in a more local context and applied in an indigenous fashion.

Even the gentle religions were not usually gentle with offenders. We know that there were ordeals and tortures with powers of life and death vested not only in rulers but often in the heads of families.

Although the Indians did not usually inflict the harsher Chinese penalties, the Kulaks of Mahabharet (5000 BC) hanged their criminals as did the Lichvi Republic between 500 and 400 BC. The great Buddhist Asoka (274-232 BC), who stood for peace in a turbulent age, left inscriptions about behaviour control and put to death murderers and robbers.

The Asia and Pacific region also has an interesting and chequered history of crime and crimes. Singapore was, *inter alia*, a haven for pirates when it was selected by the British for settlement as a countervailing influence to the Dutch presence in the area. When the Sultan of Brunei handed to the British the Island of Labuan in 1846, it was to allow it to be used as a base for anti-piracy operations. Brigandage was often rife and sometimes associated with religious fervour and the caste system of the period.

The *Dacoits* and Thugs of India were usually of a low caste who practiced robbery and murder not only as an hereditary profession but also as a religious and caste duty. They served the goddess of Kali or Devi, who carried a pickaxe as her sacred symbol, and they undertook expeditions only when the omens were favourable. Mohammedans who took to Thuggery also adopted the same religious allegiances and sometimes worshipped at Devi's temples.[1] In Japan there still exists a temple at which burglars and robbers worship and where criminals have reprobate ancestral spirits to protect and guide them.

Among the Chinese, secret Triad societies originating in self-help, often became organised crime syndicates which survived to trouble the authorities until modern times.[2] There was a long tradition of slavery in these parts and corruption has been, and still is, a serious problem for most countries in the region. The modern drug problem for the West has older roots and political significance in Asia. A herbal stimulant known as Som-vas was mentioned in the *Vedas* and variations of it were probably used down the ages. The Chinese Emperor's Special Commissioner, Lin Tse-hsu, entrusted with the elimination of opium traffic, drove

foreign traders from Canton when they refused to surrender all opium supplies for destruction and thereby provoked Britain into sending an expeditionary force which eventually exacted the Treaty of Nanking in 1842 which ceded Hong Kong.

In 1844, when the Philippines were still a Spanish colony, there were at least 478 opium dens there for the Chinese, which caused the Parian District of Manila to be set aside to segregate the Chinese. It seems that as late as 1959, 90 per cent of all those arrested for drug trafficking in the Philippines were Chinese. Since then, following the Western drug culture, the use of heroin and particularly marijuana has spread and a well organised syndicate with international connections has been uncovered.

The cultivation of ganja in Sri Lanka is traditional but now appears to have been confined to the east and south-east dry zone. However, there have recently been signs of a tendency among some young people to resort to harder drugs in accordance with the international traffic.

Australia was settled by convicts and for many years was a penal colony used by England to exile its offenders. Very soon it was using Norfolk Island as an outpost for its own offenders. It has a short but colourful history and is even now confronting the problem of how to recognise the persistence of customary law among the Aboriginals still living in the traditional way. Papua New Guinea had head hunters until quite recent times with some areas not even contacted by other than local tribes until the early 1960s.

Asia and the Pacific then, confront modern crime problems with a historical and traditional background quite different from that of the countries of the West. In the light of the discussions on criminal justice reform now current in Europe, the United States and Australia, the developments reported in this book have meanings which imply a need for a deeper analysis of Western-type assumptions. For example, one needs to look carefully at the following assumptions, which are usually unquestioned in discussions of crime and its treatment.

There Should Be More Community Involvement

It will be seen that Papua New Guinea has adopted this approach wholeheartedly with the Village Courts Act providing for customary courts. Ceylon in 1945 did much the same with rural courts

being formed out of existing village tribunals. Indonesia, on the other hand, abolished the *Swapraja* (self-government) courts because, as was stated in a Note of Explanation of the Law of 1951 (No. 1):

> Justice . . . shall no longer be trusted to courts which consist of Judges who are not independent and who in general cannot comply with the conditions of capability and proficiency stipulated by the Constitution.

Here the underlying issue, often glossed over in our adulation of public participation, is well exemplified. Just how much community involvement do we want? How much can we afford to allow? After all, lynching and the Ku Klux Klan are examples of community participation, as was the stoning to death of thieves in Uganda some years ago when the police seemed unable to cope – or the stoning to death of two attackers of a female schoolteacher by her angry schoolgirl pupils in Soweto, near Johannesburg, South Africa in 1976.[3]

Many people subject to comrades' courts and neighbourhood committees in the Communist countries have expressed to me a preference for a more formal trial. Friends and neighbours given power to supervise and judge can be really tyrannical.

On the other hand, formal law alone has power to condemn or vindicate but has little effect on the moulding of behaviour. It needs the support of community standards and imperatives. It is its failure to deal with crime – even to discover offenders in fair proportions – which has led so many to seek community alternatives. There has to be some degree of community involvement and responsibility if the law is to work – and some measure of formal law and law enforcement if mob rule is to be contained.

At the same time it is essential to make sure that when we think or speak of communities that they do actually exist. Usually in Asia they do – and they have frequently survived the impact of early industrialisation and urban sprawl. In some of the more developed areas of the West, the communities which needed to assume a greater measure of responsibility have ceased to exist. There is a 'public' but it is a collection of individuals with too few of the social bonds which they need to have with their neighbours and on which the concept of community must ultimately rest.

'Law and Order' is No More Than a Political Shibboleth

Obviously it has been and still can be that the cry of law and order can be the last refuge of a rogue. But it is obviously not always so. Order and justice are not irreconcilables. Their combination may be the only hope of avoiding the exposure of a populace to the uncontrolled tyranny of the strongest, most ruthless and best organised elements in a society. The Philippines took to martial law in the name of law and order. The account provided in this book is one of the fullest expositions of the situation in that country that has yet appeared in print.

Note too that Singapore, with an eye on its lack of natural resources and its high population density in a small geographical area, prefers 'discipline' and has returned to caning as a mandatory punishment for most crimes of violence and trafficking in drugs. It has also provided for police detention and supervision orders for members of secret societies. Also it has not hesitated to reformulate, when it thought it to be necessary, the sacrosanct rules designed to weigh the balance in favour of the offender so as to avoid miscarriages of justice.

Clearly there will always be political implications and overtones about the attempt to control behaviour by more severe or direct penal control. However, where it has the support of the public it is likely to be effective and the question of its significance in Asia depends on one's acceptance of the public will as being adequately reflected. Whether or not one likes the system is not relevant to the question of whether it works and many visitors to China have been greatly impressed by the effectiveness of its public security.

It is one thing to say that we do not want that kind of control for the price in freedom which we may have to pay; it is another to contend, as many have done, that *per se* – that is, because it is 'repressive' – it will not work, or will not work for long. There are too many contrary examples in the modern world for this to be convincing. The real question is a political one – what we get in terms of freedom for what we get in terms of order.

The Victim Should be Compensated

This is generally a tradition in Asia but it should be noted that the tradition is one of a direct link between the victim and the offender. The practice of compensating through the impersonal public purse – as happens in many Western nations which have

belatedly returned to an older customary remedy – does not fully satisfy the older concept of compensation which was not only a form of restitution but also a device for restoring peace and harmony. The element of justice is affected when the State pays the victim and then exacts a penalty from the offender. In Papua New Guinea, for example, compensation paid by an offender in customary law has to be reciprocated by a small gift from the victim to the offender. In this way peace between the contending parties is restored.

Justice Cannot be Done Without an Extended System of Appeals

It will be noted that in several of the countries, the older colonial types of law left unworkable systems once the demand for justice seemed likely to exceed the supply of professional courts and judges. In the past, justice did not depend upon a succession of hearings in every case. Nor was it a routine for anyone either able to afford the legal fees or able to charge them to a benevolent State. In fact, where the rich could pay for more, there might be a kind of injustice allowing for a succession of appeals in one type of case but only a limited number in other cases.

Asia has generally adopted simple procedures and granted power to stop cases taking up the time of the courts where this seemed unwarranted by public policy. There could be a great injustice done to the taxpayer in allowing all types of cases to go forward to higher courts rather than in vesting a greater measure of discretion in the courts to rule on the limitations of appeals.

No doubt there will be other issues of equal significance which others will be able to distil from the chapters which follow. In our present state of ignorance about what to do about crime in the West and what will work, we must keep an open mind. Hopefully others will augment these chapters and help to develop a library of experience upon which we can all draw when we are trying to look objectively at the problem of crime and its control.

---

1. See W.H. Sleeman. *Ramaseeana or a Vocabulary of the Peculiar Language Used by the Thugs* (G.H. Huttman, Military Orphan Press, Calcutta, 1836), p.150.

2. And are now said to have shifted operations to the more congenial climates of Holland, the United Kingdom and Australia. See article by Bill Squadron, Sydney *The Daily Telegraph*, 2 June 1976.

3. See the account of this published in the *Australasian Post*, 28 October 1976, p.13 – reprinted from Features International, London.

2 Social Welfare and Social Defence in Asia

S. D. Gokhale

Readers may wonder what is the prime motive behind issuing a book such as this, and what inspired our respective agencies to sponsor the volume. As far as the International Council on Social Welfare (ICSW) is concerned, our interest in this book arises from the basic dynamic link between social welfare and social defence. One deals with the normal, the other deals with pathology. An important aspect of social welfare is social defence and ICSW as an agency involved in social welfare can legitimately associate itself with a publication on criminology.

The fact that the Australian Institute of Criminology should become the co-sponsor is entirely logical. As an Institute with an abundance of knowledge about criminology and practical experience in both assimilating and disseminating the same, it becomes a valuable collaborator to the volume. What should also not be minimised is its generosity in coming forward with the necessary financial support which has made this volume possible. I am sure ICSW and the eminent contributors to the volume will find it in order if our sincere appreciation to the Institute is recorded here at the outset, since it has really made this book possible.

The substantive inspiration for this book arises from a desire to understand recent developments in criminology specific to Asia. It is evident that the ecology of crime is peculiar to the region where it thrives. In Asia, recognisably, the problems are predominantly economic – deep seated poverty, destitution, illiteracy, ill-health and unemployment. This provides a generating source for a different kind of pathology, a different dimension and type of crime which is removed and remote from the forces operating in the West. In the West, economic pressures are less and personal pathology more active in accounting for deviant and criminal behaviour. There is, therefore, a case for assessing the Asian crime

scenario in depth and in isolation, in order to come to grips with our problems in our ways.

Also, equally importantly, there is an awareness that whatever their form of government, and whatever their criminal justice system, crime is common to all countries and to all societies, and that everywhere crime presents itself basically as a manifestation of the dysfunctioning of a system. To that extent, whatever is uncovered through a study like this can be of much more than mere academic interest.

Quite apart from the above consideration, there are certain other commonly shared developments in criminology which bind most countries in Asia to each other. To begin with, there are some common objectives and even procedures in criminal justice systems of some countries within the region. Thus, whatever their level of development, all countries in the region are confronted with crime and it goes without saying that they are all engaged in coping with it. The success with which they are able to control, lower or eliminate it may or may not vary, but the aspiration is uniformly shared and upheld.

The commonness of procedures between countries arises from the colonial past of many countries in the region. This has meant that they inherited an imported and adapted version of the criminal justice system of the colonising power. The countries that were previously British colonies, for example, follow the Anglo Saxon legal and judicial practices. Likewise, in Indonesia, the system is fashioned after the Dutch and in the Philippines after the Spanish and American influence. In a country such as India, individual parts of the country ruled by different colonial powers have varying systems. For instance, Goa draws its system from the Portugese, and Pondicherry from the French. This has meant that they have a certain comparable and common, if not identical, legacy.

What is curious is that almost everywhere, alongside the colonial systems the tradition of customary law is very strong and has continued to prevail and condition the criminal justice system. In other cases, especially in Islamic states as well as among certain religious groups within individual states, the religious law has been both potent and pervasive. To an extent then, practically every country in the region has known some amount of parallel jurisdiction in criminal justice.

Here again, the range of such crime is widely dispersed. It may go from tax evasion and trafficking in contraband goods to breach of foreign exchange and gold control regulations, smuggling, black marketeering, adulteration of drugs and foodstuffs, etc. Whatever the form, this sort of crime has entered deep into the entrails of the Asian socio-economic systems. What is worse, it has excessively burdened the existing criminal justice systems. Owing to this development, there is now added awareness that some sort of legal reforms are necessary as is the diversion of cases arising out of socio-economic crime to machinery other than the formal. In this context, innovations in three areas, that is, **decriminalisation**, **depenalisation**, and **diversion**, assume special significance.

Decriminalisation is the elimination from the penal laws of some acts which are then deemed no longer punishable. **Depenalisation** is the intervention, within the administration of the criminal judicial system, to effect non-accountability or less accountability for certain acts although they still remain formal in the law books. **Diversion** is understood to be any method of removing an offender from the routine criminal justice process and of dealing with him by alternative means of disposition at any stage of the process.

The process of decriminalisation has to be reviewed in the context of a changing sociology of law. Historically, depenalisation usually precedes decriminalisation because law enforcement agencies frequently refrain from prosecuting those offences which have fallen into disuse. Thus they become a dead letter in the law. Decriminalisation, depenalisation and diversion have to be understood as merely symptoms of a continuous, dynamic process within the criminal justice system by which some forms of behaviour become stigmatised and penalised while others are removed from the stigmatisation and penalisation process. A useful matrix is presented in which on one axis are acts which are either condemned or not condemned by society and on the other axis are acts considered undesirable or desirable from the normative point of view of law-makers. The various behaviour types within the paradigm represent a useful classification of the acts which are considered for possible decriminalisation, depenalisation and diversion.

What derives from the above is that there is a need to look at crime in its sociological context. So we may pause here to briefly review the changing 'sociology' of crime in Asia.

The fact that social structures and value systems have been changing in most Asian countries has had a pronounced effect on both the nature and the composition of crime. I have referred to the emergence of socio-economic crime. The social and criminal deviance resulting from unplanned urbanisation and rapid industrialisation are a familiar phenomena. In the cities, the duality of life (in terms of the glaring disparities between the rich and the poor), the anonymity, the anomie, and the lack of a sense of belonging are all motivating forces behind deviant behaviour. And this is not only in regard to the individual but to the entire family. It is this emergence of the latter, that is, the problem family that poses a new calculation to the figuring of crime in Asia. More and more, policy makers and thinkers are advocating that crime control and social defence interventions be aimed at the problem family where every member, through force of circumstance, is either culpable or vulnerable to crime.

Conversely, the rural sociological scene, with its continued emphasis on a closely-knit social life and personal interaction, is relatively 'non-seductive' to crime. The individual pathological motivations which are behind urban crime are practically non-existent and, by and large, it may be observed that crime in rural areas tends to be based around the violation of the person or of property. These are differentials which should register when considering any revision or re-orientation of the criminal justice systems.

A basic issue when considering the sociology of crime in Asia is the link between crime and culture, or to put it differently, between crime and ethics. As I said above, what the society may condone as immoral may not be illegal and *vice versa*. This means that whatever the legal code, its observance can only be as deep as the social belief in it. Further, there is another facet to consider.

The extent and definition of crime is often derived from and conditioned by the moral fibre of the society. If the societal morals were to change, crime would change, and the law would need to change too. Today, abortion, polygamy or homosexuality may be an offence in one society, but may be both socially and legally condoned in others. Over a period of time, the same value changes may occur in a given society which would alter the context of crime considerably. The same forces could be operative in an unhealthy or healthy way, depending on the context. What

This has been a mixed blessing. On one hand, a strong, unbroken indigenous tradition of customary law has been a stabilising force and as such it must have assured some valuable continuity to the system. On the other hand, where it has differed with the tenets of the imported codified system, the customary law has been a source of clash and dichotomy, even causing a certain amount of schizophrenia in the system in cases such as early marriage, family planning, adoption, polygamy, etc. In all these cases, the customary law takes issue with the formal system and can virtually defeat or make defunct the latter. At the individual level this clash can cause infinite behavioural confusion for, in abiding by the religious or customary law, the individual may be trespassing on criminal territory.

Whatever the duality, another common occurrence in the countries of the region was that the traditional system of adjudication and law was replaced and overtaken by the system inherited from the colonial powers. This switchover has not been altogether welcome, as many countries are recently realising, since the formal system, essentially alien, has remained outside the comprehension and even sensibility of the user clientele. That has automatically narrowed its utility and its useability.

Recently, pressed by inner compulsions and assisted by the best expertise available to the United Nations, a conscious process of revival of the old systems has begun. This is expected to once again bring the judicial procedures and practices closer to home, to the doorstep of the average citizen. It is also one way of significantly reducing the present unnatural workload on the formal system by siphoning off some of the caseload to the informal adjudication mechanisms.

On the strictly theoretical front, there are again some noticeable aspects held in common. Among others, there are two dogmas which were widely upheld by the countries in the region and which seem to have, unfortunately, formed the keystones of their criminal justice systems. The first dogma is that law is a panacea to all social ills and problems. This has unnecessarily labelled much socially unacceptable behaviour as 'crime'. This tendency toward 'criminalisation' has led to the unfortunate state where social misbehaviour is actually being tackled through law and the courts rather than through social welfare action. This has weakened the credibility of the legal system and has also cast serious suspicion

on the validity of such an approach.

The other dogma is that institutionalisation is a definite cure for deviant behaviour. Out of this belief has sprung a misplaced emphasis on indiscriminately institutionalising an offender, often irrespective of the nature of his offence (which could range from drunken driving, jay walking, and parking violations to petty theft, robberies and murders). In this misuse of the 'institution', a lot can be traced directly to the influence of the colonial thinking and tradition under which the institution was viewed as a means of isolative custody and/or punishment and not treatment or rehabilitation of the offender. Institutionalisation accordingly became a standard punitive recipe.

Luckily for the region, both these dogmas are gradually weakening under the rising influence of a new school of thought that concentrates on social defence and on preventive and correctional approaches to coping with crime. Under this orientation, social welfare becomes a crucial adjunct to crime prevention mechanisms. Appreciation of this link and of related factors has also reduced the reliance of policy makers on law and judicial courts to tackle social deviance.

In this context, it is worthwhile to take a brief look at the emergence of a new form of criminality on the Asian scene. This is referred to, not euphemistically, as 'socio-economic' crime. This is so because this type of crime adversely affects the socio-economic structure and relationships of society. It is crime that is the direct offspring of the highly pressurised urban living milieu wherein there are pockets of affluence surrounded by abysmal poverty. While this phenomenon forces the average deprived person to resort to unfair and illegal ways of making easy money, it also lures the wealthy classes to generate fortunes through sheltering, sponsoring, and master-minding the clandestine activities. This type of crime is thus highly organised and systematic and equals the syndicate kind of crime with which the developed Western world is only too familiar. It is also primarily urban and white collar crime.

Regrettably, this type of crime has emerged in the last two or three decades as a very real and voluminous sub-stream of the crime scene in Asia. Both the form and magnitude of this type of crime are entirely new and they require some serious reordering of priorities and refashioning of strategies in the crime-tackling field.

this leads to is the realisation that obviously a careful screening process is necessary to assess what are harmful ethical beliefs or traditions and how they can be discarded by society through a combination of means including the ones provided by criminal justice.

Conversely, laws that seek to declaim a particular act as a crime must sufficiently and intelligently reflect on the reasonableness behind widely held social beliefs. In cases of divergence, only a well sustained two-way dialogue will help bridge the hiatus, and at the same time ensure that the law is not invalidated.

Another closely connected issue is that of the rights of the individual *vis-a-vis* those of the society. It is evident that the two sets of rights may not necessarily be incompatible but that they are certainly frequently in conflict. At any rate, it is not always clear as to what should prevail over what. This confusion was inevitably more pronounced for most of the countries in the region at the time when they were colonies. Under a colonial regime, for instance, the individual's right to freedom of speech gets equated with the crime of sedition. Likewise, there are several other activities which may be labelled as criminal in the colonial set up and as non-criminal in the post-colonial set up. Evidently, the law regulating such 'criminality' must also change and reflect the new realities. Against this setting, the search for adequate legal and judicial amendments as well as innovations assumed greater pertinence.

There are other peculiar characteristics of the new-born developing country in the Asian region affecting the sociology of crime. Most prominent is its demographic makeup. Practically everywhere, with the exception of Australia, New Zealand, Japan and very few others, Asia in the sixties has emerged as an 'old' continent growing progressively 'young'. Thus practically two-thirds of the population is below 25 years of age. Yet this age distribution has no correspondence with the age distribution of the 'criminal' population which tends to draw its majority from among those between 30 to 45 years of age. What does this reveal, especially if you juxtapose it with the ever increasing involvement of youth in the crime figures in the developed world?

Take another demographic feature, that is, the male/female distribution. Here, as analysis in at least one country in the region has revealed, the growth rate of crime among females is signific-

antly different and higher than that among males. Here too, we can only ask questions that need further study and attention at the highest policy levels. Is female crime increasing in relation to the increase in the ratio of women in the total population? If not, we have cause to worry, and a justifiable basis on which to act. Innovative searchers here would naturally have to address themselves to the question of whether existing criminal justice mechanisms are sufficient to cope with female as well as male crime, or whether separate, supplementary mechanisms have to be evolved.

Finally, I should like to make certain preliminary clarifications about the nature of the material included in this book. What are included here, first of all, are strictly factual accounts of innovations in the criminal justice systems as they exist in the different countries in the region. These should be read simply as narratives. There is no desire, covert or overt, to evaluate a system or to give it preference over another. Second, the fact that individual chapters refer to individual countries is no basis for inferring that they are in the nature of country statements. These are written by individual thinkers and practitioners who are knowledgeable about a certain system and who could find the necessary time to write about it. This applies to the book as a whole. Juxtaposing one country after the other is not intended to throw up comparisons but manifests only a physical sequence pertinent to the layout of the book. What this book has done, however, is to bring together individuals thinking separately on a common theme. The material should be read in that perspective.

A final note of caution which I must add is on the subject of crime statistics. Although individual presentations have relied heavily on these, statistical data on crime, at least in this region, must be taken with the proverbial pinch of salt. First, because time series in crime are lacking for the whole of Asia; and second, because statistics are always based on the number of offences and offenders reported. What lies hidden and is not reported obviously becomes 'non-crime'. (Both under-reporting and inaccurate reporting are problems that are extremely well known in the field of social statistics.) So too is the ambiguity caused by varying definitions of crime, between geographic regions and population groups within the same country, and among different countries. Finally, it is necessary that crime statistics be read in relation to the socio-economic reality in a given country, and equally import-

antly, in relation to its moral fibre.

Given all that, it is my hope and conviction that this book will throw light on many pertinent aspects of Asian criminology. If, at the end, we can motivate the system, as well as its thinkers, operators and users, to refashion its orientation towards today's needs and those projected of tomorrow, this book will have served its purpose.

3 Innovations in the Criminal Justice System of Sri Lanka

V. N. Pillai

Background

In many developing countries the problems of criminal justice are created within the framework provided not only by the criminal law, but also by certain aspects of the civil law, because these predetermine the general types of offenders who tend to emerge. A brief introduction to the historical background of the legal system in Sri Lanka might therefore be helpful if we are to understand, and view in their correct perspectives, recent innovations in the criminal justice system.

Ceylon, as Sri Lanka was known until recently, became a colony of Great Britain in 1799, having been ceded by the Dutch under the terms of the Treaty of Amiens. A proclamation of September 1799, which later was enacted as law[1], declared that:

> The temporary administration of justice and police in the settlements of the island of Ceylon, now in His Majesty's dominion, should as nearly as circumstances permit be exercised in conformity with the laws and institutions that subsisted under the ancient government of the United Provinces[2], subject to such expedients and useful alterations as may render a departure therefrom either absolutely necessary and unavoidable, or evidently beneficial and desirable.

It further empowered the administration of justice to be 'exercised by all courts of judicature, civil and criminal magistrates and ministerial officers'.

One section of this proclamation is of special interest in the context of recent events. The proclamation specifically made it clear that 'the practice of proceeding by torture against persons suspected of crimes, and of punishment after conviction' was to be 'wholly abolished' along with those 'forms of trial and punishment which humanity condemns and experience has shown to be less efficacious in the prevention of crimes than more lenient and

equitable proceedings'. It is a significant commentary on the march of civilisation that a resolution condemning torture as a form of punishment was adopted by the Fifth United Nations Congress on the Prevention of Crime and Treatment of Offenders 175 years later.

It was not until 1885 that the Ceylon Penal Code was enacted. The Roman Dutch criminal law which had prevailed for 85 years was abolished. The code defined criminal offences and prescribed the penalties to which offenders were liable. An enactment to consolidate, define and amend the law of evidence was introduced in 1895 and is still effective. The Criminal Procedure Code 'to amend and consolidate the procedure of the Courts of Criminal Judicature' was brought into effect in 1899. An ordinance known as the 'Courts Ordinance', which consolidated the laws relating to courts and their powers and jurisdiction, was also promulgated during this decade of legal activity.

For nearly 75 years the administration of criminal justice in Sri Lanka was, in the main, governed by the laws and procedures enacted during the last two decades of the 19th century. There have, of course, been a number of amendments to these laws and procedures from time to time, but most of them have been of an *ad hoc* and perfunctory character, with a view to keeping pace with social, political or economic changes rather than for any purpose connected with changes in the basic structure of the system.

In the meantime, the population grew fourfold, an agricultural economy began to expand to industrial and commercial fields, and the ponderous machinery of the legal system began to get bogged down by outdated procedures and insufficient resources. In 1940 a Court of Criminal Appeal was established as a superior court to hear appeals from the Supreme Court in criminal cases. Any person aggrieved by a decision of the Supreme Court was at liberty to appeal against his conviction and his sentence on a point of law, or fact or both. The Court of Criminal Appeal, consisting of a minimum of three judges of the Supreme Court, served to curb the need for appeals to the Privy Council, although the right to appeal to that body continued to exist until 1972.

In 1945 a special ordinance was enacted, providing for the establishment of rural courts in all parts of the country. The existing village tribunals were designated rural courts and given wider

powers. These courts had both criminal and civil jurisdictions and the chief merits of these institutions were their informal procedures, their location, their accessibility to rural populations and the fact that they relieved the magistrates and district courts of minor cases. Two features of the work of these courts are worthy of mention.

Irrespective of the value of the property, they had the right to try all cases in which the title to, interest in, or right to possess, any land was in dispute; thereby attempting to forestall and settle land disputes, which was one of the factors in rural crime and rural violence.

The second feature was the authority given to rural courts to bring about conciliation between parties whether in civil actions or in prosecutions instituted before such courts. 'It shall be the duty of the Rural Court by all lawful means to endeavour to bring the parties to an amicable settlement, and to remove with their consent, the real cause of grievance between them' runs the text of the law.[3]

For this purpose the court had power to refer the matter in issue to arbitration, and to give judgment in accordance with the finding of an arbitrator. Every such judgment was final and not subject to appeal.

About the same period a 'Payment of Fines Ordinance' was enacted, specifying the need for courts to take into consideration the means of the offender when fixing the amount of the fine, and authorising the grant of time for payment as well as acceptance of payment in instalments. The law further authorised the court to place any person who was granted facilities to pay the fine in instalments, under the supervision of a probation officer for this specific purpose.

In a study carried out many years ago on criminal homicide in one of the provinces[4], the time lapse between the commission of the offence and the committal of the case by the inquiring magistrate to the higher court, and the time lapse between the date of committal and the despatch of the record or brief to the Attorney-General, was ascertained to be as shown in Table 1.

The time taken for the preliminary inquiry in the magistrates' court is shown in Table 2.

Table 1 Time between offence and committal of case to higher court and between committal and despatch of record to Attorney-General

Time lapse	*Between offence and committal*	*Between committal and despatch of the record*
Under 1 month	4	5
1 month and under 2 months	22	29
2 months and under 3 months	12	4
3 months and under 4 months	9	5
4 months and under 5 months	7	5
5 months and under 6 months	2	3
6 months and under 7 months	1	5
7 months and under 8 months	0	1
Figures refer to the number of cases	Average 2½ months	Average 3½ months

Table 2 Time taken for preliminary enquiry in magistrates' court

Time lapse	*Where accused was discharged*	*Where accused was committed to stand trial*
Under 1 month	1	0
1 month and under 2 months	5	0
2 months and under 3 months	3	7
3 months and under 4 months	4	15
4 months and under 5 months	2	12
5 months and under 6 months	0	5
6 months and under 7 months	1	4
7 months and under 8 months	1	4
8 months and under 9 months	1	4
9 months and under 10 months	0	4
10 months and under 11 months	0	0
11 months and under 12 months	0	2
Figures refer to the number of cases	Average 3½ months	Average 5½ months

It must be remembered that considerable time also elapses from the date of committal to the time of trial, often up to nine months, depending on the workload of the Attorney-General's Department and the calendar of cases before the assizes during a particular circuit. During this lengthy period accused persons were invariably on remand and this partly accounted for the large increase in the number of remand prisoners held in prisons. Although homicide cases are generally more publicised and occasionally difficult to investigate, there is the fact that they do receive priority in police resources and personnel and courts are known to expedite their processes. It can be fairly accepted that the delays in less grave cases tended to be even more pronounced.

Under the old system, the judicature consisted of four tiers: the Supreme Court; the district courts; courts of requests and magistrates' courts; and rural courts. The country was divided into five circuits (western, eastern, northern, southern and midland) and each circuit was in turn divided into 'districts' and 'divisions', each district and division having its quota of district judges and magistrates. The Supreme Court, apart from its civil and criminal appellate functions, had an original criminal jurisdiction exercised either by individual puisne judges or through commissioners of assize, and was held periodically in the different circuits, in respect of the more serious indictable offences. District courts had original jurisdiction in civil, revenue, matrimonial and testamentary matters as well as in the less serious criminal cases committed from the magistrates' courts. Courts of requests dealt with minor civil actions in which the debt, demand or damage did not exceed a specified sum of money.

The main difference between magistrates' courts and the criminal jurisdiction of the district courts was that the district court could only try any offence which was punishable with imprisonment for a term not exceeding two years, or a fine not exceeding 1,000 rupees, or both, while the magistrates' court could try any offence punishable with imprisonment for a term not exceeding six months or with a fine not exceeding 100 rupees or both. These limitations on periods of imprisonment and amounts of fine were raised slightly from time to time in accordance with prevailing conditions.

Offences were broadly classified as 'summary' which were triable by a magistrate's court and 'non-summary' being those

in which the magistrate was empowered to conduct preliminary inquiries, record the statements of the witnesses and commit the accused for indictment and trial to the district court or the Supreme Court according to the nature of the offence. In cases that were committed for trial to the higher courts, the records had to be transmitted to the Department of the Attorney-General where indictments had to be prepared. Not infrequently the brief took considerable time passing to and fro between the courts and the Department of the Attorney-General in the search for evidence.

A New Approach – The Administration of Justice Law of 1973

The Administration of Justice Law of 1973 which came into effect on 1 January 1974 attempted to make a break with the past, and revealed a new approach to the problems created by the practices and procedures which had bedevilled the system for nearly half a century. Its objectives are clearly enunciated as being:

- Simplicity and uniformity in procedure.
- Fairness in administration.
- The elimination of unjustifiable expense and delay; and
- the just determination of every judicial proceeding.

The new Act repealed a number of the old procedural laws including the Criminal Procedure Code, the Courts Ordinance, the Court of Criminal Appeal Ordinance and the Rural Courts Law. It interposed an intermediate superior court known as the High Court between the district court and the Supreme Court, divided the country into 16 judicial zones, each with its own High Court judge, state prosecutor and court staff. It defined the jurisdiction of the different courts and regulated procedures in and before such courts. The old assize courts ceased to function, as did the courts of requests and the rural courts. The original criminal jurisdiction of the Supreme Court was transferred to the High Court, which sits continuously, and is expected to reduce the delays caused by assize courts which held sessions periodically.

Trials before the High Court are by jury, and on indictment by the Director of Public Prosecutions or his authorised assistants in each judicial zone. As before, sittings of all courts are to be in public, but a judge in his discretion may exclude from the hearings

people who are not directly interested in the proceedings in matters relating to family relations, sexual offences and in the interests of order and security within the court premises. The sentencing powers of the district and magistrates' courts are enhanced to imprisonment up to five years and 18 months respectively and imposition of fines up to higher amounts. The salaries of all judges and magistrates are laid down in this law and their independence and tenure ensured.

The Supreme Court now consists of the Chief Justice and not less than ten and not more than 20 judges. It is the only superior court of record and its appellate jurisdiction is described as:

> . . . jurisdiction for the correction of all errors in fact or in law committed by any subordinate court, and sole and exclusive cognizance by way of appeal, revision and *restitutio in integrum* of all actions, proceedings and matters of which such subordinate court may have taken cognizance, and such other jurisdiction as may be vested in the Supreme Court by law.[5]

It may, if necessary, receive and admit new evidence additional or supplementary to, the evidence already taken in a subordinate court. It has the power to issue writs including that of *habeas corpus*, and the power to inspect records of lower courts.

In view of the abolition of the old Court of Criminal Appeal procedure, the appellate jurisdiction of the Supreme Court in respect of judgments and decisions from magistrates' courts has to be exercised by at least two judges, and in respect of decisions from district and High Courts by at least three judges. Similarly its jurisdiction in respect of writs can only be exercised by at least three judges.

A new feature of appeal proceedings before the Supreme Court is what the Act calls 'pre-hearing proceedings'. Every appellant is required, within the prescribed period, to lodge in the Supreme Court submissions in writing in support of his appeal together with proof of service of a copy of such written submissions on each respondent or his attorney. In all criminal cases a copy of such submissions has to be served on the Attorney-General. These written submissions are to contain the relevant facts with reference to the pages of the record, the matters in issue, the errors alleged to have been committed by the court of hearing and the relief claimed in appeal. Thereafter the respondent is required to lodge counter submissions also in writing within a

prescribed period, with proof of service to the appellant or his attorney. It now becomes the turn of the appellant to lodge an addendum to his original submissions already filed in court, if he considers it necessary.

Only after such written submissions have been lodged (all typed and in triplicate, of course!) will the case be listed in the roll of appeals for hearing. At the hearing, the court may call upon the appellant or respondent or their attorneys to make oral submissions in support of their respective cases. Whether the stated purposes of the new law relating to simplicity in procedure and the elimination of unjustifiable expense and delay, will be achieved by the somewhat complicated pre-hearing proceedings remains to be seen.

Aspects of crime prevention are given prominence in the new legislation. When a magistrate receives information that any person within his jurisdiction is likely to commit 'a breach of the peace' or 'a disturbance of the public tranquility' or any wrongful act that may occasion a breach of the peace or disturbance of public tranquility, or that any person is a 'habitual offender', he may require such person to show cause why he should not be ordered to execute a bond for his good behaviour for a specific period. The amount of such a bond is to be fixed according to the circumstances of each case, and in the case of minors the bond is to be executed by sureties. The court may also order such a person to be detained in a prison pending the execution of the bond, or until such time, not exceeding six months, as he is released without 'hazard to the community or to any other person'.

Similarly, when a magistrate receives information, either from a police officer or otherwise, regarding any land dispute which is likely to lead to an offence, he is authorised to summon the parties for a summary inquiry and to make an order in accordance with the merits of the case after hearing the statements and evidence of all the parties concerned. When the settlement of a dispute is agreed to voluntarily by the parties concerned, the magistrate may approve the terms of the settlement and make an order accordingly. The disputes affecting land include such matters as possession or boundaries, or the right in the nature of a servitude affecting the land. It is generally accepted that a fair proportion of rural crime has its roots in disputes concerning land, its boundaries, its produce and its possession or ownership.

Provisions regarding the granting of bail to accused persons

have been simplified under the new law. A court may now call upon an accused person to execute a bond without sureties for his appearance before court whenever required to do so. Or the court may accept as a surety, a relative, friend or other person whom it considers a sufficient surety, without requiring the production of a certificate of worth or the deposit of cash security. The bail 'bondsman' is now a figure of the past. In the case of the category of serious offences referred to as 'non-bailable', the new enactment empowers a court to release 'at any time or at any stage of a proceeding' a person suspected or accused of any non-bailable offence on the execution of a bond with or without sureties. The only proviso is that in the case of an offence punishable with the death penalty, the consent of the Director of Public Prosecutions is required.

On the subject of sentencing, the new law has introduced some new concepts. It is expressly stated that where an accused person either makes a confession of his guilt and discloses all the circumstances connected with the offence, or pleads guilty to the commission of such an offence and the court is satisfied that he is sincerely repentant, this fact shall be taken into consideration by the court in determining the punishment to be awarded.

Provision is now made for suspended sentences of imprisonment. A court which imposes a sentence not exceeding two years may suspend its coming into effect for a period of not less than five years unless the offender commits a subsequent offence. Where a sentence of imprisonment of six months or under is imposed in respect of one offence, and the offender has not previously been in prison, the court must suspend the sentence, unless the offence involved the use or threat of violence, or the use or possession of a firearm, explosive or offensive weapon, or the offence is one in respect of which a probation order or order of conditional discharge was originally made, or the offender was already the subject of a suspended sentence, or the court is of the opinion that for reasons to be stated in writing, a suspended sentence would be inappropriate. It will be observed that whereas in the case of sentences of six months and under suspension of the sentence is mandatory unless it falls under one of the exceptions, in the case of sentences of up to two years, the court has the discretion to use this type of sentence or otherwise.

Table 3 (courtesy of the Commissioner of Prisons, Sri Lanka)

gives an indication of the great use made of suspended sentences during a period of two and a half years:

Table 3 Use of suspended sentences 1974-1976

Year	*Suspended sentences*
1974	5,288
1975	10,001
1976 (up to August)	8,443
Insurgents tried by the Criminal Courts Commission	2,319
Total	26,051

At the time of writing it is reported that only one person out of the above total has been recalled to serve the sentence.

In regard to the imposition of fines, it is encumbent on the court to consider, *inter alia*, the means of the offender so far as they can be ascertained, in order to fix the amount. Fines may also be paid in instalments as before, but the procedures have been simplified. Payments can be made through banks periodically, or if unpaid and the offender is in employment, the employer may be required to deduct for a required period such amount from the offender's salary as may be specified by court. The offender may also be required to perform unpaid work for the community for a period on the basis of one month for every hundred rupees due. However, a community service order can only be made with the consent of the offender and on the court being notified that arrangements exist for such service.

Conditional release of an offender is another method of disposing of minor infractions of the law which is emphasised under the new system. When the court is of the opinion that the charge is proved, but that in view of the character, age, antecedents, health or mental condition of the offender or of the trivial nature of the offence or the extenuating circumstances under which it was committed, the court may, without proceeding to conviction, discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour for a specific period. He has to appear for conviction and sentence when called upon to do so at any time during that period. The maximum period that may be specified in such an order is three years.

The same procedure is applicable even if an offender is convicted on indictment of an offence punishable with imprisonment, and the court is disposed to release him conditionally. The bond which is executed by the offender and his sureties may contain such conditions as the court considers necessary in the particular circumstances of the case.

Probation, adult and juvenile, as a method of dealing with offenders within the community has been in existence since 1945 and will therefore not be treated as a recent innovation in the criminal justice system. However it should be mentioned that the more important provisions of the Probation of Offenders Law of 1945 have been incorporated in the new Administration of Justice Law of 1973, thus making it clear that probation is no longer an appendage to the criminal justice system but rather an important and inalienable part of it.

Payment of costs and compensation to aggrieved persons or victims of crime is another method that is available to the court for dealing with offenders. Whenever an offender is convicted of an offence, or when the charge is proved but the court does not proceed to convict him, it may order the offender to pay within such time and in such instalments as may be specified, a sum of money as compensation to the person affected by the offence. If the offender is under 16 years of age, the court may in some circumstances order the payment to be made by the parent or guardian of the offender. Any sum of money so awarded as compensation can be recovered as if it were a fine, if payment is in default.

A court may also order the whole or any part of a fine to be paid as compensation to the injured party.

Criminal Justice Commissions

The insurrection of April 1971 was a unique event in the history of Sri Lanka. For the first time in its history an uprising against the State was organised and attempted almost entirely by youth. However, the government did not lose its cool. It reacted firmly and speedily, and in a few weeks had the situation well under control. The rank and file of the insurgents surrendered in large numbers while those who resorted to, or threatened, violence were arrested. In a matter of days the authorities found themselves

saddled with about 17,000 persons for whom accommodation under secure conditions had to be found pending investigations into their complicity in the movement. The government at an early stage announced its policy that all arrested and detained persons would be dealt with strictly according to the law, and that efforts would be made to rehabilitate those who were not seriously involved. A special Department of Rehabilitation was set up by the government for this purpose.

Table 4 Population of insurgent suspects in prisons and rehabilitation camps on 1 August 1971

Name of institution	*Insurgent suspects*
Welikade Prison, Colombo	–
Colombo Remand Prison	681
Prison Hospital, Colombo	81
Female Ward, Welikade Prison, Colombo	120
New Magazine Prison, Colombo	1,379
Hultsdorp Prison, Colombo	4
Rehabilitation Camp, Mirigama (Females)	280
Vidyodaya Camp	2,069
Vidyalankara Camp	2,255
Bogambara Prison, Kandy	1,516
Jaffna Prison	131
Hammen Heil Fort, off Jaffna	165
Galle Prison	203
Badulla Prison	285
Matara Prison	206
Anuradhapura Prison	339
Anuradhapura Rehabilitation Camp	479
Pallekelle Rehabilitation Camp	517
Negombo Prison	322
Polonnaruwa Rehabilitation Camp	1,582
Senapura Rehabilitation Camp	600
Koggala Rehabilitation Camp	550
Ridiyagama Rehabilitation Camp	825
Batticaloa Prison	158
Total	14,747

The enormous burden of housing those 17,000 detainees fell on the Department of Prisons. 'The already overcrowded prisons reached bursting point as a result of the admission of hundreds of

alleged insurgents', said the Commissioner of Prisons.[6] A number of camps were established and the overflow was accommodated in these makeshift surroundings. A special investigating unit was also set up at the same time to inquire into the cases of each and every suspect taken into custody, and a number of suspects against whom there was no evidence of complicity was released. In August 1971 the population of insurgent suspects in prisons and rehabilitation camps was as shown in Table 4.

At the same time, there was anxiety on the part of the government regarding the illegal transactions in respect of hard-to-obtain foreign exchange on such a scale as to endanger the national economy and interest. For many years exchange control laws prohibited persons normally resident in the country from possessing or dealing in foreign exchange and currencies except with the permission of the Central Bank. Nor was such a person permitted to have accounts in foreign banks or to hold assets abroad without due permission. However, it was generally suspected that these laws were being flouted with impunity by persons in high places and in low and that under prevailing procedures it would be difficult, if not impossible, to bring such offenders to book.

It was accordingly decided that Criminal Justice Commissions should be established by law (Criminal Justice Commission Act 14 of 1972) because of the fact 'that the practice and procedure of the ordinary courts are inadequate to administer criminal justice for the purpose of securing the trial and punishment of the persons who committed such offences'.[7]

The Commissions were to consist of not more than five judges of the Supreme Court, appointed by the Chief Justice. At that time the new Administration of Justice Law had not been enacted, and it was felt that the new Commissions should be free from the formalities and technicalities of the rules of procedure and evidence ordinarily applicable to a court of law. Such Commissions were to try accused persons in a manner not inconsistent with the principles of natural justice, and best adapted to elicit proof concerning the matters that were being investigated.

Apart from simplifications of procedure, some features of the new Act are noteworthy:

1. The Act is retrospective in effect. The duration of the period

during which it becomes retrospective can be specified by the government.

2. No new penal offences were created under this Act nor sentences enhanced. In fact the Act expressly rules out the passing of the death sentence, though under the Penal Code, the death sentence can be passed not only for murder, but also for the act of waging war against the State.

3. The Chief Justice alone is responsible for appointing by name judges for each of the Commissions, all of whom should be judges of the Supreme Court. This appears to be a useful safeguard in that such judges would always be men of wide experience in judicial procedure.

4. The Commissions have the power to conduct inquiries as original criminal courts and not merely by indictment.

5. While the Commissions are free from the formalities and technicalities of the normal rules of procedure, their inquiries may be conducted in a manner 'not inconsistent with the principles of natural justice'.

6. They have the power to admit any evidence which might be inadmissible under the provisions of the normal law of evidence. For example, it is a well known fact that a confession is irrelevant not only when made by inducement, threat or promise, but also if made in the presence of any person in authority. Similarly no confession made to a police officer can be proved against a person accused of any offence. For purposes of inquiries before a Commission, however, a confession or incriminating statement 'to whomsoever and in whatsoever circumstances made' by a person can be proved against him, and the burden of reducing or minimising the weight of such a confession or statement rests with that person.

7. Confessions or incriminating statements made by accomplices are also relevant and admissible against any other suspect. However in respect of both the above, there is a proviso that the Commission shall only attach such weight to the evidence

as is 'safe and just', and provided further that the accomplice is called to give evidence and tendered for cross-examination.

8. There is no appeal against the decisions of the Commission.

In spite of the existence of wider powers, the general impression is that the Commissions have conducted inquiries before them in a scrupulously fair and just manner, and that accused persons have been given every opportunity to defend themselves to the best of their resources and abilities. Lawyers are eligible to appear for accused persons and have done so in practically all cases. There have been no restrictions on the examination and cross-examination of witnesses, and the latitude allowed to defence counsel appears to be remarkably similar to normal court practices. The press and the public have been permitted to be present at the trials and the more important cases have received wide press coverage.

The Commission is empowered to pass any sentence that may be passed by the Supreme Court, other than death. Where the only sentence provided by law for any offence is death, the Commission can pass a sentence of life imprisonment. The Act creating these Commissions is in force for eight years from 1972; thereafter a resolution by Parliament is necessary to bring it into force again.

The Criminal Justice Commissions have not completed their work and it would be inappropriate and perhaps too early to assess results. Except for about a hundred hard-core insurgents whose trials have been prolonged and complicated, the great majority of those charged pleaded guilty, and in quite a number of cases were given suspended sentences or conditionally discharged on their entering into bonds to be of good behaviour. A special Department of Rehabilitation has been set up for the specific purpose of rehabilitating those involved in the insurgency movement and has given them assistance in re-settlement programs.

It is interesting to record that of the 14,747 insurgents detained in prisons and temporary detention camps in 1971, the great majority were released on security for good behaviour bonds or under the supervision of rehabilitation officers. Fifty-one suspects were charged before the Criminal Courts Commission in connection with the main charge of insurrection against the State. Four pleaded guilty at the outset and the case against one was withdrawn. Of the remaining 36 suspects, 32 were found guilty and

sentenced to varying terms of imprisonment. There were also a number of corrected cases which were inquired into by the Commissioner and terms of imprisonment were imposed on 2,319 persons convicted by the Commissioner for less serious offences. These figures will give some indication of how the system works during a period of crisis.

In regard to those accused of offences against the Exchange Control Laws, the procedures followed by the Commission have given every indication of being fair and equitable, and the sentences appear to have taken into consideration every aspect of the offences as well as the extenuating circumstances connected with each case. Here too, a majority of the offenders pleaded guilty to the charges against them and this fact was taken into consideration by the Commission in regard to their sentences.

Bribery and Corruption

A more intensive drive against bribery and corruption in all public and private organisations had for some years been gathering momentum. Although the taking of illegal gratifications and similar acts have always been offences under the Penal Code, their practical enforcement was rarely effective. The obtaining of services, particularly from public servants, through the payment of various forms of illegal gratification, became almost the accepted way of expediting business. Besides, oiling the wheels of the bureaucratic machinery through illegal payments and favours had over the years become so sophisticated in the manner in which it was carried out, and so devious in the means adopted to launder such activities, that detention was virtually impossible.

A special department was set up some years ago headed by a Bribery Commissioner and a selected staff of investigating officers to deal with the situation. He was empowered, 'notwithstanding anything in any other law to the contrary'[8] to direct and conduct the investigation of all allegations of bribery which are made to him or come to his knowledge.

The laws were amended so as to simplify and expedite dealing with offenders. The Attorney-General could indict a person charged with bribery without a preliminary inquiry in a magistrate's court. On receiving such an indictment the District Court was to expedite the trial process and the penalty for persons found

guilty was increased to seven years imprisonment and to a fine not exceeding five thousand rupees or both.

With a view to facilitating the obtaining of evidence, the Attorney-General was authorised by law to tender a pardon to any abettor or accomplice who was prepared to make a full disclosure of the circumstances relating to any offence committed by a principal.

In 1973 the legal process was stepped up by the establishment of a special court in Colombo for the purpose of trial and disposal of offences under the Bribery Act irrespective of the place where such offences were committed.

Wide publicity was given to the provisions of the law, and the public was encouraged to bring to the notice of the Bribery Commissioner's Department instances where bribery and corruption were suspected. All cases heard by the Special Bribery Court were also given wide publicity both in the press and through the radio network. Within the last two years convictions have been not only minor grades of employees, but also some in the middle and professional categories such as doctors, lawyers and businessmen. Of greater impact than the number of convictions, the severity of the sentences, or the speedy disposal of cases, is the growing realisation among the public that bribery and corruption in any form would not be countenanced by the authorities, and that both government policy and the legal process are geared towards its ultimate eradication.

The Police

The role of the police service has received increasing recognition in recent years, although it is not possible to record any innovations as such in the system itself or in the police procedures and policies which have over the years maintained reasonably high standards. Events connected with the insurrection of 1971 have drawn the attention of the public, in a manner hitherto unknown, to the fact that the effectiveness of the system of law enforcement in a developing society is a crucial factor in the administration of criminal justice. The situation further reinforced the role of the police in the preservation of law and order, and in ensuring that social and economic development was not disrupted by anti-social elements.

In recent years there has been a noticeable emphasis on the increase of police personnel, on maintaining adequate standards of training, and on better police-community relationships. It is beginning to be appreciated in Sri Lanka, as in many other countries, that public apathy or hostility towards the police affects morale and the ability to apprehend criminals, encourages non-reporting of law violations, and discourages witnesses from coming forward to testify. The police training establishment has been improved, more educated youths are encouraged to enter the service and there has been an increase in the intake of female police officers. Increasing use is being made of voluntary police officers from time to time in ancillary duties wherever permanent officers are required for specialised duties.

The total strength of the Police Department during the years 1960-1975 by five year periods (figures supplied by the Commissioner of Prisons) is shown in Table 5.

Table 5 Strength of Police Department 1960-75

Year	*Total strength*
1960	9,881
1965	11,323
1970	11,236
1975	16,262

Table 6 gives the overall crime situation over a period of 15 years. Figures are supplied by the Commissioner of Prisons. 'Grave Crimes' is a broad term which has been in use for over two decades and may in a limited sense reflect the total situation over the years. To view these statistics in their correct perspective, they should be compared with the rise in the total population of the country over the same period, see Tables 8 and 9.

Table 6 Grave crimes reported to the police 1959/1974

	Abduction	*Arson*	*Burglary*	*Cattle theft*	*Exposure of children and concealment of birth*	*Grievous hurt*	*Homicide*	*Attempted homicide*	*Hurt by knife*	*Rape*	*Unnatural offence*	*Riot*	*Robbery*	*Theft of property valued of 20 rupees*	*Cycle theft*	*TOTAL*
1959/60	164	592	2,845	824	22	2,618	536	243	4,093	98	24	70	881	4,039	1,181	18,230
1960/61	185	594	3,221	874	33	2,605	538	245	4,170	99	24	62	973	4,148	1,375	19,146
1961/62	186	574	3,417	758	37	2,706	602	227	4,373	98	22	56	1,084	4,496	1,318	19,954
1962/63	248	575	3,976	787	34	2,832	575	244	4,629	94	21	78	1,269	5,194	1,583	22,139
1963/64	211	609	4,309	694	45	2,665	614	213	4,813	116	18	83	1,410	5,243	1,429	22,472
1964/65	231	759	4,653	631	40	2,982	654	302	5,145	123	21	118	1,530	5,608	1,145	23,942
1965/66	234	674	4,824	594	35	2,952	634	305	5,046	113	16	131	1,496	6,087	1,330	24,471
1966/67	255	772	5,683	660	58	3,029	766	366	5,442	129	26	124	2,083	7,621	1,708	28,722
1967/68	257	802	6,509	721	47	3,120	697	377	5,627	146	19	114	2,399	8,457	2,032	31,325
1968/69	299	944	7,482	775	63	3,165	806	410	6,177	189	46	200	2,700	9,523	2,076	34,855
1969/70	274	1,023	8,549	823	36	2,953	845	424	6,574	166	26	382	3,268	9,939	1,729	37,011
1970/71	268	1,165	8,773	953	47	3,043	1,194	493	6,947	140	28	598	5,631	10,097	2,088	*41,497
1971/72	283	1,164	12,053	1,344	109	2,798	928	384	7,809	200	29	218	3,389	14,347	3,035	*48,133
1973	266	973	13,610	1,422	40	2,686	1,028	336	7,384	211	21	197	5,084	16,333	3,011	*52,721
1974	223	779	12,103	1,391	72	2,414	960	565	6,097	191	14	139	4,243	26,131	3,617	*59,607

* Includes a new group 'Gang Robbery'.

Corrections

The two departments responsible for correctional services are the Department of Prisons and the Department of Probation and Child Care Services.

The work of both departments was gravely disrupted by the insurrection of 1971. Even before this catastrophic disruption there had already grown over the years a situation in which penal institutions became over-crowded and under-manned and rehabilitation efforts were thwarted by lack of resources.

Table 7 gives figures relating to the daily average population, the authorised accommodation and the percentage of overcrowding in the prisons and training schools, over a period of years prior to 1971 which is the last year for which figures are available.

Table 7 Percentage of overcrowding in prisons and training schools 1967/1971[9]

	Authorised accommodation			*Daily average population*			*Percentage of overcrowding*		
	Convicted	*Unconvicted*	*Total*	*Convicted*	*Unconvicted*	*Total*	*Convicted*	*Unconvicted*	*Total*
1967	3,528	757	4,285	4,620	2,135	6,755	31.0	182.0	57.6
1968	3,528	757	4,285	5,016	2,533	7,549	42.1	234.6	76.2
1969	3,528	757	4,285	4,431	3,767	7,198	25.5	265.5	68.0
1970	3,528	757	4,285	3,695	3,617	7,312	47.3	377.8	70.6
1971	3,528	757	4,285	3,800	5,061	8,861	7.7	568.5	106.8

Table 8 Intake into prisons and training schools 1936/1974[10]

Year	*Population in millions*	*Convicted prisoners*	*Unconvicted prisoners*	*Total admissions*	*Offenders placed on probation*
1936	5.64	15,624	9,532	25,156	–
1937	5.72	15,000	8,407	23,407	–
1938	5.82	16,996	9,823	26,819	–
1939	5.91	19,936	11,561	31,497	–
1940	5.97	19,775	12,051	31,826	–
1941	6.17	15,659	11,499	25,158	–
1942	6.17	10,318	11,712	22,030	–
1943	6.29	10,001	11,825	21,836	–
1944	6.44	10,355	13,636	24,041	–
1945	6.65	9,847	15,047	24,904	335
1946	6.65	11,809	15,913	27,722	278
1947	7.03	14,310	17,870	32,180	493
1948	7.24	16,312	18,551	34,863	586
1949	7.45	14,154	17,349	31,503	996
1950	7.67	12,248	15,416	27,004	744
1951	7.87	8,842	14,252	23,094	984
1952	8.07	7,924	17,413	25,337	1,280
1953	9.09	8,764	17,742	26,506	1,097
1954	8.52	9,914	15,441	25,355	1,315
1955	8.72	9,546	15,607	25,153	1,286
1956	8.92	9,102	16,301	25,403	1,249
1957	9.17	9,059	16,425	25,484	1,406
1958	9.40	7,826	20,721	28,547	2,647
1959	–	7,963	17,191	25,154	2,831
1960	9.82	7,378	16,906	24,284	2,935
1961	10.01	7,276	16,462	23,838	2,945
1962	10.16	7,181	15,459	22,640	1,446
1963	10.43	7,931	17,625	25,556	1,394
1964	10.62	8,861	19,632	28,493	1,541
1965	10.87	9,996	21,783	31,779	1,806
1966	11.07	10,138	23,500	33,638	1,970
1967	11.74	10,740	27,113	37,853	1,964
1968	11.97	12,639	28,844	41,483	1,744
1969	12.51	12,416	36,730	49,146	1,640
1971	12.81	10,642	41,677	52,319	1,408
1972	12.95	13,085	51,667	76,465	1,299
1973	13.18	22,370	61,580	83,950	1,281
1974	13.39	12,067	70,880	82,947	1,771

The figures given in Table 8 indicate the intake into the prisons and training schools over a period of time. While Table 7 shows the enormity of the problem of overcrowding, the intake of unconvicted persons is also revealing. The number of 'admissions' according to the department is not identical with the number of persons admitted, but includes the number of occasions on which such persons were admitted. The same unconvicted person, if taken to court to be remanded in one or more cases on three occasions, would be recorded as three admissions. This explains the fact that, for example, whereas the daily average of unconvicted persons in the prisons stood at 8,861 in 1971, the total admissions this year was 41,677, which is broadly indicative of the fact that the average number of times that a suspect is remanded pending trial is about five.

Table 9 Length of sentence 1970-71

Length of sentence	*1970*		*1971*	
	Number	*Percentage*	*Number*	*Percentage*
Under one month	4,774	28.62	3,628	34.35
1 month to 3 months	3,100	25.08	2,728	25.82
3 months to 6 months	2,094	16.92	1,898	17.97
6 months to 1 year	1,056	8.54	994	9.41
1 year to 1½ years	322	2.60	341	3.23
1½ years to 2 years	322	2.60	319	3.02
2 years to 3 years	394	3.19	326	3.09
3 years to 5 years	136	1.10	158	1.50
5 years to 10 years	145	1.17	138	1.31
Over 10 years	19	0.15	32	0.30
Total	12,362	100	10,562	100

The length of sentences to which convicted persons are sentenced, and the number of persons sentenced to imprisonment in default of payment of fines, as given in Table 9 also reveal much about the working of the criminal justice system prior to 1972.

At this stage it would appear that the prison authorities, being almost the sole reservoir for the human output of the criminal justice system, found themselves in an unenviable position. One factor proved to be of great help. The policy of rehabilitating the

large number of insurgents within the community rather than incarcerating them in overcrowded institutions caught the imagination of important sections of the public.

It became evident that if the government was prepared to adopt a practical policy of rehabilitation within the community for persons who, however motivated, committed, threatened or attempted the very grave offence of waging war against the State and attempting with violence to overthrow the government of the country those who committed much less serious offences against individual persons or property, or were convicted of statutory violations had an equal claim to be treated in the same manner, if not better.

Whereas for decades the authorities had only paid lip-service to the policy of rehabilitation, the aftermath of the insurrection of 1971 caused a significant change in attitudes. The rehabilitation of the ordinary offender by means other than imprisonment, began to be seriously considered as not only being far more economical, but also more practical, less harmful and more constructive. Once the judicial processes for dealing with the insurgent population accommodated in penal institutions got under way some of the prison reforms which for years had been held up began to take shape, and the following measures have been initiated since 1974.

Parole: A new system of granting parole for prisoners was put into effect. Remission for good conduct and industry was, and still continues to be, the main system of releasing persons before their terms are completed. Now in addition to this method, long-term prisoners become eligible for release on the recommendation of a Board of Review. When so released, they are subject to supervision in the community by specially trained welfare officers.

Home leave: A system of granting home leave for prisoners was introduced and is reported to be working satisfactorily. Hitherto only inmates of training schools, that is, youthful offenders between the ages of 16 and 21, were eligible for such privileges.

Work-release: Work-release schemes for long-term offenders have been organised in different areas.

Work camps: The problem of the short-term offender is being tackled realistically. Three open institutions, called 'work camps' have been organised for short-term offenders. The work in these camps is agricultural, and they are situated outside urban areas. Similarly another work camp for medium-term offenders has been established.

Training: Special emphasis is now being placed on the training of personnel. A new Centre for Research and Training in Corrections was opened last year. Already nine inservice training courses have been conducted for different grades of staff. A five-day residential seminar on 'Rehabilitation of Offenders' was held recently at which members of the public participated.

After-care: Practical measures to ensure adequate after-care for persons released from penal institutions have been formulated and are being carried out. A discharged prisoners' building society has been organised on cooperative lines, and this society is being provided with work on the Prisons Department building annual program. The Research and Training Centre building was constructed by this society.

A residential half-way house for discharged offenders is also in operation in another area.

Voluntary supervision: A scheme for enlisting volunteer workers for the supervision of parolees and ex-prisoners is being put into effect. It is reported that when the department called for the services of such volunteers, no less than four thousand persons sent in written applications.

Seminars: One-day seminars have been organised by the Prisoners' Welfare Association in different parts of the country to enlist support for assisting in projects to rehabilitate offenders within the community. At these seminars the participation of judges, the police, senior citizens and public and local officials has been quite significant.

The various innovations indicated above are being tried out and represent a break-through in public attitudes in a developing society where problems of unemployment and economic development are being given the highest priority. In this sense, one

cannot help thinking of the insurgency of 1971 as having provided some sort of shock therapy to the criminal justice system. Perhaps one of the most significant events in the task of the correctional services is the fact that for the first time the Commissioner of Prisons was called in by the Planning Ministry to discuss ways and means by which the inmate population of penal institutions could assist in developmental work.

A New Civil Procedure

While it is true that the problems of criminology and penology are created within the framework of the criminal law, there are some sociological aspects of criminal behaviour which have their roots in the system of civil laws and procedures intended to prevent or redress wrongs. It may therefore be appropriate to mention briefly the innovations in the civil procedure which have just been introduced as the Administration of Justice Law No.25 of 1975.

Civil procedure in this country had been regulated by the Civil Procedure Code which was enacted in 1890. Deeply enmeshed in the traditions of the British legal system, it survived the vast economic and social changes of this century and even three decades of political independence. It undoubtedly gave the impression of being tailor-made to maintain the legal profession rather than to dispense justice and equity to litigants. The 'Roll' as the list of cases was called had a back-log of actions that extended to the dim past.

The new law which came into effect on January 1976 broke with the past. In preparing the new law relating to civil procedure, the framers have had the benefit of reports of law commissions in several Commonwealth countries, and they have chosen to adopt several bold and radical reforms. The most significant of these provisions are as follows:

Pre-trial proceedings: Pre-trial proceedings, similar to the procedure in appellate actions, have taken the place of the 'Roll'. The parties to a civil action are required, within prescribed time limits, to take a number of steps without the intervention of the court. The parties are required, once the action is filed, to notify each other of their respective pleadings, the nature of the evidence, the documents and such other matters as are necessary to prove their

cases. The object of these provisions appears to be the elimination of the surprise element in a case. The parties are to go to trial with the full knowledge of the strength or weakness of each other's case.

The serving of summons: The serving of summons, as well as the notification of every other information and legal process, is to be through the postal services. Previously special officers known as 'process servers' were employed for this purpose. These minor employees were required to hand over personally notices and documents to the actual person named. This system was subject to much abuse.

The pre-trial conference: The concept of a pre-trial conference or dialogue between the parties has been introduced. As soon as the pleadings are completed, a date is fixed by the court for the preliminary investigation. This is the first occasion on which the parties need actually be present in court and the judge will discuss with them measures that could be taken to dispose of the case speedily. The issues may also be formulated and, on the agreement of the parties, expeditious methods of proof of facts and documents adopted.

Execution of judgment: Execution of judgment proceeding which in the past proved to be most difficult for successful litigants, has been simplified. Provision has been made for the issue of a single writ, and the punishment thereafter of any resistance or avoidance is a contempt of court.

Minor claims: Minor claims, in which the debt, damage, claim or demand does not exceed one thousand five hundred rupees in value, will be tried in the magistrates' courts by summary procedure.

Minors: All matters relating to the custody and control of minors and their properties have been vested in the Public Trustee, thus divesting the courts of administrative functions which had burdened the courts throughout the years.

Matrimonial actions: Provision has also been made to simplify the existing procedures relating to the dissolution of marriages and the custody of children. The law relating to matrimonial actions has been modernised by the abolition of actions for pecuniary damages against a co-defendant and the concepts of connivance, condonation and collusion.

---

1. Ordinance no.5 of the 1835 'Adoption of Roman Dutch Law', Ceylon Legislative Enactments, chapter 12.
2. As the Dutch Government was then referred to in official documents.
3. S.3, Rural Courts Ordinance of 1946.
4. Dr C.H.S. Jayawardena & Dr H. Ranasinghe, *Criminal Homicide in the Southern Province* (1963) (*No Publisher*)
5. S.11, Administration of Justice Law, no.44 of 1973.
6. Administration report of the Commissioner of Prisons, 1970-71.
7. S.2(b), Criminal Justice Commission Act, no.14 of 1972.
8. S.3, Bribery Amendment Act, no.2 of 1965.
9. From Administration report of the Commissioner of Prisons for 1971 (1973).
10. Wall chart, office of the Commissioner of Prisons.

4 Grass Roots Justice: Village Courts in Papua New Guinea

N. D. Oram

Introduction

In 1973 the enactment of the Village Courts Act represented a fundamental change in the administration of justice in Papua New Guinea. Whereas previously only law imposed by the colonial administration had been administered by professional and semi-professional magistrates, the Act provided for the administration of their own custom by village leaders. In this chapter I shall discuss the differences between traditional and Western concepts of dispute settlement and social control. I then describe the administration of justice under colonial rule and the pressures and events which led to the passing of the Village Courts Act. In conclusion I consider problems which may arise from the attempt, through village courts, to close the gap between traditional and modern concepts of law and justice.

Papua New Guineans may ask why I, a foreigner, should be writing about a matter of such great concern to their country, which became independent in 1975. When I went to Papua New Guinea in 1962 with experience of native courts in British Africa, I was struck by the absence of any truly local official courts. For the next 13 years I was involved in the debate on the desirability of establishing village courts, particularly while a member of Port Moresby City Council.

Because of my concern that provisions included in an early draft of the Village Courts Bill would create a very weak judicial instrument, I approached Barry Holloway, Speaker of the House of Assembly and member for a Highlands District, who had a deep interest in the problem. He organised a series of meetings of ministers, officials and others concerned which led to significant modifications of the draft. I was subsequently asked by those present at the meetings to negotiate with the legal draftsman the

terms of the Village Courts Bill presented to the House of Assembly. A further approach to the government by Holloway and myself led to the setting up of village courts within Port Moresby. I am therefore mainly concerned with events which took place under the colonial regime and I hope that further developments will be reviewed by Papua New Guinean scholars.

Papua New Guinea consists of the south-eastern half of the island of New Guinea and of a number of islands, of which the largest are New Britain and Bougainville, with a population of approximately two-and-a-half million people. In 1884, British and German Protectorates were declared over the Southern and Northern parts respectively of what is now Papua New Guinea. German New Guinea, which was seized by a British expedition in 1914, became a United Nations Mandated Territory under Australian control in 1921. After the end of the Second World War, Papua and New Guinea were administered by Australia as a single territory.

Traditional Societies

Linguists recognise some 700 mutually unintelligible languages in Papua New Guinea. The majority of traditional political units amounted only to a few hundred people, with the exception of some societies living in the Highlands of New Guinea. A traditional Papua New Guinean society 'is stateless: with few exceptions, it places no stress on hereditary rank or leadership, and in no instance can it be described as a single united body politic'.[1] It is:

> . . . generalised rather than compartmentalised and exactly the same groups or persons in specific relationships to each other carry out all economic, religious and political actions.[2]

Although examples of achieved leadership outnumber those of ascribed leadership, in the past, anthropologists have probably underestimated the latter.

In many societies, elements of both hereditary and achieved leadership existed but formal leadership rarely extended beyond the descent group. Heads of descent groups had ritual functions, on which the prosperity of the group and control of the distribution of land rights depended. Leadership was achieved through outstanding performance in economic activities and war, combined with the manipulation of exchange relationships to form a

clientele. Achieved leadership was found in many societies but was highly developed in areas such as the Highlands where a 'big man' system existed[3]. and Southern Bougainville.[4] Such leadership was fragile and a big man who was becoming too powerful might lose his following.

Although Papua New Guinea societies were without formal government, social control was maintained within them in a number of ways.[5] There was a constant need to maintain their solidarity against disruption by enemies and the forces of nature, leading to restraint of aggressive behaviour within them. As in all societies, the basis of conformity to social norms was established through the socialisation of children in learning the customary values, beliefs and techniques of their social group. These societies were self-regulating because non-conformity brought automatic penalties. Failure to meet obligations to others would lead to the breaking of an economic chain. Fear of sorcery was a potent factor in regulating behaviour between individuals. Shame was also an important sanction governing behaviour and an extreme means employed by the injured of shaming those who injured them was to commit suicide. The last resort was self-help. All could attempt to retaliate by attacking those who had injured them or the kin groups to which they belonged.

British law is concerned with the maintenance of a moral order and inflicts penalties on those who contravene it. Those who judge are expected to be impartial and, in theory at least, all are equal before the law. In theory also, every accused person is innocent until proved guilty and rules of evidence are strict. While problems of interpretation are always present, makers of laws aim at precision in defining offences and the rights of individuals.

In Papua New Guinea, there is no concept of abstract justice. As in Indonesia, the object is 'to restore or redress the equilibrium' within the society. 'The nature of an offence is defined not so much by the act itself as by the social context within which the act occurs.'[6] Disputes are an affair of kin and other groups rather than of individuals, and their settlement is a political process rather than the impartial weighing of evidence. The way in which disputes are settled depends on the relative statuses of the parties within their community and their relationship to each other. If the relationship is close, the terms are usually milder and resort to violence less likely than if it is distant.[7] If no relationship is

acknowledged, a person may be cheated or killed without the aggressor incurring the disapproval of his own group. The only restraint is fear of retaliation.

Unlike Western law, custom does not constitute a body of fixed rules but is rather the application to particular situations of the ways of thought and principles by which a society is organised. One underlying principle is reciprocity – people should be treated as they treat you, good being returned for good and evil for evil. If an individual or group incur a loss, they should receive compensation. An example is the right of a kin-group to dispose of the sexual, procreative and labour services of its female members and to receive compensation in return.

The values underlying the Western and indigenous systems of law were different. In customary thought there was no distinction between criminal offences and torts or civil wrongs. Incest in many societies included marriage or sexual intercourse between members of a clan or a group of clans. In some societies offenders were killed but under British law this kind of incest was not even an offence. Conversely, while homosexuality was institutionalised among some tribal groups, homosexual practices were an offence under British law.

In pre-contact times there were no courts of justice which endorsed a body of laws, but settlement of disputes was achieved in many societies on a regular and even formal basis through village moots. Traditionally, a moot attended by only men was held regularly by the Kwoma in the Sepik Province to settle inter-parish disputes.[8] 'Big men' or 'chiefs' played an important mediating role depending on the social structure of the society concerned.

The Introduction of Colonial Legal Systems

British and Germans introduced their own system of law and justice in their respective territories. Sir William MacGregor, first Lieutenant Governor of British New Guinea, enacted an Ordinance for the Better Regulation of Native Affairs soon after his arrival in 1889. The ordinance provided for the making of native regulations which were to cover many aspects of village life; the establishment of native magistrates' courts, later called courts for native matters; and for the appointment of village constables, who exercised

considerable authority in their area. The courts had jurisdiction only over 'natives'.

MacGregor originally intended that indigenous magistrates should be trained to preside over these courts[9] and two Kiwai magistrates were appointed in the Western Division. They were considered to be guilty of malpractices and to be incapable of impartiality and were dismissed.[10] As a result of this inadequate experiment, European officials contrived to administer courts for native matters until they were abolished in 1966.

There was no right of appeal from courts of native affairs to district courts in New Guinea or from courts for native matters to courts of petty sessions in Papua. Cases could be reviewed by the Supreme Courts and, before 1942, all cases heard in Papua were reviewed by the judges. Mr Justice Gore, a pre-war judge in Papua, sought the revival of the practice after the Second World War but he found no official support.[11] Later, a 'courts adviser' was appointed but few cases were inspected.[12]

Custom was legally recognised in New Guinea under the Laws Repeal and Adopting Ordinance 1921-1929 but not in Papua. There senior colonial officials were fully alive to the significance of custom in the judicial field and courts 'proceeded on the assumption that native custom continued to apply'.[13] In 1898, Sir Francis Winter, the Chief Judicial Officer, wrote a clear and sympathetic account of the problem of administering justice to societies whose values were opposed to those represented by Western law.[14]

This understanding was given no legal expression until 1963, when the Native Customs (Recognition) Act was enacted. This Act provided for recognition of custom in mitigation of sentence in criminal cases and in relevant civil cases. With the exception of adultery, which was an offence under the native regulations, infringement of custom did not become a punishable offence, as it was in British territories in which a native court system had been established. An important element in the Native Customs (Recognition) Act was that, as stated in section 4, it did not regard custom as having 'obtained from time immemorial'. Custom was defined as the usage obtaining 'at the time when and the place in relation to which the question arises . . .', thus allowing for the adaptation of custom to changing conditions.

Before the Second World War, Sir Hubert Murray preferred to

appoint the sons of European residents without formal training as his field officers, while New Guinea cadets underwent a year's course in anthropology at Sydney University. After the two territories were joined in an administrative union, field officers were trained at the Australian School of Pacific Administration in Sydney. As a result of limited contact with local societies and difficulties of communication, their understanding of local problems was limited. The majority of officers could only achieve at best fluency in two *lingue franche*, Pidgin or Neo-Melanesian and Police (now called Hiri) Motuc. They were more frequently fluent in the former than the latter. As a result, they were dependent on interpreters who were rarely skilled[15] and who often achieved great power as intermediaries.

The courts over which field officers presided were physically as well as socially remote from the majority of the people. Unless they could refer their cases to a government official during an infrequent patrol, litigants were forced to go to distant administrative headquarters. The effort to take the parties concerned with their witnesses, combined with distrust of the outcome, limited the number of cases taken to administrative courts. Even so, 15,000 cases were heard in courts of native matters and of native affairs in 1962 but these courts dealt with only a small fraction of the disputes which arose.

The majority of these cases were those designated in government regulations as criminal. The main task of administrative officers, known by the Pidgin term *kiaps*, was to enforce the native regulations and Murray, in a circular instruction to field staff, dated 4 June 1925, regretted that: 'The perpetual round of prosecution and imprisonment is the least attractive feature of our Native Administration'.[16] Administration officers often acted as policeman, prosecutor, defending officer, judge and jailer. They were inclined to accept the evidence of their own officials, village constables and *luluais*, and this could lead to serious abuse of power by the latter. Procedures were simple and informal and they maintained records mainly for criminal cases.

Civil cases were usually without an informal court hearing and no records were kept. Lack of records made it possible to reopen a case as opportunity arose. Lacking time and knowledge of village situations to enable them to unravel the complexity of customary disputes[17], white magistrates tended to deal with symptoms

rather than causes. They treated disputes as being affairs of individuals rather than of groups. This lead to 'subordination of group welfare to personal advantage' without a parallel increase in personal responsibility.[18]

The justice administered by the courts was often 'rough' and the *kiaps* acting as magistrates arbitrary and harsh, which caused concern to Murray, who kept a close watch over their activities. In his Circular Instruction No.41, printed with the Native Regulations Ordinance and Native Regulations of Papua, Murray said that he had heard unofficially that a magistrate had 'brow beaten (*sic*) witnesses and accused persons by threats of personal violence, by curses, and even by blows'.

After 1945, many officers who had trained at the Australian School of Pacific Administration had a good understanding of the nature of local societies.[19] Whatever their weaknesses, these courts created some awareness of government law and provided a simple and informal kind of justice which was in some measure understood and accepted by the more sophisticated elements in the population.

Unlike the British in Papua, the Germans conferred judicial powers on New Guinean officials. In pre-contact times, *luluais* had been war leaders in the Gazelle Peninsula, possibly with a special role for settling disputes, and these officials were known by this title. Dr Hahl, judge and later governor, laid down their powers and duties in a proclamation to native magistrates dated 18 July 1903. They were empowered to hear all except serious criminal cases and cases relating to land, divorce and inter-village warfare. In some areas at least, *luluais* were chosen by the people. They had administrative as well as judicial functions. While the Germans were not satisfied with the judicial work of *luluais*, they regarded the system as preferable to open disorder. In theory, but only to a limited extent in practice, German officials heard cases outside the jurisdiction of *luluasi* and acted as courts of review and appeal. Some missionaries and other unofficials were also given judicial powers.[20]

The Australian military administration retained the German system of native administration with little understanding of the policies behind it. *Luluais* continued to hold courts, but the Mandate administration made no provision for granting legal powers to *luluais* when it issued its first regulations under the

Native Administration Ordinance. In 1924, Colonel John Ainsworth of the British Colonial Service pointed out in his *Report on the Territory of New Guinea* that *luluasi* were continuing to hold courts, sometimes with the approval of field officers, and recommended that they should be given legal authority to do so. Murray commented with scathing irony that he did not 'know of any part of Papua where native administration of justice could be introduced with any prospect but the certainty of absolute failure' and could only draw the conclusion that the 'natives of the Territory [New Guinea] must be many centuries in advance of the natives of Papua'.[21]

No action was taken on Ainsworth's recommendation but during the 1920s *kiaps* encouraged *luluais* to act as dispute settlers. In 1930, the *New Guinea Annual Report* (p.95) said that: 'The appointment of paramount chiefs is part of the scheme which has for its object the ultimate establishment of a native magistracy'.

From 1935, *kivungs* or councils were established in the Gazelle Peninsula and these were also required to settle disputes. By 1938, the Mandate administration had decided not to develop this institution. The Annual Report for that year (p.38) said that the *kivungs*' 'sense of justice is impaired, and they incline to leniency in favour of themselves'.[22]

In a letter to the Administration dated 11 October 1946, F.B. (later Sir Beaumont) Phillips, the Chief Justice, who had formerly been a judge in New Guinea, said that:

> . . . attempts to entrust the councils with magisterial duties had had to be abandoned because the councils had shewn themselves as yet incapable to dispensing justice in the way we feel that justice should be done.

Until his death in 1940, Murray continued to oppose the grant of any judicial powers to Papuans because he considered that they were unfit to exercise them. From 1929 Papuans could be appointed to sit as assessors but this practice, although initially successful in a few areas, was not widely adopted and lapsed.

Persistence of Traditional Methods of Dispute Settlement

As a result of the failure of the official judicial system to meet the needs of the people, traditional methods of dispute settlement have persisted. The introduction of colonial rule has caused many

changes to occur in indigenous societies. The solidarity of these societies and the authority of village leaders have been progressively weakened by a number of factors. The threat of warfare has disappeared or been reduced and village societies have been deprived of the use of force by colonial laws. The scale of social relationships has been enlarged and people, who were originally men only but increasingly include women, can escape to centres of employment from what many regard as the oppressive nature of village life. The spread of Western education has lessened the respect of younger generations for their less literate elders. The formal adoption of Christian morality may have removed the traditional sense of sin and the consequent need to expiate certain kinds of offences against kin groups and religious beliefs.[23]

In many areas, disputes are settled on public occasions at unofficial but formal 'courts'[24], although formality is lacking in some areas.[25] In the Eastern Highlands, unofficial 'courts' were developed by newly appointed *luluais* and other officials as a result of the 'fear and anxiety' experienced at the coming of white government. Supported by evangelists and New Guinea police, these 'courts' were 'believed to have the power to enforce punishment and exact compensation'.[26] The degree to which an official or other powerful person influenced decisions varied greatly.

Before World War II, among the Siuai of Bougainville, local officials were encouraged by *kiaps* to deal with minor matters and 'these hearings contain all the elements of actual trials, with judgments being passed and executed by the presiding native officials'.[27] Societies are affected in differing degrees by Western influences. In West New Britain, government appointed officials do not play any special role in dispute settlement among the Sengseng, while there was 'an open imitation of a European court system' over which 'a government-appointed official usually presided' in some villages among the Kove.[28]

In many areas, patterns of dispute settlement were greatly affected by the establishment of local government councils when, with few exceptions, the posts of village constables and *luluais* were abolished. Unlike these officials, local government councillors were elected representatives sitting as members of autonomous bodies, albeit strictly controlled by the central administration.[29]

While with rare exceptions they enjoyed neither legal responsibility nor legal powers outside the council chamber, they

frequently became regarded as the principal dispute settlers for their area. Administrative officials regarded the judicial functions of councillors with an ambivalence which reflected the dilemma in which the officials were placed. While the distinction was a narrow one, councillors could lawfully mediate in disputes but, if they held a 'court' and especially if penalties were imposed, they were acting illegally. In the Kuma area, district officials at first discouraged councillors from involving themselves in dispute settlement, but when in consequence a very large number of cases were referred to the district officer, they encouraged them to mediate.[30] In the Hagen area councillors and their aides regarded themselves as part of the official judicial system.[31]

At least two unofficial 'courts' maintained records of their proceedings. The Hanuabada Council had been settling disputes with some formality since 1927.[32] When in 1950, a local government council was established in Hanuabada, which lies within Port Moresby City boundary, a disputes committee was formed. The opinion of each member was recorded and the committee showed great wisdom in adapting the principles on which their society was organised to changing conditions. The committee gradually ceased to function in the 1960s because lack of power to enforce its decisions rendered it ineffectual.[33]

The *Warkurai ni gunan* was also an unofficial court which followed formal procedures and kept records. It developed in the Gazelle Peninsula in the early 1970s in response to political disturbances as official courts broke down. It has achieved considerable authority and members of all races appear before it.[34]

After 1945, unofficial 'courts' performed an essential function but their lack of formal powers made their decisions unenforceable. If dissatisfied with local decisions, disputants were often reluctant to take their complaints to official courts either because they mistrusted them or because the effort was too great. They might then resort to self-help. Because these 'courts' were unofficial, their activities were unsupervised and abuses occurred.

Proposals for Village Courts

When the Second World War ended, the Labor Government in Australia set out to establish a system of local government in the now united Territory of Papua and New Guinea and the first local

government council was established in Hanuabada near Port Moresby in 1950. The Australian Government also intended to set up a system of native courts on the British model to complement the local government system. A Bill was drafted in 1946 and provision was made for the establishment of 'native village courts' in the Papua New Guinea Act enacted by the Australian Parliament in 1949.

The 1948-9 Annual Report (p.24) declared the colonial administration's intention to recognise existing tribunals.[35] These proposals were opposed by the judges and by the Secretary for Law.[36] In 1954 a Native Courts Bill[37] was considered but it was again opposed by judges and law officers, who were supported by the Minister, Mr P.M.C. Hasluck, who had taken over a newly formed Department of Territories in 1951. A final decision not to proceed with the Bill was made in 1955.[38] The grounds for their opposition were those which had been expressed when the issue was first raised and which would continue to be expressed until the end of the colonial period.

Opponents of village courts were convinced that such courts would be partial and corrupt. This view, which he justified by reference to the pre-war *kivungs* in the Gazelle Peninsula, was consistently expressed by Phillips[39] and also by his successor, the late Sir Alan Mann.[40]

There was concern that the principles of British justice should not be jeopardised, but as in other British dependencies, not British justice but a kind of British colonial legal and justicial system had been instituted. British common law, as characterised by trial by jury, the writ of *habeas corpus*, the independence of the judiciary, and administrative action only under authority of the law was 'received' but not applied in Papua New Guinea.[41] Later, as a result of reforms resulting from the Derham Report[42], the legal system was brought closer to the common law model but only to a limited extent. It is still true that 'the common law has not played a significant role in the legal system in Papua New Guinea'.[43]

Colonial judges and legal officers have assumed that the Papua New Guinean legal system would develop in the direction of modern Western law without taking into account cultural differences.[44] Phillips wrote: 'I happen to believe in our law and its administration and in their adaptability to the conditions of this

Territory.'[45] The logic of this assertion demanded that the whole society should change in the same direction and this was recognised by Mr Justice J.R. (later Sir John) Kerr in a lecture given in 1968. After a sympathetic discussion of the problems of administering justice in Papua New Guinea, he concluded:

> To solve the enormous legal problems from the future constitution down to the village level requires the virtual destruction of the local cultures and this must depend on economic development, education and experience over long years.[46]

The nature of the system of local justice which was being opposed was generally misunderstood. This misunderstanding was largely due to a reluctance which persisted even while the Village Courts Act was being drafted to examine other and especially British models.[47] Hasluck[48] referred to 'a system of customary native courts outside the regular judicial system', to which Fenbury replied:

> . . . the type of procedure envisaged for the conduct of native courts was the simplified but essentially British procedure long used in Courts for Native Matters and Native Affairs.

A more fundamental cause of misunderstanding was the Australian style of centralised administration, which was based, *inter alia*, on mistrust of Papua New Guinean capacity and institutions.[49] The British did not merely retain traditional chiefly courts as Australian administrators such as Sir Hubert Murray[50] thought, but tried to develop courts among even the simplest societies. As Lugard the African pro-consul, wrote:

> It may hardly seem worthwhile to set up a crude tribunal consisting of naked Pagans, who can hardly be called Chiefs, and have but limited control over a few families, but from such small beginnings alone it is possible to create the rudiments of law and order, to inculcate a sense of responsibility and to evolve among a primitive community some sense of discipline and respect for authority.[51]

From such beginnings, systems of formal courts, with provision for appeals and review and defined jurisdiction, were developed in Africa and elsewhere.[52] Absence of determination to 'inculcate a sense of responsibility' was at the root of the village courts issue.

Hasluck had a clear conception of Papua New Guinean attitudes to law and justice:

> . . .the native people, especially those in the newly opened areas, had

> little or no idea of justice as a concept with some merit in itself. They were more interested in fixing up the situation created by what we would call an anti-social act.[53]

He was not prepared to let them 'fix up situations' themselves. He accurately described the process of reaching a consensus[54], but he saw no value in 'government by jabber' as he described this process.[55]

The Derham Report

The Minister was dissatisfied with many aspects of the existing judicial system. He has recently provided a full account of his views and actions.[56] He had earlier been concerned at discrimination against Aboriginals in Australia[57], and was determined to abolish judicial and other forms of racial discrimination in Papua New Guinea. He upheld 'the idea of law as a code that applied evenly and justly to all citizens'.[58] He was appalled at the way in which justice was being made to serve administrative ends. One of his principle objections to the Native Courts Bill was that the courts would be supervised by *kiaps*. He also feared that a black elite would replace a white elite:

> . . . leaving no greater liberty or freedom and possibly less just treatment for the subordinate indigenous population than they had under colonial rule. These were the main reasons why I wanted one body of law and one system of justice.[59]

In 1959 Hasluck invited Professor P.D. Derham of Melbourne University 'to inquire into the existing system of the administration of justice in the Territory of Papua and New Guinea' and to 'make suggestions for its improvement'. After spending five weeks in the Territory, Derham produced his report in December 1960, emphasising that it should only serve as a basis for further inquiry. During his brief stay, Derham tried to cover as wide a spectrum of public opinion as possible, but inevitably his consultations were predominantly with judges, law officers and senior field officers. His views were in close accord with theirs and with those of the Minister as expressed in a memorandum written in 1955 opposing the native courts proposals.[60] In one section at least, his wording closely followed that of the Minister.[61] In agreement with Hasluck, Derham found that the basic weakness in the judicial system lay

'in the relations between the executive and the judicial arms of government at all levels'.[62]

As a result of this conclusion, Derham recommended that the police should be removed from public service administrative control.[63] Because local government councils held unofficial 'courts' and their power to appoint constables might lead to abuse, he considered that the 'overall picture . . . gives some cause for alarm'.[64] In nearly all areas where councils had been established, the posts of *luluai* and village constable had been abolished, but councils were empowered to appoint their own constables. Through lack of support by *kiaps* this provision was often ineffective, but its removal left responsibility for public order with the central government police alone. Derham recommended that responsibility for maintaining law and order should be removed from local councils and this was done under the Local Government Ordinance 1963.

Official policy was to maintain public order by establishing rural police stations throughout the country, but by 1973 only 40 rural stations had been established, of which 15 were in the Mount Hagen area. In the early 1960s, the majority of native regulations were repealed, thus removing the legal basis for governmental authority in the villages. As a result of these changes, the Australian administration left itself virtually without means of law enforcement at the village level.

To improve the judicial system, Derham carefully examined the desirability of establishing native courts on the British colonial model. The arguments in favour of a native courts system were put forward by the late D.M. Fenbury[65] in a memorandum written in 1955 in answer to the Minister's objections to the Native Courts Bill.[66] He argued that official courts heard 'only a fraction of the total causes which arose'. The Australian administration had given *de facto* recognition to the existence of 'traditional magico-judicial machinery for settling disputes *within the group*'. Social change had produced a more sophisticated form of leadership in villages and those who settled cases extorted payment from all parties but were not 'viciously corrupt'. He concluded by arguing that it was essential to legitimise these 'illicit' tribunals so that they might be controlled.

Derham summarised these arguments and added the further arguments in favour of native courts that official courts were not

competent to apply native customs and that the technicalities of English law were not understood by natives and not suitable for application to matters concerning them.[67] His main grounds for rejecting proposals for establishing native courts were that they were an 'elaborate sham' providing the appearance of judicial bodies but 'covering the substance of the exercise of executive discretion'. Three of his seven grounds for rejection were concerned with administrative interference. He, in common with other legal authorities, feared that the proposals for native courts might 'undermine the principles which the Australian Government commonly accepts with respect to the administration of justice'.[68]

Derham regarded customs as rules which could not 'meet the needs of the native communities not only as they are now but as they will be':

> Once outside the sphere of clearly established customary rules, the question becomes one not of taking account of native custom but one of deciding who shall decide new problems as they arise. Is the native community to decide? or is some agency of the Central Government to decide? If we are committed to the development of a self-governing community comprehending the whole Territory then it must be the latter. If this is so then more precise direction as to what is meant by native custom will have to be given.[69]

As Fenbury pointed out in his Comments on Certain Aspects of the Derham Report, the diversities of customary practice would stultify such central government direction. Fenbury saw redefinition of custom through council rules as the 'only feasible way in which customary usages can be legally veered towards Western concepts'. The root of the problem was the concept of custom as a law or rule rather than as the application to particular circumstances of the principles which governed the society concerned.

Derham did not fully come to grips with the problem presented by the hiatus in the judicial system and by the existence of 'illicit' courts. He recommended that summary jurisdiction courts specially concerned with native matters should be established as 'an ordinary part of the judicial system'. They should administer ordinary law adapted to local conditions; native custom should be taken into account in matters which should be specified; proper appeal procedures should be established; and the distinction between native courts and other courts of summary jurisdiction should disappear as soon as possible.[70] He also recommended that local

magistrates should be appointed, including untrained men of character and standing who were fluent in English.[71]

Local Courts

The Minister's solution to the problems raised by Derham was to abolish courts for native affairs and to establish local courts with a 'relatively low limit of jurisdiction' which would 'operate under simplified rules of procedure' and 'be empowered to apply native custom in appropriate cases'. Papua New Guineans would be trained as local court magistrates.[72] In 1963 a Local Courts Act was enacted and courts for native matters and for native affairs were abolished.

Under section 13(1) of the ordinance, the courts were empowered to deal with all offences which could be dealt with summarily and all civil actions at law and in equity. The Act was not brought into force until 1966. It failed to provide, as the Minister hoped, a system of justice which was a 'Papuan and New Guinean institution with steadily increasing participation by the indigenous people'.[73] The local court policy suffered from conceptual, procedural and administrative weaknesses. It required that Western procedures should be followed, including the conduct of 'adversary-type' trials, but in practice magistrates are often required to fill an inquisitional role. One of the most serious weaknesses of the system was the failure of the ordinance to make any provision for supervision of local court magistrates by senior magistrates.[74] Simple cases, involving for example a few insulting words, are often remanded for a month to allow witnesses to be heard. Police prosecutors are sometimes barely literate and have to be helped by magistrates to carry out their tasks.[75] Appeals lie only to the National Court and few appeals are made, although there has been some increase in recent years.[76]

Local courts are excluded from hearing land matters under section 13(1)(c), but they can make provisional orders relating to occupation and use of land under section 15(a) of the Land Titles Commission Act. This provision was in accordance with the established policy of excluding land matters from the jurisdiction of lower courts. Land boundaries had been frozen when colonial rule was established and the possibility of purchase by the colonial administration gave a potential cash value to large areas of land.

These factors gave rise to a very large number of disputes which a Native Land Commission, established in 1952 with a very small staff, proved incapable of settling. Derham considered that: 'This situation amounts to a complete breakdown of the system of the administration of justice where questions concerning land are concerned'.[77]

A Land Titles Commission was set up in 1962, working through appointed demarcation committees of local rightholders, but resources in men and money were totally inadequate. There was therefore a serious hiatus in the judicial system which the Local Courts Act did nothing to fill.

Local courts could have operated more effectively if they had been given adequate financial and other forms of support by the Australian administration and the successor government. One problem has been lack of magistrates. Papua New Guinean magistrates are trained at the Administrative College but by 1973 only 90 magistrates had been appointed and a further 100 were needed to replace part-time administrative magistrates.

Until the enactment of the Local Courts Act no action had been taken on the suggestion made by Phillips in 1946 that indigenous people should be trained as magistrates. The late development of secondary education and a shortage of people with administrative experience restricted the supply of suitable people. The number of courts was not increased and the people had as far to go to obtain justice from local courts as from courts for native matters and native affairs. Lack of transport often prevented magistrates reaching the people[78], even at times within the boundaries of Port Moresby.[79] Magistrates are poorly paid[80] and a number of magistrates have been dismissed for corruption.

As a result of the failure to train enough local magistrates, *kiaps* have continued to preside over local courts. This has led many people, especially in politically aware areas such as Bougainville and the Gazelle Peninsula, not to accept these courts.[81] No attempt has been made to train and employ court clerks provided for under section 51 of the Act and the need to keep their own records imposes a heavy burden on magistrates and causes delays. In general, insufficient finance has been made available to ensure the efficient operation of the judicial system. If considerably greater resources had been made available, local courts might have functioned more efficiently and their numbers might have

increased. It would not have been possible to have developed what is fundamentally a Western judicial system to bring justice within easy reach of the mass of the population.

The most serious attempts to meet people's needs were incorporated in the mediation provisions contained in sections 31-33 of the Local Courts Act. Local magistrates may appoint local elders and others to assist in mediating disputes and amicable settlements can be embodied in a court decision. When attempts at mediation fail, evidence heard at such proceedings is not, under section 33, admissable at any court.[82] Except for a general understanding of Melanesian ways of thought, Papua New Guinean magistrates are often cut off from people by difference of language and custom and many have been reluctant to intervene in civil disputes for this reason.

One successful operation of local courts should, however, be noted. Under an energetic and sympathetic district magistrate, local courts toured the Gazelle Peninsula, visiting at their peak 81 places and always sitting with important local people. The magistrates themselves were drawn from the local population and therefore spoke their language and understood their customs.[83] The transfer of the magistrate and political unrest brought the tours of these courts to an end. This was one of the factors which gave rise to the *Warkurai ni gunan* described on page 58.

Assistant magistrates may be appointed under the Local Courts Act. Under section 7(2) they 'may sit with the Court but... shall not take part in the proceedings and shall not take part in the decision'. They are also empowered under regulation 6 of the Local Court Regulations to receive complaints and issue summonses to defendents and witnesses, meanwhile binding over those involved to keep the peace. By 1972, 140 assistant magistrates had been appointed[84], but this number represented only a fraction of those needed to provide a magistrate for each village. Their powers were too limited for them to be effective. At least one magistrate exceeded his limited powers and organised a circuit of formal courts in a number of villages. This activity was greatly welcomed by the people concerned but was suppressed by the Assistant District Commissioner because the magistrate was exceeding his jurisdiction.[85]

The Local Courts Act and the complementary District Courts Act introduced a multi-racial judicial system, although initially to

a limited extent. Provisions in the former Act made it possible for an expatriate to avoid having his case heard by a local magistrate, because section 34(c) in relation to civil cases and section 38(c) in relation to criminal matters provided that a defendant could elect to have his case heard before a district court. Until recently the majority of district court magistrates were Europeans. As Papua New Guineans are appointed as district magistrates, the remnants of discrimination are disappearing.

The Establishment of Village Courts

In 1963 an inquiry into district administration concluded that the 'predominant view' of Papua New Guineans was against conferring judicial powers on local lay magistrates, in spite of requests from many local government councillors that such powers should be granted. Demands mounted from prominent individuals such as John (now Sir John) Guise[86], from local government council conferences and from members of the House of Assembly. It also became apparent that in areas such as the Gazelle Peninsula and Bougainville, systems of courts were developing which removed the areas concerned from the control of the colonial administration.

A new Secretary for Law, L.J. Curtis, appreciated the weakness of the existing judicial system. In 1971 he and an official of the Department of External Territories in Canberra produced a report favouring establishing village courts and recommending that a further enquiry should be held. They were impressed with the general demand for village courts and were also concerned with the absence of any law-enforcement structure at the village level. They noted the failure of the administration's 'package' deal involving development of a trained local court magistracy throughout the country, extension of police into rural areas, removal of *kiaps'* judicial and police powers and the abolition of village constables and *luluais*.[87]

A committee consisting of an expatriate magistrate, R.N. Desailly and a local magistrate, Francis Iramu, strongly recommended the establishment of a system of village courts and a White Paper presented to the House of Assembly in September 1972 was debated and approved in November of the same year.[88]

The first draft of a Village Courts Bill was a very weak instrument which did little more than provide official recognition for

existing unofficial mediatory procedures. Dissatisfied with its provisions, Barry Holloway, Speaker of the House of Assembly, called a series of meetings of ministers, senior officials and others to discuss the draft. Nearly all proposals for strengthening the courts were accepted by the Secretary for Law, W. Kearney.

The Village Courts Act 1973 provides that the Minister for Justice may declare village court areas, which usually comprise several wards within a local government council area. After consultation with local government councils and others, the district supervising magistrate recommends the names of between three and 10 magistrates to the Minister for Justice. In practice, village people are close to electing their magistrates. The people of a Highlands village court area, for example, elected their magistrates.[89] The district supervising magistrate is required under section 12 of the Act to appoint a village court clerk. Inclusion of this requirement was sought at Holloway's meetings because, without records, those dissatisfied with the decision of a court could constantly try to reopen issues already decided. Magistrates and court officials are not paid salaries but are granted small *honoraria*.

Under section 19 of the Act:

> The primary function of a village court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes.

Under section 23(1), the only disputes excluded from this jurisdiction are those relating to land and those in which motor vehicles are involved. Under section 23(2), however, village courts are empowered to make orders relating to the occupation of land pending a decision by land courts. Cases relating to motor vehicles are excluded from the courts' jurisdiction and damages and compensation are limited to $100. These limitations were included because it was the intention of those drafting the Act that village courts should deal only with the customary, and not the modern, sector of the economy. There is no limit to the compensation which may be awarded in matters relating to custody of children, brideprice or compensation for death. If groups are involved it was the intention of those drafting the Act that $100 may be awarded against each member of the group which may amount to a consid-

erable sum, but there is some doubt whether the Act may bear this interpretation.

Under section 24(2) parties to a dispute may also be ordered to work for the benefit of an aggrieved party. Under section 57(4), a village court may hear claims for compensation even if the issue giving rise to it has led to a criminal conviction in a higher court.

Provision is made under Section 25 for criminal jurisdiction – an issue hotly debated during the Holloway meetings. Iramu, in a minority report, had opposed the grant of any criminal jurisdiction.[90] Those in favour argued that, while the line between civil and criminal matters is often marginal, village people needed power to hear and punish certain offences. The courts have jurisdiction in respect of offences described in the Village Courts Regulations 1974. These include minor theft, assault, insults, intentional damage and failure to perform customary obligations as ordered by village magistrates. They may also deal with breaches of local government rules if the rules so provide and also with failure to keep the peace if the offender has been ordered to do so under section 65. Penalties are limited to fines of $50 or community work for a period of up to four weeks. Imprisonment for up to one month, subject to endorsement by a higher court, may be imposed for failure to comply with a court order.

Village courts are responsible, under section 39, for determining their own procedures and, under section 31, are not to apply 'technical rules of evidence'. Lawyers are excluded from the courts, although parties may be otherwise represented, and prerogative writs, with the exception of *habeas corpus*, do not lie against actions by them. Appeals lie to higher courts and the magistrate must sit with at least two village court magistrates to form an appeal tribunal. Grounds for appeal are limited to matters such as the court not being properly constituted or the court exceeding its jurisdiction and also 'a substantial miscarriage of justice'. District supervising magistrates may review decisions of appeal tribunals.

The appointment of village peace officers may do much to close the gap in the authority structure left by the removal of village constables and *luluais*. Against the wishes of those attending the Holloway meetings, a district supervising magistrate is not required to appoint peace officers but may do so. Their appointment appears to be standard practice. Besides acting as officers of the court, peace officers are expected to keep the peace within

their court area. They have powers of arrest and, under section 67, 'the same powers as a constable at common law'.

After the Village Courts Act had become law, the government established a Village Courts Secretariat which did not initially set about the task of establishing village courts with any vigour but its work has gathered momentum. In six areas, (including the Kainantu area, represented in the House of Assembly by B. Holloway), court areas were arranged and courts began to sit before they were formally established. The first four village courts were inaugurated at Kainantu in 1974 and shortly afterwards seven village courts were established in the Rigo sub-district. By the end of September 1976, 246 courts had been or were being established and 1,101 magistrates, 275 peace officers and 255 clerks had been appointed.

The greatest problems of maintaining public order are liable to arise on the fringes of towns such as Port Moresby, where poor and heterogeneous migrant populations are living. For many years central government police only patrolled the central areas and accepted little responsibility for the fringes. In many respects these areas were virtually unadministered.[91] A district magistrate, Paul Quinlivan, tried to organise tours of local court magistrates as he had done so successfully in Rabaul. As a result of shortage of magistrates and of motor transport, combined possibly with the problem of alien magistrates administering justice to a heterogeneous population, the success of this experiment was limited.

During the three years following the establishment of the Port Moresby City Council in 1971, a number of approaches were made to the Australian administration seeking the establishment of village courts and of local peace officers in the urban area. The colonial administration resisted their proposals because it maintained that lay magistrates would not be able to settle satisfactorily issues in which different tribal customs were involved, in spite of the successful working of such courts in Africa and elsewhere.[92] In October 1975 village courts were established in Hanuabada, Baruni and Tatana.[93] These courts appear to be functioning well, although criticisms of the Tatana Court have been made by members of an opposing political faction.

Conclusion

As in Indonesia, the aim of legal policy in Papua New Guinea is 'to bring about a synthesis of the modern with the traditional systems'. The introduction of village courts is an attempt to close the gap between Western and indigenous systems, which are products of different cultural milieux. Village courts are not intended to be purely customary courts but to settle disputes and preserve order in the light of changing conditions.

These courts have been established too recently for an assessment of their impact to be made but some trends and problems are emerging.[94] They appear to be establishing their authority over local communities; in one Highlands area, 'the most powerful traditional big-man has twice been taken to court and fined' and the court's decisions have not been challenged by litigants.[95] The combination of magistrates and peace officers has given local societies more power to control their own affairs than they have held since the beginning of colonial rule.

The tradition of leadership through personal achievement has proved flexible in meeting the needs of changing conditions. Village magistrates and officials have been chosen from among the most vigorous and intelligent men of middle years rather than older men who may be repositories of customs. In one Highlands area: 'They are conscious of themselves as members of an elite taking care of an unsophisticated majority.[96] Disputes can be speedily decided in the presence of members of the community concerned. The new system relieves a sparsely spread central police force of responsibility for minor matters and leaves them free to act in a preventive role and to deal with more serious offences. In the Kainantu area, relations with the police greatly improved as a result of the establishment of village courts.[97]

The extent to which a system of village courts can be successfully spread over the whole country depends on the determination of the government and the skill and tact of its officers. Indeed the question has been raised as to whether or not village courts should be established in all areas. Lawrence[98] considers that courts will be most stable and effective in those areas where there is a great deal of litigation, and pressures and links between different groups prevent village magistrates from abusing their powers. In some areas, for example, in parts of the Madang Province, there is evidence that magistrates are corrupt because pressures are lacking.

The declaration of village court boundaries in accordance with the wishes of the people may cause problems. Minority groups may resent being included in the area of a larger group, although fair representation of groups among the magistracy may go far to overcome this.

A further problem, the multiplicity of courts, may then arise. Three villages within Port Moresby's boundaries decided each to have their own courts, whereas proximity and smallness of population would have justified only one court on administrative grounds. Too many courts may prove costly and difficult to administer but the problem may be overcome by patiently pursuing a policy of amalgamation of contiguous court areas. There is provision in the Act for people to be magistrates for more than one court area and more than one court can sit together to hear matters which involve people living in different court areas.

The extent to which village courts fulfill the aim of taking over the work of unofficial courts cannot yet be judged. Warren found that: 'The Village Court has considerably strengthened the existing system while formally replacing not very much of it'.[99]

One problem is the limited jurisdiction held by the courts. The Australian administration, in drafting the Village Courts Bill, was concerned to exclude matters relating to the modern sector from the courts' jurisdiction. In many areas, traditional and modern elements in social and economic life are inextricably mixed.

During the Holloway meetings it was argued that under its proclamation it should be possible to vary the powers of a court according to the degree of sophistication of the society concerned. While the Minister may vary a court's jurisdiction under section 22 of the Act, he may not alter the amount of compensation which is limited to $100 and a certain number of days' labour under section 24, nor may he vary the penalties which may be imposed under the court's criminal jurisdiction under section 26.

A.M. Strathern points out that in the Hagen area, $100 in compensation and $50 in fines are far below the amounts required to affect a settlement determined at unofficial 'court' hearings. She concludes that: '. . . it would be disastrous . . . if the new courts failed to encompass the kinds of settlements which are the main achievement of present unofficial courts' because ceilings are too low.[100] As a result of a general demand throughout the country, the Village Courts Secretariat is preparing a recommendation

that maximum compensation should be increased to $500.[101]

Besides the problem of too limited powers, village courts may not, as Standish[102] points out for the Chimbu area, be able to settle disputes between clans and larger groups. An imaginative development of joint sittings of courts might overcome this problem. The exclusion of land matters from their jurisdiction in favour of the land courts which are being established may weaken their authority but it is possible that in practice many land matters will be referred to them. Under the Land Disputes Settlement Act 1975 it is specifically provided that a village magistrate may be appointed a land mediator under that Act and this is being done.[103]

Village courts will not provide an ideal system of justice and village magistrates and peace officers will often abuse their authority. Even if they are not corrupt, they may interpret customs in a way which is disadvantageous to individuals and groups. A village court in the Southern Highlands convicted a woman who had infringed a resurrected or invented customary ban against smoking by women. Local white officials were worried that village courts in such a conservative area might discriminate unjustly against women and strangers to the area and appealed as a test case. The district supervising magistrate granted the appeal on grounds of the village court's lack of jurisdiction, but he upheld the right of the village court to interpret local custom against the view of the reserve magistrate. The officials were also concerned lest village magistrates would use their appointments as a power base.[104] Changing local public opinion is likely in time to modify village magistrates' interpretations of custom and, in such societies, settlement of disputes is inseparable from the exercise of power.[105]

One of the main dangers which may affect the development of village courts is an overcautious and restrictive attitude towards them. Already a law student has intervened in the workings of the Hanuabada village court[106] and there is always the threat of interference on legalistic grounds. If their powers are too small or their interpretations of custom are too frequently upset on appeal, they will neither meet the people's needs nor replace existing unofficial 'courts'.

A further threat may develop as a result of the overlapping jurisdiction of village, local and district courts. A leading indigenous lawyer has said of village courts that 'urbanised and educ-

ated people should not be required to accept them'.[107] Whether such people could succeed in having their cases transferred from village to other courts has yet to be tested. Much would depend on the attitudes of the magistrates concerned.

The Australian administration stifled the development of local councils through over-fussy tutelage.[108] It is to be hoped that the Papua New Guinean Government will not repeat its predecessor's mistake in relation to village courts. Much depends on the way in which control is exercised and this should not be through formal appeals. One weakness of the Act may be that there is inadequate provision for informal supervision of village courts. It was argued at the Holloway meetings that former field officials should be appointed to tour village court areas and tactfully encourage and guide village magistrates in their work. Law officers continued to be opposed to any form of administrative intervention in the judicial field. Circulars distributed by the Village Courts Secretariat say that under section 72:

> Local Court Magistrates and the Senior District Court Magistrate in each district will see that the officials working in Village Courts do their work properly and themselves obey the Village Courts Act.

The Secretariat claims that inspections of all village courts are carried out monthly and a report including a statistical record is forwarded to them for further inspection.[109] The task of carrying out regular inspections may be beyond the resources of supervisary magistrates and in some areas, 'the district supervisory magistrates send out junior magistrates to do the supervision work to relieve the burden'.[110] The Act (section 80) provides for regulations to be made governing such matters as supervision but this has not yet been done. The future of village courts may depend on the quality of the guidance which is afforded them from above.

Referring to the court of requests, which tried cases by equity and good conscience unfettered by strict laws of evidence, Lord Brougham, a 19th century Lord Chancellor, said: 'I say they do good by comparison, better something of justice than nothing'.[111] He thus expressed the compelling argument in favour of village courts that they constitute what is probably the only present means of filling the hiatus in the judicial system.

The process of change has not necessarily been destructive of village societies and new forms of leadership have emerged. It has,

however, made it desirable to institutionalise unofficial tribunals and to endow them with legal powers because of the progressive weakening of the authority structure in villages. According to Paliwala's survey, monthly returns of cases heard in village courts indicate that courts are setting about their tasks in different ways. Some are making large numbers of compensations orders, others few; some impose many fines, others few; and some impose many community work orders, others few. The survey found that the courts emphasised their criminal powers rather than the need to mediate in civil matters, although Warren makes it clear that much mediation is unrecorded. Paliwala sees emphasis on criminal jurisdiction as the result of colonial attitudes.

These are, however, no longer traditional societies but ones whose scale has been enlarged to a national level. Traditional methods of dispute settlement may not meet village needs and in time a satisfactory balance between customary and introduced concepts may be struck. As Paliwala says: 'Problems are balanced by the present general popularity of the courts and their general success in maintaining peace in the villages'.

Wherever the legal systems of technically and economically highly advanced countries have been introduced into countries where formal systems of law are non-existent or rudimentary, problems of synthesising introduced law and custom have arisen. Newly independent states have sought unity of their internal law as an ideal.[112] In Papua New Guinea, if no answer to a legal question can be found in written law, the Law Reform Commission maintains that the answer should be sought in the sources of the underlying law, the first of these being 'customary Law'.

An important argument in favour of allowing village people to administer their own justice is that they can develop 'custom' based on the underlying principles on which their society is governed in the light of changing conditions. The power of local government councils to make rules is extended under section 29(3) of the Village Courts Act to declaring what the 'native custom' is relating to any matter. This provision could lead to a too rapid hardening of custom which, in times of radical social change, may be undesirable. It may be preferable to wait until a state of greater social equilibrium is reached before custom is codified.

In African and other former dependent countries there has been a move away from 'native courts' in favour of salaried

national magistrates but this does not mean that the system now established in Papua New Guinea is a retrograde one. It has been suggested by Mr Justice Telford Georges, who has had African experience, that achievement of independence will lead to an acceptance of official courts and remove the demand for courts at the village level. He stressed a need to build a national system.[113]

It is unlikely, in view of the fragmented nature of Papua New Guinean society, that higher courts will quickly become '*kot Bilong mipela*'. In Tanzania, village assessors are associated with full-time magistrates because the latter were found to lack understanding of local issues when sitting alone. The assessors may outvote the magistrate and are frequently upheld on appeal.[114] The flexibility of the village courts may, if fostered carefully, lead in time to the development of a truly Papua New Guinean system of law and justice.

Acknowledgements

My thanks are due to Peter Bayne, Jim Fingleton, Sao Gabi, John Goldring, Helga Griffin, Peter Lawrence, Abdul Paliwala and Tony Pryke for their comments on earlier drafts of this chapter.

---

1. P. Lawrence, 'Introduction' in R.M. Berndt & P. Lawrence (eds), *Politics in New Guinea* (Nedlands, 1971), p.3.
2. *ibid*
3. Paula Brown, 'From Anarchy to Satrapy', *American Anthropologist* 65, 1 (1963), pp.5-6; A.J. Strathern, 'Despots and Directors in the New Guinea Highlands', *Man* 1, 3 (1966), pp.365-67.
4. D.L. Oliver, 'Southern Bougainville' in R.M. Berndt & P. Lawrence, *op. cit.*, p.281.
5. P. Lawrence, 'The State versus Stateless Societies' in B.J. Brown (ed.), *Fashion of Law in New Guinea* (Sydney, 1969), pp.25-37; N.D. Oram, 'Law and Order', *New Guinea* 7, 3 (1973), pp.4-22.
6. A.L. Epstein, 'Law, Indigenous' in *Encyclopedia of Papua and New Guinea* (Melbourne, 1972), p.632.
7. Lawrence, 'The State versus Stateless Societies', *op. cit.*, p.32.
8. Whiting, *Becoming a Kwoma* (Yale University Press, 1941).
9. A.M. Healey, 'Paternalism and Consultation in Papua 1880-1960', *A.N.U. Historical Journal* 14 (1967), p.21.
10. *British New Guinea Annual Report* 1893-4, pp.52, 58.
11. W.A. Lalor, personal cummunication.

12. P.D. Derham, Report on the System for the Administration of Justice in the Territory of Papua and New Guinea (mimeo, University of Melbourne, 1960), p.27.

13. R.S. O'Rogan, *The Common Law in Papua New Guinea* (Sydney, 1971), p.7.

14. *British New Guinea Annual Report* 1898-9, p.62.

15. S.H. Johnson, 'Criminal Law and Punishment' in B.J. Brown (ed.), *Fashion of Law in New Guinea* (Sydney, 1969), pp.88-94.

16. Healey, *op. cit.*, p.23.

17. Derham, *op. cit.*, appendix B.

18. M. Reay, 'Changing Conventions of Dispute Settlement in the Minj Area' in A.L. Epstein (ed.), *Contention and Dispute* (Canberra, 1974), p.329.

19. Compare A.J. Strathern, 'When Dispute Procedures Fail' in A.L. Epstein (ed.), *Contention and Dispute* (Canberra, 1974), p.341.

20. C.D. Rowley, *The Australians in German New Guinea 1914-1921* (Melbourne, 1958), pp.215-19.

21. *ibid*, pp.227-8.

22. C.D. Rowley, 'Native Village Officials and Councils in the Territory of New Guinea', appendix J in D.P. Derham, *Report on the System for the Administration of Justice in the Territory of Papua New Guinea* (1960).

23. Oram, *op. cit.*, pp.8-10.

24. A.M. Strathern, *Official and Unofficial Courts Legal Assumptions and Expectations in a Highlands Community. New Guinea Research Bulletin No.47.* (Port Moresby, 1972), p.119-22, pp.148-51; Bowden, personal communication.

25. Compare M.W. Young, 'Private Sanctions and Public Ideology: Some Aspects of Self-Help in Kaluana, Good Enough' in A.L. Epstein (ed.), *Contention and Dispute* (Canberra, 1974), p.44.

26. R.M. Berndt, 'Political Structure in the Eastern Central Highlands of New Guinea' in R.M. Berndt & P. Lawrence (eds), *Politics in New Guinea* (Nedlands, 1971), pp.414-16.

27. D.L. Oliver, *A Solomon Island Society. Kinship and Leadership Among the Siuai of Bougainville* (Boston, 1955), pp.325-6.

28. A. Chowning 'Disputing in Two West New Britain Societies: Similarities and Differences' in A.L. Epstein (ed.), *Contention and Dispute* (Canberra, 1974), pp.175, 178.

29. N.D. Oram, 'Administration, Development and Public Order' in A. Clunies Ross and J. Langmore (eds), *Alternative Strategies for Papua New Guinea* (Melbourne, 1973), p.23.

30. Reay, *op. cit.*, pp.210-11.

31. A.M. Strathern, *Official and Unofficial Courts, Legal Assumptions and Expectations in a Highlands Community. New Guinea Research Bulletin* No.47. *op. cit.*

32. *Papua Annual Report* 1926-7, p.39.

33. T.E. Barnett, 'The Courts and the People of Papua New Guinea', *Journal of the Papua and New Guinea Society* 1, 2 (1967), p.98; N.D. Oram, Field Notes (1962-75).

34. J. Goldring, 'White Laws, Black People', *Australian Quarterly* 43, (3) (1973), pp.9-10.
35. L.P. Mair, *Australia in New Guinea* (Melbourne, 1970), pp.76-7.
36. Derham, *op. cit.*, p.28.
37. Redrafted by J. Lynch and D. Fenbury.
38. P.M.C. Hasluck, Justice in Papua and New Guinea, statement in the House of Representatives, 24 October 1961, Canberra.
39. F.B. Phillips, letter dated 11 October 1946 to the Administrator, Papua New Guinea re. the proposed Village Council Ordinance and the proposed Native Courts Ordinance (Law Department, Port Moresby); and letter dated 24 November 1955 to the Administrator, Papua New Guinea, re. Native Courts (Law Department, Port Moresby).
40. N.D. Oram, Field Notes (1962-75).
41. P. Bayne, 'Legal Development in Papua New Guinea: the Place of Common Law', *Melanesian Law Journal III* (1) (1975), pp.10,12, 21.
42. See under next sub-heading.
43. Bayne, *op. cit.*, pp.29, 31.
44. Goldring, *op. cit.*, pp.5, 9, N18; P. Bayne, *op. cit.*, pp.36-9.
45. Phillips, letter dated 24 November 1955.
46. J.R. Kerr, Law in Papua New Guinea, The Australian Institute of International Affairs (1968), p.23.
47. N.D. Oram, 'Administration, Development and Public Order', *op. cit.*, p.5.
48. Hasluck, *op. cit.*, p.4.
49. N.D. Oram, 'Administration, Development and Public Order', *op. cit.*, pp.4-5.
50. J.H.P. Murray, 'The Machinery of Indirect Rule in Papua' in *Essays in Honour of Gilbert Murray* (London, 1928).
51. Quoted in M. Perham, *Lugard. The Years of Authority 1898-1945* (London, 1960), p.462.
52. H.F. Morns & J.S. Read, *Indirect Rule and the Search for Justice* (Oxford, 1972).
53. P.M.C. Hasluck, *A. Time for Building* (Melbourne, 1976), p.179.
54. 'The men sat around talking. They all seemed to be talking at once. Voices rose in excitement or they subsided to murmers. The gathering often went on for hours. Then all at once as though some had said, "well thats it, lets go" the confabulation ceased. They were of one mind.' *ibid*, p.166.
55. *ibid.*, p.170.
56. *ibid.*, pp.173-191, 343-56.
57. P.M.C. Hasluck, *Black Australians: a Summary of Native Policy in Western Australia 1829-1897* (Melbourne, 1970).
58. Hasluck, *A Time for Building*, *op. cit.*, p.348.
59. *ibid.*
60. *ibid.*, pp.187-91.
61. Derham, *op. cit.*, para 43(c)(iv).
62. *ibid.*, p.5.
63. *ibid.*, p.7.

64. *ibid.*, pp.62-6.

65. Fenbury, who has been described by Hasluck as 'the chief exponent of a comprehensive system of native courts', had been seconded to Tanganyika and the British Colonial Office after the Second World War. He had been mainly responsible for establishing local government councils and had drafted the Native Courts Bill.

66. Derham. *op. cit.*, appendix 6.

67. *ibid.*, pp.30-1.

68. *ibid.*, p.31.

69. *ibid.*, pp.34, 36.

70. *ibid.*, pp.36-7.

71. *ibid.*, p.33.

72. Hasluck, *Justice in Papua and New Guinea, op. cit.*, pp.6, 7.

73. *ibid.*, p.3.

74. T.E. Barnett, 'The Local Court Magistrate and the Settlement of Disputes' in B.J. Brown, *Fashion of Law in New Guinea* (Sydney, 1969), pp.181-215.

75. N.D. Oram, Field Notes, 1962-75.

76. Bayne, *op. cit.*, p.23.

77. Derham *op. cit.*, p.81.

78. For example, Gima Maro, A. Paliwala, L. Blaxter, 'Mediation of an Ancient Land Dispute', *Melanesian Law Journal* 3(2) (1975), pp.359-60.

79. P. Quinlivan, personal communication.

80. G. Nash, The Development of the Magistracy in Papua New Guinea (mimeo, International Commission of Jurists, Port Moresby, 1967).

81. Compare Goldring, *op. cit.*, p.7.

82. Barnett, 'The Local Court Magistrate and the Settlement of Disputes', *op. cit.*, pp.170-2.

83. P. Quinlivan, 'Local Courts in Papua New Guinea: Bringing Justice to the Villages', in Jean Zorn & P. Bayne *Lo bilongol Manmen* (Port Moresby, 1975), pp.61-4.

84. *Papua Annual Report*, 1971-2, p.52.

85. Barnett, 'The Courts and the People of Papua New Guinea', *op. cit.*, p.99; N.D. Oram, Field Notes 1962-75.

86. L.K. Young, *Constitutional Development in Papua New Guinea* (International Commission of Jurists, 1971), p.62; International Commission of Jurists, *The Rule of Law in the Emerging Society* (Sydney, 1970).

87. Village Courts Secretariat, The History of Village Courts (mimeo, Konedobu), (a).

88. House of Assembly Debates, 14 November 1972, p.1072; 20 November 1972, pp.1163-8.

89. M. Warren, *The Introduction of a Village Court. IASER Discussion Paper No.2* (Port Moresby, 1976), p.3.

90. R.N. Desailly & F. Iramu, Inquiry into the Need for Village Courts and Village Constables, (mimeo, Law Department, Port Moresby, 1972).

91. N.D. Oram, *Colonial Town to Melanesian City, Port Moresby, 1884-1974* (Canberra, 1976), p.225.

92. See, for example, A.L. Epstein, *The Administration of Justice and the Urban African* (H.M.S.O., London, 1953).

93. N.D. Oram, Field Notes, 1962-75.

94. The only detailed publication on the workings of a single village court is 'The Introduction of a Village Court' by Neil Warren, 1976. In 1976 A. Paliwala wrote a survey of village courts based on enquiries by law students in their own villages.

95. Warren, *op. cit.*, p.10.

96. *ibid.*, p.5.

97. B. Holloway, personal communication.

98. Personal communication.

99. Warren, *op. cit.*, p.25.

100. A.M. Strathern, 'Sanctions and the Problem of Corruption in Village Courts' in Jean Zorn & P. Bayne (eds), *op. cit.*, pp.54-7.

101. A. Pryke, personal communication.

102. B. Standish, 'Warfare, Leadership and Law in the Highlands', in Jean Zorn & P. Bayne (eds), *op. cit.*, pp.104-25.

103. J. Fingleton, personal communication.

104. J. Martin, Some Notes on the Village Courts Based on a Visit to the Menda Sub-district 10th July 1975 (manuscript, University of Papua New Guinea).

105. A.J. Strathern, 'Despots and Directors in the New Guinea Highlands', *Man* 1(3) (1966), pp.356-67.

106. N.D. Oram, Field Notes, 1962-75.

107. P. Bayne, 'The Village Courts Debate' in Jean Zorn & P. Bayne (eds), *op. cit.*, p.41.

108. Oram, 'Administration, Development and Public Order', *op. cit.*, p.23.

109. A. Pryke, personal communication.

110. A. Paliwala, Village Courts in Papua New Guinea. Colonial Courts or People's Courts. (mimeo, Faculty of Law, University of Papua New Guinea, 1976).

111. O.H. Beale, 'Equity and Good Conscience', *Australian Law Journal* 10 (1937), p.349.

112. G.F.A. Sawyerr, 'Internal Conflicts of Laws in East Africa' in G.F.A. Sawyerr (ed.), *East African Law and Social Change* (Nairobi, 1967), p.160. See also J.S. Read, 'Customary Law Under Colonial Rule' in H.F. Morns & J.S. Read, *Indirect Rule and the Search for Justice* (Oxford, 1972), pp.167-212.

113. Bayne, 'The Village Courts Debate', *op. cit.*, p.40.

114. Compare Bayne, *ibid*; Yash Gai, personal communication.

5 Innovations in the Administration of Criminal Justice in Thailand

Dhavee Choosup

Introduction

Thailand is unique among countries in Asia in that it did not have a colonial heritage and was left free to develop its own system. The Thai legal system had its origins in the Code of Manu which was, in the ancient past, the prevailing law among the inhabitants of India and the neighbouring countries. This code was translated from Sanskrit into Pali, and from Pali into Thai and, in course of time, modified to harmonise with the needs and circumstances of the people. In particular, most of the original features peculiar to Hindu jurisprudence were left out so as to bring the code into line with Buddhism which was the state religion from time immemorial. Side by side, there grew up another set of rules developed from the actual decisions of the kings who administered justice in those times.

Although the country was never a colony of any colonial power, western influences began to creep in, and the latter half of the 19th century witnessed major social changes. Changes in the economic and social life of the country made the then existing laws unfit for the new conditions. A comprehensive law reform became overdue, and this was undertaken in the reign of King Chulalongkorn (1868-1910) who was one of the Thailand's most enlightened monarchs. A Ministry of Justice was set up in 1892 with a view to introducing a unified system of administering justice. The abuses and inconsistencies of the old system were dealt with by a succession of new enactments. For example, torture as a means of extorting evidence and obtaining confessions was done away with; flogging was abolished; and other forms of severe punishments were replaced by more humane penalties.

As trade with Western countries began to expand and develop, the need for a sound system of commercial law acceptable to the

country's trading partners began to be felt, and the laws of commerce were adopted from English Commercial Law.

For its general criminal law reform, the country turned to the continental tradition of codification, and the result was the Penal Code of 1908. Although this code was not an imitation of the prevailing penal codes of other countries, it owed much of its form and inspiration to the French, Italian and Indian penal codes. Under the code of 1908, six modern forms of punishment for crimes were recognised: death; imprisonment; fines; restricted residence; forfeiture of property to the state; and bonds for keeping the peace. The simplicity of its 340 sections proved of great practical advantage.

At the same time, there were enacted the Law of Evidence (1895), the Law on the Organisation of the Courts in the Provinces (1895), the Transitory Criminal Procedure Code (1896) and the Transitory Civil Procedure Code (1896). The latter two enactments were of a temporary nature till the proper codes were completed. While the Law of Evidence was based on the English model, the Act on Court Organisation was partly patterned on the French system. Where there was no existing Thai statute or precedent, the King's Court administered customary law. Laws in other fields such as revenue, mining and local administration were also passed during this era.

Inspite of royal absolutism in matters of government, the law remained curiously democratic in texture. When a new law was required, it was drafted in the form of a Bill by the department and the advisers concerned. The Bill was then submitted to the Council of State consisting of ministers and nominees of the King. This Council carried out the functions of a legislative assembly, and when a Bill was approved, it received the royal assent.

With the establishment of the Ministry of Justice in 1892, it might be assumed that a modern system of judicial administration was introduced. For the first time the judicial service was separated from, and became independent of, the executive service.

The revolution of 1932 changed the system of government from that of an absolute monarchy to a constitutional one patterned mainly on the British parliamentary system. Under a series of Constitutions that have been in force between 1932 and the present day, the changes made in respect of the judiciary were more related to inherent and constitutional power than to any

changes in the organisational pattern. Under these Constitutions, judicial power was exercised according to law and in the name of the King, who remained the fountain of justice. Judges were assured complete independence in conducting trials and delivering judgments. No special courts could have been or were established to try cases over which the ordinary courts had jurisdiction.

An interesting feature of the legal system in Thailand is noteworthy. In most of the countries of the Asian region, the laws, statutes and regulations were originally drafted and enacted in the languages of the ruling colonial powers. When these countries gained their independence in the post-war period, these laws were translated into the languages used in the respective countries. In some cases, they are still in use in the original English, French or Dutch versions, as the case may be, especially in the use of precedents and case law. In these instances, the thought processes that have helped in developing the laws have, inevitably, been Western oriented. In Thailand, the language of the law as expressed in its laws from ancient times was characteristically Thai. To those well versed in the language, it was a work of art with touches of literary elegance. The present day laws still continue to be couched in the sort of simple and precise language so essential to the clarity and certainty of the law. From the standpoint of legal interpretation, the wording of modern Thai law is considered by lawyers as being scientific yet practical. Unlike most branches of the technical language, it has hardly been affected by foreign influence.

New Developments in the Criminal Justice System

Thailand has undergone many political convulsions and changes during the post-war era, but it may be safely affirmed that the gradual development of the system of administering criminal justice has proceeded without changes in its basic structure and organisation in spite of the fact that there was a period during which the country was not governed in a proper democratic manner. However, with the adoption of a new Constitution in December 1974, the administration of criminal justice was placed on the solid foundation of certain constitutional guarantees, the purpose of which was, in the words of the preamble, to 'protect the rights and liberties of all people equally, and uphold the rule of law in order that justice may be accorded to all people'.

One section of the new Constitution enumerates certain fundamental human rights and legal principles which few other constitutions have deemed fit to mention specifically in such a vital document. The infliction of punishment, or the trial of offences, on a retroactive basis is forbidden, and the principle of the presumption of innocence is clearly accepted. Even the necessity of affording reasonable bail to accused persons is specified in the Constitution. Rights relating to arrest, detention, search and legal aid are also mentioned. The right of an accused person to a speedy trial or inquiry is made clear, as is also the prohibition of torture, threat and coercion as a means of obtaining evidence. The following sections are reproduced in order to show the emphasis and the supremacy placed on the administration of criminal justice by the Constitution itself:

Section 31: No person shall be inflicted with a criminal punishment unless he has committed an act which the law in force at the time of its commission provides to be an offence and imposes a punishment therefore, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of its commission.

Section 32: An alleged offender or an accused in a criminal case shall be presumed innocent.

Before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as an offender.

An application for bail by the alleged offender or the accused in a criminal case must be accepted for consideration and an excessive bail shall not be demanded. The refusal of a bail must be based upon the grounds specifically provided by the law, and the alleged offender or the accused must be informed of such grounds.

The right to appeal against the refusal of a bail is protected in accordance with the law.

A person being detained or imprisoned has the right to receive a visit as may be appropriate.

Section 33: Every person enjoys the liberty of his person.

No arrest, detention or search of a person, under any circumstances, may be made except by virtue of the law; provided that

the person so arrested or searched shall be notified without delay of the charge or cause together with reasonable particulars in respect of such arrest or search, and the detainee has the right to see and consult his advocate in privacy.

In making a charge against a person, there must be evidence sufficient to prove that such person is likely to have committed the offence in accordance with such charge.

In the case of detention of a person, the detainee, the Public Prosecutor, or other person acting in the interests of the detainee has the right to lodge with the court having criminal jurisdiction a plaint alleging that the detention is unlawful. Upon receipt of such plaint, the court shall forthwith proceed with an *ex parte* examination. If, in the opinion of the court, the plaint presents a *prima facie* case, the court shall have the power to order the person responsible for the detention to produce the detainee promptly before the court, and if the person responsible for the detention cannot satisfy the court that the detention is lawful, the court shall order the immediate release of the detainee.

Section 34: An alleged offender or an accused in a criminal case has the right to a speedy and fair inquiry or trial.

In the case where the alleged offender or the accused is an indigent person unable to afford the employment of an advocate for himself, such person has the right to receive aids from the State in accordance with the law.

Section 35: Every person has the right not to make a statement incriminating himself which may result in criminal prosecution being taken against him.

Any statement of a person obtained from torture, threat, coercion, or any act which causes such statement to be made involuntarily shall be inadmissible evidence.

Section 36: If it appears in a judgment of the court upon retrial of a case that the person who was inflicted with a criminal punishment by a final judgment was not an offender, such person has, subject to the conditions and procedure provided by the law, the right to receive compensation and to have all rights deprived by the judgment restored.

The Judiciary and the Courts

Under the present system the courts are organised in three categories: the courts of first instance; the Court of Appeal; and the Supreme Court. In Bangkok the courts of first instance are the criminal court, the civil court, the magistrates' courts and the central juvenile court. In the provinces, the courts of first instance are the Provincial courts, the magistrates' courts and the provincial juvenile courts.

Magistrates' courts: The primary function of the magistrates' court is to dispose of small cases quickly and with a minimum of formality and expense. Its jurisdiction is local and limited. It may try criminal offences punishable with a maximum of three years' imprisonment or fine not exceeding 6,000 Baht, or both, but it may not impose a sentence of more than six months' imprisonment, or a fine exceeding 2,000 Baht, or both, for any offence. Judges of the magistrates' court sit singly. There are generally two judges at each magistrates' court, but where the workload is exceptionally heavy and continuous, there may be more judges. For example, at the magistrates' court of the southern district of Bangkok there are eight. At present there are 20 magistrates' courts in Thailand; three having jurisdiction over the areas of Bangkok and Thonburi, and 17 over the central districts in the provinces where the volume of litigation is large.

Provincial courts: The provincial court exercises unlimited original jurisdiction in all civil and criminal matters including bankruptcy within its own district which is generally the province itself. However, the districts served by provincial courts are so arranged that in all parts of the country there is a provincial court within reasonable distance. Thus in some provinces, there are two provincial courts.

There are altogether 83 provincial courts. From three to 13 judges are assigned to each court, depending on the amount of work to be done. The quorum is two, except in interlocutory matters, where one judge constitutes the court. Only a single judgment is delivered.

The Criminal Court: The criminal court has unlimited original criminal jurisdiction. It acts as the court of first instance not only

for criminal cases in Bangkok and Thonburi, but also for criminal offences committed on the high seas and elsewhere outside the country but triable in the country, and for those committed in the provinces. Leave of court is required for criminal cases arising in the provinces, except those transferred there under the provisions of the Code of Criminal Procedure.

As in the case of a provincial court, a quorum consists of two judges, and subject to the same restrictions as those in a provincial court, its appeals go to the court of appeal and the Supreme Court. The criminal court consists of the chief judge and 45 judges.

The Court of Appeal: The Court of Appeal has appellate jurisdiction in all civil, bankruptcy and criminal matters. Appeals from all of the courts of first instance throughout the country come to this Court.

The Court consists of the Chief Judge and 74 judges. It is divided into 27 divisions, each having a senior judge and two other judges. Two judges form a quorum to hear appeals, except in interlocutory matters where one judge constitutes the Court. But in practice, the usual composition in ordinary appeals is three judges, and in appeals in interlocutory matters two judges.

Apart from the juvenile division of the Court, there is no exclusive jurisdiction in any matter given to any one division. Thus while all other divisions exercise all the powers of the Court of Appeal, the juvenile division deals with appeals in both juvenile and all other matters.

A single judgment of the Court is delivered. When opinions differ, the majority opinion prevails, but the dissenting judge may attach a dissenting opinion to the judgment.

An appeal on a point of law and, subject to certain specified restrictions, on a point of fact, lies from the Court of Appeal to the Supreme Court.

The Supreme Court: The Supreme Court is the final court of appeal in all civil, bankruptcy and criminal cases in the whole of the country. The Court consists of the president and 45 judges. It is divided into 14 divisions. There are three judges in each division, a senior judge and two other judges. Assignment of appeals are made to all divisions without specialisation. However, four judges with experience in juvenile matters are drawn from these divisions

to form a juvenile section which has exclusive jurisdiction over this type of appeal. Thus these four judges deal with appeals in juvenile matters while sitting in the juvenile section, and with other appeals when sitting in their own divisions.

The quorum in the Supreme Court consists of three judges except for appeals in interlocutory matters where one judge may sit. In practice, the usual composition in all appeals is three judges. A single judgment is delivered and the majority opinion prevails. Dissenting opinions, if any, are not attached to the judgments of the Court.

The Police Service

The police department has the following responsibilities:

1. The prevention of crime through both direct and indirect services.
2. The detection of offences.
3. The apprehension of offenders.
4. The performance of a number of auxiliary services directed towards the general welfare of the people.

Apart from the investigation, detection and identification of offenders and the collection of evidence for their prosecution, the police department handles, where necessary, numerous other duties. These duties include: registering immigrants and aliens; safeguarding coasts and rivers; enforcing fishery and navigation laws; guarding against smuggling; and looking after the safety of passengers and property on railways.

One of the most important aspects of the duties of the police in Thailand is closely related to the geographical situation of the country. It is bounded on three sides by three different countries, Cambodia, Laos and Burma. It is well known that in all three of these countries there has been continuing political instability in recent times. The necessity for keeping the northern and eastern borders of Thailand free from illegal immigrants and from smuggling has been one of the most important responsibilities of the police department. There is also the very serious problem of the smuggling and transport of narcotics through these borders. Constant vigilance and strict border patrolling have become an essential part of police duties. A Special Border Police Force has been organised for this purpose.

The police department derives its authority from royal decrees and the laws of the country. Since the structure of the government is divided into central, provincial and local administrations, the police department is also thus divided. Although the Director-General of the police department has the power to direct the actions of the police in the provinces, the Governor of each province or the district officer exercises major control of the police serving in their respective areas.

The Metropolitan Police Headquarters is responsible for police duties in the area of Bangkok and its suburbs. It has a number of divisions and sub-divisions for the purpose of effective administration and crime control. One such division is the Juvenile Aid Sub-Division which is responsible for all matters related to juvenile delinquency. It compiles records and statistics of missing juveniles, studies and conducts research and investigation on matters connected with juvenile delinquents, and also provides juvenile social welfare.

The Provincial Police Administration is divided into four regional headquarters, each with its own training facilities. A separate Border Patrol Police Headquarters supervises and controls all matters connected with the security of borders. It counteracts the infiltration of criminal elements from neighbouring countries and conducts its own training of border police personnel. Each of the regional headquarters is responsible for controlling police activities and police stations within its area.

A Central Criminal Investigation Bureau is located in Bangkok and its jurisdiction extends over the whole country. Its main duty is to help the local police, both metropolitan and provincial, in the detection, prevention and suppression of crime. The Bureau controls most of the specialised units, such as, the Railway Police, the Marine Police, the Highway Patrol and the Forestry Police. Included in the work undertaken by the Criminal Investigation Bureau is the collection and maintenance of criminal records and information on offenders, ex-convicts, and missing persons. The Scientific Crime Detection Laboratory assists in the detection of crime and the prosecution of the offenders.

The strength of the police has been increasing in recent years, as is also its expenditure. In 1974, the budget of police expenditure amounted to US$100,477,000. In 1977, it will be US$167,762,500. For numbers of staff see Table 1.

Police Staff 1977
(Source: Police Department of Thailand)

1. Metropolitan Police	9,189
2. Provincial Police	57,920
3. Border Patrol Police	15,384
4. Special Squads	6,678
5. Plain Clothes Police	6,295
6. Training Staff	2,070
7. Railway Police	719
8. Highway Police	1,731
9. Forestry Police	522
Total	100,508

The crime statistics in respect of the period 1 October 1974 to 30 September 1975, broken up into the most important categories, are as follows:

Table 2 Crime Statistics
(Source: Police Department of Thailand)

Category	*Number of known cases*	*Number of arrested persons*	*Committed to courts*
Offences against property	54,571	30,886	17,154
Offences against life and person	31,022	17,311	8,967
Theft of domestic animals	3,060	1,676	872
Miscellaneous offences	657,057	643,326	90,735
Total	745,710	693,299	117,728

Rehabilitation of Juvenile Offenders

Prior to 1952, children and young offenders who committed criminal offences were kept in detention along with adult criminals and they were required to undergo the same court procedures as adults. In 1952, the Central Juvenile Court and the Central Observation and Protection Centre were established by the Act

instituting juvenile courts and by the Juvenile Court Procedure Act of 1951. A new system of rehabilitating delinquent children came into force with the passing of these Acts. The new system required that there should be a thorough study of the personality and environment of the delinquent child, conducted at the same time as the investigation of the alleged offence. The court was thus assisted by a pre-sentence report in determining the appropriate treatment. In addition, there was provision for an after-care program for those who were released from institutional treatment to enable them to adjust satisfactorily to the community.

After a period of 11 years, these Acts were amended in 1963 for the purpose of enlarging the jurisdiction of the juvenile courts and providing speedier trials.

The juvenile courts established under these acts constitute a court of first instance. The Chief Judge of the Central Juvenile Court in Bangkok is responsible for the organisation and administration of all the juvenile courts and observation centres throughout the country. The juvenile court has jurisdiction in the following cases:

Any criminal case in which a child (who is over seven but not over 14) or young person (who is over 14 but under 18) is alleged to have committed what the law has specified to be an offence.

Any civil action using, applying or taking any court proceedings whatever concerning any minor (that is, a person who is under 20) which is governed by some sections of the Civil and Commercial Code.

Any proceedings where the court must pass judgment or issue an order affecting the person of a child or young person under the provisions of the law on primary education, the law on the control of children and school children, or other laws providing for the proceedings to come under the jurisdiction of a juvenile court.

Subject to the condition that no imprisonment can be imposed upon a child under 14 years of age, the following measures are available to the judge in dealing with juvenile delinquents:

1. Treatment in freedom
   (a) Admonishing the child or young person and then releasing him.
   (b) Releasing the child or young person and cautioning his parent or guardian.
   (c) Placing the child or young person under the care of any

person or organisation that the court considers fit for giving training and instruction.
(d) Releasing the child or young person on probation.
(e) Substituting corporal punishment for a fine.
(f) Imposing a fine.

2. Institutional treatment
(a) Sending the child or young person to a training school.
(b) Sending the child or young person to an annex of a training school, that is, any place for detention other than a prison.
(c) Imprisonment.

The observation centre serves as a remand home where children and young offenders who are not released on bail are detained for study and social inquiry.

A child guidance clinic attached to the Central Observation and Protection Centre was opened in 1966 as an out-patient unit of the court clinic. Psychiatrists attached to the clinic treat problem children who are brought there by their parents.

Probation officers are attached to the Observation and Protection Centre. Their services are utilised in investigation and supervision. Increasing use of probation services is being made by the juvenile court.

Where offenders require institutional training, they are sent to training schools. At present, there are four training schools for boys and three for girls. There is also one reformatory school for boys, which is run by the Department of Public Welfare. These training schools are in the nature of cottage homes and the policy is to give the offenders a home environment rather than institutionalising them. They offer courses in primary education as well as vocational training in cottage-type industries.

Corrections

The Department of Corrections, which is attached to the Ministry of Interior, is responsible for the rehabilitation of all offenders other than those dealt with by the juvenile court. Treatment is provided in prisons, penal institutions, houses of confinement and a house of relegation. Houses of confinement are places of detention for persons who are sentenced to 'confinement' for short periods for minor offences. This type of punishment is less

severe than imprisonment. A house of relegation is a place where habitual offenders are kept in safe custody and provided with corrective measures.

The Department of Corrections maintains and administers the following institutions:

Central prisons: There are 22 central prisons located throughout the country. They are responsible for the imprisonment and rehabilitation of convicted prisoners whose terms of sentence are over five years. Prisoners in this category are transferred from local prisons to the central prisons. Some of these central prisons have separate wings for special classes of prisoners, such as females, re-convicted prisoners and those awaiting death sentences.

House of relegation: There is only one such institution, providing corrective measures for habitual offenders under the Habitual Criminal Relegation Act.

Youthful offenders institutions: There are four such institutions which are intended for the rehabilitation of young offenders between the ages of 18 and 25 who are also first offenders serving terms of imprisonment from one to ten years. These institutions are organised on the lines of borstal institutions and the training and treatment in these institutions are different from those in the prisons.

Reformatory institutions for the misconducts: These institutions are specially intended for training and re-education of those who have been arrested and identified by the court as the 'misconducts'. There is one such institution and the work carried out here is similar to that of the land settlement scheme of the Public Welfare Department. Selected inmates are given land for cultivation and allowed to take their families with them. Some financial help is given to them towards their living expenses and for initial cultivation needs.

House of confinement: There is one central house of confinement and 129 temporary houses of confinement in the country. These institutions are responsible for the custody of persons who are sentenced to the punishment of 'confinement' for not more than three months, and also for those who are unable to pay fines.

Women's correctional institutions: There is one central women's correctional institution for long-term women offenders and a number of other smaller units are attached to the main prisons in the provinces.

Medical correctional institutions: This institution is responsible for providing treatment for drug addicts. Also for serious medical cases transferred from various prisons. It must be mentioned that about 20 per cent of those admitted to penal institutions are found to be drug addicts or connected with the traffic in drugs.

Provincial and district prisons: There are 51 provincial prisons and 13 district prisons. These are responsible for the custody and rehabilitation, where possible, of all prisoners whose terms of sentence are under five years. These prisons also house offenders awaiting trial in the provinces.

Open institutions: There are four open institutions in the country. These institutions have come into existence during the last 15 years and are gradually increasing in number. Selected prisoners are transferred from other prisons to these institutions with a view to inculcating self-discipline and responsibility, so that they can better adjust to life outside on their release. The work and the type of living conditions in these institutions are organised so as to resemble more closely normal life in the community.

In addition, there are 31 prison camps which are organised as part of provincial, regional and central prisons. These are used for the correction of prisoners of good conduct who can be usefully trained for agricultural operations.

In view of the serious problem of overcrowding which has confronted the department for a number of years, the department has in recent years constructed nine new prisons.

The department is responsible for providing rehabilitation programs and welfare services to prisoners. The correctional programs are aimed at changing the prisoners' socially unacceptable behaviour and developing better attitudes. The division conducts training courses in moral, cultural and general education; attempts to provide employment for discharged prisoners; and sponsors aftercare programs for those discharged from institutions.

It is also responsible for developing and supervising agricultural

and livestock projects, cottage industries and other forms of labour that require moderate skills. The division also handles sales of produce as well as purchase of raw materials and equipment.

Another aspect of the work of the department is the collection of data, the keeping of records and statistics, and the preparation of annual reports. It also, from time to time, attempts to evaluate the activities of the department.

The Penitentiary Act and its regulations authorise the Department of Corrections to grant parole to prisoners who have served part of their term of imprisonment. The grant of parole is subject to the prisoner's conduct and industry within the prison as well as to the situation connected with his home environment. Prisoners become eligible for parole after they have completed two-thirds of their term of imprisonment.

Prison population: The total number of inmates in institutions during 1974-75 is shown in Table 3.

Table 3 Total number of inmates in institutions 1974-75

Prisoners	56,919
'Misconducts'	14
Persons sentenced to 'confinement'	546
Persons sentenced to 'relegation'	79

It must be mentioned that in 1966 the number of persons identified by executive officials as 'hooligans' who were under the custody of the Department of Corrections in various institutions was over 10,000. This number has been gradually reduced by the enactment of a new law in 1973 which transfers authority to identify 'hooligans' by the executive officials to the authority of the court of first instance. The persons identified by the court were thus called 'misconducts'. After the extensive use of land settlement schemes where selected inmates were given land for cultivation, only 14 of the 'misconducts' were left in custody in 1974.

Further information on prison populations is contained in Tables 4, 5 and 6.

Table 4 Total number of prisoners during 1974-75 under various categories

Convicted persons	35,002
Pending appeal before higher courts	7,252
Awaiting trial in courts of first instance	8,118
Pending investigations	6,337
Others	161

Table 5 Types of offences committed by convicted offenders, terms of imprisonment and age groups for 1974-75

Types of offences	*Number convicted*
Offences against property	16,119
Offences against the narcotics law	6,633
Offences against life	5,337
Offences against person	1,476
Sex offences	1,379
Others	4,058

Term (including cases on appeal)	*Number*
Under 2 years	20,018
Between 2-5 years	5,815
Between 5-10 years	6,064
Between 10-15 years	3,698
Between 15-20 years	1,765
Over 20 years	1,410
Life sentences	401
Death sentences	83

Age group	*Number*
Under 20 years	6,255
Between 20-29 years	15,246
Between 30-39 years	8,572
Between 40-49 years	3,988
Over 50 years	941

Table 6 Total number of admissions to prisons during 1970-1975

Year	*Total number of admissions*	*Daily average population after disposition of cases*
1970	130,447	45,837
1971	121,344	39,203
1972	130,974	43,765
1973	130,663	47,113
1974	144,389	58,634
1975	173,537	56,919

Prison staff: One of the most important steps taken by the department in recent years was the establishment in 1972 of a new training and research centre for correctional officers. Staff training is now accepted as being an essential ingredient in the improvement of conditions in institutions and in the rehabilitative process. Not only are all new recruits given comprehensive training at the centre before assuming duties, but also regular in-service training courses for different categories of staff are organised, and such sessions are continued throughout the year. The centre has residential facilities for all trainees and staff, and is equipped with a library and audio-visual training material. The increases in the number of the staff between 1966 and 1975 are indicated in Table 7.

Table 7 Increase in staff 1966-1975

Year	*Staff*
1966	4,122
1967	4,238
1968	4,441
1969	4,523
1970	4,616
1971	4,724
1972	4,811
1973	5,080
1974	5,223
1975	6,054

6 Innovations in the Criminal Justice System in Indonesia

Oemar Seno Adji

Introduction

As in many other countries in Asia which attained independence from colonial rule, Indonesia has had the problem of bringing about reforms in the criminal justice system with a view to making it suitable for the altered situation. Independence from foreign rule naturally involved greater attention to national aspirations and objectives and greater respect for indigenous institutions and values. It was natural that in making innovations to the criminal justice system, due consideration had to be given to traditional values and institutions. At the same time the modern system of police, prosecutor, judge and correctional authorities had to remain the basic structure of the criminal justice system. The aim has therefore been to bring about a synthesis of the modern with the traditional systems. For a country like Indonesia, the approach to crime and punishment should be conditioned by both systems.

It is increasingly being realised that the Western approach to crime and punishment has not succeeded in providing a solution to the problem of crime, which in recent years has assumed new forms and dimensions. As seen from the proceedings of the preparatory and final meetings of the Fifth United Nations Congress, inquiries are being made by jurists, judges, social workers and administrators into the effectiveness of traditional forms of social control adopted in the past in countries like Indonesia so that some of them may be advantageously incorporated into modern systems.

In this context, Indonesia offers an interesting study because it has recently evolved its own system of administration of justice in which the traditional institution of village courts and *Adat* (customary) law exists side by side with the modern system of police, prosecutor and judges.

Historical

Indonesia attained independence from Dutch Colonial Rule in 1945. Prior to that, the territories of the State were in two categories: the 'directly governed' territories and the 'self-governed' or 'indirectly governed territories'. The indirectly governed territories which (outside the islands of Java and Madura) constituted about 60 per cent, had what was called 'political contracts' as the basis of their national status. Administration of justice in those territories was based on *Adat* constitutional law. Each of the regions in the territories constituted a unit for this purpose. The courts in these territories administered *Adat* criminal law which was based on customary law, as applicable to the particular community or region.

In the directly administered territories the courts of criminal justice generally administered statute law and followed the procedure prescribed by such law. However, such courts were also assisted by *Adat* courts and a place of honour was accorded to both substantive and procedural *Adat* law. Historically, this originated from an early decree of the Dutch transferring to the native population the right to have their own native system of administration of justice.

The regular courts of justice were closely associated with two other categories of courts: religious courts and village courts.

Religious Courts

Administration of justice by religious courts has been a recognised system in Indonesia for a long time and is recognised even in the latest consolidation of marriage laws made in 1974, which will soon be made applicable to the whole of Indonesia. However religious courts only supplement the regular courts on certain matters and the two types of courts exist side by side. Religious courts deal mainly with matters relating to marriage and divorce among Moslams. This restriction regarding subject matter and persons dealt with by the courts defines the jurisdictional difference between the two types of courts. The decisions of religious courts can be executed only after they are confirmed by the regular court which has to satisfy itself that the decision is executable and that the religious court has acted within its jurisdiction. If there is any surviving dispute about jurisdiction, the question will be decided by the Supreme Court.

It may be mentioned that no complications arise in the administration of justice by religious courts from the changes in the concepts relating to monogamy or polygamy, because the court has due regard to these when deciding whether a criminal offence is committed under the appropriate law.

Village Courts

Village courts had their origin before World War II in Article 3 of *Rechterlijke Organisatie* which authorised such courts to give decisions based on *Adat* constitutional law. This authority was conferred on small groups of communities called *Nagari*, *Nagorij*, *Kuria*, or *Marga* (the name depending on the particular territory) or to groups common to villages or to hereditary communities like *Dayak*.

The local *Adat* law determined who the functionaries of a village court should be, while the law that was administered by all these courts was the *Adat* law including criminal law *delictan recht*.

The village court, however, was not competent to administer codified criminal law. It could not impose the penalty of imprisonment or confiscation of property or other penalties sanctioned by statute law. It was also not competent to try contested cases. The village court was part of the system of *Adat* courts and *Swa Praja* courts.

The regular courts also had parallel jurisdiction with village courts in some respects. A person was not bound to file his case only in a village court but could file it in a regular court if he so desired. This however did not mean that village courts had no importance. The decisions of village courts also constituted a distinct source of law which the regular courts should recognise and apply. They had a duty to recognise and apply *Adat* law wherever necessary and such integration of the village court (which administers *Adat* law) with the regular court helps to keep *Adat* law alive and to make the judges of regular courts conversant with this law.

Further discussion of *Adat* criminal law and its application will be resumed after briefly describing the course of history of the administration of justice.

Effect of Recent Laws

It will be sufficient, for the purposes of this chapter, to start with the Supreme Court Act of 1950 which contained provisions relating to the constitution, organisation, jurisdiction and procedure of the Supreme Court. That law reflected the constitutional position at that time when the Provisional Constitution of the United States of Indonesia was in force. This was followed by law No. 1 of 1951. These laws aimed at the unification of the judicial system in the entire State and to this end they curtailed, and even abolished, the jurisdiction and powers of many of the institutions that existed earlier. A specific provision was made for the gradual abolition of *Adat* courts and *Swa Praja* courts and also such religious courts as were part of these *Adat* and *Swa Praja* courts. Other religious courts and village courts were left untouched.

The main ground for abolishing *Adat* and *Swa Praja* courts appeared to be the view that it would help in the establishment of an independent and impartial judiciary which was envisaged in the new Constitution. It was considered that a judicial system would not serve its purpose unless the judges inspired confidence and were independent and competent. It was also stated that this was in accordance with popular desire.

The abolition of the *Adat* and *Swa Praja* courts, which took effect gradually, was confirmed by the law of 1970.

As a consequence, the present position in Indonesia is that the regular courts established by the States have replaced the old *Adat* and *Swa Praja* courts. Apart from regular courts, the other courts which are now recognised are the religious courts, the military court and the administrative court.

As regards village courts, it would not be correct to assume that they have also ceased to exist. The provision in Article 3 of the Basic Law of 1970 does not lend itself to the interpretation that with the abolition of *Adat* and *Swa Praja* courts, village courts were abolished. On the other hand, several courts have expressed the opinion that the existence of village courts was not affected by the Basic Law of 1970 and that the settlement of disputes outside the purview of regular courts can still be the function of village courts.

It is necessary to bear in mind the important fact that the abolition of the *Adat* and *Swa Praja* courts does not mean that the *Adat* or customary law has disappeared. It only means that the

development and the application of that law was transferred to the regular courts. The judges of these regular courts are expected to study, understand and apply such unwritten laws. This is made explicit in the General Explanation (Item 7) to the 1970 law.

The continued existence of village courts does not really depend on statute law, as it rests on the existence of *Adat* law. As long as villages and *Adat* law exist in Indonesia, village courts must also exist. This view is justified by several studies by experts and by painstaking research undertaken by universities, judges and jurists.

Village courts are composed of men who command respect and who are fully conversant with local customs. They are experts in *Adat* law. Decisions are arrived at by discussion and consensus (*Begundem*). The procedure is informal and the aim is to settle the dispute rather than to perpetuate it. Such decisions do not leave a trail of bitterness. For instance in a case of adultery (which is called *bekekaruh* in *Adat* law) the village council (*Kramadesa*) decided that in view of the gravity of the offence, the two offending persons must be expelled from the village and that if the man whose wife was party to the adultery takes back the wife, that man should also be expelled.

Village courts thus constitute an integral part of village life in Indonesia and play a useful role.

Adat Criminal Law as Part of the System

Adat criminal law still has a role and a place in the criminal justice system in Indonesia. This will be clear from the following:

1. Village courts still apply *Adat* law in dealing with cases brought before them.
2. Ordinary courts also have to be conversant with and to apply *Adat* law when a matter comes to them from the village courts.
3. Decisions of village courts based on *Adat* law constitute a source of law in Indonesia. The judges of regular courts must therefore be conversant with such law.
4. When an act is an offence under any statute, the regular court will only go by the provisions in that statute and *Adat* law will not apply.
5. But where there is no provision in the statute law to punish an act and such an act is regarded as a crime under *Adat* law, the

Adat court (the village court) may proceed to impose the punishment sanctioned by custom. In such a case, if the matter comes up before a regular court that court may substitute, for the social sanction imposed by the village court, a punishment of imprisonment or a fine. This is authorised by the criminal code which provides that in the absence of any other punishment for an offence, the court may impose punishment of imprisonment for a period not exceeding three months or a fine not exceeding Rp.500. In special circumstances, the court can also award a sentence of imprisonment of up to 10 years.

6. The village head, who is *Adat* chief, is still being called in as an expert witness by regular courts to speak about *Adat* law. The constituent elements of *Adat* law follow:
   a. Unwritten native law which lives in the consciousness of the people (*Volksrect*) as disclosed in their conduct and behaviour and which is enforced through preventive legal care (*preventieve rechtszorg*) and repressive legal reaction.
   b. Legal rules as gathered from decisions of *Adat* chiefs, legal functionaries, meetings of people, village officials and village court judges.
   c. Religious rules of Islam as accepted by society from time to time in the evolution of law and as determined by legal functionaries.
   d. Rules, regulations or other such laws of local legislative bodies, decrees of local kinds and orders of *Yogya* and *Solo*. Unlike item a. above, these rules do not emanate from the people.

Adat law must of course be understood in the context of Indonesian culture, which has a dominant spiritual aspect. This law is not static but dynamic as is the case of Indonesian society which is changing progressively. From this it will follow that judges in Indonesia who interpret the law should be in touch with the community and should take interest in research.

In *Adat* criminal law, any one-sided 'disturbance' or infringement on the material or immaterial property of an individual will constitute an offence and will be met with a 'reaction'. Any act which causes a state of disharmony with *Adat* law and creates a 'hot atmosphere' has to be redressed or remedied by *Adat* reaction which is intended to neutralise the effect of the act.

Acts which constitute offences under codified law do not always constitute *Adat* offences. Thus offences against public peace, duel, perjury, debasing of coinage, stamps, etc., do not constitute *Adat* offences. Similarly offences under military or fiscal laws are not covered by *Adat* law. All these are not regarded as touching the 'personal institutions' of *Adat* society for which *Adat* law makes provision.

On the other hand there are some offences which are considered serious under *Adat* law (like incest, casting magic spells, etc.,) which are not offences under codified law.

The two types of laws are therefore distinct and there is no possibility of any conflict between them. The following points of difference between them are important.

Under codified law, punishment for an offence is usually imposed on natural or physical persons and not on the community as a whole (which is possible under old *Adat* law). The concept of punishing the group or community for certain types of offences (like subversion, corruption or economic offences) is gaining ground.

Intention or negligence (*Dolus* or *Culpa*) which are usually ingredients for an offence under codified law are not the main considerations under *Adat* law.

The fine distinction made in codified criminal law between preparation, attempt, abetment, conspiracy, etc., do not exist in *Adat* law. For instance in the case of black magic, punished by *Adat* law, the concept of incomplete or infructuous attempt is not workable.

Repentence and bad reputation are factors which *Adat* law recognises as relevant for determining the guilt of the person but in codified criminal law this is not so and the court may look into these factors only for awarding the sentence and not for determining the guilt. There are some other factors of the same nature.

The object of codified criminal law is to impose a punishment by the infliction of a harm on the offender whereas the object of *Adat* law is to 'restore or redress the equilibrium' to rehabilitate, or to diffuse the situation. The following *Adat* reactions may be mentioned in this connection: penance; humiliation; obliteration of libel; apologising by offering *Sirih* to restore the damage; compensation; payment of money in addition to compensation; arranging for the funeral if a person is killed by the act; expulsion

from the community; etc. The reaction that is actually awarded in a case should be acceptable to the person or to the community.

Influence of *Adat* Law on Codified Law

Codified criminal law in Indonesia not only codifies the law but also brings about uniformity of its application to all persons. At the same time it recognises and provides for special situations and recognises diversities in civil law in matters relating to bigamy, adultery, etc., which have different implications to different groups. This dependence on the civil law involves automatically a dependence on *Adat* law. Codified criminal law is thus influenced by *Adat* law.

Another feature which indicates the influence of *Adat* law on codified criminal law is illustrated by the system of 'conditional' conviction by courts. Right from 1926 the regular courts were authorised to impose general or special conditions when awarding a sentence. In practice most of these conditions were the same as *Adat* sanctions, like apology, offering *Sirih* leaves, payment of damages to the victim, etc. In this way, *Adat* law gets incorporated into the operation of the criminal justice system based on codified law.

Functionaries under the *Adat* law, like the village head or *Adat* chief, are still being used as expert witnesses by the regular courts on matters relating to *Adat* law. Village officials who are steeped in *Adat* law and tradition are also associated with the investigation of offences. All this shows the dependence of the regular courts on these old *Adat* institutions thereby bringing in the influence of *Adat* law in the administration of criminal justice.

Law Revision

When Indonesia attained independence in 1945, the codified criminal law inherited from the Dutch was allowed to continue, with a view to avoiding a vacuum. However there was a natural desire to revise the law and to make it subserve national aspirations.

In 1946 a new criminal law was enacted for the limited purpose of bringing the old law into conformity with the new constitutional and political status. Several changes were made in the law, some for revoking earlier provisions and some for incor-

porating new provisions. For instance, all provisions which were intended to curb the freedom movement or national struggle were repealed. It was in this way that Indonesia came to know about 'decriminalisation'.

The new law also provided for new sanctions like *hukuman tutupan*. This law of 1946 was, however, of a transitional nature as a comprehensive new code to fit in with the new realities was needed.

Apart from the general criminal code, there was also a need for special criminal laws relating to specific and special needs, such as for dealing with economic and social crimes and crimes related to fiscal and military laws. The changes in the social, economic and cultural aspects of Indonesian life and in the outlook of Indonesian society, necessarily involved different changes in the approach to such special crimes from those adopted in the ordinary criminal law.

Similarly, there was also a need to make special provisions regarding political crimes such as those relating to subversion, elections, etc. All these special laws provided for special procedures and rules of evidence as well as special penalties – all of which were innovations. They were intended to speed up justice and to ensure proper implementation of social laws. For instance, in the law dealing with corruption, there is a provision which compels the accused person to disclose all information about his assets, etc.

Innovations in Codified Criminal Law

Codification of criminal law was one of the objectives mentioned in the first Five Year Plan for Indonesia, which also postulated that such codification should have as its aims first the elimination of all old laws which have a tendency to hamper development or which are repugnant to national aspirations and objectives; and second, the creation of a legal order based on *Panchshila* (the Five Principles) which constitutes the foundation for stable national existence. Such codification has not yet been completed but the suggestions mooted in that connection are worth consideration.

First, as regards the current ideas about decriminalisation, the scope for reforms of that nature is very limited in Indonesia. As seen from the papers prepared for the 1975 Fifth United Nations

Congress on the Prevention of Crime and the Treatment of Offenders, the thinking in some quarters is that depenalisation can be considered in the areas of victimless crimes, infra-family conflicts, vagrancy, sexual misconduct between consenting adults, euthanesia, private immorality, etc.

An attitude which would keep away private immorality or private sexual relationship from the field of crime would not be tolerated in a society like Indonesia where private morality is still a hallmark of culture and where conjugal fidelity and sound family life are still regarded as the foundations of society. On the contrary, moral standards and law are so inextricably connected in Indonesia that the tendency is to have more and more laws to penalise acts which are moral lapses and those bordering on morals like pornography, gambling, narcotics, etc.

Second, as regards procedural laws, there is no provision in the law for giving legal aid to an accused person or for awarding compensation for illegal arrest or seizure. Recently several countries have modernised procedural laws and Indonesian law should also take note of these developments.

Criminal law has of late been brought into contact with constitutional law, especially in countries where the rule of law is the governing principle of state. Parts of it also come into the field of human rights. In Indonesia the Basic Law on the Judiciary 1970 also contains directives on the law of procedure and indicates that the procedure should be based on the rule of law.

Among other things, 1970 law stipulates that no person shall be convicted unless a court of law is satisfied on clear evidence that he is guilty. This is a departure from the old theory of *conviction raisonnee*. It also stipulates that every person accused of an offence is entitled to legal assistance and to the freedom of communication. Such legal assistance should be available at all stages including that of investigation. Similarly, the procedural law should also provide for compensation for wrongful arrest or seizure.

Another important principle confirmed by the Basic Law is that a criminal trial should be in the presence of the accused. However, the accused person may have the right to waive this and agree to the trial in his absence. Such waiver may even be presumed by the court in case the accused refuses or omits to attend court in response to a summons.

The Basic law also postulates the doctrine that an accused person shall be presumed to be innocent unless the contrary is proved.

Another important change envisaged by the Basic law is that the judge should also supervise the execution of sentence. The judge does have a supervisory role to play in the preparatory stages such as in issuing warrants of arrest, search or seizure, etc., and it would only be an extension of this principle if the judges' role was also extended to the stage after conviction, that is, the supervision of the execution of the sentence. This will secure some advantages. The judge will become more conversant with prison administration and thereby will be better equipped in discharging his sentencing function. The much desired coordination between the police-prosecutor, judge and correctional agency can be secured by associating the judge in this way with the whole process and thereby the organs of the criminal justice system would function smoothly.

There are separate basic laws for the police, the prosecutors and the judges. The provisions of the new Code of Criminal Procedure should bring about a coordination of these agencies. The new law should also spell out more precisely the relationship between the public prosecutor and the court. In doing so, the position in other countries should be taken into account.

The innovations contemplated in the new Code of Criminal Procedure should take due account of all these factors. It should also, of course, provide for the continued application of *Adat* criminal law which has had its own role all along and which must continue to play its role if the criminal justice system is to have its roots in the people and thereby serve its essential purpose of protecting society.

Police

Principles: On 1 July 1955 an ideal foundation for the police (Indonesian State Police) *Tribrata* was laid.

The principles are: *Rastra sewakottama* (the police should be examplary servants of the country and its people); *Negara Yanottama* (the police should be examplary citizens of the State); *Yana anuganadharma* (the police should be guardians of the self-discipline of the people).

In the framework of the coordinated armed forces (*Angkatan Bersenjata*), the Indonesian State Police as one of its members, gets another ideal – *Catur Prasetya*.

The technical directives tied up in the *Catur Prasetya* are:

Satya Haprabu – be loyal to the chief of the State.

Hanyaken musuh – destroy the enemy of the State.

Gineung Pratidina – uphold the State's principles based on the *Panca Sila* in the sense of having patriotism fully devoted to nation and country.

Tan Satrisna – to be free from everything but tied to servitude for country and nation.

Organisation: After the proclamation of Indonesian independence on 17 August 1945, the Indonesian State Police Department was incorporated with the ministry of home affairs/service.

Since 1 July 1946 the police have been separated from the ministry of home affairs and subordinated to the Prime Minister.

On 17 August 1950, in accordance with a provision in the Constitution 1950 (article 130), the police department was established.

In 1959 the Indonesian State Police became the Department of State Police.

The State Police has since been declared by a decision of the Provisional People's Consultative Assembly 1960 to be part of the armed forces of the Republic of Indonesia (*Angkatan Bersenjata*). However the State Police does not lose its identity as a law enforcement agency – a maintainer of the security and public order.

It was decided that the ranks of the police members would be equivalent to those of the military members.

The police organisation is centralised at headquarters in Jakarta and every chief of police in the region (province police etc.,) is responsible for the management and execution of his duties, maintaining security, etc.,) directly to the chief of the police who is hierarchically above him.

Function: The main duties of the police are set out in the police basic law:

. To promote public peace and order.

. To prevent and combat social diseases.

. To keep national security against internal disturbance.
. To protect individual security, property and society.
. To keep law abiding citizens obeying the law.

The police also have duties involving the suppression of crime and the investigation of offences.

In implementing their role, the police have the cooperation of the society, and work together with the *Rukun Tetangga* and other forms of community organisations, such as the boy-scouts organisation, youth-centres and the like.

Police activities in the field of crime prevention involve co-operation with the *Muspida*, a body comprising prosecutors, police, and local government officials, which stands for *Musyawarah Pimpinan Daerah* or in English: deliberation among the heads of municipal regions. The idea of this *Muspida* is the preservation of peace and order in the society by the prevention of crime.

Another activity of the police is their cooperation in the *Bakolak Badan Koordinasi Pelaksanaan Inpres* No. 6.

For the execution of the President's instruction nr. 6/1971, concerning combating the abuse of narcotic drugs and the counterfeiting of money, etc., the police cooperate with other law enforcement agencies.

In crimes concerning false currency, narcotics, smuggling, juvenile delinquency, subversion and matters concerning the supervision of aliens, a presidential instruction on coordination has been issued to the Chief of the State Intelligence, and authorities.

It should be noted that this coordinating body is headed by the Chief Intelligence and is composed of representatives of the Department of Home Affairs, Foreign Affairs, Defence and Security, Justice, Finance, Information and the Office of the Attorney General.

The presidential instructions stress balanced efforts in the repressive and preventive treatment of crimes concerning narcotics and juvenile delinquency problems. So prevention of crime and treatment/rehabilitation is an important part of the changes proposed by this coordinating body.

Police training: The State Police Department organises a special police training for constables different from that of police officers. Training for constables is organised in each capital city of the province and in the metropolitan capital of Jakarta.

Education for the rank of second class Lieutenant of Police is arranged and centralised at the Academy of the coordinated armed forces.

Police officers with the rank of at least second class Police Lieutenant have the opportunity for a higher study at the Faculty for Police Science in Jakarta.

Police officers with a rank not lower than Police Lieutenant Colonel have the opportunity to attend the General Staff and Command College in Jakarta.

It could be said that as far as the current police strength is concerned, 111,116 men are supported by what is called assistant magistrates, that is, officials from several departments who deal with investigation processes on certain offences, for example, Forest Police, Customs Officers, Traffic Officers and some others. Their numbers depend upon local needs.

These police dealt with 40 kinds of crimes and offences totalling approximately 250,000 in 1974/1975 and 300,000 in 1975/1976 throughout Indonesian territory.

Offences committed by members of the police force, whether or not by abuse of power, are tried by a special court, in this case a Police Tribunal which is in the framework of the Military Tribunal. It is beyond the jurisdiction of the courts of general jurisdiction.

The Correctional System

The treatment of offenders: Although the legal provisions on the treatment of offenders are still contained in the old Colonial Prison Regulation of 1917, this Colonial Regulation, although still effective, is considered only to serve as a formal legal framework.

In practice, entirely new courses of action have been adopted and gradually implemented during the course of time in anticipation of a more suitable national basic law and regulations for the Directorate General of Penitentiaries of Indonesia.

The current system is more humanitarian in character, and is directed more towards the rehabilitation of the offender in conformity with the ideals of the nation as mentioned before.

Immediately after independence, the Penitentiary Service of Indonesia conducted several important conferences in order to discover the right methods and measures to improve and develop

the treatment of offenders. This search for a new system of treatment in conformity with the ideals finally culminated in the birth of an idea in 1963 known in the justice administration circles of Indonesia as the idea of *Pengayoman*, which is an enlightened outlook towards the treatment of offenders founded by His Excellency the Minister of Justice, the late Dr Sahardjo.

At this particular conference, a national concept was adopted on the treatment of offenders in Indonesia, known as the concept of *Pemasyarakatan* (the idea of re-socialisation).

Quite a few experiments have been undertaken by the Directorate General of Penitentiaries in order to implement this newly adopted concept of *Pemasyarakatan*. For example, an offender proving to have achieved good behaviour at the first stage of his treatment within the Institution, after having served one-third of his sentence, will be allowed by the Penitentiary Board to enter an open institution with less strict security measures. More responsibility will be entrusted to the offender and opportunity given to him to have contact with the community.

Since our Indonesian society is still mainly of an agrarian nature, we have several of these open institutions in the regions, practicing agriculture, stock-breeding, farming, fishing, etc.

After further improvements have been observed, having served half of his sentence, the Penitentiary Board will then allow the offender to participate in the activities of the surrounding community, such as religious, recreational, or any other social activity conducted by the members of the community as a group. He is even allowed to participate in security patrols conducted during the night to maintain peace and order within the territory of the community. Arriving at this stage of treatment, furloughs at weekends or at some regular intervals to meet his family, opportunity to attend school or evening courses outside the institution, or even permission to be employed during the daytime to earn an income of his own, could also be given to the offender in treatment.

During this stage of the assimilation process, the Directorate General of Penitentiaries, in collaboration with other departments of the government (that is, the police, other local government officials, etc.) as well as with non-governmental or private organisations, prepares the necessary measures to create a harmonious relationship between the offender under treatment and his community.

After two thirds of his sentence has been served, or if he still has nine months to serve, the offender could be granted complete release from the institution under supervision of the Penitentiary Board in order to complete his process of reintegration into society.

All of these above mentioned methods of treatment of offenders which are implemented in practice, are, in fact, far ahead of the formal provisions contained in the Prison Regulation of 1917.

Consequently, the government is now undertaking the necessary measures to draft a National Basic Law and Implementation Regulations for the Directorate General of Penitentiaries in conformity with the adopted concept of *Pemasyarakatan* mentioned before, in order to adjust the legal framework to the present conditions.

The implementation of the United Nations Standard Minimum Rules: As far as the Standard Minimum Rules are concerned, in 1969 an improved and complete translation was re-issued and distributed. This was a translation of all of the provisions contained in the revised text adopted in 1955 by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders inviting member governments to take these provisions into account as fully as possible and to give favourable consideration to their adoption and application.

These United Nations Standard Minimum Rules for the Treatment of Prisoners turned out to be in conformity with the technical application performed by the Directorate General of Penitentiaries of Indonesia.

We have, for example, inherited equipment and prison buildings with architectural styles structured to meet the need of the colonial concept of treatment. If these buildings have to be reconstructed in order to adjust to the current conditions in conformity with the idea of *Pemasyarakatan*, a quite considerable amount will be needed to finance it. Hence the introduction of architectural change to fit into the new system of treatment will certainly take quite some time.

We also have to face and solve the problem of lack of trained personnel specialising in this field of re-socialisation. The Academy

of *Pemasyarakatan* (the Correctional Staff College) aims to produce qualified correctional staff, as well as conducting regular training courses to up-grade our present officials.

Correctional systems-judges: In order to make the best choice among sentences or measures, the judge should have information about the individual life of the offenders, covering his or her home, family and social life, education, employment and other things necessary to give a picture of his/her personality. This kind of information is what is called in many countries the home inquiry and social situation report and is usually compiled by probation officers.

Since Indonesia is also aware of the importance of these reports, we are making efforts to provide judges with this information. While waiting for the new law dealing with such problems, as an early step, a judge can ask for such information and reports. To meet the need of probation officers, the Directorate General of Penitentiaries has set up professional courses and training programs.

Another important role judges have to play deals with conditional release and pre-release treatment of offenders.

The problem of aftercare has also become a focus for our attention. For this reason a special directorate was created some years ago dealing with guidance and aftercare problems for ex-offenders, whether they be adults or minors. This directorate gives advice and guidance to ex-offenders in obtaining material and non-material aid. Finding employment is, in many cases, the most serious problem which faces the released offenders. Other aid can also consist of counselling them on problems which may make their re-adaptation easy.

These all are the main tasks of the directorate for probation, parole and aftercare.

7 Recent Innovations in the Criminal Justice System in India

S. Balakrishnan

Introduction

For nearly a century before 1947, India, which at that time also included territories now forming part of Pakistan and Bangladesh, was ruled by the British. It consisted of provinces directly ruled by the British and a number of Princely States over which the British Crown exercised a good measure of sovereignty. When British rule came to an end, the territories left with India on partition became first a Dominion and then, when the Constitution of India came into force, a Sovereign Democratic Republic. The erstwhile Princely States which acceded to India joined the Union of States formed by the Constitution. India today is a vast country covering an area of about 330 square kilometres with a population of about six hundred million composed of a number of communities, castes and language groups.

The Constitution of India which came into force on 26 of January 1950, provides for a federal pattern of government. The Parliament of India and the Central Executive perform respectively the legislative and executive functions assigned to the Centre by the Constitution, while the State Legislatures and the State Executives perform corresponding functions assigned to the States. But the judicial system is common to the Centre and the States. The police, the courts and the prisons are subjects assigned to the States under the Constitution and so are administered by the States but the same machinery is utilised also for the enforcement of laws made by the Centre. The Centre has a reserve power to set up its own courts for enforcing its laws and it also has its own bureau of investigation and special prosecutors, but these are for certain limited purposes and for certain categories of cases. The generality of cases, whether relatable to the Centre or to the States, are handled only by the State agencies and institutions of the criminal justice system. However, the procedure followed by

courts in general is regulated by Central laws like the Code of Criminal Procedure and the Indian Evidence Act, thereby securing uniformity in this important matter. This is rendered possible by the fact that 'Criminal Procedure' and 'Evidence' are subjects on the 'Concurrent List' of the Constitution on which the Centre as well as the States can make laws, the Central law, if made, prevailing over the State law wherever there is repugnancy between the two.

The subject 'Criminal Law' is also in the 'Concurrent List'. The Centre as well as the State make laws in their respective fields and such laws may contain penal provisions so that the entire body of criminal law in India consists of both Central and State laws. Such criminal law is in two parts. The first is the basic law as contained in the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act. The second part is the body of special laws made by the Centre as well as by the States, to deal with special matters or to meet local or special situations. Some of these, like the law for the prevention of corruption or the prevention of adulteration of drugs or for the suppression of immoral traffic in women, supplement the provisions of the basic law. Quite a few of these laws dealing with substantive law also contain special rules of procedure or of evidence applicable to proceedings thereunder. Most of these special laws are not of any general interest and at any rate it will be beyond the scope of this article to give details of the multifarious special laws. Reference will, however, be made to important innovations if any, made in these laws, wherever necessary.

Recent innovations in the criminal justice system in India are mainly those made in the Code of Criminal Procedure and those contemplated in the Indian Penal Code. The Code of Criminal Procedure was first enacted in 1861 and re-enacted after revision in 1898 while the Indian Penal Code was enacted in 1860. These codes were the result of painstaking research and hard labour on the part of the British Law Commissioners. They were acclaimed as excellent pieces of legislation, which is borne out by the fact that the Indian Penal Code did not undergo any major change during more than a century of its existence while the Code of Criminal Procedure underwent only some minor modifications, right up to the end of the British rule.

As is well known, India attained independence through peace-

ful means and the transfer of sovereignty was smooth. Consistent with this, independence did not mean any sudden break from the past in regard to the laws of the country. The constitution specifically provides for the continuance of all pre-existing laws insofar as they were not repugnant to its provisions. The criminal justice system accordingly continued to function without any dislocation arising from the transfer of sovereignty.

This did not, however, mean that the old laws required no reappraisal or revision. On the other hand, not only the constitutional changes but also the changes in the basic concepts, in the behaviour patterns and in the economic and social structure of society demanded a thorough revision of the old laws or at least a second look at them.

Accordingly, a few years after attaining freedom, the Government of India set up a Law Commission consisting of eminent jurists and judges to examine the important laws of general application in the country with a view to suggesting modifications wherever called for. The Commission took up first the revision of the Code of Criminal Procedure 1898 and then that of the Indian Penal Code. It took pains to ascertain the views of all sections of the community by inviting written memoranda and interviewing a large number of persons including judges, jurists, administrators, police officers, trade union officials, etc. After carefully considering these views and after taking due note of the innovations made in the laws of other countries, the Commission presented comprehensive reports recommending a number of modifications in these codes.

Based on the recommendations made by the Law Commission and on suggestions for reform received from various sources, a Bill for the enactment of a new Code of Criminal Procedure was introduced by the Government of India in Parliament in 1970. After close scrutiny by a Committee of Parliament, the new code was enacted in 1973. In the case of the Indian Penal Code a similar Bill was introduced in Parliament and sent to a Committee of Parliament which has recently presented its report. This Bill awaits approval by Parliament.

Both these committees ascertained and considered the views of all persons interested before taking final decisions. A fact worthy of special mention is that the elaborate inquiry made by the Law Commission as well as by the Committees of Parliament did not

disclose any need for making any major structural changes in these basic codes. The recommendations were mainly for making improvements and for bringing the law up-to-date.

The question is sometimes asked whether in the altered context after independence, the old Indian laws based on Anglo-Saxon jurisprudence and enacted during an alien rule, have any relevance today. It may be mentioned in this connection that although these old codes incorporated many of the principles of Anglo-Saxon jurisprudence, they were not made in a vacuum. India had had, for centuries before the advent of the British, a fairly well organised system of administration of justice and the basic principles of justice and fairplay were in many respects remarkably similar to modern concepts. In any case, the present system which can more appropriately be called the Indian system, has been in operation for more than a century and has, by and large, given reasonable satisfaction. There is no sense in rejecting it merely because it is based on Anglo-Saxon principles. Indeed, those who raise this point do not have any better, more indigenous system to suggest.

For instance, the continental system for which there are some supporters, is also of alien origin. Further, some of the so-called modern approaches may not be suitable to India. For instance, some countries have a preference for a system in which the judge plays a more active role in the case instead of remaining passive as in India. This system would be alien to the Indian concept of an impartial judge which requires him to be objective and detached when handling a case and this attitude may be jeopardised if he were to enter into the fray. In any case the whole matter has been considered in depth by the Law Commission and the Indian Parliament and, as already stated, it did not favour a wholesale change in the structure or the approach.

In the following sections of this chapter, an attempt has been made to explain briefly the more important innovations made recently in the procedural law and those contemplated in the substantive law. They also contain information about the latest thinking on certain allied matters of interest such as preventive detention, the *Panchayat* system, the novel approach to dealing with certain professional robbers, and, of course, prison administration.

Innovations at the Stage of Investigation

The criminal justice system virtually starts, or should start, functioning from the moment a crime is committed. The first stage of the system is the stage of investigation, that is, proceedings covering the period between the time when information about the commission of a crime is available and the time when the accused person is sent to the court for trial on a charge. This is obviously the most crucial stage because it is as a result of proceedings at this stage that the culprit is identified and the evidence which involves him in the case is collected.

In India, under the Code of Criminal Procedure which governs these proceedings, in all cases (except a few cases where the aggrieved person files a complaint directly before a magistrate) it is the police who have the statutory duty and responsibility of investigation of crime. The role played by the police at this stage is vital because under the Indian law, the decision whether to file or not to file a charge against a person is solely for the investigating police officer to decide, although he may take the legal advice of the public prosecutor wherever necessary. Consequently, it is in relation to the work of investigation that the police have come in for adverse criticism whether it is that of corruption, negligence of duties, inordinate delays, inefficiency or favouritism.

When the revision of the old Criminal Procedure Code was in progress, two views were put forward. The first was that the powers of the police in connection with the investigation of cases should be substantially curtailed because the working of the provisions have, according to this view, disclosed that the police have often abused their statutory powers and harrassed innocent persons. The opposite view was that there was need to give greater powers to the police to enable them to discharge their responsibilities more efficiently, particularly because the inherent difficulties in the task of investigation have recently been accentuated by reason of the sophisticated methods adopted by criminals. The revised code has made an attempt to reconcile these two opposing views. The police will continue to have the essential powers required for a proper and efficient investigation of crime. At the same time, certain safeguards have been incorporated in respect of matters where the possibility of abuse of powers cannot be ruled out.

Such safeguards are reflected in the following innovations:

- To ensure that arrests are not made arbitrarily, a specific statutory provision has been made making it incumbent upon every police officer who arrests a person to inform him of the grounds of arrest. Such an officer should also inform him of the right to be released on bail whenever the offence is bailable.

- The law in India provides that no person who is arrested can be kept under detention by the police for more than 24 hours without being produced before a magistrate, and such magistrate has been given the discretion to decide in whose custody the person should be kept pending investigation. There were allegations to the effect that the police often managed to obtain orders authorising detention in the custody of the police for long periods during which the person was harassed in many ways. To meet this, the new code provides that the magistrate can in no case permit custody of an arrested person with the police for more than 15 days during the investigation.

- A new and important right of being medically examined has been conferred on every arrested person. When any person who is arrested alleges at the time he is produced before the magistrate, or at any time during the period of his detention in custody, that he wants to be medically examined to enable him to provide that he has been subjected to physical assault or torture during custody, or otherwise to help him in his defence, the magistrate is under a legal obligation to have the body of the person examined by a medical practitioner, except when the magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

- When a person is in custody during an investigation, any confession made by him to any police officer of any rank is totally inadmissible in evidence even if the confession is voluntary. He is to be produced before a judicial magistrate if his confession is to be recorded. This was the position under the old code. The further refinement made in the new code is that when the accused person is produced by the police before a magistrate for recording his confession and he expresses his unwillingness to make a confession, he cannot be remanded

to the custody of the police thereafter. This innovation is intended to ensure that a confession is not extracted from an unwilling person by the police.

- To enable a person who is arrested outside the jurisdiction of the court concerned to obtain bail without delay, the new code provides that he can apply for bail to and be released on bail by, the nearest magistrate. This will avoid the necessity of his being taken in custody to the court having jurisdiction, which usually takes time.

- Under the old code, information given to a police officer about the commission of an offence had to be recorded by him immediately and he should thereupon proceed to make investigation. There were allegations that the police officer sometimes manipulated the record for his own reasons. To meet this, a provision has been made in the new code that a copy of the information as recorded should forthwith be given to the informant. Another allegation was that police officers sometimes refused to record information for questionable reasons. The new code provides that a person aggrieved by a refusal of a police officer to record information may send the same by post to the Superintendent of Police who is required to go into the matter himself.

Regarding the problem of delays in investigation, the innovations made in the procedural law were designed mainly to infuse a sense of urgency among the investigating officers. Among these may be mentioned the following:

- If the offence under investigation is one which is punishable with imprisonment for a term of two years or less, and the investigation is not completed within six months, the magistrate has been given the power to stop further proceedings in the investigation.

- If any person is kept in detention during the investigation, he is entitled to be released on bail on the expiry of 60 days of detention if the investigation is not completed by then and the charge is not filed against him. This will secure the additional advantage of reducing the number of under trial prisoners in prison.

. Any period spent by the accused person in prison during the investigation will be set off against the period of imprisonment ultimately awarded on conviction and the person will undergo only the balance of the term in prison.

. For the first time in India, periods of limitation have been prescribed for launching prosecution. The details of this important innovation are set out in the following paragraph.

Prior to the enactment of the new Code of Criminal Procedure, Indian law, following the Anglo-Saxon model, did not provide for any general law of limitation for launching criminal prosecution (although there were a few provisions in some special laws which prescribed a time limit for launching prosecutions thereunder). This was based on the principle that when a crime is committed, the community as a whole, apart from the injured party, has an interest in tracking down and punishing the offender. This public interest cannot be allowed to be defeated by the mere expiry of a time-limit. Accordingly, under the Indian law, while long delays in the launching of prosecution may justifiably be taken by a court as a ground for entertaining doubts about the truth of the prosecution story, the court cannot legally throw out a prosecution merely because of the delay in launching it. This has been the settled legal position in India all along.

However, recent developments in criminal law favour the application of the principle of limitation to criminal cases also and many countries have adopted this principle. Some of them have even provided for periods of limitation for the execution of sentences. The reasons in favour of adopting this principle are well known. The accused should not be called upon to meet a charge when evidence has been lost, memories have faded and witnesses have disappeared. It is in the general public interest that for the purpose of peace and repose a person who has committed a crime, however trivial, should not be kept in continuous apprehension that he may be prosecuted at any time. After the expiry of a certain period, the sense of social retribution loses its edge and the punishment does not serve the purpose of social retribution. Deterrence is also impaired if the punishment is not inflicted promptly and if it is inflicted at a time when the crime has been wiped off from the memory of the persons concerned.

The new Indian Code of Criminal Procedure has taken note of

these considerations and has adopted a middle course. The principle of limitation for criminal cases has been accepted but it will apply only to comparatively minor offences punishable with imprisonment for not more than three years. The provision is that no court shall take cognizance of an offence after the expiry of:

(a) Six months if the offence is punishable with fine only.
(b) One year if it is punishable with imprisonment for a term not exceeding one year.
(c) Three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

There will be no limitation for offences punishable with imprisonment for more than three years.

The periods of limitation are to be computed from:

(a) The date on which the offence was committed.
(b) Where the commission of the offences was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier.
(c) Where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

Other incidental provisions have been made as to the exclusion of time in certain cases, etc. The court has been given a reserve power to condone the delay and take cognizance of a case after the expiry of the period if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interests of justice.

Innovations at the Stage of Trial

The usual complaint about the criminal justice system in most countries is that the procedural laws, based on certain archaic principles, involve agonising delays which sometimes lead to denial of justice. The elimination of such delays by a simplification or rationalisation of procedure has, therefore, necessarily to be one of the main objectives of any scheme for the reform of the system. A note of caution is, however, necessary in this connection.

Simplification of procedure is no doubt desirable but this should not be at the cost of rendering adequate justice to the

accused. Short cuts in procedure may, if carried beyond a limit, be attended with the risk of denial of fair trial to the accused. As the primary function of procedural laws is, and should continue to be, to secure a fair trial to the accused person and ensure proper justice, emphasis should not solely be on expedition when considering reforms in procedural laws.

Due attention was paid to this aspect when the Indian Code was revised. Many innovations have been made in the procedure for trial but care has been taken to see that the innovations in procedure for speeding up trial are such that they will not prejudice the interests of the accused person. The new code also confers certain additional facilities to accused persons, particularly those coming from the poorer sections of society.

The innovations incorporated in the new Code are indicated in the following paragraphs.

Abolition of committal proceedings: The old code provided for an elaborate and time-consuming procedure for the trial of the more serious criminal cases, that is, those involving offences punishable with imprisonment for more than two years. It required first a preliminary inquiry by a magistrate to 'commit' the accused person for trial and then a fully-fledged trial before the Sessions Court. (This was not the pattern of the procedure in the United Kingdom for the trial of serious offences by the court of assize or quarter sessions.) The preliminary inquiry, which was called 'committal proceedings', involved the taking of oral and documentary evidence produced in support of the prosecution and on behalf of the accused, and the magistrate was expected to send the case to the court of session only if in his opinion there was sufficient ground for doing so. Otherwise, he had to discharge the accused. The main object of this procedure was to avoid harassment of innocent persons by being accused of grave offences and made to face the sessions trial straightaway.

As early as 1955 it was felt that the procedure did not serve this purpose. Magistrates used to commit practically all the persons brought before them by the police and the proportion of persons discharged was only about two per cent. It was realised that these unnecessary preliminary inquiries, which often took several months, served only to protract the trial. It also was potentially productive of a sense of unfairness and of risk of pre-

judice for the defence when reported in the press. Only the prosecution case was given at the committal stage and the press report was necessarily one-sided and even haphazard. Judges often had to warn the jury to forget about what they had seen in the press about the case.

Experience disclosed that the considerable time lag between the examination of witnesses before the committing magistrate and their examination in the Court of Session resulted in the witnesses being won over or tampered with. Illiterate witnesses often made discrepant statements, thereby furnishing a ground for discrediting them. The two-stage trial invariably involved long delays causing serious hardship to the accused person who, if not on bail, would all the time be languishing in jail.

The preponderance of opinion in India was that committal proceedings were largely a waste of time and effort and did not contribute appreciably to the efficiency of the trial before the court of session. The primary object of protecting the innocent accused from the ordeal of sessions' trial had not been achieved in practice and the delay in the commencement of the trial did not advance the cause of justice.

The new code has dispensed with the need for committal inquiries. The magistrate who takes cognizance of the case simply passes it on to the court of session, if it is triable by such court, after complying with certain routine work of a preparatory nature. The prosecution is expected to act on the advice of the Public Prosecutor who has to apply his mind at that stage. The court at its first hearing goes through the papers and if it finds that on the materials furnished there is no *prima facie* case, it may refuse to proceed further with the matter and discharge the accused. Or it may send it to a magistrate for trial as a minor case. If it takes up the case for trial, the procedure follows the usual pattern with one difference, namely, that the judge is at liberty to acquit the accused after hearing only the prosecution witnesses without even calling upon the accused to enter upon the defence.

There were of course some who considered committal proceedings as necessary, to enable the accused person to be apprised of the case he had to meet at the trial. To meet this point, the new procedure provides that the magistrate taking cognizance should furnish the accused person with copies of all documents including statements of witnesses recorded by police on the basis of which

prosecution has been launched.

This innovation in the procedure is bound to result in considerable saving of time in the trial of serious cases besides securing other advantages to the accused, not the least important of which is the considerable reduction in the period of detention of persons in prisons, pending trial.

The other innovation in respect of cases tried by a court of session is that the system of jury trial has been abolished, as it was not working satisfactorily. In fact, this is not an innovation as such because the system was abolished earlier in practically all the States by local legislation.

Removal of obstructions by stay orders: One of the most potent causes which contributed to delays in the trial of cases was the facility of getting the proceedings stayed by the High Court. Under the code every High Court is vested with what is known as revisional powers. By virtue of this, the High Court may call for the records of any case at any stage before any magistrate and if it finds there is any illegality or impropriety, it may make such order as it considers proper. These wide powers are intended to enable the High Court to correct miscarriages of justice even when no appeal had been made, and were available not only in respect of final orders of conviction or acquittal but also interlocutory orders or decisions.

In practice this facility was found to be responsible for some of the longest delays in criminal trials, particularly when the accused happened to be a rich person. At every stage of the trial before a magistrate, some interlocutory order or other may have had to be passed, such as for the production of a document, the summoning of a witness, the disallowing of a question in cross-examination, etc. The interested accused person may have taken each one of these orders to the High Court in revision and obtained from the High Court an order of interim stay of the trial or other proceeding of the lower court pending disposal of the revision petition. A sample survey of some of the cases of the longest duration revealed that delays extending to as long as five or six years occurred in the trial of certain cases because of successive revision petitions of this nature. Although ultimately all these petitions were dismissed, the party succeeded in delaying the trial.

It was not the common man but only the person who could

afford to carry on litigation, like the rich businessman, industrialists, corrupt official and the like, that had resort to this device for delaying disposal of cases indefinitely. During this interval, some of the witnesses died or lost interest in the case and sometimes even the prosecution lost its keenness, and so this facility of revision not only delayed but also defeated justice. With a view to putting an end to this state of affairs, the new code has taken away the jurisdiction of the High Court to entertain any revision application against interlocutory orders. No serious damage is likely to result from this because such interlocutory orders can be reviewed by the lower court itself or can be made a ground of attack when an appeal is filed. This innovation has made a significant change for the better.

Another similar device adopted by some accused persons under the old code was to avail themselves of the provision for an automatic stay of proceedings in a magistrate's court if the party declared his intention to file an application before a superior court for transfer of the case to another magistrate's court. This was abused to a very large extent and many trials were held up in this manner. The new code has taken away this facility and it provides that a stay of proceedings can only be given by the superior court which actually entertains a transfer application and only for good and sufficient reasons.

Shortened procedures for simple cases: What is known as summons case procedure was available under the old code in respect of offences punishable with imprisonment for not more than six months. In this procedure no formal charge is framed. The particulars of the offence of which a person is accused are explained to him and he is asked to show cause why he should not be convicted. If the accused does not plead guilty, the magistrate takes evidence and in doing so he is not required to take a verbatim record of the evidence – only the memoranda of the substance of the evidence is recorded. The scheme is simple and the intention is that those numerous but not very serious cases should be decided quickly. All the essentials of a fair trial are present and the nature of these cases is such that the more elaborate procedure would only harass the parties without substantially adding to the cause of justice.

Under the new code, magistrates will all be judicial officers duly trained and equipped for taking on more responsibility. The

new code accordingly enlarges the scope for summons procedure by permitting it to be adopted in respect of offences punishable with imprisonment up to two years. This will obviously shorten the duration of trial in a much larger number of cases. It may be mentioned that under the new code the magistrates who try cases will be judicial officers duly trained and equipped to take more responsibility and so this step is not likely to result in any risk.

Apart from the condensed procedure available in respect of summons cases, the code also provides for what is called a summary trial, that is, an abridged form of regular trial, in the case of some categories of offences like petty thefts, criminal trespass, etc. Some special laws relating to anti-social activities like practising untouchability also empower magistrates to try even more serious offences summarily as quick justice is essential in respect of these anti-social crimes. In a summary trial the procedure is the same as that for a summons case but the court cannot impose a sentence of imprisonment of more than two months. The court need not write any elaborate judgment or record the evidence verbatim. Only senior magistrates are usually empowered to try cases summarily.

Other innovations: Among other changes made with a view to expedite procedure the following may be mentioned:

- In petty cases the personal attendance of the accused person can be dispensed with. The court may issue a summons indicating therein that if the accused desires to plead guilty without appearing in court, he may transmit his plea and the stipulated fine either by post or by messenger. If he does so, the court convicts the accused in his absence and adjusts the amount remitted by him towards the fine. This is expected to save the time of the court as well as of the accused person in petty cases.
- The court has the power to regulate arguments by prescribing time limits and also to receive written arguments. This will facilitate the work of the appellate court also.
- The need for oral examination of formal witnesses like handwriting experts, etc., has been dispensed with. The court can accept affidavits except when the accused person wants to cross-examine the experts.

- The court may continue the trial in the absence of an accused person if he persistently disturbs the proceedings.
- Sometimes the reason for arrears of work is due to shortage of regular magistrates. Provision for a new system of honorary special magistrates has been made in the new code. Under this, any suitable person like a retired government officer can be appointed as special magistrate with power to try minor cases summarily. The advantage of this system is that at no appreciable cost to the government (these magistrates are paid only a nominal allowance) a large number of petty cases can be disposed of leaving the regular magistrates free to deal with more important cases.

Additional benefits to accused persons: Most of the provisions intended to reduce the scope for abuse of powers by the police and those for speeding up the investigation and trial, to which reference has already been made, will prove beneficial to accused persons, especially the poorer among them. The new code makes some other specific provisions of this kind. Among them are the following:

- A provision for compulsory legal aid at State expense to an indigent accused person has been inserted. In view of the financial implications, the aid is at present limited to cases triable by a court of session but it can be extended to other categories of cases if so desired by any State Government.
- In every trial the court, after it finds a person guilty of an offence, is under a legal duty to give an opportunity to the accused person to show cause against the actual sentence proposed on conviction. This has been inserted because in many cases the court, when hearing the case, may not be aware of the special circumstances relevant to the punishment, such as family circumstances of the accused. The new provision will ensure that the sentence passed in any case fits in not only with the crime but also with the criminal. (The system of delegating the sentencing function to an authority other than the convicting court, which has been adopted in some countries, has not been accepted in India.)
- The code makes a provision that in the case of a first offender.

the court shall, in certain circumstances, release the person on probation to be of good conduct, instead of sentencing him to imprisonment. Similar provisions are also made in some special laws. The code also provides that in the case of an offence punishable with imprisonment of not more than two years, the court may, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances, direct the release of the person after due admonition instead of sentencing him to any punishment. To ensure that these and other such liberalising provisions are made available to the accused person, a specific provision has been inserted that, where the judge does not give the accused the benefit of these provisions, he is bound to record in the judgment the special reasons as to why he has not done so.

- When the accused person is examined as a witness at his own request, a specific provision has been made that answers given by him should not be used against him.

- The court is bound to hear the accused person in an appeal petition even if such appeal is presented by him as a prisoner in jail.

Separation of judicial and executive functions: During the British rule, criminal judicial functions formed part of the general administration and were, therefore, entrusted to officers of the executive under the control of the government. This may have originated as a matter of administrative convenience and, at an early stage, the British themselves were inclined to consider the desirability of taking away judicial powers from the revenue officers. For some reason this was not done. Generations of eminent statesmen, administrators and judges pressed for this reform. The Indian National Congress which fought for freedom included this among its main demands and so, unwittingly, the issue assumed a political colour.

Presumably because of this, the demand was resisted by the British and the reform was not carried out till after independence in British India. A specific provision was made in the Constitution of India enjoining upon the States the duty of separating the judicial and executive functions. Many States implemented the

reform in some form or other.

The real purpose of the reform was to ensure the independent functioning of the judiciary freed of all suspicions of executive influence or control, direct or indirect. It incidentally ensures that officers devote their time entirely to judicial duties thereby leading to efficiency in the administration of justice. Correspondingly, officers of the Executive are free to devote their undivided attention to welfare and other measures.

The new Code of Criminal Procedure is based on this separation of functions. Although it is not strictly an innovation because in many States the reform had already been implemented, the code has brought about uniformity in the scheme. The direct result of this will be that the administration of criminal justice will be by experienced persons trained in law and directly controlled by the High Court. In view of this, the new code has enhanced the sentencing powers of magistrates. The day-to-day control of their work by the High Court is bound to ensure greater expedition.

Burden of proof in certain cases: The normal rule of evidence adopted in India in most cases is that in a criminal trial the prosecution must prove by positive evidence every ingredient of a criminal offence to establish the guilt of the accused person beyond reasonable doubt. The accused is called upon to prove only his defence, such as a plea that he comes under any exception or a plea of alibi. However, an important innovation has been made to this rule in relation to certain special categories of offences and these are cases where in the nature of things it would be extremely difficult for the prosecution to prove certain facts whereas the defence will be in a position to prove and could easily prove, its case. In this connection, it may be mentioned that, unlike the prosecution which has to prove every fact beyond reasonable doubt, the defence need prove a fact by predonderance or probability.

Some special laws make provision for legal presumptions of certain facts which the prosecution need not prove. An illustration of this is contained in the Prevention of Corruption Act. Under that Act the offence of bribery will be committed where a public servant:

(a) Solicits or receives an illegal gratification; and

(b) receives such gratification as a motive or reward for doing any official act.

If the normal rule of criminal law is applied, it is the duty of the prosecution to prove both these two ingredients to the hilt. However, experience has shown that a charge of corruption, in the very nature of things, is difficult to establish as direct evidence is in most cases meagre and of a tainted nature. The bribe giver who often benefits from the corrupt official will generally not cooperate in such cases. In particular, it is very difficult to prove positively that the receipt of any gratification was in fact a motive or reward for doing an official act. To meet this difficulty, a specific provision has been made in the Act to the effect that where the prosecution had proved that a public servant solicits or receives any illegal gratification, the court shall presume that the same was received as a motive or reward for doing any official act. This means that the public servant has to prove that the receipt of illegal gratification was with the requisite motive of reward. This new provision has helped considerably in tracking down corrupt public servants. This special rule of evidence is particularly useful and has been adopted in certain special laws relating to white collar or anti-social crimes such as in relation to smuggling, adulteration of drugs and food, etc.

Prisons

Overcrowding in prisons: One of the most difficult problems in prison administration in many States in India is that of overcrowding. There are about 1,200 prisons in India and on an average, the number of prisoners at any given time is about 200 thousand. The number of persons admitted to prisons during one year is about 1.37 million, and the rate at which this has been increasing is about 3.7 per cent per annum. This is an appreciable icnrease even allowing for the annual increase of about two per cent in the population. The disturbing feature is that about 85 per cent of men and 95 per cent of women convicts spend less than six months in custody. Almost 80 per cent of the convicts are sentenced to imprisonment for a term not exceeding three months. About 55 per cent of the prison population consisted of undertrial prisoners, that is, persons remanded to custody pending conclusion of trial.

Vigorous and sustained efforts to tackle this problem administratively were made in many States by constructing additional prisons, etc. But the limiting factor was non-availability of funds for such programs because other developmental programs such as agriculture, industry, irrigation, etc., had to be given higher priorities. As an unfortunate consequence of such overcrowding in prisons, measures for prison reform could not make headway in some prisons because in an overcrowded prison it is virtually impossible even to maintain the minimum standards. The harassed persons in charge of the prisons have their hands full in maintaining peace and order.

Serious attention was paid to this problem when revising the Code of Criminal Procedure. As a direct result of the series of changes made in the new code for reducing the duration of investigation and trial of cases (referred to in the previous section), there will be a substantial reduction in the number of under-trial prisoners. In particular, the abolition of committal proceedings by itself will account for a sizeable reduction in the number as in some States these proceedings took several months. Every other change for expediting trial will similarly result in the reduction in the number of under-trial prisoners. It will be difficult for the police under the new code to prolong investigation indefinitely. Periods of limitations have been prescribed for launching prosecutions in certain cases. Where the offence under investigation is punishable with imprisonment for two years or less, the police cannot continue the investigation beyond six months as the magistrate can direct the discontinuance of such proceedings at that stage. In other cases, including serious cases, any person who is kept in detention during investigation must be released on bail if the investigation is not completed within two months. The court has also to release an accused person on bail if the trial is not concluded within 60 days from the date fixed for taking evidence, except for special reasons. A further provision has been made that any period of detention spent by a person before the conviction as an under-trial will be set off against the period of imprisonment ultimately awarded to him on conviction.

As regards the evil of short-term imprisonment, mention may be made of the following provisions in the new code. It has been provided that where an offence is punishable with imprisonment for one year or more, the court must give special reasons in its

judgment if it awards a sentence of imprisonment for less than three months. Where under the various laws provision has been made for the release of persons on probation or for the remand of youthful offenders to certified schools, etc., a court cannot order a sentence of imprisonment except when it considers it necessary and it records reasons for the same in the judgment. In the amendments to the substantive law now in an advanced stage of consideration by Parliament, several measures have been contemplated in this direction. First, offences for which short terms of imprisonment for one or two months will be made punishable either with fine only or with imprisonment for more than three months. Second, a number of sentencing alternatives have been provided with a view to avoid as far as possible the imposition of a sentence of imprisonment. These changes are expected to improve the position considerably.

Open air prisons: The employment of prisoners in open conditions and under minimum watch and ward was started in this country on an experimental basis in the early fifties of this century soon after independence. Under this experiment, prisoners were employed on public projects such as construction of dams, roads, bridges and digging of canals, etc. The experiment proved quite successful and there were fewer escapes and breaches of discipline than anticipated. This led to a gradual extension of the scheme. During the quarter of a century that has elapsed since the system was introduced in India, it has been vastly improved and extended. It has now become part of the regular prison system in many States of India.

An open air prison is not just a prison without walls or ceiling. The objective of an open air prison is to give the prisoners an experience that will help them to change their attitudes and behaviour and to secure their social, moral and economic rehabilitation. It involves trust and an appeal to human nature. It also develops in prisoners a sense of social responsibility. The tension usually associated with closed prisons is absent and this is conducive to good physical and moral health of the prisoner.

The actual features of the open air prisons differ from State to State in minor details but broadly they fall in the pattern of life and living in the Indian rural groups as a large number of prisoners come from rural areas with an agricultural bias. The normal form

of employment in an open prison is agriculture and agro-industries such as poultry, dairy, animal husbandry, horticulture, fruit preservation, sugar cane and other juice extraction, construction of buildings and roads, etc. In most States, uncultivated land is taken up and the prisoners are employed in reclamation of the area and converting it into cultivable area.

For instance, in Punjab, the open air agricultural jail took up nearly 1,000 acres of forest land and in a short period of about two years, it reclaimed the whole area and brought it under cultivation. Recently, in the State of Ultan Pradesh, about 900 long term prisoners in an open air prison have been engaged in cultivation of a 400 acre farm and are looking forward to a comfortable life after their terms of imprisonment are over. Usually, such prisons have a capacity for about 200 to 300 prisoners. The prison is not enclosed by walls but some demarcation of boundaries by fencing is made to prevent encroachment by outsiders. Accommodation of the cottage or barrack type is provided for the prisoners in the area. The persons to be sent to open air prisons are selected with great care particularly in view of the limited availability of facilities due to financial constraints.

The prisoners are allowed to have full freedom in doing their own work on which they are engaged. They are otherwise subjected to the same restrictions as regards hours of work, etc. A program of daily routine, including community prayers, education, recreation, etc., is drawn up for each such jail. Every prisoner gets wages for the work done by him almost at the market rate of wages. The maintenance charges are recovered from the prisoners earnings and the prisoners are free to spend the earnings which remain after such deductions. The other privileges available to a prisoner such as remission, home leave, parole, etc., are available to him in an open jail. In fact, he gets a larger remission for good conduct. As regards discipline, reliance is not based on punishment but on persuasion and personal example of the staff. The general atmosphere of freedom and responsibility induces a sense of self-discipline. The punishment for contravention usually takes the shape of sending him back to the closed prison. The return to the closed prison is also made on medical grounds or on his own request.

A number of inter-State teams for assessing the working of the system were set up and it has been found that the system has been

working very smoothly and the general objectives have been realised to a large extent.

Preventive detention

It is almost axiomatic that the prevention of crime is of vital importance to any society, even to a greater extent than the punishment of the offender. One of the well-known methods of prevention of crime is by preventive detention, that is, the detention of a person to restrain him from committing a crime which he may commit but has not yet committed or from doing some act injurious to the community which he may do but has not yet done. This concept proceeds upon the principle that prevention is better than cure. Provision for preventive detention exists in the laws of several countries in some form or other. Preventive detention has thus to be viewed in the context of the need for prevention of crime in general.

Nevertheless, it is a fact that a section of opinion would regard preventive detention with horror on the ground that it involves the detention of a person without trial and as such is a contravention of rule of law. This view is not fully justified and is a somewhat superficial view. The rule of law is not a utopian concept of what ought to exist in some imaginary state of perfection but on what civilised nations accept as the practical necessities of existence in the present state of the world. In any case, the rule of law does not require that a person should be allowed to commit crimes before he is restrained by detention or otherwise. The proper view to take would be that preventive detention as such is not against the rule of law although the actual manner in which the power is exercised may have to be assessed in the context of the rule of law. For that purpose, certain procedural and other safeguards are generally insisted upon. Among other recognised principles in this behalf may be mentioned the principle that power to order preventive detention of persons should have the backing of constitutional or other legislative provisions; that certain minimum safeguards should be provided to protect innocent persons from harrassment; and that courts of law should have some control over the exercise of the power to ensure that the power is not exercised *mala fide* or arbitrarily.

The Indian Constitution, while guaranteeing protection of life

and personal liberty to every person, including foreigners in India, makes a specific provision enabling Parliament (and also the State Legislatures to a limited extent) to make laws providing for preventive detention of persons for reasons connected with defence, security of the State, the maintenance of supplies and services essential to the community, etc. It incorporates several safeguards. For instance, no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an advisory board, consisting of persons who are or have been or are qualified to be Judges of a High Court, has reported that there is in its opinion sufficient cause for such detention. It is also provided that the authority making the order of detention should furnish the grounds of detention to the person concerned and give him an opportunity of making representation against the order which must be taken into consideration by it. Parliament has been given power to make laws permitting exceptions in regard to some of these restrictions in certain circumstances.

The Indian Constitution also confers the right on every person to approach the highest court of the land with petitions for writs of *habeas corpus* whenever they feel aggrieved by any wrongful detention. Innumerable cases have been taken in this manner to courts which have ordered the release of such persons in several cases. Apart from the requirements of the constitution, the courts have been insisting on certain other principles such as existence of some material on record to justify detention, absence of *mala fide*, want of jurisdiction, etc.

A recent innovation in the field of preventive detention is a law of Parliament providing for preventive detention of persons with a view to prevent them from acting in a manner prejudicial to the conservation and augmentation of foreign exchange and prevention of smuggling activities. As is well known, activities of this kind have serious impact on the well-being of the entire nation by virture of their pernicious effect on the national economy, particularly in the case of a developing nation. The unscrupulous activities of smugglers and foreign exchange manipulators have been responsible to a large extent for accentuating serious economic distress. The normal laws relating to smuggling and foreign exchange were made stringent from time to time and administrative action also was tightened. All this did not have any perceptible effect on these activities.

The nature of these offences is peculiar as they are planned and executed in secrecy by shrewd and dexterous persons with sophisticated means, more often than not with foreign collaborators. The offence is felt and not seen and so its detection is unusually difficult. Another important feature is that smuggling carried on systematically on the borders provides a respectable outfront for espionage, and so these activities, if unchecked, spell disaster to the nation in more than one respect.

After anxious consideration of the whole matter, a new law was enacted in 1974 by the Indian Parliament making provision for preventive detention (The Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974). Under this law, power was conferred on senior government officers to order the detention of any person, if the officer was satisfied that such detention was necessary to prevent that person from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or from smuggling goods or dealing in such goods or harbouring persons engaged in smuggling goods. As required by the Constitution, the law provides for setting up of advisory boards to consider whether or not there are sufficient grounds for detention of the person concerned. The law contains other safeguards against arbitrary action.

It is a fact that after the enactment of this law, smuggling and foreign exchange manipulations have gone down to a remarkable extent. By immobilising persons known (though not seen) to be engaged in these operations, the links which facilitated them were disrupted. In the nature of things, it is not possible to quote statistics to prove the effectiveness of these measures but there are several indications in this behalf. For instance, the amount of foreign exchange remitted to this country through regular and legal channels has just doubled as a consequence of these measures. In short, the innovation of preventive detention of smugglers and foreign exchange manipulation, in accordance with law, has achieved its object of preventing the commission of these anti-social and anti-national crimes much more effectively than any of the measures taken so far in this behalf.

The *Panchayat* System

Despite urbanisation on a massive scale that has been taking place in India during the last few decades, statistically India still continues to live in the villages. More than 80 per cent of the population of about 600 million live in the villages. Mahatma Gandhi, the Father of the Nation, observed: 'If the village perishes, India will perish too. India will no longer be India. Her own mission in the world will get lost'.

Any scheme of administration or organisation of the social, economic or judicial aspects of the community will cease to have meaning and content unless this vast majority of the population is in some way associated with it. Imperial powers, indigenous and foreign, realised this and made appropriate provisions.

From time immemorial, the village administration was carried on at the village level itself by *Panchayats*, that is, groups of five or more persons of the locality who commanded respect. The Muslim rulers were somewhat indifferent to this scheme. The British, in the early years of their rule, discouraged the system and worked for a centralised control. The courts set up by the British were given greater importance leading to the neglect of the village courts. Later, the British realised the importance of decentralisation and made provisions for reactivating village courts by conferring on them powers to deal with petty civil and criminal cases. When India attained independence and opted for a democratic form of government, it was but natural that attention should turn to the vast bulk of the population in the villages and to the indigenous institutions.

One of the directive principles of State policies requires the village *Panchayats* be encouraged to enable them to function as units of self-government. In pursuance of this, the state has been taking a variety of measures to develop the villages, particularly to associate them with developmental activities. There are now more than 200 thousand *Panchayats* all over the country entrusted with the work of development programs, and these cover about 98 per cent of the village population. The actual scheme of democratic decentralisation differs from State to State but a general pattern under central direction is adhered to.

The system of democratic decentralisation included the decentralisation of the administration of justice. *Nyaya Panchayats* that is, *Panchayats* for the administration of justice, have been set up

by several States, for villages or groups of villages, to decide disputes in the villages. Although the present institutions have been set up by recent State laws, the system of *Nyaya Panchayats* is nothing new as it has been functioning in some form or other, down the ages.

The question whether *Panchayats* have any useful role to play in this country has been debated all through these years, from the beginning of this century. Reference need however be made only to the studies made by two important bodies in this connection. The question was considered in depth by the Law Commission of India set up in 1955 which comprised some of the country's top jurists. After a thorough examination of the various aspects and after hearing the views of all concerned, the Commission expressed the categorial view that the *Panchayat* courts were capable of doing a good deal of useful work by relieving the regular courts of petty civil or criminal cases and that in many ways they will be more advantageous to the villagers than the courts set up in the headquarters. The Commission suggested several measures for improving the working of these courts. Thereafter, a study team set up by the Central Government also went into the matter thoroughly and found that there was near unanimity among the villagers for the continuance of the system. It also made several suggestions for improving the system.

For a country of such a size, with its population spread out mostly in villages, a system of administration of justice which: is based on sound common sense; is made available at the very door of the villager; is cheap and effective; is not ridden with procedural delays; seeks more to compose differences than perpetuate them; is undertaken by persons who live in the same area, speak the same language and perhaps think alike on many matters; is homely, informal and open to the public gaze; and has a sound tradition, is bound to command ready acceptance, at least among the villagers, whatever a sophisticated urban view on the matter may be.

The regular law courts are notoriously expensive and the complaint generally made is that they pay more attention to technicalities and procedure than to the soul and substance of the case. Litigation before such courts drags on for a long time. The villager welcomes an institution near at hand composed of men who understand the customs, the local idiom, and when certain things are said and done. They may make mistakes in the procedure but

they know the people and to a great extent give them satisfaction. These local institutions provide greater opportunities for settlement and the decision given in a dispute does not leave behind that trail of bitterness which generally follows in the wake of every litigation in the ordinary courts. The desire to fight out every case to the bitter end which is associated with a court of litigation tends to disappear because of the conciliatory method of approach to the problems adopted by *Nyaya Panchayats*. One strong reason why the villagers are themselves in favour of the system may be that in the village it is difficult for any person to speak an untruth and get away with it. Indeed, some enthusiasts even suggest in view of its inherent advantages, the extension of the scheme to urban areas.

Nevertheless, critics against the system are not wanting. There has been criticism against this system through the ages and all the commissions and committees set up for the purpose, including the Civil Justice Commission set up by the British Government in 1920, took note of these criticisms but all of them found that despite all that can be said against the system, it has its usefulness. The main points made by the critics are set out below.

The first criticism is that villages are generally faction ridden or caste ridden and so *Panchayats* cannot function with that objectivity and detachment so essential to the administration of justice. Added to this is the fact that as a consequence of the party system of democratic government, suspicion as to political motivation in the decisions given by these lay judges is a factor to reckon with. This criticism has, however, been there all along. But the fact remains that in spite of all this, the *Panchayats* have been functioning reasonably well according to the administration reports of the various States. That the existence of the factions did not always lead to injustice is evident from the fact that the number of revision applications against the decisions which were successful was extremely small amounting to less than 1 per cent. The strongest rebuttal of this criticism, however, is that the persons in the *Panchayats* have always to be careful about public opinion and they cannot, therefore, afford to be blatantly partial and still thrive in the small village community.

The second criticism is that the administration of justice is a technical job and the illiterate villager cannot be entrusted with this. Here again, the criticism appears to be exaggerated. Educ-

ation is not the only criterion of wisdom, and in any case the powers exercised by the *Panchayats* are only in relation to petty offences not involving complicated issues.

The third criticism is that the existence of a court nearer home will encourage litigation. This again does not appear to be a very serious objection and it has been found in experience that the *Panchayats* do not generally deal with frivolous disputes.

It is of course true that the system is not perfect in every way. It has certain defects but the overall interests of the Indian society at the village level would appear to be to retain the system after remedying the defects rather than to throw it away. In fact, if the system is thrown away, there is no other equally efficient system which can be devised for dealing with the huge problem of village litigation.

A Novel Experiment in Respect of a Chronic Criminological Problem of Professional Robbers

If any one were to say that some hundreds of professional robbers, many of whom were wanted in connection with several murders and other heinous crimes, voluntarily surrendered to the authorities for being dealt with according to law, that person is not likely to be taken seriously and may stand the risk of being branded as a liar. However, this is just what happened in India a couple of years ago. (These professional robbers are popularly referred to as *dacoits* based on the definition of '*Dacoity*' as robbery by five or more persons.)

For several decades, a sprawling stretch of land lying in three States in India used to be infested with numerous gangs of *dacoits*. The cases were many. The nature of the terrain is such that it looks as if it was made for *dacoits*. The area is full of deep ravines criss-crossing for hundreds of miles along the banks of a river, flanked by thick shrub jungles. It is impossible for any person to find his way about in these ravines and jungles. Historically, this area does not appear to have been controlled effectively by the rulers, native as well as British. The people in this area belonged to a sturdy stock and the surrounding villages consisted of men with a low level of literacy. All these factors contributed to this area being a fertile ground for *dacoits*.

Till the early sixties, the field of operation of these *dacoits* was

limited to villages situated in the interior and the methods were the traditional forms of *dacoity* and plunder. Their very presence in the neighbourhood evidenced by firing of guns, made the villagers run away leaving the *dacoits* to do their job. Curiously, several legends were woven around these *dacoits* and a few of them are known to have been worshipped as heroes. Some of them had a good reputation of not harassing the poor or molesting women and of rendering financial assistance to the needy. They were generally religious minded.

The number of gangs became formidable in course of time and their activities became more dangerous. Till very recently people were afraid to travel in these areas after dark. The *dacoits* resorted to kidnapping for ransom on a large scale. The victims were removed to jungles and were released, if at all, only after the heavy ransom was paid. Cases of brutal murders of kidnapped persons were frequent. Such kidnapping took place not only from villages but also from cities, transport buses, etc.

The government had, of course, not been keeping quiet. Vigorous efforts were made to tackle this problem by the traditional methods. There were several 'encounters' with the armed police and cases of shooting down some of the *dacoits* were also reported. But all these measures could control the evil only to some extent and the problem continued to exist. Nor was it possible to clear the area of jungles and ravines because of the huge cost involved. In short, the problem of *dacoits* in this area was almost unsolvable.

A dramatic change in the situation was brought about in 1972 when a large number of these *dacoits*, including some dangerous ones, voluntarily surrendered to the authorities to be dealt with according to law. The credit for this is due to a social welfare organisation started by Mahatma Gandhi and called the *Sarvodaya* movement. It was an offspring of the Gandhian ideology of mobilising the spiritual, moral and material resources of society in the service of the general good for the uplift of all. According to this approach, no one is wholly wicked and there is an innate nobility even in an apparently ignoble man. Even a wicked man can be trained in the virtues of truth, non-violence, self-sacrifice and self-control and can be converted by adopting the non-violent method of appealing to his head and heart.

The none-too-easy task of bringing round these *dacoits* to the normal way of life was undertaken by some prominent members

of this organisation. As a result of years of patient work, the social workers came up with concrete proposals for coming to an understanding with the *dacoits* so as to enable them to give up their activities and become normal citizens. The Centre Government handled this matter with extreme tact and understanding and in a spirit of cooperation. The conditions stipulated were discussed with the social workers informally. As a result of this, some 520 *dacoits* voluntarily surrendered to the authorities and agreed to be tried by courts of law. It will be interesting to know that one of the important conditions stipulated by the *dacoits* was that the trial should be quick. Special arrangements were made by the government for this purpose and the *dacoits* were convicted and sentenced quickly.

The mere surrender and conviction of these *dacoits* was not the sole aim. The more important problems were to remove the root causes for such anti-social activities and to ensure that the new generation in the area grew up in peace and friendship which can be achieved by diverting the energies of the local community to useful channels. The problem of rehabilitating the *dacoits* and the members of their families had to be tackled. There was the more difficult problem of rehabilitating the victims, which was equally vital for ensuring peace and tranquility, because the spirit of vengeance had to be curbed. There were instances where a person lost many members of his family as a result of atrocities committed by the *dacoits* and he might not have been inclined to excuse the *dacoits*. Finally, there was the most difficult problem of developing the area.

A systematic study was made of all these problems by government and several specific steps were planned. The *dacoits* were not confined in jails after conviction but were put in special open air jails which were established in the area. Groups of persons with their own leader were allotted specified plots of land for cultivation. After the plots were developed, the idea was to make the *dacoits* the owners of the plots. The former criminals were themselves utilised for the useful purpose of reclamation, etc. It was also proposed to start a number of labour-intensive industries in the area to employ the persons usefully. Railway lines and other means of communications had to be opened up. All these steps were aimed at tackling the socio-economic problem of the region which gave rise to the problem of *dacoits*.

These measures involve huge expenditure and this is the factor which stands in the way of implementing these programs with vigour. Though not spectacular, progress has been made to the extent possible within the financial restraints.

The fact, however, remains that the area is now free from the large scale *dacoities* which used to plague it for decades and the unique methods employed to tackle this problem stands out in contrast with the conventional methods.

The surrender of about 500 *dacoits* in 1972 referred to above was not just a flash in the pan. Subsequently some more batches of *dacoits* surrendered to the authorities, on terms similar to those agreed to in respect of the first batch. This is encouraging news for every one who is interested in evolving new solutions to old problems.

Innovations in Substantive Law

Substantive criminal law in India can be grouped under two headings: the basic law and the special laws. The former, which is contained in the Indian Penal Code, deals with general offences like murder, theft, rape, waging war, etc., and also with the general principles of criminal liability. The second group consists of a large volume of laws enacted from time to time by the Centre as well as by the States to deal with special or local situations or special problems such as suppression of immoral traffic, prevention of corruption, prevention of adulteration of food or drug, regulation of motor vehicles, etc. In addition, every law enacted for the purpose of dealing with any social or economic problem or regulating activities contains penal provisions to punish those contravening the provisions therein. Some of these special laws are ephemeral while some are permanent. Although many of the special laws may include provisions which may be regarded as innovations, it is difficult to set them out in detail. At any rate as they are intended to deal with special problems, they may not be of any general interest. All that can be said about these special laws, is that there has been a recent general trend indicating that Indian society takes a sterner view in regard to anti-social or white-collar crimes than to conventional crimes.

Regarding the basic law, the Indian Penal Code enacted in 1860 has generally been regarded as adequate to meet all require-

ments and certain sections of opinion were against any major change in the code. However, it is not possible to overlook the fact that during the interval of more than a century that has elapsed since the code was enacted, there have been several changes in the social and economic structure of society, in ideas about crime and the concept of private property, in the attitudes concerning family, and in fact in the whole approach to crime and punishment.

The Law Commission of India went into the matter and made its recommendations for the revision of the code in 1971. A Bill for comprehensive amendments to the code was introduced in Parliament and after a through scrutiny and wide ranging discussions by a Committee of Parliament, the Bill in its final form is in the last stage of enactment. The comprehensive amendments to the code include a number of innovations making provision for some new concepts, some new crimes and some new punishments.

Among the new concepts the following may be mentioned:

1. Extra-territorial operation of the criminal law is to be provided for in respect of certain crimes committed outside India by aliens, such as an offence by an alien in government service in connection with his official duties, an offence against the sovereignty, security or integrity of India, an offence relating to coinage, currency, passport or other travel documents, and an offence of hijacking.

2. In respect of certain crimes like rioting, robbery and counterfeiting, the act is to be punished even at the stage of preparation, that is, even before the offender makes an attempt to commit the offence.

3. The principle of vicarious liability is to be adopted in the case of crimes by companies, and it is proposed to make a company liable for an offence committed by its manager or other employee, if it is by an act committed in furtherance of the affairs of the company.

4. In regard to the offence of adultery, the old concept was that the wife was the property of the husband and so the law punished only the male intruder. The amendment seeks to bring about equality between sexes by providing that in such cases of illicit intercourse, the wife of the male can prosecute the other female whether married or not. Illicit intercourse by a married man with a widow or an unmarried woman is also to be punished.

Among the new offences may be mentioned the following:

1. Corruption on the part of employees of private firms.
2. Invasion of privacy such as by unauthorised photography, or the planting of artificial listening or recording appliances.
3. Disfigurement of public places.
4. Publication of scurrilous or objectionable matters.
5. Large scale cheating of government by dishonest contractors.
6. Sabotage of public property.
7. Driving of vehicles while under the influence of drink or drugs.
8. Theft of antiquities.
9. *Gherao*, that is, unlawful restraint by a large number of persons.
10. False or misleading advertisements.
11. Malicious use of official powers or malicious authorisation of payments by public servants.

The punishment of death will be retained but the scope for awarding it will be very much less because it will be provided only for a murder committed after previous planning and involving extreme brutality or exceptional depravity or if the murder is of a member of an armed force or other public servant while on duty to preserve peace and order. The judge has to give special reasons in the judgment when he awards the sentence of death.

The new punishments for which provisions have been proposed are public censure, order for payment of compensation, disqualification from office, and order for community service. The punishment for certain offences like hijacking, abetting a child to commit offences, kidnapping for ransom, etc., has been raised while offences for which short terms of imprisonment are provided under the present code will be made punishable with fine only.

Apart from the innovations proposed in the basic substantive law as briefly outlined above, a number of innovations have been made from time to time in some special laws. Mention may be made of a few of them:

1. A provision has been made in the Prevention of Corruption Act that the possession by a public servant of wealth beyond the known sources of his income is by itself an offence. Earlier, such possession only raised a presumption that the wealth was acquired by corrupt means. This innovation has proved very useful in tracking down some officials who were known to be corrupt but who

could not be prosecuted because of the difficulty of getting evidence.

2. In some special laws made by certain States, there is a provision which enables the executive officers concerned to order the deportation of a person from a locality for a specified period, if he is satisfied that it is necessary to do so for maintaining peace and tranquility in the area. As is well known, some persons have great potential for mischief by reason of the hold they have over people in the locality but they are put out of action if they are removed from their moorings. This power has been used effectively against persons who stir up communal or other disturbances.

3. An association of persons which is engaged in unlawful activities like preaching secession or acting seditiously can be ordered to be dissolved and the individuals concerned can be punished under a central law.

4. The slaughter of cows and other milch cattle yielding milk has been made an offence in many States under special laws.

5. The termination of pregnancy by a medical officer with the consent of the individual will not be a crime, as provided by a special law.

There are more such special laws dealing with special and local problems.

Conclusion

It will be seen from the foregoing brief survey that in India the problem of modernising the old laws and institutions connected with the criminal justice system has received the most earnest attention and that as a result of the systematic studies undertaken in this regard, several significant and useful innovations have been made – many of which may be found useful in other countries facing problems similar to those of India. The whole purpose and the central idea behind all these innovations is to make the criminal justice system serve its essential purpose of protecting society and subserving the common good and the happiness of mankind.

8 Criminal Justice Innovations in Singapore

A. W. Ghows

Introduction

In a speech he delivered at the annual medal presentation ceremony held at the police academy on 24 January 1976, the Commissioner of Police of Singapore said that 1975 had been another difficult year but it had also been a successful one for the police. Although unrevised crime figures for seizable offences showed an increase of 0.5 per cent over 1974, there was an actual and marked decrease in the number of serious offences during the year. Robberies dropped by 381 cases, housebreakings by 40, murders by 13, rape by 8 and thefts of all types by 594 cases over the previous year's figures. The number of robberies recorded was the lowest since 1970.

The Commissioner of Police attributed the substantial reduction in serious crimes in 1975 to several factors but added that he had no doubt that the major ones were the greater certainty of arrest and conviction in the courts of law and the swift and severe punishment meted out to offenders. The criminal justice innovations we introduced in recent years seem to be beginning to bear fruit. The new amendments proposed for our Criminal Procedure Code and Evidence Act, we hope, will make it difficult for an offender to escape conviction in our courts of law.

The Commissioner of Police did not refer to drug offences in his speech as they are the responsibility of the Central Narcotics Bureau. The drug problem has suddenly taken on serious proportions and we hope that the measures we introduced in 1975 will contain it in the same way as the other measures we introduced recently have served to reduce serious crime in Singapore.

Trial by Jury

Singapore inherited its criminal justice system from the British and together with it came trial by jury. The jury in Singapore consisted of seven persons chosen by lot from persons summoned to act as such. Trials were held in the English language, so any person who was unable to understand English was disqualified from acting as a juror. Jurors who were better educated were classified as special jurors and the others became common jurors. Special juries were usually empanelled, on the application of the Public Prosecutor, when the case before the court was technical or presented special difficulties. A majority verdict was acceptable from the jury, but the majority should not have been less than five to two. If the verdict was guilty by a majority of not less than five to two, the court must have concurred with the majority verdict before the accused could be convicted, otherwise the accused was committed for trial before another jury.

As more and more local-born persons were chosen to act as jurors, it became evident that if a case was tried by a special jury the chances of securing a conviction increased. It was difficult to find common jurors of the right type and such jurors as were generally available were easily approachable and could be moved by extra judicial consideration.

In 1960, by an amendment made to the Criminal Procedure Code, trial by jury was abolished except in cases where the punishment authorised by law was death. The non-capital cases heard before the High Court were henceforth tried by a judge sitting alone, but power was reserved to the Chief Justice, with the approval of the *Yang di-Pertuan Negara*, to order that the trial of any particular type of offence before the High Court should be by jury.

These amendments were successfully implemented and trials of non-capital cases in the High Court were speeded up, but the trials by juries of cases involving the death penalty caused increasing concern as their verdicts were more often than not unpredictable. Most jurors felt overwhelmed with the responsibility of having to find a man guilty when they knew that this meant a death sentence. In one case a trial which should have taken five days dragged on for over 30 days and every visiting psychiatrist was called to give evidence, ending with the majority of the jurors being so impressed or confused that they reduced the charge of

murder to one of culpable homicide. If respect for criminal procedure and confidence in the administration of justice were to be maintained, the government had to act decisively in the matter.

In 1969, therefore, the government passed an Act amending the Criminal Procedure Code by abolishing trial by jury. Henceforth in all cases where the accused is charged with an offence punishable with death, he shall be tried by a court consisting of two judges of the High Court, one of whom shall be the presiding judge. The decision of the court as to the guilt of the accused in respect of such a charge shall be arrived at unanimously. Where the two judges fail to reach an unanimous decision as to the guilt of the accused charged with a capital offence, he shall not be convicted of that offence but may, if the two judges agree, be convicted of any lesser offence of which he could have been charged, based on the same facts. However, upon all questions relating to procedure and the admission or rejection of evidence during the trial, the presiding judge shall have a casting vote in the event of disagreement between the two judges.

Triad Societies

Even today, despite vigorous police action, secret societies pose the greatest threat to law and order in Singapore. To appreciate the present day problems arising from the activities of secret societies, it is important to know something about their background. Some people attribute the apparent indestructibility of these societies to the fact that they stem from the Triad Society which originated in China not long after the Ming Dynasty was overthrown by the Manchus. Towards the end of the 17th century the Abbot of the Shao Lin Monastery trained 108 monks in the art of self-defence with a view to using them to fight the Manchu rulers. Before the plan could be carried out the monastery was destroyed by the Manchus through the treachery of one of the monks.

During the siege of the monastery 36 of the 108 monks managed to escape. Finally only five of these monks survived and they founded the Hung League, which was the original name of the Triad Society. Soon prominent officials of the Ming regime joined the Hung League and began to organise an army. In order to ensure loyalty among members of the league, each of them

had to participate in the Triad initiation ceremony. After suffering further defeats at the hands of the Manchus the members of the Hung League dispersed and spread the principles of the Triad Society in the southern provinces of China.

During the 19th century, owing to difficult conditions in South China, the Chinese from Fukien and Kwangtung migrated in large numbers to South East Asia and the Malay Archipelago. They brought with them not only their religions and customs but also their Triad tradition. The early immigrants settled in groups and in order to protect their interests and maintain their common integrity they formed Triad societies. Singapore soon became a rough frontier town and the large numbers of Chinese immigrants arriving each week knew of no governing authority except that of the secret societies to which they soon became affiliated.

The immigrant Chinese, disciplined by the leaders of the secret societies, pushed into the interior of Malaya to work the tin mines. The secret societies even brought the tin out of the jungle, carrying, defending and delivering it. They identified themselves with Chinese business, supplying labour, monopolising certain trades and businesses such as stevedoring and transportation and giving protection to gambling farms, vice dens and smuggling syndicates. Inevitably disputes and differences arose and fights often took place. This led to the breaking up of the Triad societies into different gangs and they began to degenerate into instruments of criminal aggression.

The government had to take action. The first major step was the appointment of the Protector of Chinese under the Chinese Immigration Ordinance of 1877. All Triad society members were compelled to register. The purpose of the first Protector appointed under the Ordinance was to govern the Chinese through their secret societies. Their headmen were increasingly used, under threat of banishment, to enforce law and order in their areas of operation and among their members. Indirect rule was one thing, but using potential criminals to help govern a country was something else. The situation deteriorated further when control of the Triad societies went into the hands of the least reputable members of the Chinese community.

So in 1890 the Societies Ordinance was introduced outlawing all secret societies. All lodges or secret society headquarters were closed down and large numbers of foreign-born secret society

officials were banished. The Societies Ordinance drove all secret societies underground but failed to eradicate them.

During the Japanese occupation between 1942 and 1945, secret societies in Singapore went out of action for fear of Japanese brutality. Soon after the end of World War II they were revived. The Banishment Ordinance and the Societies Ordinance proved far from effective as the former could not be applied against local-born gangsters and the latter required proof of membership of an unlawful society. In 1949, after the Emergency Regulations were passed to counter communist insurgency, attempts were made by the police to apply the regulations against active secret society members. This effort however met with disapproval from the law officers who contended that the Emergency Regulations were not meant for the suppression of gangsterism.

In 1955 the Criminal Justice (Temporary Provisions) Ordinance was passed with the object of enhancing the punishment of secret society members found guilty of certain types of offences described in the Schedule thereof and also to enable the police to oppose bail to prevent the gangsters from intimidating or interfering with prosecution witnesses before their trial. A subsequent amendment to this Ordinance enabled a police officer not below the rank of Inspector to arrest and bring before the court any secret society suspect found in the immediate vicinity of, or fleeing from, a place where a gang fight was about to take place or had just taken place, to show cause why he should not be bound over. This Ordinance, although helpful, was not adequate to deal with the growth of secret societies.

By 1957 the situation was intolerable because during that year there were 400 secret society incidents including stabbings, gang fights, assaults, riots and murders, not to mention robberies, extortions and intimidations committed by members of secret societies. Secret societies which formerly took in only Chinese as members began to recruit Malays, Indians and Eurasians. Their weapons included knives, spears, acid, iron-rods, bicycle chains and even firearms. They ran little risk of prosecution in court as witnesses feared reprisals.

In 1958 an amendment was made to the Criminal Law (Temporary Provisions) Ordinance, 1955, which empowered the police to detain any person suspected of being an active secret society member for up to a maximum of 16 days pending inquiries for the

purpose of submitting an application to the Minister for a detention order or a police supervision order against the suspect.

Evidence against the suspect will be treated as secret and photographic identification of the suspect will be admissible in evidence. The suspect may be released by the police at any time during the 16 days he is in police custody if the evidence does not justify his further detention. If the Minister is satisfied from the police submission that it is necessary that the suspect be detained in the interest of public safety, peace and good order, he may, by order under his hand, direct that such person be detained for any period not exceeding one year from the date of such order or if the Minister is satisfied that it is necessary that such person be subject to the supervision of the police, he may direct that such person be subject to police supervision for any period not exceeding three years from the date of such order.

No detention or police supervision order may be issued without the consent of the Public Prosecutor. Every detention or police supervision order, together with a written statement of the grounds upon which the order was made, shall be referred by the Minister to an Advisory Committee within 28 days of the making of such order and the committee shall submit to the President a written report on the making of such order and may make such recommendations as it shall think fit and the President shall consider such report and may cancel or confirm such order and in confirming such order may make thereto such variations as he thinks fit.

When the Advisory Committee is reviewing either the detention or police supervision order, the detainee or supervisee may appear before it and state his case. The period of detention may be extended year by year and every time it is extended the detention order has to be referred to the Advisory Committee and the committee's report has to be referred to the President.

Normally a secret society gangster does not have to be detained for more than two or three years after which he is put on police supervision which is usually cancelled if he shows good behaviour. The usual conditions stipulated in a police supervision order are that the supervisee shall live at a given address and shall not change his place of residence without the prior approval of the police; that he reports himself once a week to the divisional police station at the time and dates stipulated in the order; that he

remains indoors between the hours of 7 p.m. and 6 a.m. and that he shall not leave Singapore without the written authority of a police inspector. Occasionally, where it is deemed expedient, an additional clause prohibiting the supervisee from entering a specified area is included. Breaches of any of these conditions are triable by court and the minimum punishment on conviction is 12 months imprisonment. In addition, police supervisees are not permitted to consort with other police supervisees. A police supervisee convicted of an offence described in the Schedule to the Ordinance is liable to have his sentence doubled and to be caned.

The Criminal Law (Temporary Provisions) Ordinance, 1955, which is now known as the Criminal Law (Temporary Provisions) Act (Chapter 112), has achieved a large measure of success but other measures are also necessary to dissuade youngsters from joining secret societies.

Corporal Punishment

In 1955 the cat-o'-nine-tails was abolished and henceforth corporal punishment ordered by the court could only be inflicted with a rattan not more than half-an-inch in diameter or, in the case of youthful offenders, with a light rattan. No sentence of caning can be executed by instalments and no females, males under sentence of death or males over 50 years of age can be punished with caning. The punishment of caning is inflicted on the buttocks in the presence of a medical officer and if during the execution of such sentence the medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence, the caning shall be finally stopped.

Crimes of violence are more often than not committed by members of secret societies. They molest women and victimise small-time businessmen who do not pay them protection money. They kidnap for ransom, accept payment for beating people up, protect smugglers, houses of prostitution and gambling dens, and commit robberies, extortions and snatch thefts. Secret society members usually operate in groups. As members of groups, they are bullies but when alone they are far from being brave. Although they are capable of inflicting injury on their victims with or without pretext, they fear pain. Often when they are ordered to be caned they will plead with the court to impose a longer sentence

of imprisonment instead.

As caning has been found to have a salutary and deterrent effect on most criminals, the government recently made caning a mandatory punishment for most crimes of violence. In the government's view there is no point in keeping a youthful robber in jail for several years when 10 strokes of the cane and two or three years imprisonment are sufficient to put him on the straight and narrow path.

Arms Offences

Towards the end of the war in Vietnam it was found that quantities of pistols and revolvers were being smuggled into Singapore and more and more robbers were armed with them. Even though any person who used or attempted to use a firearm with intent to cause physical injury to any person was punishable with death or imprisonment for life on his conviction, robbers in Singapore were not unduly deterred as they found that they stood a good chance of escaping conviction for this offence. In the confusion during an armed robbery where a firearm was discharged, especially where three or more robbers were involved, it was difficult for any witness to say with certainty who discharged the gun. So in 1973 a new Arms Offences Act was passed under which it is an offence punishable with death to use or attempt to use an arm with intent to cause physical injury to any person.

Where arms are used by any person in committing or in attempting to commit any offence, each of his accomplices present at the scene of such offence who may reasonably be presumed to have known that such person was armed shall, unless he proves that he had taken all reasonable steps to prevent the use of arms, be punishable with death on conviction. Any person trafficking in arms shall on conviction be punished with death or imprisonment for life and caning with not less than six strokes. Any person proved to be in unlawful possession of more than two arms shall, until the contrary is proved, be presumed to be trafficking in arms.

The new Arms Offences Act, 1973, has caused the use in firearms in robberies to drop to an all-time low as most criminals are loathe to accompany any person to commit a robbery or any other offence if he is carrying a firearm.

Drug Offences

In 1973 and 1974 most of the youths arrested for drug offences were found to be in possession of either cannabis (marijuana) or methaqualone. Most of the persons found in possession of or smoking opium were over 50 years of age. In 1973 10 persons were arrested for being in possession of heroin. In 1974 there were 110 arrests but in 1975 more than 1,700 persons were arrested for possessing heroin, the vast majority of whom were between 17 and 25 years of age. Ordinarily it would cost an addict at least S$32 a day to keep himself supplied with heroin. No youth aged between 17 and 25 years earns that kind of money in Singapore and so he has to turn to crime in order to obtain his supply of heroin.

As the situation was getting out of hand, the Misuse of Drugs Act, 1973, was amended in 1975 to increase the penalties for the unauthorised trafficking in, manufacturing, import or export of controlled drugs. A person who is found guilty of unlawfully trafficking in, importing or exporting a controlled drug containing more than 30 grams of morphine or 15 grams of heroin is liable to be sentenced to death. Any person who is convicted of unauthorised traffic in, import or export of less than 30 grams of morphine or 15 grams of heroin is liable to long sentences of imprisonment and to mandatory sentences of caning. Any person found guilty of unlawfully manufacturing morphine or heroin is liable to be sentenced to death. The Act also prescribes minimum terms of imprisonment for offenders involved in other drug offences.

To overcome the difficulty of proving 'possession' and 'trafficking' the Misuse of Drugs Act contains various presumptions. Any person who is proved to have had in his possession or custody or under his control anything containing a controlled drug, or the keys of anything containing such drug, or the keys of any place or premises in which a controlled drug is found, or a document of title relating to a controlled drug, or any other document intended for the delivery of a controlled drug shall be presumed to have had such drug in his possession. Any person who is proved or presumed to have had a controlled drug in his possession shall be presumed to have known the nature of such drug.

A person proved or presumed to be in possession of 100 grams of opium or 3 grams of morphine or 2 grams of heroin contained in

any controlled drug or 15 grams of cannabis or cannabis resin shall be presumed to have such drug in his possession for the purpose of trafficking therein. When a pipe, syringe or any other article intended for the smoking, administration or consumption of a controlled drug is found in any place or premises, it shall be presumed that such place or premises is being used for the purpose of smoking or administering a controlled drug, and any person found in or escaping therefrom shall be presumed to have been smoking or administering a controlled drug in such place or premises. All the above presumptions are, however, rebuttable.

An officer of the Central Narcotics Bureau or an immigration officer may, if he reasonably suspects that any person has any controlled drug in his body, require that person to provide a specimen of his urine for a urine test, and any person who, without reasonable excuse, fails to provide such specimen of his urine shall be guilty of an offence. Any person (other than a Singapore citizen or a permanent resident) arriving in Singapore by land, sea or air who fails to provide a specimen of his urine for a urine test, if required to do so, or if found as a result of a urine test to have consumed a controlled drug, may be prohibited from entering or remaining in Singapore.

Not every young addict is dragged before the court unless he also happens to be a drug pusher. The government has set up approved institutions for the treatment or rehabilitation of drug addicts and if it appears to the Director of the Central Narcotics Bureau, as a result of such urine test or from observation, that it is necessary for any person to undergo treatment or rehabilitation at such an approved institution, he may require that person to attend the institution for treatment or rehabilitation for such period as he may determine after consulting the institution.

A person who is a drug addict may volunteer to undergo treatment at an approved institution and he may be admitted to such institution on such terms and conditions as may be prescribed. In the approved institution the drug addict is subject to the so-called 'cold turkey' treatment, that is, no medication is given during the withdrawal process, unless he is above 50 years of age, is weak or sickly.

However, the most interesting section from a legal point of view in the Misuse of Drugs Act, 1973, is section 11 which provides that:

It shall be an offence for a person to:
(a) aid, abet, counsel or procure the commission in any place outside Singapore of an offence punishable under a corresponding law in force in that place; or
(b) do an act preparatory to, or in furtherance of, an act outside Singapore which if committed in Singapore would constitute an offence under this Act.

The expression 'corresponding law' is defined in the Misuse of Drugs Act as follows:

'Corresponding law' means a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside Singapore to be a law providing for the control and regulation in that country of the production, supply, use, export and import of drugs and other substances in accordance with the provisions of the Single Convention on Narcotic Drugs signed at New York on 30th March, 1961, or a law providing for the control and regulation in that country of the production, supply, use, export and import of dangerous or otherwise harmful drugs in pursuance of any treaty, convention or other agreement or arrangement to which the government of that country and the Government of Singapore are for the time being parties.

The Law of Evidence

Accomplice evidence: Although our Evidence Act (Chapter 5) purports to consolidate, define and amend the law of evidence and also repeals all rules of evidence not contained in any written law, so far as such rules are inconsistent with any of its provisions, it is by no means exhaustive and we have to rely to some extent on the common law. For instance, the rules about accomplice evidence as explained in *R.* v *Baskerville* (1916) 2 K.B. 658 and *Davies* v *D.P.P.* (1954) A.C. 378 are religiously followed in Singapore.

Although the common law rule requires a judge to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice but makes no mention of non-jury trials, it has become a rule of practice to require a judge or magistrate sitting without a jury in Singapore to state in his grounds of decision that he has warned himself of such danger. Then he has to set out the testimony which, in his opinion, corroborates the evidence of the accomplice. If he omits to state that he has warned himself as aforesaid the conviction will be quashed, even if there is corroboration, unless the appeal can be dismissed on the ground that no

miscarriage of justice has occurred.

After the abolition of trial by jury, the rule requiring even a Judge of the High Court sitting without a jury to warn himself of the danger of convicting looks unreal. So a Bill is now before Parliament which seeks, *inter alia*, to amend the Evidence Act by abrogating the rule whereby at a trial it is obligatory for the court to warn itself about convicting the accused on the uncorroborated testimony of an accomplice.

The Bill proposes also to amend the Evidence Act by inserting the following illustration to section 114 of the Act:

> (b) that an accomplice is unworthy of credit and his evidence needs to be treated with caution.

If this proposal becomes law a magistrate or judge will only have to identify who are the accomplices in the case, following the rule in *Davies* v *D.P.P.* (*supra*), and treat their evidence with caution.

What is meant by corroboration was stated by Lord Reading, C.J., when giving judgment in the Criminal Court of Appeal in the Baskerville case. A witness whose evidence requires corroboration cannot be corroborated, under common law rules, by another witness in whose case corroboration has to be looked for. Thus accomplices cannot corroborate each other. The technical distinctions as to what kinds of evidence may be corroboration make the rules difficult to apply and have caused many mistaken rulings at trials and consequent quashings of convictions. So the Evidence (Amendment) Bill also seeks to abrogate any rule of law or practice whereby in criminal proceedings the evidence of one witness is incapable of corroborating the evidence of another.

The hearsay rule: As all magistrates and judges in Singapore are legally qualified, the abolition of trial by jury presented an opportunity to relax the rule against hearsay evidence. The Evidence (Amendment) Bill and the Criminal Procedure Code (Amendment) Bill, both of which are now before Parliament, propose to make admissible in criminal trails:

1. Any out-of-court statement if the maker
   (a) Is called as a witness.
   (b) Cannot be called because he is dead, unfit to attend as a witness or is abroad.
   (c) Is available but is either not compellable as a witness and

refuses to give evidence or is compellable but refuses to take the oath.

2. Statements contained in certain kinds of records, if the information in the statement was supplied by a person having personal knowledge of the matter in question and the supplier
   (a) Is called as a witness.
   (b) Cannot be called for one of the reasons referred to above; or
   (c) Cannot be expected to remember matters dealt with in the information.
3. Information derived from computers.
4. Out-of-court statements, subject to certain safeguards, if the parties so agree.

Under the above proposals admissibility of hearsay statements will be subject to a number of restrictions, the most important of which are:

1. A statement said to have been made after the commencement of investigations into the offence with which the accused is charged by a person who is compellable as a witness but refuses to be sworn or by a person said to be abroad or by a person who has refused to give evidence will not be admissible at all.
2. A statement will not be admissible by reason of the impossibility of calling the maker as he is dead, unfit to attend as a witness or is abroad or refuses to give evidence, unless the party seeking to give it in evidence has given notice of his intention to do so, with particulars of the statement and of the reason why he cannot call the maker thereof.
3. A statement contained in a proof of evidence (including a proof incorporated in a record) given by a person who is called as a witness in the proceedings in question will not be admissible without the leave of the court. The court may give leave if in the circumstances of the case it is in the interest of justice that the witness's evidence should be supplemented by the proof.

Where an out-of-court statement made by a person who is not called as a witness for any of the aforesaid reasons is admitted, evidence which, if that person had been called as a witness, would be admissible for the purpose of destroying or supporting his credibility, shall be admissible.

Where a previous inconsistent or contradictory statement

made by a witness is proved, that statement shall be admissible as evidence of any fact stated therein. Where a witness is cross-examined on a document used by him to refresh his memory, that document may be admitted in evidence and any statement made by the witness in that document shall be evidence of the facts stated therein. However it is proposed that no statement admissible in these circumstances shall be capable of corroborating any evidence given by its maker.

It is for the court to decide what weight to give to the hearsay evidence admitted under the above proposals, and in estimating the weight, if any, to be attached to it the court shall take regard of all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, for example, whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated and whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

The accused's right to silence: The Judges' Rules became law in Singapore by virtue of a 1966 amendment to our Criminal Procedure Code and any statement obtained from a prisoner contrary to the spirit of these rules may be rejected as evidence by the court. It is now proposed to amend the law to abolish the so-called Judges' Rules and to provide instead that when a prisoner is charged with an offence or officially informed that he might be prosecuted for it, he shall be served with a notice in writing setting out the charge and the following advice:

> Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.

The above proposals are contained in the Criminal Procedure Code (Amendment) Bill which is now before Parliament. The Bill also provides that no statement made by an accused person in answer to the said notice shall be construed as a statement caused by any inducement, threat or promise if it is otherwise voluntary. If the accused fails to mention a fact which he afterwards relies on at the

committal proceedings or at the trial, after being served with the written notice, the court may draw such inferences as appear proper in determining the question before it. The fact would have to be one which the accused could reasonably have been expected to mention at the time. The accused's failure to mention such fact may be treated as or as capable of amounting to corroboration of any evidence given against the accused in relation to which the failure is material.

The Criminal Procedure Code (Amendment) Bill also seeks to abolish the accused's entitlement to make a statement from the dock without being sworn or affirmed. If this proposal becomes law, if the accused wishes to give evidence he shall do so on oath or affirmation and be liable to cross-examination. If the accused after being called upon by the court to give evidence refuses to be sworn or affirmed or, having been sworn or affirmed, without good cause refuses to answer any question, the court may draw such inferences from the refusal as appear proper in determining whether the accused is guilty of the offence charged. However, these proposals shall not be taken to render the accused compellable to give evidence on his own behalf and he shall accordingly not be guilty of contempt of court by refusing to be sworn or affirmed as aforesaid. This amendment shall not affect the right of the accused, if not represented by counsel, to address the court otherwise than on oath or affirmation on any matter on which, if he were so represented, his counsel could address the court on his behalf.

The Correctional System

The recidivism rate in Singapore is in the region of 30 per cent of the overall population of convicted prisoners. The recidivist, in this context, is a prisoner who has served at least one term of imprisonment previously. The above figure is rather low compared to the rates of recidivism in other countries. Basically the factors that contribute to the low rate of recidivism may be said to be as follows:

1. Modernisation of prison programs.
2. Sound rehabilitation schemes.
3. Provision of a prison social assistance/counselling service for prisoners.

4. Prison vocational/industrial job emplacement for the prisoners.
5. The prison education service.

Other related contributory factors may be said to be:

1. The high rate of crime detection by the police.
2. Sustained action against the secret societies and the application of the Criminal Law (Temporary Provisions) Act.
3. Enhanced terms of imprisonment for certain scheduled offences, including mandatory caning.
4. After-care for certain categories of prisoners.

For the young offender the policy is to make imprisonment a traumatic experience for him. For the first four to six months of his imprisonment, he is kept in a detention centre and subjected to a strict regimentation system where he is drilled as if he is undergoing basic training in the army. This is to inculcate discipline in the prisoner. Then he is obliged to do general labour. During this period he is denied most of the prison privileges. After this breaking-in period the young offender is put on a work intensive program after he has undergone a strict classification to assess his aptitude. Every opportunity is extended to the young offender to attend literacy classes or to pursue formal education in any of the four main language streams. The prison's education service, which is staffed by qualified teachers, conducts day and evening classes for prisoners.

The prisons recently began operating the punishment and reward system. Hard-core prisoners – those serving sentences of corrective training or preventive detention – are put through a very tough regime and are given few privileges. The prison regulations are being amended to abolish automatic remission of sentences. Prisoners in future will have to earn remission through good conduct and industry.

A prisoner is now paid an allowance commensurate with his output and his skill. The unskilled prisoner is provided vocational and industrial training facilities by the Prisons Department and as he acquires more skill his allowance is increased correspondingly. He is able to spend part of his earnings in the prison canteen but the greater portion of it is kept for him in the Post Office Savings Bank. Quite often the prisoners are able to send money home to their families to ease their financial difficulties.

The Prison Industries Section of the Prisons Department which provided facilities for various trades including woodworking, metalwork, book-binding, printing, tailoring, footwear and leather craft, canework, timber processing and cement work has now been taken over by the Singapore Corporation of Rehabilitative Enterprises which is a statutory body created by the Singapore Corporation of Rehabilitative Enterprises Act, 1975. The Corporation will be more flexible than the Prison Industries Section which had to comply with administrative and financial regulations like all other government departments. The Chief Executive Officer of the Singapore Corporation of Rehabilitative Enterprises is the Director of Prisons himself. It is proposed to transfer to the Corporation all industrial or vocational training institutions established by or vested in the government for the purpose of training prisoners and also all property, movable and immovable, including monies held by the government for the purpose of training prisoners in order to fit them to earn their living after their release.

The prisoner-earning scheme which was recently introduced will be revised further by the corporation, as it is proposed in the near future to place all prisoners on salary scales comparable to those prevailing in the private sector for similar jobs. Thereafter prisoners will have to contribute from their earnings towards their board and lodging in prison.

The Prisons Department does not attempt to make its prisons a home away from home for its prisoners. It deliberately sets out to leave the impression that prisons are unpleasant places to be in. At the same time it tries to up-grade the skills of its prisoners so that on their release they will be able to find employment without too much difficulty. The philosophy of the Prisons Department is that work helps to develop discipline and self respect. It should be the primary medium for the rehabilitation of prisoners. Rather than allow a prisoner to waste his time in prison, work enables him to be a productive unit. It will help him to readjust himself to society on his discharge after serving his sentence.

Other Schemes to Reduce Crime

One cannot rely entirely on more criminal laws and harsher treatment for offenders to reduce and prevent crime. In a predominantly young population like that of Singapore, one has to provide

facilities to harness the energies of its youth. Our Enlistment Act (Chapter 229) makes all male citizens and permanent residents between 16½ and 40 years of age liable for national service in the Singapore Armed Forces, Police Force and Vigilante Corps. Those enlisted for full-time national service have to serve two and a half years in the Singapore Armed Forces while those doing national service part-time have to serve 12 years. National service takes our young men off the streets where they are liable to get into mischief and teaches them discipline. For the younger boys still attending school, the government a few years ago enacted the National Cadet Corps Act and the National Police Cadet Corps Act to give them army or police training.

But what to do with school drop-outs who are not old enough to be liable for national service? Recently the curriculum of the government and government-aided schools in Singapore was changed to give one extra year of schooling at elementary level. There will be no more automatic promotions and those children who are unable to make the grade are given vocational and industrial training. The Ministry of Defence has introduced an apprenticeship scheme for youths not yet 16½ years old so that by the time they reach enlistment age they will have some skills and will be more inclined to make the army their career. In June 1975 two pilot training schemes were implemented with a view to giving apprenticeship training to school drop-outs, particularly males between 14 and 18 years of age. Response to these pilot schemes so far has been poor.

Suppression of Vice

Gambling: As there is no effective way to wipe out gambling in Singapore the government, by amendments to the Common Gaming Houses Act in 1961 and 1971, took steps to legalise certain forms of gambling by empowering the Minister to exempt certain companies and the members and officers of a racing club from the provisions of the Common Gaming Houses Act (Chapter 96) in respect of public lotteries and sweepstakes held, promoted, organised, administered or operated by them or their authorised officers or agents at places subject to the control or supervision of such companies or racing club. The Act also provides that notwithstanding the prohibitions and penalties prescribed and imposed in

the Act in relation to public lotteries, it shall not be an offence for any person to buy a ticket or take part in any public lottery held, promoted, administered or operated by any racing club or company which has been exempted from the provisions of the Act.

Despite the fact that the companies and racing club exempted by the government under Section 23 of the Common Gaming Houses Act are properly run and lottery winners are guaranteed their winnings, many Singaporeans still patronise the illegal bookmakers because they get discounts when placing bets with them. Police action which is being vigorously enforced against the illegal bookmakers has met with some success, especially as recently there have been stories in the press of illegal bookmakers welshing on their bets.

Alcoholism: Alcoholism is not a problem in Singapore mainly because of the high price of intoxicating liquor owing to the heavy tax on it. However, to protect road users, the Road Traffic Act was amended this year so that any person who has been arrested by the police under suspicion that he was driving or attempting to drive or was in charge of a motor vehicle on a road or other public place while under the influence of drink or of a drug to such an extent as to be incapable of having proper control of such vehicle, shall be guilty of an offence if, without reasonable excuse, he fails to provide at a hospital a specimen of his blood or urine for a laboratory test, if required to do so by a police officer. A police officer, when requiring any person to provide a specimen for a laboratory test, must warn him that failure to provide a specimen of blood or urine may make him liable to imprisonment, a fine and disqualification. The Act presumes that any person whose blood specimen contains a blood alcohol concentration in excess of 110 milligrams of alcohol in 100 millilitres of blood is incapable of having proper control of a motor vehicle.

By an amendment to the Liquors Licensing Regulations made this year, it is an offence for any person below the age of 18 years to buy or attempt to buy any intoxicating liquor for consumption on any licensed premises and for any person to buy from any licensed premises intoxicating liquor for consumption by a person below 18 years of age on licensed premises. Any bar or nightclub which serves intoxicating liquor to any person below 18 years of

age for consumption on its premises shall be guilty of an offence and shall also be liable to lose its licence.

Prostitution: It is not an offence to be a prostitute in Singapore but any person persistently loitering or soliciting in any public road or place for purposes of prostitution commits an offence. It is also an offence to live on the immoral earnings of a prostitute, to traffic in women and girls or to keep, manage or assist in the management of a brothel. It is hardly possible to eradicate prostitution in Singapore, but steps are being taken to control it and to prevent a proliferation of brothels. However the authorities are aware of the danger of driving the prostitutes underground.

With this in mind, the Anti-Vice Squad has been transferred from the police and is now operating under the Ministry of Home Affairs. The Anti-Vice Squad works closely with the Immigration Department and the Department of Social Welfare. Prostitutes who are illegal immigrants are referred to the Immigration Department for deportation. Prostitutes below 21 years of age are referred to the Department of Social Welfare for detention under section 145 of the Women's Charter. Prostitutes operating in residential areas and prostitutes not carrying medical cards to show that they go for regular medical check-ups are continually harassed by the Anti-Vice Squad.

The Infectious Diseases Bill, 1976, which is now before Parliament, is expected to give more powers to the Anti-Vice Squad. The Bill seeks to impose a duty on medical practitioners and every person in charge of a laboratory used for the diagnosis of diseases to notify the Director of Medical Services of infectious diseases. In this Bill the expression 'infectious diseases' includes venereal diseases. The Bill also proposes to empower the Director of Medical Services to order the removal, detention and isolation in a hospital of any person who is or is suspected to be a case or carrier or contact of an infectious disease. It is also proposed to give the Director of Medical Services power to order any such person to undergo surveillance. 'Surveillance' means the subjection of a person to periodical medical examinations or observations to ascertain his state of health and any person subject to surveillance who does not comply with any condition or requirement relating to his surveillance shall be guilty of an offence. If this Bill becomes law, any prostitute may be ordered to be detained or ordered to

undergo surveillance if she refuses to undergo medical examinations regularly.

Pornography: Obscene books and magazines and pornographic objects are kept out of Singapore by the uncompromising enforcement of two Acts of Parliament. The Penal Code (Chapter 103) makes it an offence to sell, hire, distribute, publicly exhibit or circulate any obscene book, pamphlet, paper, drawing, painting, representation of figure or any other obscene object. It is also an offence to import, export or convey any obscene object for the purpose of selling, hiring, distributing or publicly exhibiting it. The Undesirable Publications Act (Chapter 107) makes it an offence merely to possess any prohibited publication or any extract therefrom without reasonable excuse. A 'prohibited publication' is defined as written, pictorial or printed matter, the importation, sale or circulation of which has been prohibited by the Minister under Section 3 of the Act on the very wide ground that its importation, sale or circulation would be contrary to the public interest.

Under this Act the Minister has prohibited the importation, sale or circulation of some of the glossy girlie magazines popular in the United States and other Western countries. Under the Undesirable Publications Act power is given to senior officers of the Postal Department, of the Customs & Excise Department and of the police to detain, open and examine any package or article which he suspects to contain any prohibited publication or extract therefrom and during such examination he may detain any person importing, distributing or posting such package or article or in whose possession such package or article is found. Moreover, any authorised officer may detain, open and examine any article coming into Singapore from outside which he has reason to believe contains or consists of a publication, the importation, sale or circulation of which is prejudicial to public safety or public interest in Singapore. Any person entering Singapore shall, if he is required so to do by any authorised officer, declare whether or not he has with him any publication and produce such publication for examination.

Cinematograph films imported into Singapore must be deposited by the importer thereof in a warehouse approved for that purpose by the Board of Film Censors established under the

Cinematograph Films Act (Chapter 239). The owner of any cinematograph film produced in Singapore shall within seven days after the completion of production also deposit the film in the warehouse. Every film which is intended for exhibition in Singapore shall be presented for the purpose of censorship at such time and place as the Board of Film Censors shall appoint. After viewing the film the Board may approve it for exhibition in Singapore with or without alterations or excisions or may refuse authority to exhibit the film.

Sometimes obscene films are shown surreptitiously in Singapore, mainly for tourists, but the exhibiters of these films are liable to be arrested and charged in court.

Because of these stringent laws, pornography is not a problem in Singapore.

9 Innovations in the Criminal Justice System in Pakistan

H. S. D. Jamy

Introduction

The system of criminal justice of a country depends largely upon the ideology of its people and the socio-economic and political milieu in which they live. The organisation and existence of a society is closely linked to a well defined system of rules, norms and laws regulating the inter-relationships between its members and between those members and the state administration which a society may have developed for its integrity, both internal as well as external. A progressive modern state is, therefore, identified with the concept of the rule of law which is a corner-stone of its existence. One may agree with Harold Lasky in his 'Grammar of Policies' when he says:

> When we know how a national state dispenses justice, we know, with some exactness the moral character to which it can pretend.[1]

Historical Perspective of the Judicial System

The system of administration of criminal justice in Pakistan is partly a legacy from British times and partly related to Islamic jurisprudence. In respect of matters relating to personal law, that is, marriage, divorce, inheritance, guardianship, etc., the Muslims of the country follow the Islamic Law and in that connection the precedents laid down by Anglo-Muhammadan courts in India and courts in Pakistan are generally followed. In the field of criminal law and civil law we have, by and large, retained the English *corpus juris*, as evolved over the last two hundred years of British rule in India.

The disintegration of the Mughal Empire and the advent of the British in the Indo-Pakistan sub-continent can be justifiably described as the time when the foundation-stone of modern judic-

ature was laid. The traditional courts set up by the Mughals, which were more in the nature of the tribunals designated as *Qazi's* courts, were replaced by courts created by Royal Charters issued from Westminster from time to time until the coming into being of Pakistan.[2] The judicial system in the sub-continent has been subsequently crystallised on the pattern of court structure as it existed in the United Kingdom.

In short, Pakistan inherited on the eve of independence a court structure for administration of criminal justice with magistrates' courts at the lowest rung with the sessions courts intervening both as a courts of original jurisdiction for heinous offences as well as a courts of appeal/revision from the decisions of the magistrates' courts. The High Court was the court of appeal. Only special cases could be taken to the Privy Council and that too on a point of law.

Adoption of Laws

Not only did Pakistan inherit and adopt the court system, but it also adopted laws pertaining to the administration of criminal justice like the Penal Code of 1861, the Evidence Act of 1872 and the Criminal Procedure Code of 1896 besides various local and special laws of India. Other laws were also practically adopted, *mutatis mutandis*, and are in force today. It would, therefore, be fair to call all such laws traditional laws based more on common law principles and largely designed to meet the social order as it appeared in the last century and towards the beginning of this century. As regards the criminal law, it was primarily covered by the Penal Code and special laws were very few and far between. The Penal Code was treated as a complete code for itself and was deemed sufficient to cope with the situation.

Need for Change

After Pakistan acquired independence in 1947, the State structure underwent a tremendous change – socially, politically, economically and ethnically. A territory which had been a British colony for over 250 years suddenly became a republic under the name and title of the Islamic Republic of Pakistan. Millions of Muslims migrated from all parts of India and elected to settle in Pakistan.

This mass movement in the population also brought about changes in the social and economic order. Hindus, the business community, left this part of the sub-continent and were replaced by Muslims who were primarily of agricultural background. With the shift of population, the literacy graph with respect to the territory comprising Pakistan suddenly showed a downward trend and the crime rate showed a corresponding increase. As such, as soon as the country became politically stable and there was a breathing respite, the legislature started taking stock of the special situation and began enacting special laws to cater for the exigencies faced by the state and its people.

Importance of Procedure

It would be stressing the obvious to elaborate on the importance of procedure in the dispensation of criminal justice. It is not sufficient to create offences and specify punishments. It is equally important that the procedure be stipulated by which the guilt or innocence of a person is determined. Viewing the conventional criminal law as it is couched in the Pakistan Penal Code, one can justifiably assert that in its comprehensiveness it is treated as one of the best codes in the world inasmuch as it encompasses almost all manner and aspects of offences. It is, however, incomplete, insofar as it does not put proper emphasis on providing for punishment for various offences and it is for this reason that the Pakistan Penal Code has to be modified from time to time, redefining various offences and revising punishments.

Special Laws

It would be difficult to recount within the scope of this chapter all the measures adopted and put into practice. All the same, an endeavour will be made to refer to them in order to highlight the conditions which prompted the promulgation of special laws and to point out the ills which were intended to be cured through special laws. The common feature of the new laws promulgated by the State is that they tend to produce expeditious results. This was necessary in response to the criticism which is often laid that the present procedural laws are too complicated and elaborate to suit our people. Some critics assert that this system should be

abolished and replaced by a simpler system. Conditions of life have grown complex in the modern world and this complexity must in some measures be reflected in the laws that govern the country. A certain amount of formalism is a necessary adjunct to any legal system. Further criticism to the effect that the existing laws were primarily punitive and deterrent was met with by the new laws which aim at the prevention of commission of crime. Such provisions as section 107 read with 151 Criminal Procedure Code (apprehension for breach of the peace) go a long way in combatting crime in its initial stage.

The Criminal Procedure Code

The Criminal Procedure Code of Pakistan is almost like the other side of the coin in relation to the Pakistan Penal Code. It specifies which offences are cognizable by police and which are non-cognizable. It also specifies the type of offences triable by different levels of magistrates and by sessions and High Courts and which offences are to be tried under summons procedure or warrants procedure, or for that matter by way of summary trials. Further, it draws a distinction between bailable and non-bailable offences, and deals with important subjects like the investigation of cases, remand, jurisdiction of various courts, cognizance of offences, joinder of charges and persons, defence, granting of bail, execution of sentence, appeals, transfer of cases and disposal of property matters.

The Criminal Procedure Code cannot be dealt with lightly as a simple code providing for procedures to be followed by courts in administering criminal justice. If examined closely one finds that in practice it is more in the nature of substantive than purely procedural law. It reflects the intention of the State showing equal emphasis on both aspects of criminal justice, namely that no guilty person should go unpunished and that no innocent person should be punished. It is for the latter reason that the law envisages a number of safeguards. It may, however, be pointed out that the safeguards provided in the Code sometimes result in delays in meting out justice. In this way, justice delayed becomes justice denied. Lately the Pakistan Government has introduced law reforms to simplify the procedure for expeditious disposal of cases by promulgating the Law Reforms Ordinance 1972 (XII of 1972).

It is hoped that it will go a long way in providing an effective step towards speedy trials.

Socio-economic Changes

With rapid changes in social conditions, the need for better and more effective dispensation of justice had been felt all along. Invariably, many an evil could be traced to the tardy and laborious procedures specified by the Criminal Procedure Code. Consequently many offenders managed to get away. The procedural law was, therefore, amended in 1968 by the introduction of the Criminal Law Amendment Act of 1968 to provide for more speedy trials and for more effective punishment in respect of certain heinous offences like murder, etc.

By this Act, tribunals were set up comprising a magistrate and a panel of four other persons of the locality. The tribunals were to try only such cases as were referred to them by the executive divisional commissioners, and as a matter of practice only such cases were referred as pertained to offences like murder, abduction, robbery, mischief, rioting, prevention of corruption and offences of smuggling. The complicated and protracted procedure prescribed by the Pakistan Evidence Act and the Criminal Procedure Code was made inapplicable to these trials. Normally cases lacking sufficient evidence for the purpose of court trials were referred to the tribunals. Since the tribunals comprised members from the locality, they were competent to deliver judgments on the basis of personal knowledge, coupled with whatever evidence was produced before them. This Act introduced quite an interesting innovation in the administration of criminal justice with the result that cases where the accused would have otherwise escaped were suitably dealt with.[3]

It would, however, not be out of place to mention that this simplification of procedures before the tribunals resulted in the miscarriage of justice in a number of cases. There were many reasons for this. The integrity of the local assessors who were susceptible to tribal and family influences could not be ensured. Similarly, full reliance could also not be placed on the evidence of witnesses. It must be emphasised that the Act which tended to vest judicial functions on the executive authority, without the executives having been trained to maintain judicial attitudes,

tended sometimes to create exceptional situations. Furthermore the impact of the Act on the performance of the police was deplorably adverse as the latitude allowing them to refer a seemingly 'dark' case to the Commissioner resulted in inefficient handling of cases. However, it was felt that in some cases, although the court was morally convinced of the guilt of the accused, it found that evidence on record did not permit it to find him guilty. The legislature tried to correct the situation by providing for a mode of trial which dispensed with the strict procedure prescribed under the Criminal Procedure Code and also the rules of evidence enunciated by the Evidence Act.

Under the new procedure, the dispensation of justice was required to be more expeditious because it provided for day-to-day proceedings. One startling aspect of the statute was that it invested the executive with judicial powers. This is an unhealthy trend in a democratic State. A number of amendments were made to democratise the Act but as it was found to be incompatible with constitutional provisions it had to be withdrawn in 1966. Besides, to deal effectively with corrupt public servants, a Special Procedure under the Criminal Law (Amendment) Act 1958 had been provided and special judges were appointed to deal with such cases.

Simplification of Procedure

One of the salient features of our Criminal Procedure Code is that it tilts invariably in favour of an accused person, and he is given the option to recall the witnesses against him for re-examination whenever he desires. As such, whenever the accused desired they could abuse this provision and delay the trial for years by resorting to this method of re-examining witnesses. In India this provision was done away with in the 1950s whereas in Pakistan it was repealed only in 1964 as it was more in the nature of an obstruction than a safeguard in the dispensation of justice. Two law commissions were set up in the country to overhaul the Criminal Procedure Code but no effective recommendations were made nor was serious thought given to streamlining the Criminal Procedure Code in order to bring it into conformity with the needs and circumstances of the time. Ultimately, as mentioned earlier, drastic changes were made in 1972 by a Law Reforms Ordinance both in Civil Procedure as well as in the Criminal Procedure Codes.

Innovations Made by the Law Reforms Ordinance

To start with, judicial functions of magistrates were separated from executive functions, the distinction between the summons trials and warrant trials was done away with and a simplified procedure of summons trial was introduced. For heinous offences the earlier law envisaged a pre-trial procedure – if a man is charged with murder, he is presented before a magistrate who records the entire evidence against such an accused, as well as his defence, and then reports to the sessions judge if there is a *prima facie* case made out against him. Thereafter the trial begins before the sessions court.

This duplication resulted in prolonged trials in cases involving serious offences and was not at all conducive to the speedy administration of criminal justice. With the pre-trial procedure having been done away with, persons accused of offences like murder, etc., will be tried straightaway by the sessions court and acquitted or convicted in the shortest possible time. High Courts, while exercising their original jurisdiction will, however, follow a warrant trial procedure.

Bail

It was felt that with the higher rate of crime, the law relating to bail needed to be streamlined. As such, in offences which entailed punishment by death or transportation, grant of bail was prohibited except where it could be shown that the case involved further enquiry. Notice to the State was made compulsory and the general pre-arrest bail was also done away with inasmuch as the new amendment in the procedure made in 1976 ensures that the court has the power only to grant bail in respect of such offences in respect of which a case has been registered or the accused is actually under arrest. It has been done to forestall the recent trend with the higher judiciary to grant blanket bail on the strength of the wide interpretation put on section 498 Cr.P.C. read with article 199 of the Constitution which deals with the powers of the High Courts to grant bail.

Institution of Special Tribunals

Apart from making the aforesaid changes in the Criminal Procedure Code, endeavour has been made to make the criminal justice system more viable, convenient and expeditious by setting up special tribunals for special offences. The creation of such tribunals is a new trend in our judicial system. The primary purpose of these tribunals is to alter the previous accusatorial procedure for better and more expeditious dispensation of justice. Since these tribunals have been set up recently, it would be premature to comment on their utility and functions. It would, however, be reasonable to assume that they will produce healthier and better results. The types of special tribunals created will be discussed in this Chapter under different headings.

Degeneration of the Civil Service

The spectre of corruption stalks almost unchecked athwart the world, more so in most of the developing countries. Opportunities for corrupt practices increased enormously by conditions created by World War II, and although the war is long over, the momentum which corrupt practices had received has all along been fed and kept alive by more and wider opportunities that are the necessary concomitant of development in a country of scarce resources and high expectations.

The bureaucracy in Pakistan could not resist the temptation of falling prey to the tentacles of graft, thus causing widespread concern for integrity in administration as demonstrated in the work of the anti-corruption agencies both in Provincial and Federal Governments.

Anti-corruption Agencies

Provincial anti-corruption agencies hold inquiries mainly in respect of crime cognizable in the Criminal Code, such as bribery, black-marketing, embezzlement, misappropriation of funds, etc. Cases of inefficiency, misconduct and reputation for corruption are dealt with departmentally. The Federal Government agency deals with cases of Federal Government employees whereas Provincial Government employees are the concern of the Provincial anti-

corruption agencies. To exorcise the demon of corruption which had permeated the soul of the civil service was by no means an easy task when juxtaposed with the umbrella of constitutional protection which they had inherited as a legacy from the days of British rule. Iron-cast safeguards provided to the civil services could have had adequate justification in the days of alien rulers in enlisting their unflinching loyalty and single-minded devotion. But viewed in the context of an independent nation, their anachronistic stance could only result in behavioural deviancy warranting remedial measures.[4]

The Constitution of Pakistan 1956 also guaranteed fundamental safeguards to civil services. This position was radically changed in 1959 when the martial law government resorted to a novel procedure known as 'screening' for the elimination of corrupt and inefficient elements from the services. This 'screening' was carried out under the Public Scrutiny Ordinance and Public Conduct (Scrutiny of Rules) which were both promulgated in 1959.

Action taken under these ordinances was not subject to judicial review. Forty-nine screening committees were subsequently set up which recommended to the President the award of punishment for a total of 662 employees of the Central Government.[5]

The Law Reform Commission of 1959 took notice of the 'screening' procedure and refrained from condemning it outright. Instead, it proposed that the screening system be substituted by the Board of Enquiry system as was in vogue in Ceylon.

Special Tribunals

Under the Pakistan Criminal Law Amendment Act 1958, tribunals of special jurisdiction were created, laying out special procedures for the trial of offences committed by public servants. The object was to provide for speedy trial and effective punishment in respect of offences mentioned in the Schedule to the Act. The reasons for simplifying and short-circuiting the normal procedure of warrant cases and appointing high powered special judges to deal with accused public servants are easy to see. Such strict measures were instituted to check the growing instances of corruption among public servants.

By way of illustration one may take up the sudden upsurge of

corruption in the civil service and examine the corresponding changes made by law from time to time to deal with this colossal problem. Chapter IX of the Pakistan Penal Code (sections 161 to 171 and 409) deals with the offences by or relating to public servants. These offences dealing with illegal gratification etc., were triable by ordinary criminal courts. In 1958 the Pakistan Criminal Law Amendment Act was passed and persons accused of offences under the aforesaid chapter were made triable by special judges exclusively and special rules of evidence were introduced whereby the burden of proof was shifted on to the accused public servant. This law specified a number of offences to be tried exclusively by special judges.

In 1958 the first martial law was imposed on the country. The martial law government came down heavily on offenders against pure food laws, smuggling and adulterers of drugs, but no special measure was introduced to further tighten the unbecoming trends in the civil service. The Constitution, which came into force in 1962, gave constitutional protection and provided basic service guarantees to a public servant as a result of which the essence of security was breathed into the civil servants and reaction to this added security was felt in tendencies towards corruption among the civil servants.

When the first martial law was succeeded by the second martial law in 1969, corruption in the civil service had grown out of proportion and the martial law regime was constrained to adopt stringent measures, not only in terms of dismissing civil servants but also in prosecuting them on account of their bad reputation, or for reasons of their living beyond their known sources of income, (M.L.R.R. 58 and 59 refers).

In 1969 a special committee was set up under the Improper Acquisition (Special Committee) Ordinance, 1969, to scrutinise the conduct of senior public servants. They were enjoined upon to submit statements of all assets under their control, directly or indirectly in their own names, or in the names of any other persons. If the committee came to the conclusion that such public servants had acquired any property or assets by unlawful and improper means, or by means of bribery, corruption, jobbery, favouritism, nepotism, wilful maladministration, wilful misapplication or diversion of public money or abuse of official power or position, it would make recommendations in regard to punish-

ment or other action against the person. The orders or findings of the committee were exempted from being called into question before any court. This ordinance was later supplemented by M.L.R. 37 which provided that any person whose assets were being scrutinised by the special committee could surrender such portion of his property and assets illegally acquired and was given the assurance that no penal action would be taken against him. However, section 5 of the aforesaid regulation imposed punishment of 14 years on a person who did not surrender such portion of his property and assets which had been acquired illegally.

This was followed by M.L.R. 58 known as the Removal From Service Special Provision Regulation. Under this regulation the martial law authority was empowered to dismiss or remove from service any person who in the opinion of the authority was guilty of misconduct or inefficiency or carried a reputation for being corrupt or was engaged in or reasonably suspected of being associated in subversive activities. Under M.L.R. 58 action was taken against 303 officers, some of them being very senior persons. However all the affected officers were afforded full opportunities of being heard and a right of appeal/revision was provided under M.L.R. 59.

Special Measures Adopted by the Present Government to Control Corruption

The present regime enacted another law, M.L.R. 114, whereby the safeguards of M.L.R. 58 inasmuch as that a public servant accused of corruption, nepotism, etc., was given opportunity to explain himself before the tribunal, were taken away and a public servant was liable to be removed from service with no remedies, judicial or quasi-judicial. This was supplemented by the imposition of a special law, the Criminal Law Amendment (Special Court) Order 1972, whereby a special court was set up to try such offenders. The rules of evidence and room for adjournment as well as provision for suspension of sentence were taken away and only one appeal was made competent from the order of the special court to the Supreme Court of Pakistan. This order was given protection in the Interim Constitution and also in the present Constitution of 1973.

Apart from the above, some other unorthodox measures have

been introduced by the present government to contain the problem of corruption. For example:

1. Constitutional guarantees granted by the previous constitutions have since been abolished and now the terms and conditions of service of government servants are regulated by an Act of Parliament.
2. Government servants can be retired after 25 years of service if their record of performance does not justify their further retention in service.
3. Officers in the higher echelons of service like Additional Secretaries and Secretaries to the Federal Government can be removed from the service without assigning reasons.
4. Complaints against public servants are entertained by the Prime Minister's Representative on Administrative Inspection. The representative may be likened to an 'Ombudsman' but in a very different way.

From the above, it will be noticed that the general innovations made in the law and procedure dealing with the problem of corruption in the public service aim at expediting proceedings, reducing appeal procedures and eliminating the intervention of ordinary courts in respect of such offences.

Food Laws

When Japan entered World War II, the economic structure of most of the Asian countries including the Indo-Pakistan sub continent was greatly disturbed. Essential commodities had to be transported to vast armies of allies fighting in various fronts. Shortages began to appear and famine conditions prevailed in some parts of the sub continent. As the war progressed, the problem of food became more accute and acquired multi-dimensional proportions. Since then the food problem has never eased. The situation was bad enough towards the end of the Second World War. By the end of 1947, when Partition came, West Pakistan (the present Pakistan territory) was faced with a tremendous influx of refugees. Over nine million persons, more than those who had left, came in wave after wave with absolutely no resources at all. Efforts were made to meet the situation by increasing production but the hectic efforts which lasted for about four years ultimately did not prove to be of any avail as the increase in population completely over-

took any increase in the production of food.

To meet the situation, the government was constrained to import wheat from the United States but this did not alleviate the situation. On the other hand, it created a temporary phase of security and self-sufficiency in respect of food grains could not be achieved. Consequently farmers preferred the production of cash crops to wheat and as such the country remained in a vicious circle of continuing shortages of food supplies.

To meet this exigency, the government brought in the West Pakistan Food Stuff Control Act 1958 to maintain supplies of food stuffs and secure their adequate distribution and availability at fair prices. Supplementary measures including the West Pakistan Flour Mills Order 1959 were passed, whereby vast powers were assumed over the trade and industries to function at the discretion of the executive authority. Violation of the provisions were not only made punishable but the courts were also given power to confiscate the property involved in such an offence.

Similarly, to check smuggling of food over the borders, the West Pakistan Border Area Food Stuff Control Order 1958 was enacted and transport of food in the notified border belt was rendered punishable. This measure was not considered adequate and as such the smuggling of food was made an offence under the Defence of Pakistan Rules. Similar laws were also made with respect to paddy and rice. It may be interesting to note that the food problem could not be effectively regulated or controlled by any amount of legislation. It is for this reason that the Defence of Pakistan Rules have been used as a measure for taking care of people who either indulge in smuggling of food grains or have a reputation for doing so.

As a stop-gap measure it has now become a practice in the country that when the harvest seasons set in, the people who are known as smugglers near the borders of Pakistan are apprehended straightaway and are detained in jail under the Defence of Pakistan Rules until the harvesting season is over. The adoption of this measure by itself is strong proof of the fact that stringent laws may have short-term effects in controlling a given situation but cannot be a permanent solution to the problem. What is required to meet this national problem is an increase in production commensurable with the population rather than enforcement of stringent or seemingly arbitrary laws which are only of transient value.

Side by side with the above measure, it has been appreciated that illicit trade in food stuffs across the border cannot be controlled unless the price indices are non-competitive. Wheat prices across the border are so much higher in some of the neighbouring countries that it is a big temptation for anti-social elements to embark upon smuggling. The situation can be rectified by resorting to preventive measures as well as adopting economic measures which leave little room for manipulation by the miscreants. It would be platitudinous to say that the lure of profit is so great that many a person would rather lose his life in an armed encounter with the law enforcement agencies than give up his neferious trade.

Border Crime

While on the subject of the smuggling of food stuffs, one must also mention the other type of border crime which is usually committed. Mention has been made above as to how essential commodities are smuggled across the border. But apart from this, a number of other articles produced or manufactured in the country are also prone to find their way to some of the neighbouring countries by devious means. The usual type of crime committed on the border pertains to cattle-lifting, abduction of women, illegal entry and offences against the integrity of the State besides offences under the Customs Act.

Because of a very long stretch of border contiguous with several countries, the problem of crime on borders is a real one and Pakistan has not only learnt to live with it but to control it in an effective way. Law enforcement agencies man the border at strategic points and have orders to take drastic action against offenders in this respect. In this connection it would not be out of place to mention that India and Pakistan had at one time entered into a border agreement in the late 1950s to exchange information about the crime committed on either side of the border through meetings of local officers. Matters were sorted out by the return of the property or subject involved. This kind of agreement proved to be very useful but had to be discontinued as a result of armed conflict between the two countries in 1965.

Laws Against Obscenity, Sexual Offences and Exhibition of Immoral Films

Being an ideological state, public opinion in Pakistan is highly sensitive to anything that is at odds with the normally accepted social values in respect of obscenity and offences relating to sexual aberrations. The colonial rulers, having realised this, had framed laws that took due care of this attitude. But there was a point beyond which they would not like to go. Thus, although sanctity of marriages was ensured through the passage of strict laws against the violation of matrimonial faith and bond, consent or connivance of a husband in respect of his wife indulging in sexual promiscuity with another man was considered enough justification for the negation of the offence. Similarly, in a number of situations, consent or willingness of a woman to submit to cohabitation did not make an act of sexual aberration exceptionable. This had always remained a sore point with the general public for whom sexual misbehaviour against the norms of society is tantamount, *per se*, to an offence.

Taking into consideration the norms of society in respect of sexual excesses, the law makers have provided heavy punishments for adultery; the enticing away of a married woman (for which the husband may prosecute); the abduction of a woman for the purpose of illicit intercourse; and for the offence of rape. However, it must be understood that all these laws supplement the stricter control exercised by society itself which keeps cases of sexual promiscuity to the minimum level.

In some areas of Pakistan, feelings on sexual offences are so strong that they lead to the murder of the guilty parties. This amounts to taking the law into one's own hands, but questions of self-respect, honour and moral code override all other considerations. Thus, the problem of sexual morals is not as acute in Pakistan as in some of the Western countries.

Pakistan is constitutionally committed to bringing all laws into conformity with the tenets of Islam. As such, religious beliefs and sentiments as expressed by the overwhelming Muslim majority are being gradually accommodated in old as well as new laws. A few special enactments have been promulgated whereas old laws have been amended with a view to bringing them in keeping with the ethical values of society. Some of such laws are discussed below.

Laws against obscenity: Under section 292 of the Pakistan Penal Code, the sale, display, export, import, distribution or hire of any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever is prohibited. This does not extend to any book, etc., which is used *bona fide* for religious purpose or any representation sculptured, carved, painted or otherwise represented on or in any temple or any car used for the conveyance of idols.

Obscenity has not been precisely defined in any code. Whether a particular act is or is not obscene is a question of fact and one of the tests to be applied for determining whether a book is obscene or not is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of such sort may fall. Applying the generally accepted yardstick, obscenity in common parlance may mean anything which is offensive to modesty or decency or expressing or suggesting unchaste or lustful ideas. Any act in violation of this prohibition is punishable with a term of imprisonment of up to three months and enhanced punishment is prescribed if the act is intended for persons under 20 years of age. Apart from this, doing any obscene act, to the annoyance of others, in any public place or singing, reciting or uttering any obscene song, ballad or words in or near any public place has been made punishable.

In addition to the above, under the Indecent Advertisement Prohibition Act 1963, indecent advertisements have been prohibited. Advertisements have been defined to include any notice, circular or other document displayed on any house, building or wall or published in any newspaper or periodical and any announcement made orally or by any other means. An attempt has also been made to define 'indecent' as anything which may amount to any incentive to sensuality and excitement of impure thoughts in the mind of an ordinary man of normal temperament and which has the tendency to deprave and corrupt those whose minds are open to such immoral influence and which is deemed to be detrimental to public morals and calculated to produce pernicious effect, in depraving and debauching the minds of persons.

Under the provisions of the Press and Publication Ordinance 1963, a printing press is prohibited from printing or publishing any book or paper containing any words, signs or visible represent-

ations which report crime of violence or sex in a manner likely to excite unhealthy curiosity or an urge to imitation. Similarly, under the West Pakistan Publication of Books (Regulations and Control) Rules 1969, permission for the publishing of a book can be refused by a competent authority if in his opinion the book or work is prejudicial to the national interest or culture. All these laws have gone a long way in maintaining the purity of cultural and moral syndrome in the face of a heavy influx of material of a highly permissive nature.

Sexual offences: Rape is a serious offence under the Pakistan Penal Code and transportation for life is prescribed as a punishment. The offence is committed when a person has sexual intercourse with a woman under any of the following descriptions:

1. Against her will.
2. Without her consent.
3. With her consent when it has been obtained by putting her in fear of death or hurt.
4. With her consent when she is erroneously led to believe that he is her husband.
5. With or without her consent when she is under 14 years of age.

Besides rape, carnal intercourse against the order of nature with any man, woman or animal is viewed gravely and stern punishment of transportation for life is prescribed. It is of interest to note that homosexuality, in the strictest sense, has not been defined as an offence apart from an act of carnal intercourse against the order of nature.

Cases of drunkenness in public are few and far between. Drinking is not permitted for the faithful under Islamic injunctions and violation thereof is not resorted to openly. Thus there is a strict control over such phenomena as organised orgies of drinking that have become the bane of some of the developed countries are unknown in Pakistan. The situation is similar in respect of prostitution which, although one of the oldest institutions, has not spread its tentacles in the form of street walking or open solicitation. Public opinion has kept this social evil within manageable bounds. In addition to laws against prostitution and the regulation of singing and dancing activities late at night, social workers have achieved good results by reclaiming prostitutes and arranging their

marriages with persons who have the moral courage to make them their partners in the face of social stigma.

Adultery: Adultery in all forms is repugnant to the moral conscience of the society and is made severely punishable. Under the provisions of section 497 Pakistan Penal Code, whoever has a sexual intercourse with a person who is or whom he knows or has reasons to believe to be, the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and can be punished up to five years. Similarly, the enticing away of a married woman with intent to commit illicit intercourse is made punishable under section 498 of the Pakistan Penal Code. However the provisions of law on adultery fall short of peoples' expectations for whom both the man and the woman are culpable and the consent or connivance on the part of the husband does not condone the offence.

Exhibition/import of obscene films: Under the Censorship of Films Act 1963 and the Censorship of Films Rules 1963, the Federal Government has prescribed a stringent censor code for the guidance of the censor board. Extra care has been taken to ensure that the exhibition and import of foreign films does not impinge upon the ethical standards of society. Viewed in this context, themes which are purely permissive in character and treatment and which come into direct clash with the accepted standards of morality and social values in Pakistan, are discouraged. In the light of this principle, a film is regarded as unsuitable for public exhibition if it:

1. Glorifies adultery, promiscuousness, lustful passion, lewdness or excessive drinking.
2. Presents scenes of rape, sexual acts or perversion, abortion, child birth and surgical operations beyond the limits of decency and unavoidable demands of the plot. This does not apply to technical or scientific documentaries meant for specialised audiences.
3. Contains dialogues, songs, speeches, dances, jokes or gestures which are obviously vulgar, obscene or indecent.
4. Displays the living human figure in the nude or in indecorus clothing in an obviously licentious manner with the intent

to provoke lustful passion.

5. Glorifies vice, crime, violence, blackmarketing. smuggling, bribery, corruption or any other social evil.

Within the above prescribed limits a film maker in Pakistan has the right to contribute towards the broadening of the viewer's vision of life by giving him an insight into human impulses and an awareness of the social factors at work, and by identifying the realities that impinge on contemporary existence such as intolerance, cant, humbug, graft, dishonesty, inequality or exploitation in their daily manifestation.

Offences Against the Integrity of the State

All developing countries have to guard jealously their integrity and solidarity against all corrosive attempts, and Pakistan is no exception. Offences against the integrity of the State may well have their origin on the borders and may take the shape of infiltration by undesirable elements or an influx of subversive literature on economic warfare designed to subvert the economy of a country. Pakistan has dealt with such situations by streamlining its control over the border areas.

Anti-State Activities

As stated above every State is very jealous of its own integrity and, as such, individuals who undermine or attempt to undermine the State sovereignty are dealt with severely. The conventional penal law of the country deals with the problem of offences against the State in a fairly elaborate manner. Waging, or attempting, or conspiring to wage war, condemnation of the creation of the State and advocacy of abolition of its sovereignty, assaulting the President or the Governor or creating hatred or disaffection towards the Government of Pakistan or countries friendly with Pakistan, have all been made punishable with various terms of sentences extending to life imprisonment.

Until 1970, when the present government came into power, the provisions set in the Penal Code were considered adequate to deal with offenders against the State but when the new government came into power the political differences over Provincial autonomy came under very sharp focus and, following the

example of Bangladesh, miscreants in some of the Provinces of Pakistan like Baluchistan and NWFP endeavoured to create law and order situations with the intention of disrupting the State machinery. This was a very alarming situation and it could not be controlled any longer through the ordinary criminal courts.

As such, special laws had to be made from time to time to take stock of the situation. The High Treason Punishment Act of 1973 made acts abrogative or subversive of the Constitution of Pakistan at any time since 23 March 1956 punishable with death or transportation for life. This enactment was made consistent with Article 6 of the Constitution of the Islamic Republic of Pakistan. To adequately safeguard against acts of sabotage, subversion and terrorism and to provide for speedy trial of offences committed in furtherance of or in connection with such acts, the Suppression of Terrorist Activities (Special Courts) Act 1975 was enacted and according to which the court was manned by high powered judges and only one appeal was provided for to the High Court. The interesting feature of this law is that the burden of proof has been shifted onto the accused person and the State functionaries stand indemnified in respect of any act done by them against the individual while acting under this Act. This Act has been made applicable to a good number of situations, for example, waging war against the State, committing serious property offences by bomb-blasts, etc., causing damage to public property and offences under the Defence of Pakistan Rules and a host of other offences.

Police Structure on the Eve of Independence

Pakistan could not remain content with the crime fighting apparatus received as a legacy on the attainment of independence. The police system inherited from the past was constituted under the Police Act of 1861 and was attuned to maintain law and order at the highest level. It could not, as such, cater to the requirements and needs of an independent country. It had to be reoriented, not only to cope with the old problems in a new way, but also with new problems that were bound to arise, for example, one aspect of the holocaust following independence was the abduction of as many as 40,000 children and women on both sides of the border. Wide-spread disturbances, upheavals and a general massacre characterised the birth of Pakistan. Millions of people were up-

rooted from their homes and thousands lost their lives. The police force had to bear the main brunt of these cataclysmic events. Not only did it continue to perform its job of maintaining law and order as well as keeping track of the movement of miscreants, but it also continued to function during the period of two military governments (1958 and 1969) in a more over-enthusiastic manner.

Total Strength of the Police Force

The total strength of the police force in all the four Provinces of Pakistan is about 102,000 personnel of all ranks. This strength is mainly engaged in the prevention and detection of crimes. The figures include officers and men of all ranks.

Total Population of Pakistan

The total population of Pakistan comes to 64,976,000 according to the census of September 1972. The present population stands approximately 72,773,120 calculated on the basis of a 3 per cent increase per annum.

New Patterns of Crime

Crime all over the world has undergone a change in its pattern, intensity and dimension. This is due to a number of political, social and economic factors. Some of the newly independent countries are open to subversion. Rapid industrialisation; technological advancement; speedier means of communication; population pressure; mass migration of rural population to cities culminating in the rapid growth of slum areas; wide gaps between the expectations of people and their actual realisation; generation gaps; and frustrations of young people with the establishment have all contributed not only towards the eruption of new waves of crime but have also added intensity to the old ones. Cases of sky-jacking, crimes of violence, political assassinations, subversive activities, etc., are everywhere to be seen. Pakistan has had its share of such criminal activities, among the more important of which are:

1. Crimes of violence.
2. Crimes of agitation – by students, labour, government ser-

vants, political workers, etc.
3. Political crimes or crimes having political overtones – sky-jacking, assassination, subversion, bomb-blasts, etc.
4. Economic crimes – smuggling, black-marketing, hoarding, adulteration of consumer goods, over-invoicing, under-invoicing, tax-evasion, etc.
5. Corrupt practices by public servants, industrialists, businessmen, etc.
6. Trafficking in narcotics.

Traditional Crime

Apart from the above, certain types of crime are common in Pakistan such as cattle-lifting, crimes of vendetta, blood-feuds and *Karokari*[6], etc.

The three principal motives behind murder which, according to a saying, are *Zamin*, *Zar* and *Zan* – that is, land, money and women – are being augmented by new ones, like disputes arising from elections to local bodies or legislature. Some of the crimes have a geographical significance particularly in Baluchistan and North West Frontier Province. Crime can also be distinguished as rural and urban on a geographical basis as well as having a tribal/customary origin.

Innovations in the Crime Fighting Apparatus

Pakistan has been introducing innovations in the crime fighting organisations in order to meet with new problems. Two police commissions were set up which made several useful suggestions to reorientate the working of the police. The main emphasis is being laid on a reorientation of the outlook of the police force so that its performance remains compatible with the hard-won liberty of the citizen. Then again, efforts are being made to bifurcate the functions of the police into well-demarcated fields, for example, into watch and ward and purely investigation side. A good deal of relief is also being provided in the shape of the Federal Security Force which augments the over-stretched strength of the police in times of agitations and civil disturbances.

The above measures can yield good results if congenial conditions are provided, because the law enforcement agencies of

a country work within the framework of the socio-economic milieu. Any innovations made in the police system or the police role would presuppose a change in the total culture of society to which all sub-cultures, including police, are inalienably connected. Any change made in the law enforcement agencies must be linked with changes in the executive, legislative and judicial process on the one hand and the value system in respect of economic and political life on the other.

Changes in the Sub-Culture

The police have remained for a long time subservient to the executive which enjoyed wide judicial powers. The present government is committed to the separation of the judiciary from the executive and in some districts like Sialkot an experiment to try this is afoot. Side by side with it, the judicial system of the country is being geared to delivering the goods by making it easier for witnesses to cut down long waits. Courts are being set up almost at the doors of the rural population. The legal codes of the country which often hinder police work are being updated and allowance is being made to take into account the inspirational force of society *viz* religion.[7]

Viewed in this context, there are a number of anomalies which are being gradually rectified. For example, Section 25 of the Evidence Act does not make any confessions made before a police officer admissable. Statements made to a police officer are not to be signed by the witness according to section 162 of Code of Criminal Procedure. Then again it should be appreciated that certain offences which are regarded by society as grave such as drinking, gambling, prostitution and horse-racing, etc., are not regarded as serious by the law. Efforts are in the offing to bring all laws into conformity with the normally accepted social norms of society.

Changes in the Economic Order

Police work has been greatly influenced by rapid changes in the economic pattern of the country. The old order is changing, yielding place to the new, and the feudal order is on its last legs. The present government is committed to the creation of an egalitarian

society inspired by the Islamic principles of justice and socialism. The police force has been putting its house in order to embark upon a policy of integration with the changing conditions. In the major urban cities like Karachi and Lahore, where rapid industrialisation and mass immigration from other parts of the country often results in ugly situations for the police like labour agitation, student strikes and lock-outs, etc., police have discarded their rough and ready methods and are now likely to deal with the situation in a tactful manner.

Values of Society

The values of a society have a direct bearing upon the working of the police. In a country where family ties, tribal associations and bonds of friendships override consideration of justice as a social obligation, the task of the police becomes very difficult. Then again, in some parts of the country a land lord would resort to the tactics of getting the cattle of his opponents stolen with a view to exerting influence in the area. This is highly exceptionable but mutely accpeted as a norm in places where vestiges of feudalism are still lurking. Similarly among the Baluch Tribes in Sind and Baluchistan, instant killing of the dishonourable man and dishonourable woman is a matter of great pride and prestige.

In the North-West Frontier Province, the rule of *Pukhto*[8] holds a complete sway over the lives of people. Wreaking vengeance upon an opponent is taken to be a most honourable act, without which life would not be worth living. In Baluchistan, persons suspected or accused of sexual aberrations are done away with. This evil practice is being dealt with informally by the spread of education and enlightenment. Propagation of Islamic values and injunctions on taking a *Kasas*, that is, compensation money for murder have equally been making inroads into the violent way of life to which some of the tribes are accustomed.

Democracy and Police

Democracy has taken root in the country after a long period of authoritative rule. Hence there is greater compulsion on the law enforcement agencies in safeguarding human rights than in maintaining law and order. The realisation is growing that law and

order should not be the primary preoccupation of the police. This situation must be viewed in the context of the fact that, for the first time in the history of Pakistan, the present government is committed to a program of social justice and social change which necessitates improvement in the quality of police contact with the masses at large through association with welfare departments and members of the community. In short it may be stated that the role of the police is being redefined and re-interpreted to be in keeping with new socio-economic trends and a new police-public relationship.

Establishment of a Federal Investigation Agency

The greatest danger that a developing country faces is on the economic front. Pakistan is no exception to this. Therefore the need for an agency for protecting the economic interests of the State was felt. Pakistan received aid in the form of credits, loans and technical assistance but performance in the economic sector was not compatible with it. The reasons are obvious. Foreign aid has generated illegal practices, and graft swayed the bureaucrats and commercial enterpreneurs in a hand-and-glove collaboration with one another. The two military regimes (1958 and 1969) adopted coercive methods by way of shock treatment but the results proved transitory because of the absence of an institutional framework and infrastructure within which to guard the interests of the State.

A Federal Investigation Agency was envisaged and set up in order to overcome this deficiency – particularly because Pakistan is a Federation of autonomous provinces and a federal agency was considered the crying need of the hour. The agency is organised to deal with smuggling, drugs, narcotics, immigration and passport, serious inter-provincial crimes and for development of technical expertise. It replaces the Pakistan Special Police Establishment, set up in 1948, which has served as a nucleus for the new organisation whose duties are purely investigative. The main purpose and functions of the FIA may be enumerated as follows:

1. To locate and identify the areas of activities where the Federal Government is being defrauded of substantial amounts of government revenue by
   a. nefarious and corrupt practices by business houses, commer-

cial concerns, industrial concerns and individuals connected with such economic and financial pursuits; and

b. corruption and malpractices of government functionaries who, in collaboration with corrupt businessmen, industrialists and persons engaged in other financial fields of activity, deprive the Federal Government of its legitimate dues and thereby obtain pecuniary advantage at the cost of the Federal Government and, in fact, the nation as a whole.

2. To administer the Federal laws, enactments/orders as far as these are entrusted by the Federal Government to the FIA by the specific provisions of law.
3. To assist the Provincial law enforcement agencies to coordinating and disseminating criminal intelligence; in detection of special series through identification and a central record division and federal laboratories; and in training of police executives in police procedures, practices and effectiveness.

The agency has a number of wings dealing with anti-smuggling, technical matters, economic matters, immigration, etc. The anti-corruption division deals with corrupt practices indulged in by the Federal Government employees under the various anti-corruption laws. The technical division provides a federal laboratory and maintains a national fingerprint bureau. The economic enquiry wing investigates all economic offences in the areas of foreign exchange, export and import, income tax, banking, insurance, etc. It has also a small research and statistical cell for providing the periodical reports which the government could use in the formulations of policies. The anti-smuggling wing coordinates the activities of all the anti-smuggling agencies like customs, coast guards and rangers, etc. Establishment of a centrally controlled agency is a new departure in Pakistan. Only time will show whether it can acquit itself creditably as the conscience-keeper of the nation and put the fear of God into the hearts of the unscrupulous.

Federal Security Force

To take some burden off the back of the Provincial Police in the maintenance of law and order, a Federal Security Force has been set up with the following functions assigned to it:

1. Assisting the civil administration in maintaining law and order

in case of large scale unlawful demonstrations or serious breaches of law and order.

2. Assisting the police in
   (i) Dealing with dangerous criminals and outlaws.
   (ii) Carrying out surprise highway patrols for prevention of road hold-ups and robberies.
   (iii) Carrying out occasional surprise traffic checks and periodical night patrols.
   (iv) Carrying out surprise checking of illicit traffic in arms and food grains.
3. Such other functions as the Federal Government, by notification in the official gazette, require the force to perform.

During the initial period of its existence, the Federal Security Force has rendered valuable services in the maintenance of law and order. Consequently, the Provincial police forces have been able to concentrate more on their purely professional functions – prevention of and investigation of offences. The crime situation in Pakistan in all its four provinces is reflected in Table 1.

Table 1 Crime statement for 1975 for all the four provinces of Pakistan

Nature of crime	*Punjab*	*Sind*	*NWFP*	*Baluchistan*	*All Pakistan*
All reported	106,591	30,217	29,962	2,392	169,162
Murder	2,126	1,173	1,303	119	4,721
Attempted murder	3,204	1,237	2,263	nil	6,704
Rape	228	122	–	–	340
Riots	262	1,035	–	–	1,297
Decoity	25	28	39	8	100
Robbery	272	127	87	33	519
Burglary	7,790	1,850	623	250	10,513
Thefts	21,231	5,956	1,095	274	28,556
Kidnapping/ abduction	2,194	575	474	28	3,271
Assaults on public servants	623	401	74	41	1,139
Traffic accidents	3,941	5,078	885	207	10,111
Local and special laws	33,180	995	17,459	–	51,634

The Correctional System in Pakistan

Conceptually speaking, Pakistan shares with the civilised world the anxiety to ensure the re-integration of the prisoner in society. The extra-mural treatment of offenders is, as such, a cardinal principle of the criminal justice system of the country. Eminent penologists and jurists of the developed societies in the world have recognised the immense benefits of a probation service and many a Bill was passed by the governments of advanced countries dating from as far back as the end of the 19th century. Towering over these stands the First Offenders Act 1907 of England, often styled as the Magna Carta of probation methods, since it introduced for the first time the statutory status of the idea of supervision in the method of probation.

In view of these developments, the Indo-Pakistan sub-continent was motivated to introduce provisions in 1923 in the Pakistan Criminal Procedure Code of 1898 for the release of offenders 'on probation of good conduct' but did not make provision for the supervision which is the heart and soul of probation. The application of the provisions was restricted to first offenders as well as to the legal character of the offence, visualising more liberal use in respect of minors and women. The procedure prescribed provided for release of first offenders on their entering into a bond, with or without sureties, to appear for sentence when called upon during a period (not exceeding three years) as determined by the Court and 'in the meantime to keep the peace and be of good behaviour'.

Attempts to introduce further probation legislation following the amendments in the Pakistan Criminal Procedure Code 1898, did not bear fruit until the birth of Pakistan when the government of the Punjab passed the Children Act of 1952 and the Youthful Offenders Act 1952. But these Acts remained unimplemented. Prior to this in 1926, the government of the Punjab had also passed the Good Conduct Prisoners Probational Release Act, providing for an advanced system of release on parole. The Act did not embody the intrastructure of probation methods, yet it is regarded as a probational release system and is considered an improvement even on the revising board system of parole obtaining in several developed countries. In 1957, provisions of the Act were made applicable to all parts of the country, but the Act could only play its role within a limited field. The above circumstances impelled the introduction of the Pakistan Probation Ordin-

ance 1960, annulling the provisions of sections 382 and 562-564 of the Pakistan Criminal Procedure Code which had become obsolete and did not, in any way, provide for the supervision of probationers.

The Pakistan Probation of Offenders Ordinance 1960 is a great leap forward in the process for the redemption and rehabilitation of offenders. It aims at arming the judiciary in respect of certain offences, with the power to put an offender on 'good conduct' instead of confining him to a prison. This procedure presupposes the innate goodness of human beings and attempts the redemption of an offender by providing to him much-needed guidance and supervision so that he can be re-absorbed into society as a useful member. Probation is thus one of the weapons placed at the disposal of a judicial officer for dealing with an offender in a humane manner, particularly in respect of these who are not as yet fully exposed to a life of crime.

In the context of Pakistan, probation is of paramount importance as 70 per cent of the total population in prison houses comprises chance and novice offenders serving sentences ranging from one month to less than a year. Most of these have taken the law into their hands on a sudden fight over a minor dispute pertaining to land, money or some family feuds. They do not have criminal propensities and their contamination at the hands of the hardened criminals in jails is fraught with serious consequences. Viewed in this context, the immeasurable value of probation lies not only in segregating the raw offenders from the hardened criminals but also in providing them with environmental opportunities for their re-integration with society. The probation methods as enunciated in the Pakistan Probation of Offenders Ordinance 1960 constitute a bold experiment in the treatment of offenders and are in line with the other advanced countries of the world.

The administration of the Good Conduct Prisoners Probational Release Act 1962, the Probation of Offenders Ordinance 1960, and the West Pakistan Control of Goondas Ordinance 1968 rests with the Reclamation and Probation Department. Matters connected with parole, probation, control of *Goondas* and juvenile offenders fall within the scope of this department in the following manner.

Parole: Under the Good Conduct Prisoners Probational Release Act 1926, offenders are released conditionally on parole. Parole release provides opportunities to novice and chance offenders to stay away from the contaminating atmosphere of the jails and remain within the community with certain limitations and obligations. Prisoners who give evidence of good conduct in jails and are found devoid of criminal characteristics are selected for parole release only after having served out a portion of their sentence in the prison. The remaining period of their sentence is spent on useful employment in environments conducive to their moral as well as social reformation and uplift, under the guidance and supervision of parole officers. This method aims at saving the chance offenders who may have committed an offence under circumstances beyond their control from the contaminating influence of hardened criminals. The parole system is also economical as it costs government more to maintain an offender in the jail than to keep him outside. Besides, the government has to spend nothing for his maintenance as he remains employed on monthly wages prescribed by the department.

Probation: The probation system as envisaged by the ordinance known as the Probation of Offenders Ordinance 1960, has been applied only in limited areas for want of funds, resources and trained personnel. Under the provisions of this ordinance, the full term of sentence of an offender is suspended from the first day of conviction and the convict is placed on probation under the charge of a probation officer, the period of probation ranging from one to three years. Offenders accused of grave offences like murder and robbery are ineligible for consideration for release on probation. The probationer is encouraged to revert to his pre-conviction professional pursuit within his own homely environments, provided they are congenial and healthy. If they are not, changed and better environments are arranged for him by the probation officers. This arrangement has been judged to be highly beneficial for the integration and adjustment of the convict with society at large, apart from being financially less burdensome.

Control of *Goondas* ordinance: Under the West Pakistan Control of *Goondas* (Disorderly Persons)(Amendment) Ordinance 1968, the supervision and control of the persons stigmatised as disorderly

has also been given to the Reclamation and Probation Department. Previously, Deputy Superintendents of Police were entrusted with this task which smacked of a coercive, instead of a benevolent, approach in the treatment and supervision of disorderly persons in their re-adjustment as peaceful denizens of society.

Juvenile delinquency: The Punjab Youthful Offenders Act and the Punjab Children Act were passed in 1952 but remained unimplemented. Later, two draft bills – the West Pakistan Youthful Offenders Bill and the West Pakistan Children Bill – were prepared and are under the active consideration of the Federal Government for promulgation throughout the country as a federal legislation. The Bills aim at the creation of a number of juvenile courts, approved schools and remand homes for convicted and neglected children.

All the abovementioned measures are intended to build up strong social defences against the evil of crime. But their full benefits will only accrue when all the laws are implemented fully and the participation and support of the community is fully ensured. In certain parts of the country, the question of an exaggerated sense of self-respect and honour is carried to an extreme – resulting in iron-cast norms on vendettas and self-perpetuating feuds even on small matters. In such a milieu, the task of correctional officers becomes all the more difficult and delicate.

At present, the Reclamation and Probation Department undertakes the supervision and guidance of about 1,000 parolees and probationers in a year. The department has made much headway by saving the souls of hundreds of citizens. However, the whole system of correction is still in a nascent stage and much remains to be done to achieve the desired results. The government is committed to the welfare of offenders and convicts and, to achieve this end, have provided vocational opportunities within the premises of prisons. Apart from this, every administrative district has established prisoners aid societies through which public spirited citizens help the prisoners and ex-convicts in rehabilitating themselves.

Drug Control

Drug addiction has the world in its thrall and the evil has sent a wave of horror down the spine of humanity. Pakistan is vitally

concerned with drugs, perhaps more than many other countries, because it produces opium on a large scale. Poppy growing areas in Pakistan are:

1. The settled district of the North West Frontier Province.
2. The merged areas, namely, the former states of the North-West Frontier Province now administered by the Provincial Government, to which narcotic laws have not yet been extended.
3. The centrally administered tribal areas to which normal laws of the country do not apply.

Under the provisions of the Single Convention of 1961, to which it is a signatory, Pakistan is under international obligation to control the supply, demand and movements of all narcotics, particularly that resulting from the indigenous opium poppy.

Pakistan is committed to a phased elimination of the production of poppy, and to achieve this a reorganisation of the Pakistan Narcotics Control Board took place in 1973. Narcotics are dealt with at present by a number of law enforcement agencies such as the police, customs, excise and taxation, coast guards, West Pakistan rangers, frontier constablery and Health Department. As none of these agencies was exclusively responsible for the enforcement of narcotics laws, the Board has been entrusted with responsibilities to coordinate the activities of the existing enforcement agencies and for taking suitable measures for the redirection of the economic life in opium growing areas. The Board has taken all steps to streamline enforcement activities throughout the country and has for this purpose undertaken useful surveys of the poppy growing area with the help of UNFDAC.

Seizure of Contraband

Various measures adopted by the Narcotics Board, coupled with incentives through grant of liberal rewards, have produced unprecedented results. The seizure of contraband during 1973 almost increased by 100 per cent as compared to the figures of the preceding year in so far as opium is concerned. As regards cannabis, one particular case has hit an all time high when about 10.200 kgs of cannabis was seized. The total quantity of cannabis seized during 1973 has risen to six times when compared to that of the previous year.

During the current year, the tempo of work has further accelerated in as much as 2,130 kgs of opium has been seized during the first seven months alone which means an increase of 19 per cent when compared to the quantity of illicit opium seized during the entire year 1973. The quantity of charas seized during the current year, also includes a record haul of 41 litres of liquid hashish which is a very concentrated form of the drug.

The comparative figures for the last two years are as follows:

Year	Opium kg.	Charas kg.
1972	1,057,000	5,551,000
1973	1,789,000	31,721,000

Common Drug Abuse

The most common drugs of abuse in Pakistan are opium, charas and bhang, though opium derivatives, synthetic drugs and psychotropic substances are also being misused at a smaller scale. While opium is obtained from the opium poppy (papaver Somniferum) charas and bhang grow wild in the northern parts of the country.

Opium – Medical and Quasi-Medical Purposes

Opium required by the government for medical and quasi-medical use is obtained from opium poppy cultivated under licence in certain districts of North-West Frontier Province. In 1974, 1,250 hectares were brought under opium cultivation under a licence issued by the Provincial Government in North-West Frontier Province and 7,043 kgs (60 tons) at 100 per cent consistency was extracted out of this. This quantity was acquired by the government and issued to the government *vends*. The yield comes to 5.635 kg. per hectare at an average. Compared to this, the yield in India is much greater. According to one estimation, about one-third of the yield is given to the government and the rest goes into the black market for illicit trade. According to another estimate prepared by an outside agency about 170 tons of opium is extracted instead of the official figure of 60 tons. These figures are

based on an interview with the Secretary, Pakistan Narcotics Board, Islamabad.

Distribution of Excise Opium

Opium is being used legally to cater for addicts and for medical and quasi-medical purposes. This opium is known as excise-opium and is distinguished from raw opium produced and distributed illegally. The prevalent system of distribution of excise-opium is that throughout the country a fixed number of licensed shops known as *vends* have been established to which excise-opium is issued by the government on a fixed rate.[9]

It is proposed to substitute the present *vends* system of opium by a more scientific and efficient system of issue of opium to registered addicts.

Spectrum of Drug Addiction in Pakistan

Drug addicts are not new to Pakistan – they have been in existence since times immemorial. The evil has taken possession of the world and caused immense concern to the conscience of humanity. Previously, drug addiction was regarded as a personal problem but now a drug user is considered as a derelict character.[10]

At the first International Workshop on Prevention and Control of Drug Abuse held in Pakistan in August 1975 at Rawalpindi, the Prime Minister referred to the serious concern which the world community felt in view of the international ramifications of the drug abuse problem. He declared that it was crucial to control, if not to eliminate, the drug demand spectrum and this demanded the cooperation of everyone in society.

Drugs – A Two-Fold Problem

The problem in Pakistan with regard to abuse of drugs is two-fold, the stopping of cultivation of opium and the rehabilitation of drug addicts. Despite the existence of the problem in its various manifestation no authentic research or documentation on production and abuse of drugs has taken place.[11]

A survey was conducted in 1972 in order to find out the nature and extent of drug abuse in Pakistan.[12] In order to check

the findings of the survey, a small sample of a cross section of the population was also interviewed. In all, 1,488 customers including 41 females were interviewed from the *vends*. The total number of urban males addicted to opium in West Pakistan was 295,237 as estimated from the survey of the *vends*. They constituted 5.52 per cent of the total male urban population in Pakistan. The number of urban males addicted to charas came to 66,493, constituting 1.24 per cent of the total male urban population of Pakistan. The number of persons addicted both to charas and opium were 14,700, constituting 0.27 per cent of the total urban males. The percentage of the total male urban population of Pakistan addicted to opium and charas or both was 7.03 per cent. The percentage of students addicted to various drugs was 3.68 per cent. The average age of respondents at the time of survey was 44.8 years. According to the Health Secretary, Government of Sind, 44 per cent of the students in the Province of Sind were drug addicts. These statistics would show that drug addiction is spreading fast in the country and there is an acute need for nipping the evil in the bud.

The Pakistan Narcotics Control Board also had a socio-economic survey of the Buner (Swat) area undertaken in respect of the proposed crop replacement program under the United Nations Fund for Drug Abuse Control.[13] This program is a landmark and sets the style of pre-project activities in any opium producing area. The report has collected a wealth of information and is heavily relied upon for crop substitution program information.

Side by side with the above measures, the Board has taken in hand a commendable program of public education, treatment and rehabilitation of addicts, and publication and dissemination of literature on the subject. For creating a necessary awakening among the people about the health hazards of addiction, special lectures, group discussions and symposia with ex-addicts participation in them, have also been arranged. All these measures are new in Pakistan and are likely to yield rich dividends.

It may be appreciated that drug abuse is confined in Pakistan to the lower strata of society and has not as yet hit either the younger generation or the affluent in a big way. Bhang and charas happen to be popular with the pseudo-mystics who pretend to be indifferent to the world at large and live usually near graveyards. There is no acute generation gap on account of the disciplinary

control of the joint family system, and so the youth of the country are not as wayward and prone to drug addiction as a cult as in some advanced countries. However, outside influences being introduced by 'hippies' have been seeping into the country necessitating the need for constant vigilance.

Conclusions

A skein of developments in the field of criminal justice has been unravelled in this chapter to show mainly that the original purpose for which it was evolved has become a little anachronistic and that the ends it must serve today are different. It does not mean that the criminal justice system has either become obsolete or ineffective and needs discarding *in toto*. The circumstances explained in the preceding pages only affirm the proposition that it needs radical changes in content and procedural practice. A developing country must make justice inexpensive, expeditious and aim at elimination of iniquitous practices that tend to create a sense of despondency with the dispensation of justice. An insight into the causes of murder and other violent crime would bring out the fact that the inordinate delays in the judicial process that the guilty may manage to get away with, provokes others into taking the law into their own hands. Therefore all the new trends in the legal codes, judicial system and police practices have taken into account the fact that the whole fabric of the criminal justice system is placed in an unprecedented situation today.

The alien rulers always meant business and were not in the least responsive to popular desires, wishes or demands. The pyramid of their power structure was firmly grounded on the maintenance of law and order only. The country is in a totally different situation today. The less-ethical tone, attitude and temper of not only the law enforcement agencies but also of the entire legal process should be decidedly of a positive and realistic character.

This becomes all the more imperative when we see that the present government is solemnly pledged to further and promote egalitarian and democratic causes. This pledge is a direct reflection and embodiment of the thinking of the people and all new steps being taken in the criminal justice system have kept this constantly in view. This lends further strength to what was said earlier that the roles of the police, the executive and the judiciary are being interpreted anew so that the ends of justice are met and the

criminal justice system stands integrated with the wishes and aspiration of the people.

---

1. The Report of Law Reforms Commission, 1958-59, p.6.

2. The court of *Faujdar* dealt with the violation of religious law whereas that of *Kotwal* dealt with secular laws like rebellion, rioting, theft, robbery, murder, etc. *Panchayats* at village levels were in the nature of domestic forums for localised areas.

3. In this connection the case of Major Muhammad Yaqub, who killed his wife, Naseem Yaqub, and destroyed the body and other circumstantial evidence, can be cited. His guilt was established before the tribunal and he was awarded a heavy punishment.

4. The controlling principles were laid down in a case decided by the Privy Council in 1949. A High Commissioner for India and High Commissioner for Pakistan, V.I.M. Lall, 75 I.A.225 (1948). These principles held that termination of services at the pleasure of the government was limited by certain conditions.

5. The screening of senior executives came as a rude shock to the higher echelons and their sense of security which they had enjoyed for decades received a jolt. The jurisdiction of the courts to question the results of the screening committees was barred by Section 10 of the Public Conduct (Scrutiny of Rules, 1959).

6. A *Karo* is a 'black-faced' offender who is guilty of sexual offence and a *Kari* is his female accomplice. In the Province of Baluchistan and some parts of Sind, such guilty persons are done away with by the aggrieved party.

7. Richard V. Weeks in his book *Pakistan* (1964) writes:

> No single element in the lives of Pakistanis plays a more persuasive role than religion. It affects the way they work, their adjustment to hardships, the course of their government. Religion helps determine what they eat, whom they marry, what they learn in school and how they develop their society. For millions, religion is the very reason they are Pakistanis at all rather than Indians.

8. The word *Pukhto* in *Pukhto* language is a comprehensive term meaning the quintessence of all that is honourable and worth living for.

9. There are a total of 334 *vends* in Pakistan as follows:

Punjab	204
Sind	91
North West Frontier Province	20
Baluchistan	19

10. M.B. Chinard, *Sociology of Deviant Behaviour* (Holt Rinehard & Winston, London, 1966) p.292.

11. There was a report of an Indian Hemp Commission prepared by the British towards the end of the 19th century.

12. Mazhar Hussain, *Nature and Extent of Drug Addiction in Pakistan* (Social Science Research Centre, University of Punjab).

13. *Socio-Economic Survey of Buner (Swat)* (Printing Corporation of Pakistan Press, Islamabad, May 1975).

10 Martial Law and Criminal Justice in the Philippines

P. P. Solis

Introduction

The Philippines emerged as a sovereign and independent state from the ravages of the Second World War. The enormous reconstruction program was inadequate not only because of the vast areas affected but also because of the destruction of vital aspects necessary for its national existence. Major cities were razed to the ground, industrial establishments were destroyed, people were displaced and agricultural lands were abandoned because of the atrocities committed by the belligerent forces. Compounding these calamities, feelings of hatred, revenge and antagonism by people who suffered injustices spawned chaos and disorder.

Tremendous economic, political, and social problems burdened the post-war Philippine Republic. The newly won political autonomy gave rise to an arduous struggle for political supremacy among the local bourgeoisie. The feudalistic foundation of the country's agricultural economy tilted the power scale heavily in favour of oligarchs who, with the aid of their private armies or liquidation squads, dominated the political scene.

As the Republic progressed towards industrialisation, a complex social problem arose as displaced rural people migrated to urban centres. People from all walks of life concentrated in the cities. Housing problems became acute and labour and capital problems emerged. Under such a pluralistic society, relationships between people were characterised by indifference, suspicion, distrust, animosity, and outright enmity. Thus in our midst were ominously reflected the lessons of hatred and dissatisfaction. We saw them in the daily lives around us – in homes, in the streets, in the public markets, in churches, in schools, everywhere.

As succinctly described by one writer:

> Everyday we read on the front pages of newspapers the rising criminality throughout the country which brought about an atmosphere of constant fear. Lawlessness became a symbol which disintegrated not only the social fabric but also the political structure of the community. Hence, riots were a common occurrence, crime a daily pastime. The destruction of humanity seemed inevitable in the country. The hyprocrisy of some national leaders and their impervious leaning towards corruption were on the rise. Parenthetically, from day to day we used to hear about the sufferings of the hungry and poverty-stricken masses scattered all over the country. Ironically some of our leaders trampled upon our deepest respect for the law and shattered every vestige of our fundamental rights merely for personal interests and self-aggrandizement. In the light of those developments, the general welfare could no longer be ignored as the adverse effects were gradually destroying the democratic heritage of every institution. They eroded the moral fabric of the whole nation.

Then came the sweeping decision of the President to proclaim martial law throughout the country on 21 September 1972. This date signalled the turning point of the course that the ship of state of the Republic has been traversing since its birth on 4 July 1946. President Marcos declared to the nation on the night of Saturday, 23 September 1972, that he had installed martial law under Proclamation No.1081, on 21 September 1972, and authorised its implementation by the military at 9.00 p.m., Friday, 11 September 1972. In brief, the President summarised the reason behind the proclamation thus:

> I am utilizing the proclamation of martial law for one purpose alone, to save the Republic and reform society.[1]

Declaration of Martial Law

Concepts: The term martial law until recently did not have a well settled meaning. Winthrop[2] observed that the earlier confusion as to the concept of martial law resulted partly from the wrong definition of the term by the Duke of Wellington who stated that it is nothing more or less than the will of the General, and this had misled even the Supreme Court of the United States in the leading case of *Ex parte Milligan*.[3] However, Chief Justice Chase, in his dissenting opinion, clarified and laid down the classic distinctions between martial law, military law, and military government, which considerably helped clear the confusion in the meaning and application of these terms.

The *Manual for Courts-Martial of the United States Army* (after which was patterned the *Manual for Courts-Martial of the Armed Forces of the Philippines*) promulgated on 17 December 1938 pursuant to Executive Order No.78, contained this distinguishing description of martial law:

> Military jurisdiction in relation to the term 'martial' law is that exercised in time of rebellion or civil war by a government temporarily governing the civil population of a locality through its military forces, without authority of written law but as necessity may require.

What is the fundamental basis of martial law? Wiener, on p.16 of his book *A Practical Manual of Martial Law* (1940), states that:

> . . . martial law is the public law of necessity. Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed.

Under the Philippine Constitution, the President of the Republic, as Commander-in-Chief of all the armed forces of the Philippines, has three extraordinary remedies in meeting crisis situations. The first remedy is the calling of the armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. The second and third remedies are the suspension of the privilege of the writ of *habeas corpus* and the proclamation of martial law, to meet emergencies arising from 'invasion, insurrection or rebellion, or imminent danger thereof, when the public safety requires it'.[4]

From the very nature of these three emergency measures, it is apparent that their severity progresses in the order in which they are enumerated in the constitutional provision, and there seems to be no doubt that martial law is the extreme constitutional remedy for state survival, or as President Ferdinand E. Marcos puts it in his own phrase, the 'imperative for national survival'.

Under martial law, the President exercises both executive and legislative powers. Under the latter power, he issues presidential decrees, general orders, letters of instructions, letters of implementations, and letters of authority. Presidential decrees are laws issued by the incumbent President under his martial law powers. They have the same force and effect as the laws enacted by Congress. General orders are directives or orders issued by the incumbent President defining or stating specific policies that will govern or regulate certain activities. Letters of instructions are

orders to specific government officials telling them what to do.

Letters of Implementations are those that put into effect the reorganisation of the government as provided in Presidential Decree No.1. Letters of Authority are instructions issued by the incumbent President to government officials authorising them to perform certain acts.

Martial law Philippine style: Under the martial law regime, President Marcos remained as civilian Chief Executive and Commander-in-Chief of all the armed forces. He did not establish a ruling military junta. The President did not send military armoured trucks and tanks rumbling through the streets. The people seldom saw uniformed soldiers on street corners. There were no mass executions of the enemies of government, no mass liquidation in detention camps and gas chambers as his enemies had charged and as the people had feared. It is martial law without blood bath.

A journalist, Frederic S. Marquardt, former editor of the Philippines Free Press and editor of the Arizona Republic, wrote approvingly of martial law in his paper. He was impressed by the benign, compassionate, and 'light hearted' character of Philippine martial law, compared to the martial regimes of Spain's Francisco Franco and Argentina's Juan Peron.

> Those who criticize the lack of democracy in the Philippines today are usually the ones who accept the lack of democracy in China as perfectly natural because, they say, the system in Red China works. The system is also working in the Philippines . . . There is a universal consensus that order has been established after a period of intolerable lawlessness. In sharp contrast to the Franco and Peron dictatorships, there are no soldiers on the streets and relatively few police. A curfew is in effect from midnight to 4 a.m. but there are few violators. Business has been stable under martial law and inflation has been contained. The old Malayan concept of *musiawara*, a national consensus arrived at without formal vote, is the guiding principle in this country today.[5]

President Marcos revealed that the resurgence of dissidence and of common crimes stemmed from the uniqueness of the martial law he had imposed, 'a smiling martial law', according to some foreign observers, 'one that does not rule with the barrel of the gun or install barbed wires in the streets, or deploy large contingents of troops and tanks in centers of population'. President Marcos said:

> We have it martial law – Philippine Style, unique in the history of martial rule because it is human and forgiving, and does not stand up against the wall, even the gravest offender, provided he offers to mend his ways and take part in our reform program. Where violence could be avoided, we have avoided and will continue to avoid it; but the fact that we have not used and will not use it on our people, in the manner that other governments have used it on theirs, does not mean that we will not use it, if and when so compelled, on the enemies of the state.[6]

Impact of martial law on criminality: Proclamation No.1981, placing the entire Philippines under martial law, has undoubtedly improved the peace and order situation of the country. The gains achieved are immeasurable in terms of specific data as they involve the total well-being of the nation in general and the happiness and contentment of every citizen in particular. However, in certain aspects, as in the crime rate, an objective survey can be made, based on the incidents, causes, and results where data are available. Although it may be gleaned that there is no appreciable reduction of crime rate and volume yet, what is readily observable is the minimisation of violent crimes which can be safely attributed to the successful program of the government in the confiscation of firearms which are not authorised.[7] See Table 1.

Administration of Criminal Justice Through Martial Law (Philippine Model)

The ultimate purpose of the administration of criminal justice in any country is the preservation of law and order, and the control of crime. These objectives can, in the main, be achieved primarily by instilling in the people a sense of national and personal discipline.

Measures to instill national and personal discipline:

1. Confiscation or surrender of firearms

Before martial law, the carrying of firearms was a symbol of power, prestige, and authority. Criminal acts were committed with the aid of armed men to insure consumation of the crime. Political supremacy was accomplished and maintained with the aid of private armies with high powered guns. Smuggling, highway robberies, and other acts of violence were committed with the use of deadly weapons more sophisticated than those used by members of the

Table 1 Crime volume and crime rate of index crime in the Philippines by calendar year (Source – Monthly Peace and Order Situation Report)

	1971		1972		1975		1974	
	Volume	*Rate*	*Volume*	*Rate*	*Volume*	*Rate*	*Volume*	*Rate*
Total index crime	41,326	108.9	42,650	109.0	40,636	100.9	46,888	113.0
Murder	3,315	8.7	3,085	7.9	904	2.2	935	2.2
Homicide	4,147	10.9	3,575	9.1	2,244	5.6	1,906	4.6
Parricide	101	0.3	84	0.2	76	0.2	45	0.1
Physical injuries	10,994	29.0	10,966	28.0	13,335	33.1	15,754	38.0
Robbery	11,336	29.9	12,193	31.2	8,481	21.0	8,902	21.5
Theft	10,565	27.8	11,705	29.9	14,485	36.0	18,186	43.8
Rape	815	2.2	685	1.8	760	1.9	818	2.0
Abduction	-	–	316	0.8	347	0.9	342	0.8
Kidnapping	53	0.1	41	0.1	4	0.009	2	0.004
Other crimes	29,945	78.9	35,643	91.2	33,971	84.3	30,936	74.6
Total crime volume	71,271	187.8	78,293	200.2	74,607	185.2	77,824	187.6
Population	37,959,000		39,102,000		40,280,000		41,493,000	

Crime rate – volume per 100,000 inhabitants

law enforcement units. Sale and trafficking of firearms was a lucrative business inasmuch as the demand was great.

Guns of the Second World War vintage and those transported into the country from Vietnam have been the primary factors in the firearm problem. Guns of all types, brands and calibres and ammunition in big quantities were available. Armed goons roaming the streets were tolerated and were beyond containment by law enforcers. Hospital and clinic reports show a great percentage of death and physical injuries cases caused by gunshots and shrapnel from grenades and bombs.[8]

To restore the tranquility and stability of the nation and secure the people from violence, injuries, and loss of lives, General Orders Nos 6 and 7 were promulgated on 22 September 1972. These general orders prohibit the inhabitants of the country from keeping any firearm without a permit, duly and legally issued for that purpose as well as the carrying of such firearm outside the residence of the duly licensed holder thereof.

Implementing the policies set by the general orders mentioned above, the government has successfully accomplished the following record in the confiscation of firearms:

No. of firearms collected as of 31 December 1973	525,397
No. of firearms collected as of 31 December 1974	528,176

Under General Order No.6, any person found violating this order shall forthwith be arrested and taken into custody and held for the duration of the emergency unless ordered released by the President or by his duly designated representative. Presidential Decree No.9, issued pursuant to General Orders Nos 6 and 7, provides for heavy penalties. Any violation of the General Orders Nos 6 and 7 is unlawful and the violator shall, upon conviction suffer:

a) The mandatory penalty of death by a firing squad or electrocution as a military court, tribunal/commission may direct if the firearm involved in the violation is unlicensed and is attended by assault upon, or resistance to, persons in authority or their agents in the performance of their official functions resulting in death to said persons in authority or their agent; or if such unlicensed firearm is used in the commission of crimes against persons, property, or chastity causing the death of the victim, or used in violation of any other

Table 2 Violent death cases investigated by the Medico-Legal Section, National Bureau of Investigation

	1970		1971		1972		1973		1974		1975	
	No.	*%*	*No.*	*%*	*No.*	*%*	*No.*	*%*	*No.*	*%*	*No.*	*%*
Gunshot	329	14.1	447	18.35	408	18.75	92	5.44	113	6.36	118	6.31
Sharp instruments	421	18.1	622	25.59	433	19.95	176	10.42	127	7.28	130	6.95
Others	1,577	67.80	1,361	56.06	1,329	61.30	1,241	84.14	1,503	86.36	1,621	86.74
Total	2,327	100.00	2,430	100.00	2,170	100.00	1,689	100.00	1,743	100.00	1,869	100.00

general orders and/or letters of instructions promulgated under Proclamation No.1081. The menace of possessing and indiscriminately using firearms was a threat to national service and hence stern measures were necessary.

b) The penalty of imprisonment may range from 20 years to life imprisonment as a military court, tribunal/commission may direct, when the violation is not attended by any of the circumstances enumerated under the preceding paragraph.

c) The penalty provided for in the preceding paragraphs shall be imposed upon the owner, president, manager, members or the board of directors, or other responsible officers of any public or private firms, companies, corporations, or entities who shall wilfully or knowingly allow any of the firearms owned by such firms, companies, corporations, or entities concerned to be used in violation of General Orders Nos 6 and 7.[9]

Relative figures of death by firearms for the years 1970 to 1975 are given in Table 2.

2. Curfew

It has been observed that criminal acts, like arson, violent killings, destruction of public and private properties, and robberies have been going on unabated during the night time. As a solution to the problem, the President issued General Order No.4 which declared a curfew to be maintained between the hours of midnight and four o'clock in the morning (which later on was modified, imposing a curfew between one o'clock to four o'clock in the morning) and that between these hours and during the effectiveness of the order, no person shall be allowed to move outside his or her residence unless authorised in writing by the military commander-in-chief of the area. Any person who violates the order shall be arrested and forthwith taken in custody to the premises of the nearest military camp and shall be released not later than 12 o'clock on the day following the apprehension unless there are valid and compelling reasons or grounds for prolonging his detention in which case he shall be transferred to and kept in the nearest prison camp.

General Order No.23, issued on 18 January 1973, amended the above order by providing that the Chief of Staff, Armed Forces of the Philippines, may, for such critical areas as he will

determine and specify, extend the duration of the curfew period consistent with the requirement of military necessity.

However, to enable the people to freely discuss and debate publicly the issues in periodic referenda, the curfew hours are suspended within a reasonable period sufficient for the purpose. Curfew hours are also suspended during religious or legal holidays.[10] See Tables 3 and 4.

Table 3 Volume of index crimes, by time of commission RP wide

	Total		*Day*		*Night*	
	1973	*1974*	*1973**	*1974*	*1973*	*1974*
Murder	2,367	1,573	1,055	644	1,312	929
Homicide	6,801	3,163	3,405	1,674	3,396	1,489
Parricide	237	196	111	122	126	74
Physical injuries	23,325	26,824	12,832	14,589	10,493	12,235
Robbery	5,249	6,155	1,492	1,562	3,757	4,593
Theft	20,659	30,255	9,921	14,476	10,738	15,779
Rape	891	1,097	323	461	568	636
Total	59,529	69,263	29,139	33,528	30,390	35,735

* Period covered is April to December 1973 only.
No available data for January to March 1973.

3. Cleaning yards and surroundings

Under General Order No.13, issued on 30 September 1972, every resident and citizen of the Philippines, all universities, colleges, and schools and other similar institutions, private as well as public, all commercial and industrial establishments, hotels, restaurants, hospitals, cinemas, public markets, transportation companies, and all establishments of any kind, are enjoined to undertake the cleaning of their own surroundings, their yards and premises. The Order also prohibits anyone to throw garbage in public places, such as roads, canals, *esteros*, or parks.

In the event of any property owner's failure or inability to comply with this obligation, the government will undertake the cleaning at the owner's expense and the government may further utilise the land for its food production program. This cleanliness

Table 4 Volume of index crimes, by time of commission metropol area

	Total			*Day*			*Night*		
	1972	*1973*	*1974*	*1972*	*1973*	*1974*	*1972*	*1973*	*1974*
Murder	918	261	231	316	93	80	602	168	151
Homicide	2,466	1,293	1,007	934	480	364	1,532	813	643
Parricide	76	36	14	36	16	8	40	20	6
Physical injuries	12,158	14,980	14,171	6,055	6,902	6,498	6,103	8,078	7,673
Robbery	11,218	7,695	6,884	3,924	2,825	2,157	7,294	4,870	4,727
Theft	11,318	13,179	15,981	4,993	6,569	7,506	6,325	6,610	8,475
Rape	537	579	528	165	182	163	372	397	365
Total	38,691	38,023	38,816	16,423	17,067	16,776	22,268	20,956	22,040

drive of the government is very effective in instilling personal discipline among the populace and at the same time it has considerably improved the image of the country in the eyes of foreign tourists.

4. Display of wealth

General Order No.15, issued on 5 October 1972, calls upon every resident and citizen of the Philippines, including all elective local officials, from provincial governors and city mayors down to *barrio* captains and councilmen, to avoid and prevent as the case may be, ostentatious displays of wealth and extravagance, including lavish town fiestas or social gatherings. To this end, they are directed to limit town fiestas and other local festivities to one day, which should be as simple and economical as possible.

This order is merely a reaffirmation of an article in the New Civil Code of the Philippines which states:

> Thoughtless extravagance in expenses for pleasure or display during a period of public want or emergency may be stopped by order of the courts at the instance of any government or private charitable institution.[11]

Under the law, generally a person has the right to use his property and even consume it, provided he does not injure others (*Sic utere tuo ut alienam non laedas*). This right however is not absolute. When the right to indulge in thoughtless extravagance or display during a period of acute public want or emergency is not controlled it may unwittingly provoke unrest in the hearts of the poor who thereby become more keenly conscious of their privation and poverty. Such displays of pomp and frivolity tend to demoralise the suffering masses, and weaken the very structure of such social groups. This limitation on property rights is an exercise of the inherent power of the State, and is a commendable step towards the attainment of social stability.[12] Besides, this measure is an effective instrument in preserving our natural and human resources.

5. Rumour mongering

Presidential Decree No.90, issued on 6 January 1973, provides that any person who shall offer, publish, distribute, circulate, and spread, rumours, false news, information and gossip, or cause the publication, distribution, circulation, or spreading of the same,

which cause or tend to cause panic, divisive effects among the people, discredit of, or distrust for, the duly constituted authorities, undermine the stability of the government and the objectives of the new society, endanger the public order, or cause damage to the interest or credit of the State shall, upon conviction, be punished by *prison correccional*. In case the offender is a government official or employee, the accessory penalty of absolute perpetual disqualification from holding any public office shall be imposed.

To reinforce this decree, General Order No.19, issued on the same date, provides for the arrest and detention of any person found violating its provision.

Before martial law was declared, freedom of expression, which is guaranteed by the Constitution, had been gravely abused. This was exemplified by the slanted and distorted news reporting made by mass media people who as a rule, were solely actuated by a desire to advance their private interests or that of their bosses. The public was misled and often, the government was discredited. To remedy this situation, the President issued the above decrees to curb and penalise such inimical acts.

6. Use of sirens

It has been observed that much of the chaotic conditions from which our people have suffered were the direct result of indiscriminate and unregulated use of sirens, bells, horns, whistles, and similar gadgets that emit exceptionally loud or startling sounds, including dome lights and other similar signalling or flashing devices attached to motor vehicles and used on the highways. Furthermore, these devices actually impeded and confused traffic and were inconsistent with traffic discipline and control on the highways and in effect constituted a major problem in the maintenance of peace and order.

As a remedial measure, the President issued Presidential Decree No.96 declaring unlawful the use or attachment of sirens, bells, horns, whistles, or similar gadgets that emit exceptionally loud or startling sounds.

7. Discipline of government officials

In line with the government's program of ridding the public service of undesirable officials and employees, Presidential Decree

No.6 was issued on 27 September 1972. This decree amends certain rules of discipline of government officials and employees. The amendments consist of adding more grounds for disciplinary action and a provision for summary proceedings. Under the latter amendment, no formal investigation is necessary and the respondent may be immediately removed or dismissed if any of the following circumstances is present:

a) The charge is serious and the evidence of guilt is strong.
b) The respondent is a recidivist or has been repeatedly charged, and there is reasonable ground to believe that he is guilty of the present charge.
c) The respondent is notoriously undesirable.

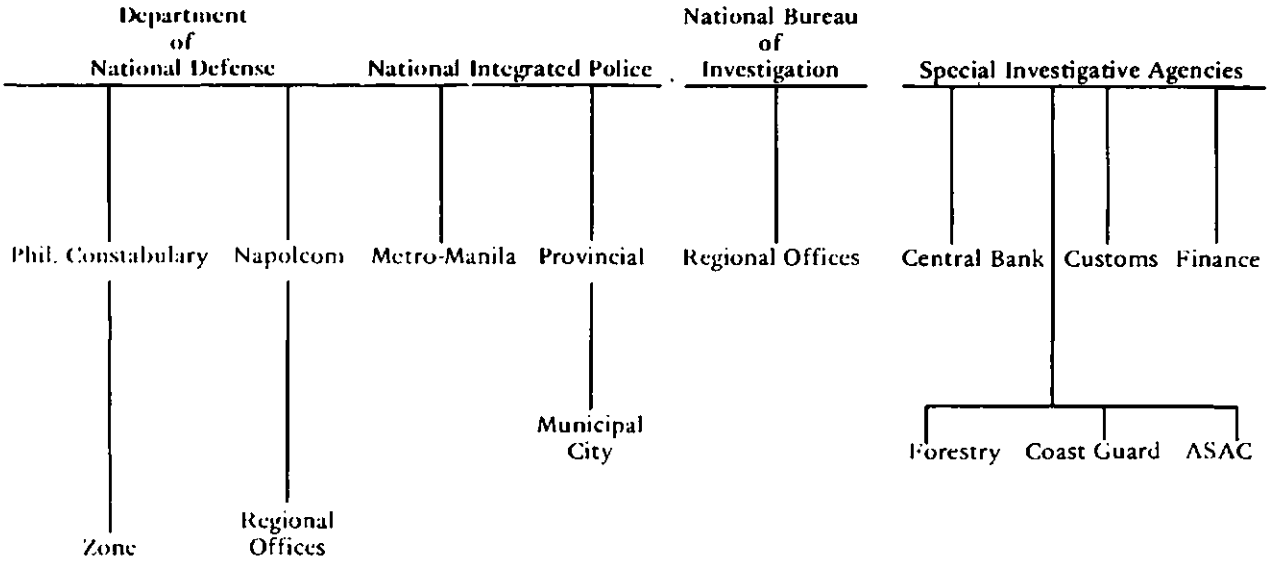
Innovations in Police Organisation

Integration of police forces: Before the advent of martial law, police forces were under the direct control and supervision of municipal elective officials. The existence of separate, independent police forces and facilities, whose jurisdictions were restricted by political/territorial boundaries, rendered the greater Manila area and its environs a virtual haven for criminals who posed a constant danger to the public safety, peace, order, and tranquility of the inhabitants therein. The lack of coordination within and among law enforcement agencies, real or apparent rivalries, conflicts, jealousies, and indifference among city/municipal police forces greatly hampered the prosecution of crimes.

To remedy this situation, President Marcos issued several decrees and general orders to effect an immediate integration of the different police forces. The primary aim was to promote a uniform and effective law enforcement system. It would also enable police forces to coordinate and synchronise their operation so as to achieve an optimum result in crime prevention, detection and prosecution. Integration also meant economy in the maintenance of communications and technical assistance.

Integration of the city/municipal police forces, jails, and fire departments was started within the greater Manila area through Presidential Decree No.421. Later, Presidential Decrees Nos 482, 531 and 585, established nationwide police integration. See Figure 1.

Figure 1 Organisation of police in the Philippines



Qualifications and discipline of the police: The presence of unqualified and ill-trained members in the various police forces had been a serious blow to their strength and efficiency. The usual cause of this was the vicious practice of political patronage which was rampant during the heyday of politicians in the Philippines prior to martial law.

To bolster and upgrade the ranks of the police forces, President Marcos issued Presidential Decree No.448, which, among other things, prescribed higher qualifications for policemen. Primarily this measure was intended for recruits. For those who were already in the service, a strict and rigid method of discipline was provided for in Presidential Decrees Nos 12 and 12A. Under these two decrees, the Chairman of the National Police Commission was empowered to create as many adjudication boards in the office of the Police Commission as were necessary to review and dispose of all administrative cases of city and municipal police forces referred to the Police Commission for final action.

Each board is composed of a senior official of the Police Commission as chairman, a senior officer of the Philippine constabulary and a representative of the Secretary of Justice.

A thorough scrutiny of the records of ranking officers and members of the city and municipal police forces throughout the country proved indispensable in view of the fact that it had been discovered that some of them were among the criminal and lawless elements who conspired with those who wanted to undermine the faith of the people and to overthrow by force, violence, and deceit, the duly constituted government. To get rid of such undesirable elements and to inculcate a sense of discipline among all city and municipal policemen, the government, through Presidential Decrees Nos 12 and 12A, provided for an expeditious and immediate disposition of their cases.

Prosecution and Courts

Preliminary investigation by provincial and city fiscals, State and District Prosecutors: The President, after Proclamation No.1081, decided to overhaul the procedure laid down by the existing law relating to preliminary investigations with a view to rendering it truly summary in nature as it was really intended to be from the beginning. This was accomplished through the issuing of Presid-

ential Decree No.77 which, in fact, reduced preliminary investigations to simple procedures.

Under the law formerly governing preliminary investigations – the Republic Act No.5180 (1967) – by fiscals and other public prosecutors, the complainant and the respondent, or their lawyers, were granted the right to confront and to cross examine each other and their witnesses. Thus, preliminary investigations were conducted in the manner of full-dress court trials and were therefore unnecessarily protracted. This contributed to one of the major problems in the past, as far as administration of justice was concerned, that is, the long time lag in the investigation and prosecution of criminal cases.

Under the law as it stands now, the complainant and his witnesses are only required to submit affidavits to be subscribed and sworn to before the investigating fiscal, together with other supporting papers. If on the basis of these documents, the investigating fiscal finds no *prima facie* case, he shall dismiss the complaint. Otherwise, the respondent shall be asked by subpoena to submit his counter-affidavits and the affidavits of his witnesses together with any supporting documents at an indicated date within 10 days from service of the subpoena. The fiscal then will render his resolution on the basis of the affidavits, counter-affidavits, and their supporting papers.

Creation of military tribunals: In imposing martial law, it was emphasised that the civilian government would continue to remain supreme as this was not a military take-over. The officials and employees of the national and local governments continued to discharge their functions as before within the limits of the situation. Thus in accordance with laws existing at the time of Proclamation No.1081, all executive departments, bureaus, offices, agencies, and instrumentalities of the government, as well as government owned or controlled corporations, governments of provinces, cities and municipalities and *barrios* continued to function under present officers and employees. The judiciary would continue to operate under the present organisation and personnel and try to decide cases according to given guidelines.[13]

However, while the President maintained in full the supremacy of the civilian government and independence of the judiciary, the exigencies of the situation that led to the declaration of martial

law demanded some changes, especially in the expeditious and speedy prosecution of crimes. Thus to aid the civilian courts, the President promulgated General Order No.8, authorising the Chief of Staff, Armed Forces of the Philippines, to create military tribunals to try and decide cases of military personnel and such other cases as may be referred to them. The tribunals created under this authority are the military commissions and the provost courts.[14]

Military commissions: The Chief of Staff of the Armed Forces of the Philippines is empowered to create military commissions. A military commission is composed of not less than five members, one of whom is designated as law member. The commission shall try cases of military personnel as may be referred to it by the Secretary of National Defence. Only officers of field grade rank, if practicable, with judicial temperament, prudence, and integrity shall be appointed. Only an officer under active military duty holding a commission in the Judge Advocate General's Office (JAGS), or a lawyer-officer who has been certified as qualified to sit as a law member by the Judge Advocate General, Armed Forces of the Philippines, may be appointed as law member.[15]

A military commission has jurisdiction to try cases where the range of punishment that may be imposed is confinement for at least six years and one day or a fine of not less than two thousand pesos (P2,000.000).[16]

Provost courts: A provost court is composed of one officer designated as Provost Court Officer. He must be a commissioned officer of suitable rank and a member of the Philippine Bar.

Cases involving civilians are referred to a provost court upon direction of the Secretary of National Defence. No case involving a civilian shall be referred to a provost court except for an offence over which a military tribunal exercises exclusive or concurrent jurisdiction. The Chief of Staff of the Armed Forces of the Philippines, with the approval of the Secretary of National Defence, allocates the cases involving civilians among the various provost courts.[17]

Review: Letter of Instruction No.233, issued on 13 December 1974, orders the Secretary of National Defence to review pending

cases in the military tribunals and in cases of congestion or overcrowding that would inevitably cause delays, submit recommendations as to which cases should be transferred to civil courts for trial.

Innovations in civil courts: The new Constitution of the Philippines, which was ratified by the Filipino people in a nationwide plebiscite held in January 1973, provided for one of the greatest innovations in the judicial system of the Philippines. Under section 6 of Article X of the Constitution, the Supreme Court has been vested with the power of administrative supervision over all courts and their personnel. Thus, all inferior courts which were formerly under the administrative supervision of the Secretary of Justice, an executive official, are now placed exclusively under the Supreme Court. The independence of the judiciary is thus secured and its position as one of the three main branches of government is clearly defined. To strengthen the ranks of the judiciary, the President issued Letters of Instruction Nos 14 and 14A which provide for the summary removal of unqualified and undesirable fiscals and judges based on their performance, integrity, and competence.

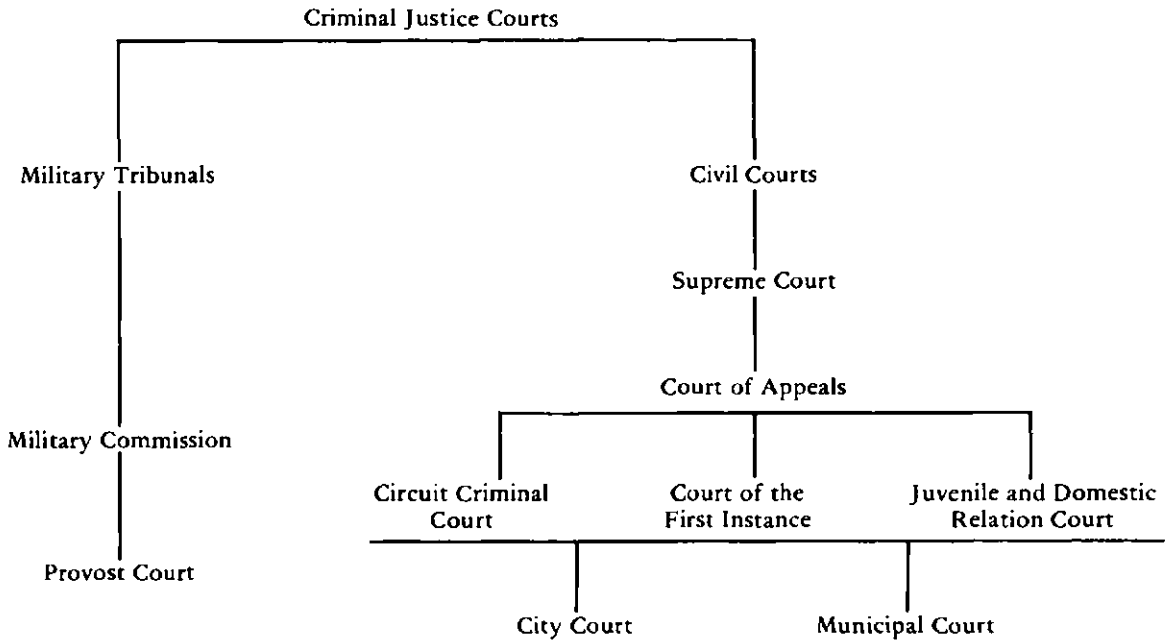
The jurisdiction of our circuit criminal courts has been enlarged by Presidential Decree No.126, issued on 19 February 1973. This measure has answered the long-felt need for expanding the jurisdiction of these courts because of the volume of criminal cases that delays the work of other courts. See Figure 2.

Corrections

Under the revised Penal Code of the Philippines, which is the repository of the criminal law, the classical or juristic theory of crime and punishment is adopted. This theory considers man as 'essentially a moral creature with absolutely free will to choose between good and evil' and man should answer 'for wrongful acts as long as such free will remains unimpaired'. Our Penal Code was punitive and retributive in character.

Under the new society, as envisioned by President Marcos, criminals are not considered as enemies of society, rather their reformation becomes one of the main purposes for their confinement in jails. The government lays stress on two objectives: segregating the criminal from society and training him to return as a law-

Figure 2 **Philippines court system**



abiding citizen. Respect for human dignity is the hallmark of our present penal administration.

To this end, the President issued Presidential Decrees Nos 28, 29 and 137, establishing additional regional prisons and converting existing penal institutions into regular prisons and penal farms. Regarding this point, and by virtue of Presidential Decree No.137, another regional prison was established in Cebu to accommodate prisoners coming from Antique, Capiz, Iloilo, Cebu, the two Negros provinces, and the cities in the area. This regional prison, together with the Iwahig Penal Colony in Palawan, the San Ramon Penal Colony in Zamboanga, and the Davao Penal Colony in Davao, serves to reduce the numbers in the over-crowded Muntinglupa national prison. These regional prisons are, more often than not, characterised by the presence of a minimum number of custodial staff and may be fairly categorised as 'open prisons'. This is intended to give full scale implementation to the innovations introduced by the government towards more meaningful penal reform as well as to rehabilitate national prisoners.

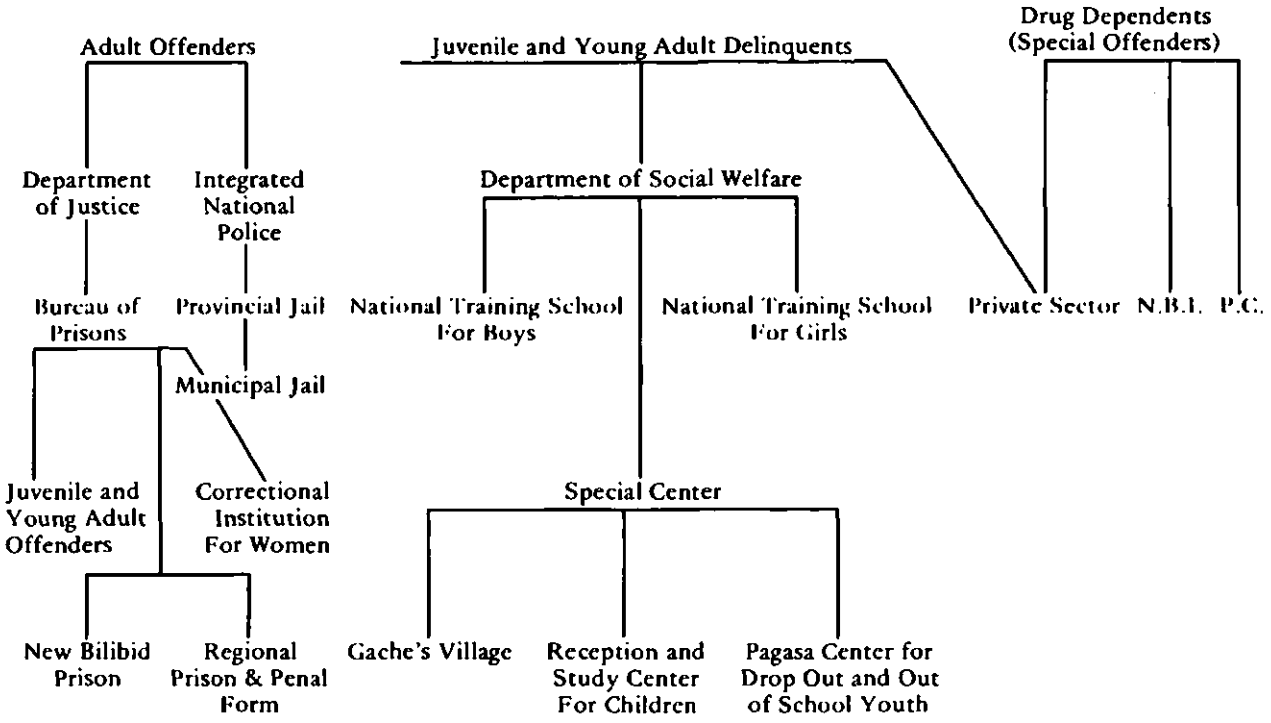
Table 5 Republic of the Philippines, Department of Justice, Bureau of Prisons, Muntinlupa, Rizal – February 1976

Fiscal years	*1969/70*	*1970/71*	*1971/72*	*1972/73*	*1973/74*	*1974/75*
Prison population	21,119	20,222	20,240	20,698	20,778	21,054
Received from different courts	6,829	5,977	5,747	5,886	4,650	4,567
Discharges or dropped	5,931	6,874	5,754	5,428	4,570	4,091

Prepared by: George M. Perez
Clerk II

Moreover, with the establishment of these regional prisons, our government has envisaged remedying the existing situation. Prisons are invariably located far from the homes of the prisoners. Under the present set-up prisoners may be confined to places nearest their residences, thereby relieving their relatives from the unusual difficulties relative to their customary visits. Improvement of

Figure 3 Philippines correctional system



correctional methods, therefore, is the main theme of these decrees. The integration of jail custodial forces with other police agencies of the government has immeasurably enhanced the facilities of penal institutions by becoming closer to other law enforcing agencies. See Figure 3 and Table 5.

An equally important innovation, introduced by the government under the martial law regime, is the issuance of Presidential Decree No.603, dated 10 December 1974. This decree stems from the constitutional mandate that, 'The natural right and duty of parents in the rearing of the child for civic efficiency should receive the aid and support of the government'.

Along this line, therefore, minor children over nine but under 21 years of age at the time of the commission of the offence are entitled to the following treatment.

Article 192 of this Presidential Decree No.603 provides:

> If after hearing the evidence in the proper proceedings, the court shall find that the youthful offender (minor child over nine but under twenty-one years of age at the time of the commission of the offence) has committed the acts charged against him, the court shall determine the relevant penalty, including any civil liability chargeable against him. However, instead of convicting him, the court shall suspend all further proceedings and shall commit such minor to the custody or care of the Department of Social Welfare, or to any training institution operated by the government, or to a duly licensed agency or to any other responsible person, until he shall have reached twenty-one years of age or, for such shorter period as the court may deem proper, after considering the reports and recommendations of the Department of Social Welfare or the agency or responsible individual under whose care he has been committed.

Article 196 of the same decree further provides:

> If it is shown to the satisfaction of the court that the youthful offender whose sentence has been suspended, has behaved properly and has shown his capability to be a useful member of the community, even before reaching the age of majority, upon recommendation of the Department of Social Welfare, it shall dismiss the case and order his final discharge.

In addition to the above, all the records of the youthful offender's case shall be destroyed immediately after such acquittal, dismissal, or release, unless civil liability has also been imposed in the criminal action, in which case such records shall be destroyed after satisfaction of such civil liability.

In the event of the youthful offender being found to be incorr-

igible, or if he has wilfully failed to comply with the conditions of his rehabilitation programs, or should his continued stay in the training institutions be impracticable, he shall be returned to the committing court for sentencing. In any case, however, the youthful offender shall be given credit for the period spent in actual commitment and/or detention.

Conclusion

The innovations in the criminal justice system under martial law are phenomenal. They constitute a monument to a people's resolute struggle against lawlessness, violence, and disorder. The old machinery of government suffered from the crippling effects of being surrounded by terrorists, kidnapping gangs, crime syndicates, private armies, and thousands of criminals. As the President put it:

> A year after proclamation of martial law, we faced a crisis of survival. We have surmounted the crisis.
>
> The man who feared to walk his own street has been freed from his fears, he can now walk his city.
>
> The farmer who feared for his cattle can now sleep.
>
> The man whose father tilled another man's land will no longer sire children who will till the land of the landowner's sons. Together they will have their own lands to till.
>
> The man who once surrounded himself with hired guns has been put in jail or reduced to insignificance.
>
> The armed force of the rebellion has been crushed. It can no longer re-establish itself to its old position, unless we allow it. The urban terrorists have been checked. The rightest conspirators too. Over a half million firearms taken from or surrendered by, the population will never find their way again into private hands. 145 so called private armies that have been disbanded will no longer intimidate innocent men . . .[18]

A new political, economic, and social climate has pervaded the nation. A sense of national pride in every Filipino citizen has been achieved through President Marcos' successful stewardship of the ship of state in the midst of turbulent times and crisis situations. The radical innovations introduced by the martial law regime are still in the process of implementation. As martial law is merely to combat a crisis in the government, it is not permanent, and will soon give way to a permanent one as envisaged in the fundamental law of the land. However, to consolidate the achievements of

martial law, the farmers of the new Constitution have inserted therein transitory provisions, which state, among others that:

> All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land and shall remain valid, legal, binding, and effective even after the lifting of martial law or the ratification of this Constitution unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly.[19]

The Filipino people are thus assured of the lasting legacies of the regime of President Ferdinand E. Marcos.

---

1. Proclamation No.1081.
2. Winthrop, *Military Law and Precedents* (2nd ed., 1920) p.799.
3. Wall, 2, Ed., 281 (1866).
4. S.12, Article IX, Philippine Constitution.
5. Quoted in Teodoro F. Valencia's column, 'Over a Cup of Coffee', *Bulletin Today* (Manila, 15 April 1973). Mr Marquandt's statements were contained in his column in the *Arizona Republic* on 10, 11 and 12 April 1973.
6. Ferdinand E. Marcos, 'The New Society is in Peril', report to the nation, 7 January 1973. Published in the *Daily Express*, 8 January 1973, Manila.
7. Source: NBI Monthly Peace and Order Situation Report, Crime Volume and Crime Rate of Index Crime in the Philippine calendar year 1971-74. See Table 1.
8. Source: NBI Report on Medico-Legal Violent Death Cases, 1970-75.
9. Presidential Decree No.9.
10. General Orders Nos 33 and 35 and see Table 3.
11. Article 25, Civil Code of the Philippines.
12. Tolentino, *Comments on the Civil Code of the Philippines* (vol.1, 1974), p.89.
13. Proclamation No.1081.
14. Presidential Decree No.39.
15. *Ibid*
16. Presidential Decrees Nos 277, 328 and General Orders Nos 12, 12A, 12B, 12C, 21, 28, 31, 37, 39, 49 and 54.
17. Presidential Decree No.39.
18. Excerpts from the President's Report to the Nation, *Daily Express*, 22-23 September 1973.
19. Section 3(2), Article XVII, Philippine Constitution.

11 Criminal Justice Adaptations and Innovations in Japan

William Clifford

The System

In terms of criminal justice history and effectiveness, Japan represents a special case of incorporated Western law, indigenous adaptation and a mutation of principles in practice.[1] It is a non-colonised country which had no experience of invasion until the occupation era following the Second World War and with a carry over of feudal attitudes if not feudal concepts into the modern period of economic resurgence.

According to the earliest documents it would appear that law was part of a melange of social, ethical and religious rules.[2] Crime and sin were not distinguished and state action was mingled with purification rites. Such rules as were observed were conceived as being the divine will interpreted by the sovereign. When codes began to appear they were formulated on Chinese models overlaid with morals. They were intended to guide the people in doing right as much as to punish them for doing wrong.

Then followed a long period of feudalism which gradually established itself firmly and persisted through the vicissitudes of Japanese history until the Meiji era of 1868 when, for the first time in centuries, Japan opened its doors not only to Western trade but to Western culture and technology. There had been Western contact before this with the Spaniards, Portuguese and Dutch trading in a limited way, but the feudal pattern had had such a long run and the transition to capitalism had come so late and so quickly that the people carried through into the modern era very many of the earlier concepts and ways of thinking or behaving. This had both good and bad effects according to one's point of view. On one hand it meant that there was a quiet acceptance of authority and only a superficial appreciation of individual rights even when these were enshrined in statutes. On the other

hand the patterns of social cohesion based on central, local and familial authority persisted to neutralise the anomic effects of urbanisation and industrial concentration.

In 1853 Commodore M.C. Perry of the United States Navy came with four steam powered warships to 'request' the Japanese Government to open its ports to foreign shipping. He carried a letter from President Fillmore to the Japanese Emperor which in itself lent support to groups in Japan which had been compaigning for an 'open-door' policy. The Emperor was in Kyoto – a remote, divine, ancestral ruler who reigned but did not rule. For hundreds of years the actual ruling of the country had been in the hands of a *Shogun* based in Tokyo. This sudden Western pressure on a regime which had kept Japan generally insulated from Western influence imparted momentum for change and strengthened the pro-Emperor, anti-*Shogunate* movements which eventually (after civil war) restored power to the Emperor, who was supported by a group of less powerful *daimyo's* or feudal lords.

This Meiji Restoration of 1867 led to a rapid transformation of the State from feudalism to modern capitalistic organisation. There was a rush to modernise by importing to Japan the technologies and philosophies of the Western powers. And there were no half measures.

For some 250 years prior to the Restoration, Japan had kept herself isolated almost completely from foreign countries so as to keep off Christianity, for the *Shogunate* was suspicious that religious 'invasion' would accompany other forms of invasion. With the Restoration, however, Japan entered into diplomatic and commercial relations with the Western powers, and sent a large number of students to Europe and America for studying matters necessary for the modernisation of the country. Within three years, the external feudal structures were eliminated, and a centralised government was established, based mainly on a German model.

By 1858 Japan had signed treaties with the United States, England, France, Russia and Holland. It was soon aware however that it had fared badly in the negotiations. It had accepted a variety of claims to extra-territoriality which, when their full implications were appreciated, were not palatable to a proud nation. The drive to modernise Japanese law and *inter alia*, the criminal justice system, was predicated on a desire to find ways of

dispensing with these unfavourable treaties. The concern was to strengthen the independence of the State against foreign incursions. The government invited various legal missions notably from England, France and Germany, as it sought to find patterns suitable for its purposes.

If Japan was to follow the model of the two most advanced capitalist countries of the time it had a choice between England and France. English common law was not so readily transferrable, being so deeply rooted in English traditions and customs. French law on the other hand had the advantage of being codified and had already been adopted by a number of other states seeking to modernise quickly. There were translations of the French codes from 1868 and the Minister of Justice of the time was so impressed with what he could now read in Japanese, that he had in mind to apply French Law as it was to Japan. It did not happen quite like this, but the influence of the translated codes on judicial decisions can be traced. The judges had to operate from general principles since they had no precedents and it would have been surprising had they not drawn concepts of generality from the only available translations of foreign law.

In 1872 George Bousquet, a French lawyer, was appointed as an adviser to the Japanese Government and he helped to train local lawyers in the French system. In 1873 Gustave Boissonade, a French professor of law, was appointed to undertake the drafting of new laws. He began with a penal code and a code of criminal procedure which were then translated and modified by local committees to suit Japanese conditions. These came into force in 1882. In 1880 the first written constitution on the Western model had come into effect. It incorporated such basic principles as the rule of law, the protection of civil liberties and representative government. The penal code which had brought in the principle of 'no penalty if no law', lasted until 1908. Boissonade also worked on a civil code but this part of his work need not detain us here.

It should be borne in mind that the new government of the early years of the Meiji era was going through a difficult period of establishing its authority over the powerful interests which derived from the earlier feudal pattern of lords and retainers. It gradually established its authority and became more centralised at a time when the influence of French culture was losing ground. The absolutist government found the German model of centralised

authority more amenable to its purposes. The German Civil Code superceded the work in the French Civil Code but although the approach was different, much of Boissonade's work was retained. Even though H. Roesler, a German, was appointed to draft a commercial code he too chose a French model for much of his work.

In 1907 Japanese lawyers drafted a new Criminal Code which came into effect on 1 October 1908 and remains substantially in force. Since 1956 it has been the subject of discussions on reform but the draft is still disputed. This new code of 1908 dispensed with the familiar French classification of offences into crimes, delicts and contraventions (which prevails in French law today). It provided for a greater degree of individualisation of penalties by prescribing maximum and minimum sentences, leaving discretion to the judges, and it made other changes which generalised some of the principles.

In 1947 during the occupation, the Criminal Code was amended to take account of Anglo-Saxon concepts favoured by the conquerors. The idea was to make it more liberal and less authoritarian. Offences against the imperial family were excised and, in the interests of preventing a resurgence of militarism, many sections on war were annulled. Some of the provisions recognising the authority of a father over his family and particularly over women were amended.

The new constitution which came into effect in Japan in May 1947 sought to democratise Japan and to reduce the worst feature of the absolutism (and particularly the militarism) which had brought Japan to war. The most dramatic change was in the role and function of the Emperor. From being absolute and divine he became 'the symbol of the State and the unity of the people'. He has therefore an unusual and sometimes anomalous position which the ingenuity of Japan has absorbed and made workable. He is not really a constitutional monarch, a president nor indeed a head of State since his powers and position are somewhat different to each and all of these.[3]

The people were now sovereign for the first time in Japanese history. The Cabinet is responsible not to the Emperor but to the Diet. So that although the Emperor plays a formal role, he can only dissolve the House of Representatives when this action has already been decided by the Cabinet. The civil rights provided for

in the United States Bill of Rights are generally repeated in the Japanese Constitution but there are some important additions, for example:

> All people have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security and of public health.

There is a specified right to education, labour organisation and equality of spouses. And there is guaranteed the right to freedom from arbitrary arrest and punishment with a special law on *habeas corpus* enacted in 1948. It is an independent Supreme Court which decides on constitutionality and at the time of writing this court has just decided that public servants do not have a constitutional right to withhold their labour. An earlier Court of Administrative Litigation was abolished so that disputes in which government agencies were or are involved have to be heard by the ordinary courts.

To provide for decentralisation of the government, local autonomy was fostered by the new constitution which abrogated the extensive supervision over local affairs previously administered by the Ministry of Home Affairs. Governors of prefectures were to be elected not appointed and could no longer disregard the decisions of prefectural assemblies which were also elected. Mayors, who before had been elected by local councils, were to be elected directly by the people.

Particular attention was paid to the police force which had been highly centralised and was, in effect, an area of the military with powers to judge and sometimes fine as well as to investigate. Instead of coming under the Ministry of Home Affairs and prefectural governors, the police were divided on lines similar to those obtaining in the United States. Municipal authorities having more than five thousand people were required to maintain their own police forces. For the less populated areas of the country a National Public Safety Commission operated a small rural police force. But in a national emergency the Prime Minister could take command of both rural and local police (though such action had to be ratified by the Diet within 20 days).

In addition to her constitutional equality with her husband, a wife was able to own her own property, could divorce her husband

on equal grounds, and daughters ranked with sons for inheritance. Primogeniture was abolished. At 18 for males and 16 for females, children could marry without the consent of parents.

This move towards a break-up of the national police did not survive the political disturbances of the 1950s. At that time it became clear that local divisions detracted from the effectiveness of the police in dealing with disorder and the government needed a more integrated and efficient instrument of law and order. Accordingly there have been several revisions of police administration culminating in the Police Law (No.162 8 June 1954). These largely recentralised the police but retained the spirit of the new constitution's specification of police duties. Article 2(2) of this law for example states:

> Activities of the Police shall be strictly limited to the extent provided for in the preceding paragraphs and in performing their duties they shall make it their principle to be impartial, non-partisan, unprejudiced and fair and their authority shall never be abused in any way such as to interfere with the rights and liberties of an individual guaranteed in the Constitution of Japan.

By Article 3 of the law this passage is made a part of the oath which a policeman takes on his appointment to office.

At present there are 45 prefectures in Japan and each of these has a Public Safety Commission. These prefectural public safety commissions are linked and coordinated by the National Public Safety Commission, a body under the direct jurisdiction of the Prime Minister. The Chairman of the National Public Safety Commission, who is appointed by the Prime Minister with the consent of the Diet, is a minister without portfolio. The five members are also appointed in the same way. All must be:

> . . . persons who have had no career of professional public service in the police or prosecutions in the preceding five years.

Three or more members cannot belong to the same political party.

The National Public Safety Commission is responsible to the National Police Agency. The Director-General of the National Police Agency is appointed and may be dismissed by the National Public Safety Commission with the consent of the Prime Minister. This National Police Agency is the executive of the Public Safety Commission coordinating the autonomous prefectural police. For this purpose it has several Regional Police Bureaux each with its

own Regional Police School for the training of all ranks up to inspector. For inspectors and above, training is given by the Central Police College. Thus there is a national police career structure and an integration of training. Yet local control is retained in the prefectures.

Over the years, the courts in Japan have established their independence. The separation of powers was established by law early in the Meiji era and reinforced in succeeding years. But it was firmly asserted in practice in 1891 when Kojima Iken, President of the Supreme Court, insisted on the law as it stood being applied rather than exceptional penalties decreed by the executive in cases of public interest. There are different versions of what happened during the militarism of the 30s and 40s but the occupation authorities were not satisfied that the court was sufficiently insulated from influence. After the Second World War the autonomy of the courts was reinforced and since the Supreme Court, unlike its predecessor, now pronounces on the Constitution and administrative matters it has a position clearly above the other organs of State.

Below the Supreme Court are eight superior courts around the country, each with several chambers (three or five judges). These are mainly courts of appeal from lower courts – but there is provision for them to hear certain cases at first instance. Then come the 50 district courts in the prefectures which hear both civil and criminal cases and also hear appeals from the summary courts. The family courts are on a level with the district courts dealing with domestic cases and juveniles but there are no separate juvenile courts in Japan. At the lowest level of tribunals are the 570 summary courts. The judges who sit alone are professionally trained but provision is made for laymen to qualify for this appointment.

However, the heart of the Japanese criminal justice system is to be found in its public prosecutors. This elite corps of trained lawyers not only prosecutes all cases according to the Continental systems of law and works for the Prosecutor-General and his large staff which controls policy throughout the country, but it also staffs the Ministry of Justice. All the main departments of the Ministry of Justice are supervised by public prosecutors. The Directors-General of the Correctional and Rehabilitation Bureaux are public prosecutors and the Vice-Minister is also a public

prosecutor. Legal drafting and amendments to the penal laws will come from this group which is also responsible for research and training as part of which it wholly finances and runs the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders.

Whether one is thinking therefore of the police, courts or corrections in Japan, the Ministry of Justice is crucial and its public prosecutors are present throughout the system of both legal and social administration as this affects crime and criminals. The police hand over their cases to the public prosecutor who has discretion to prepare them for court – or to dismiss them if certain conditions are satisfied. His influence on the courts is indicated by the high level of conviction in Japanese courts. The prosecution structure is a sieve ensuring that the courts are not troubled unless the prosecution case is well prepared. Then, as shown, it has departments governed by public prosecutors of the Ministry of Justice which execute the sentences. Not only do prisons and parole systems come under the ministry but probation officers (including some 60,000 voluntary probation officers), who also service family courts, do also. Each of these departments of the ministry has a public prosecutor in charge.

Corrections in Japan were, like nearly everything else in Japan, reformed at the time of the Meiji restoration. Before then, prisons in Japan, as nearly everywhere else in the older world, had been places of safe-keeping pending punishment. Prisons were not intended to be a punishment in themselves because at that time punishments were usually physical. An offender was executed, expected to commit suicide, exiled, maimed or flogged. There is evidence of the occasional use of short periods of imprisonment as a substitute for flogging in the case of women and children but generally a person was in prison awaiting trial or the execution of sentence.

After 1868 the Japanese imported Western ideas, designs and administrative structures. New prisons were built on the patterns of the West so that some of the existing buildings are faithful copies of prisons in the United States and Europe. There are at the time of writing 55 prisons throughout Japan with nine juvenile prisons, three medical prisons, seven major houses of detention, seven branch prisons, two branch medical prisons and 107 branch houses of detention – with other institutions for juveniles.[5] These

function on the surface very much like similar prison systems in the West but are differently linked with commerce for production and some operate as factories on contracts with outside firms so that many of the institutions are virtually self-supporting.

Innovations

It is not easy to discuss innovations in Japan without recognising the fact that the whole criminal justice system is imported and that, in accordance with the Japanese sensitivity to being up-to-date, it has been changed and adapted to bring it abreast of Western changes over time. It is also necessary to observe that in working out these imported patterns, there have been innovations in the way that the Japanese have adapted new systems to fit older expectations. It is therefore not sufficient to take account of the overt changes in law and institutions because innovations have developed in practice – sometimes without statutory re-enactments. Indeed, far-reaching changes in statutes at the time of the Meiji restoration and after the Second World War could give a false impression of the adaptability of the system. Sometimes legal change is difficult because of divisions between the conservatives and progressives in Japan and this again is complicated by the fact that not infrequently it is the progressives who are resisting changes to the democratic principles implemented after the Second World War and the conservatives who are seeking changes so as to restore some of the authoritarianism lost at that time but which they believe more faithfully represents the traditional wishes of the people.

To take only two examples of the problems of legal change there is the penal law reform which has now been under discussion for over 20 years. Beginning within the Ministry of Justice in 1956, a draft was worked on by leading authorities in the government and the universities. This draft was eventually published in 1974. Since then, it has been discussed and criticised but is still, at the time of writing, very far from submission to the Diet. And a Supreme Court reform which took a number of years to prepare was introduced into the Diet in 1957 but was never adopted.

Yet there have been statutory changes. Mention has already been made of the adjustment of the localised police system to something more centralised in practice in 1954. This was carried

through the Diet with great difficulty and there was physical violence. The session of the Diet had to be extended, opposition parties absented themselves and the Bill was eventually passed on the votes of the government supporters alone. Similarly in July 1952 a special law to prevent political violence and subversive activities went through with very great difficulty and only then with a special clause which specifically prohibited any broad interpretation of its terms.

There have been laws against prostitution, drug abuse and in 1972 the law against glass bottle grenades was enacted. These and some administrative innovations are described by Mr Shikita in the next chapter. He also deals with very important innovations in the road traffic law. When it is remembered that by 1977 the deaths on Japanese roads had been brought down to the figure of nearly 20 years earlier, this innovation requires special attention. Once again these innovations derived from similar changes in the West but if we want to discover their greater effect in Japan it is necessary to look beneath the changes to the way in which they were both implemented and received in a purely Japanese context.

Thus, in administering the Japanese criminal justice system, there has been wider but informal use of the known attitudes and expectations of Japanese people. In the first place there is still a widespread dependence in Japan on obligations rather than rights. Of course, there are civil rights movements and all the constitutional safeguards but, for the Japanese, the concept of human rights still smacks a little of egotism because of its individual rather than group bias – and the Japanese ideograph for 'human rights' still conveys a partial sense of privilege. They are not alone in this. Obligations and filial piety are not purely feudal hangovers. They are discoverable in the customary law of many older societies where group solidarity is preferred to individual vindication and the same idea is general throughout Asia. Nor does this imply that human rights are not valued or protected. It only means that they are conceived as better obtained through the group to which one belongs – and that they are better ensured if everyone operates within a system of reciprocal obligations which safeguard the rights of all.

In this setting there is still much more of the peace-making dispute settlement about the Japanese criminal justice system than the service of abstract justice. Innovations in Japan have therefore

this special characteristic of modifying imported law in practice by adjusting it to these realities. The police fully endorse the cry heard throughout the West for greater public participation but seen in practice in Japan this means mobilising group influence on members to conform. These are crime prevention groups formed within the schools, at work and in the neighbourhoods – and voluntary patrols going around with the police officers. The objective is for these older and more experienced people to advise the younger and more troublesome citizens to avoid the problems of contact with the law which is still regarded as punitive and authoritative rather than as a protective device for the rights of the individual.

In many cities of the West today such 'do gooders' would be scorned by the young but in Japan they have considerable influence. Again, the neighbourhood police do not only occupy themselves with crime or law enforcement in the negative sense. They regularly visit the homes of people in their area, become known personally and remind them of the need to renew licences or do those things the omission of which might place them on the wrong side of the law. The general emphasis is towards conformity. Moreover, in the interests of avoiding unnecessary conflict with the law, the police have permission (by Article 246 of the Code of Criminal Procedure) not to send the case to the public prosecutor (that is, not to proceed) if, in cases of theft, fraud, embezzlement and in cases dealing with stolen property:

1. The amount of damage is negligible.
2. The offence is petty.
3. The property stolen or taken has already been recovered or the damage repaired.
4. The victim does not wish proceedings to continue.
5. The case was accidental.
6. The likelihood of a repetition of the offence is not great.

This is indeed an opportunity for the police to initiate victim-offender transactions and to use their judgment as to whether the prosecution would do more harm than good. It is a useful lesson for those seeking various forms of diversion from overworked criminal justice systems in the West. Moreover, this discretion not to proceed is a well established prerogative of the public prosecutors confided to them in the late 19th century and preserved through the changes after the Second World War.

There is a great deal of peace-making and warning in the Japanese system and an avoidance of labelling long before the full majesty of the law is brought into play. This extends into the correctional system, where the public prosecutors by administrative change have been able to take full recognition of attitudes in the West towards rehabilitation and the individualisation of treatment – without recourse to statutory change to effect the transformations in practice.

Nothing is quite what it seems to be in Japan but it takes quite a long time to realise this. There is no impatience in police headquarters when people telephone for all kinds of general information and social advice unrelated to the work of the police, instead they are encouraged to do this. Offenders infrequently stand on their rights and call their lawyers. They are often almost indecently anxious to acknowledge fault and make amends. It is not always socially acceptable for a person to prosecute his rights in the courts and the distress of a person causing damage may be more important to the victim than obtaining precise or even appropriate damages or restitution.

Riot police are as fiercesome looking (in their protective garb) as riot police anywhere in the world but in action, in confrontation with violent demonstrators, they sometimes appear to be carefully calculating their role limitations in a dramatic scene. There is something ritualistic about the way the helmeted and scarved students and the shielded police actually behave towards each other. Both sides feel a need to allow the other to justify their public performance in a way which will bring no crushing defeat or disrespect. And, in the prisons, the divisions between inmates and custodial staff are rarely embittered by disrespect.

At the first glance this might be said to reflect an underlying acceptance of a hierarchy of positions in society – an attitude derived from deeply ingrained feudal ideas. Or it might be felt to reflect a deeper consensus on underlying values than is likely to be found in the West where there is less homogeneity, more pluralism and conflict, not only on law but on morals and life styles. But this is to oversimplify. Japan has its share of ideological divisions which sometimes erupt with more drama than elsewhere. It is not insulated from world movements and quickly responds to world pressures. Rather, the different reaction to and use of the law in Japan is a function of the subjectivity and emotional/intuitive

traits in Japanese character which sit beside but do not merge with the abstract logic or rational conceptualisation of a legal system imported from the West. It is from the reconciliation of this dichotomy in daily practice that a great deal of innovation develops informally. It is this adaptability to alien concepts – respected, accepted but not digested – which distinguishes the Japanese reaction not only to law but to many other Western influences.

Yet, sometimes the pull of the West develops innovations even in established informal Japanese practices. An example of this has arisen in recent times in the prosecution of Mr Tanaka, an ex Prime Minister, for accepting Lockheed money for the diverting of government orders to Lockheed planes. While the courts, as already shown, had firmly asserted their independence, and the democraticisation of Japan after the War made all equal before the law, there was a long-standing tradition that scandals within government or the higher echelons of the administration could be handled by resignation. Stimulated by the public outcry against Lockheed payments and the precedure of Watergate, the Public Prosecutor was free to act, without inclination towards government, in the interests of national or public interest. Not only that, but when a false call purporting to come from the Public Prosecutor-General was made to Prime Minister Miki, seeking his guidance, he refused to give any – leaving the matter entirely to the Public Prosecutor-General.

Here the underlying social, political or other deeper rooted imperatives did not prevail over a public concern which was very modern and Western in character and contrary to the traditional approach to such matters in Japan. It will be observed however that despite his arraignment, the ex Prime Minister was still able to stand again for election while awaiting trial – and he was very firmly re-elected by his constituency (to which he had met his obligations while in office and they felt some reciprocal obligation) so that he takes his place in Parliament and will presumably continue to do so for a number of years while his trial continues.

From an opposite angle, a controversy has broken out about whether the government had the constitutional right to release four political activists at the demand of hijackers holding hostages abroad for this purpose. Here the government was, by tradition, interpreting the law to meet new and unexpected circumstances

and thereby acting in accordance with the adjustment to change typical of Japan's adaptability over the centuries. But the technical and legal rights were quickly raised as an obstacle to this conciliatory and appeasive move.

Innovation in Japan is therefore to be sought more in the routine adaptations which occur rather than in structural or institutional changes which in any case are likely to resemble those in the West. Inevitably change is taking place over time and as Japan and other countries are drawn closer together always there seems to be a change in thinking among the young. Yet over a period of two decades, there seems to be more evidence of consistency in the traditional Japanese approach than signs of radical breaks with the past being developed by younger generations. They themselves seem to adapt to the older practices over time rather than to develop something new.

---

1. For a fuller account of the ideas in this chapter see W. Clifford, *Crime Control in Japan* (D.C. Heath, Lexington Books, Boston, 1976).

2. The Kojiki (Records of Ancient Matters) and the Nihonshoki (Chronicles of Japan) both written in the 8th century A.D.

3. See Yosiyuki Noda, *Introduction to Japanese Law* (tr. and ed. Anthony H. Angelo, University of Tokyo Press, 1976), p.69.

4. For a full treatment of this subject see Y. Noda, *op. cit.*

5. See W. Clifford, *op. cit.*, pp.88-89.

12 Recent Innovations in Criminal Justice in Japan with Special Reference to Traffic Law

Minoru Shikita

Introduction

Criminal justice would be one of the fields in which an innovation is necessary but difficult to materialise. It is necessary because criminal justice has legal stability as its most essential guiding principle and the authorities are often reluctant to alter the existing system even with sufficient reasons to do so. But very few systems can remain functional and effective after the surrounding social, economic and various other conditions have changed. It might be the case in some instances that the system is not as functional as it was planned and anticipated to be from its inception. These and other reasons will make constant efforts to make innovations an essential prerequisite for the functional operation of criminal justice systems.

An innovation in the criminal justice field is difficult because of the innate nature of criminal justice. Static values such as legal stability seem to be emphasised universally. There are difficulties in experimenting and therefore finding adequate alternatives for improvement. Objections from those who favour the existing systems regardless of reasons often block innovative efforts.

It would therefore be correct to say that prerequisites for innovations are not only the wisdom of finding areas needing to be improved and of devising new approaches to the problem, but also innovative efforts to persuade and convince legislators, related agencies and sometimes the public in general of the necessity of such new approaches. Such persuation will become increasingly difficult as the value judgments of the public become more diversified. The more crucial the issue, the more fierce will become the opposition. This is particularly so when the issue involves ideological backgrounds.

Some Aspects of Innovations in Japan

Innovations in Japan can be classified in various ways such as by subject (whether substantive, procedural or administrative matters), by means (whether by formal actions of legislative, executive or judicial powers or by informal administrative actions), or by the fields in which the main innovation takes place (whether police, prosecution, judiciary or corrections).

Enactment of a new category of offences is a substantive matter achieved through legislative action. A typical innovation of this category is the enactment of the Law for Punishing the Use, etc., of Glass-Bottle Grenades, in 1972, which is intended to control not only the possessing and manufacturing of 'Molotov cocktails' but also the possession of a bottle of petroleum, which is otherwise lawful to possess, for the purpose of using it as a grenade. This measure is innovative in that it gives a clear definition of a glass-bottle grenade and intends to suppress violent demonstrators at an early stage when a bottle of petroleum is possessed separately from firing devices. The use of Molotov cocktails has drastically decreased in Japan – from 406 in 1972 to 45 in 1974. The number of such grenades which were seized before use also decreased from 440 to 182.

Major innovations mostly need legislative action. However, the Prison Law (1908) presents an interesting exception in that Japanese innovations in the treatment field, such as the progressive treatment system, classification system, work release and such like, have been effected without, in fact, revising the law. It has been done through the revision of the Prison Law Enforcement Rule or the issuance of a Minister's Order or of the administrative directives of the Director of the Corrections Bureau. Rights and freedom of prisoners can be restricted only by law, but the matters relating to treatment measures can be reformed without law. In view of the fact that an enactment of law is time-consuming and often unpredictable, the correctional authorities would have preferred to have quicker means and wider flexibility in trying out correctional innovations.

The establishment of the Traffic Infraction Notification System in 1968 has been one of the most innovative and significant reforms in the field of criminal justice. In 1975, it diverted as many as eight million traffic violation cases from the ordinary criminal justice procedure without adversely affecting traffic

safety. This was effected by the revision of law.

Coordination of efforts of the related agencies also produce rather drastic improvements. Such a 'soft' approach will become increasingly important in the future. One such example is the creation of the 'one-day disposition procedure' in 1959 to deal more expeditiously with the growing number of traffic offenders without revising laws. The establishment of the Traffic Ticket System in 1963 can also be placed in this category.

Typical examples of innovations in administrative matters can be found in the field of police operations where computers have been extensively utilised. Much crucial information for successful investigation, which has long been difficult to obtain, can now be retrieved through the 'on-line and real-time' process within several minutes. Through development of the innovative use of soft-ware, for example, the police can now identify criminals from incomplete data, from their *modus operandi* or from incomplete finger prints. The aforementioned Traffic Infraction Notification System could be adopted largely because the computerised information of violation records is easily retrieved so as to eliminate repeated violators from the new system.

Since the recent innovations in criminal justice in Japan have often been in the field of traffic law, and because these might demonstrate the problems involved in different kinds of innovation, I shall focus on them.

Innovation in Traffic Law and its Administration

Background: Owing mainly to the remarkable economic development of Japan, the number of motor vehicles has increased considerably since the end of World War II. It increased from 166,647 in 1946 to 958,173 in 1955; to 5,790,763 in 1965; and further to 27,710,808 in 1974. It has increased by a factor of 166 in less than 30 years. Not surprisingly, the number of traffic accidents has increased; the annual numbers of traffic deaths and injuries increased from 4,409 and 12,655 respectively in 1946 to 6,379 and 76,501 in 1955; to 12,484 and 425,666 in 1965; and further to 16,765 and 981,096 in 1970. However, these numbers have started to decline constantly from the peak figures in 1970 to 11,482 and 651,420 respecitvely in 1974. This is an unusual phenomenon.

Likewise, the number of traffic violation cases received by the Public Prosecutors' Offices increased rapidly from 199,896 in 1949, to the peak figure of 4,597,663 in 1967, representing an increase by a factor of 23. However, it was caused to decrease in the ensuing years. It was 1,868,250 in 1974. This is due to the establishment of the Traffic Infraction Notification System. The decrease in the number of traffic deaths and injuries is also believed to be relevant to the innovation of this system, preceeded step by step by the two other innovations.

The first innovation – inauguration of 'One-Day Disposition Procedure' (1954):

1. Necessities

The new Code of Criminal Procedure was enacted in 1948. In 1949, the number of traffic violation cases received by the Public Prosecutors' Offices was 199,596, representing 12 per cent of the total received cases. However, violation cases increased very rapidly in the following years. In 1953, there were 3.8 times as many as in 1949 and these accounted for 43.9 per cent of the total received cases.

It was obvious that formal court proceedings could hardly handle these numerous cases with reasonable speed. The Code of Criminal Procedure was equipped with a special procedure to deal with minor cases expeditiously. The special proceeding is called 'summary procedure' which is an informal action initiated by the public prosecutor with the consent of the accused. Since this procedure presupposes the defendant's waiver of his right to a public trial, his willingness to follow this informal proceeding has to be ascertained by the prosecutor. The court examines the case on documentary evidence without opening a public hearing, and gives an order imposing a fine of not more than 50,000 yen. The defendant or the public prosecutor can demand a formal trial within 14 days of the receipt of the order if they are discontented with it.

However, it was realised that the existence of summary procedure was not sufficient to cope with traffic offences growing so rapidly in number. In fact, the special study of the Ministry of Justice revealed that the period spent for concluding one violation case from apprehension by the police to the complete collection of a fine, averaged as much as 123.5 days in 1958. The breakdown

of these days was as follows:

1. From the apprehension of a violator to the referral to the prosecutor (police)	25.5 days
2. From the reception of a case to its prosecution (prosecutors' office)	20.1 days
3. The court stage	
a) From the receipt of prosecution to the issuance of a summary order	18.9 days
b) Waiting period for the finalisation of the case (statutory)	14 days
c) Transfer of the case document to the prosecutor	13.2 days
4. For complete collection of a fine (prosecutors' office)	31.8 days

Considering the fact that these violation cases seldom involve factual or legal problems, this is an unbelievably long time. The main reasons for such a delay were believed to be the following.

Non-appearance of violators. Violators were requested to appear at least three different times in order to settle their violation case: first, at the police station to be questioned about their violation; second, at the public prosecutors' office to be examined about the case and to have their wish concerning the proceeding to follow ascertained; and lastly at the prosecutors' office again in order to pay a fine. However, there was no way to secure the attendance of violators. Reflecting probably the lack of guilt toward the violation, most violators appeared at the police station only after repeated requests by the police. From time to time the police obtained a warrant of arrest in order to bring a violator, having failed to appear, to the police station, but it was clearly impossible to arrest all these numerous violators. They were reluctant to appear once again at the prosecutors' office for the same charge. Prosecutors sometimes visited the police station when many violators attended so as to save their trip to the prosecutors' office. But this coordinated effort had a limited effect, since the number of violators appearing at the police station was already insufficient.

Delay in the prosecutors' stage. Because of the disproportionate increase in traffic cases, the prosecutors' office became increasingly understaffed. There was considerable delay in preparing necessary documents such as the information requesting a

summary order. Moreover, the prosecutors had greater difficulties than the police in securing the attendance of violators. Since it was the second contact with the justice machinery, the violators were more reluctant to appear on the same charge for the second time.

Delay in serving a summary order on the accused. A copy of the summary order issued by the court had to be served on the accused by a registered mail. However, the court did not have the staff to prepare the ever-growing number of copies of summary orders and to despatch them promptly.

Difficulties in collecting fines. Collection of fines presented even greater problems to the staff of the prosecutors' office. Since the violators had appeared twice before the law enforcement agencies on the same violation charge, they would be reluctant to appear again at the prosecutors' office for the purpose of paying a fine. Those who failed to make a complete payment could be detained at the work house by the order of a public prosecutor. The prosecutors' offices utilised this method from time to time, but not to the extent that covered all failed violators.

In order for the justice machinery to rectify these malfunctions, it was felt essential to devise a new system whereby one appearance would become sufficient to complete the whole procedure, from the interrogation to the collection of a fine.

2. Innovations introduced

The innovations in the approach to the problem were mainly threefold.

Revision of the Road Traffic Law. The law was revised in 1954 to empower a police official to take custody of the violator's driving licence so as to secure his attendance at the police station. It is returned upon his appearance.

Coordination of efforts. The prosecutors' office spares a part of its office space to house traffic police officials. They investigate violators as they appear before the police and refer them to the prosecutor together with the relevant document. Thus the prosecutor now receives the case only when it is accompanied by the person. This saves considerable manpower from the prosecutor's staff for securing the violators' appearance at the office. The violators are then reviewed and prosecuted, if necessary, through summary procedure. Since the prosecutors' office building is normally located within the same building as the

court, or nearby, the violators walk to the court and wait for a copy of the summary order.

Utilisation of the system of temporary payment of a fine. The prosecutors' office may collect a sum of money equivalent to the amount of a fine, even before the sentence becomes final, if the court orders the accused to make a temporary payment of a fine. The judiciary and the prosecution agreed to utilise the above system as stipulated in article 348 of the Code of Criminal Procedure. Thus, the violators, upon receiving a copy of summary order, are directed to walk back to the prosecutors' office to make make a temporary payment of their fine. It is usually after this payment that a violator may claim his confiscated driving license.

3. Results

This innovative arrangement of coordinating the efforts of the three agencies into a one-day disposition procedure started in Tokyo in 1959 and was soon followed by other districts with substantial case-loads. It brought about dramatic improvements in saving violator's time from three appearances to one, and in expediting state agencies' time, from 129.5 days to several days. In such big cities as Tokyo and Osaka, the traffic court buildings were rebuilt so as to accommodate prosecutors' staff and police officials within the same building.

The second innovation – inauguration of the Traffic Ticket System (1963):

1. Necessities

The above-mentioned time saving effect was largely a result of the curtailment of geographical and chronological distance between the three related agencies and the concentration of the manpower of these agencies in a coordinated manner. There was little improvement in terms of rationalisation of procedure *per se*.

The number of traffic violation cases received by the prosecutors' offices continued to increase from 753,543 in 1953 to 1,919,544 in 1958 and to 2,571,963 in 1960. The proportion of these traffic violation cases to the total cases received by the prosecutors' office likewise increased from 43.95 per cent in 1953 to 70.3 per cent in 1958, and to 75.4 per cent in 1960. This was indeed a furious rate of growth.

2. Various choices considered

Various solutions were considered. The first was to increase the staff in the prosecutors' office and the judiciary. But the number of available lawyers was limited, and so were funds.

The second was to allow the police to use the warning as a reaction to violations more extensively so as to lower the number of cases sent to the prosecutors' office. But the number of cases to be punished was already too few: of the total number of traffic violation cases known to the police in 1961 (4,924,801), only 59 per cent or 2,914,258 were referred to the prosecutors' office for possible prosecution. Since the Code of Criminal Procedure, article 246 requires the police, upon the completion of investigation of a case, to refer it, whether it is a minor violation or a serious crime, to the public prosecutors' office for investigation and possible prosecution with the complete dossier and evidence, the practice of the police was not in accord with the article. It was due partly to the fact that the police were too understaffed to draft and prepare complete dossiers for referral to the prosecutor and partly that they were reluctant to burden the prosecutors' office with minor cases. Thus, the non-observance of article 246 had to be rectified by devising some new system.

The third solution considered was to devise a system whereby certain traffic violations might be disposed of without having to go through the prosecutors' office and the court. This course was followed, but not without protracted anxious consideration.

3. Penal and non-penal fines

It is a fundamental precept of the Japanese judicial system that criminal penalties should be imposed only by courts. There are, however, well-recognised differences between the fines charged in criminal cases by criminal courts and the non-penal fines imposed by civil courts or administrative agencies. Article 37, paragraph 2, of the Constitution of Japan provides that: 'In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.'

This has been interpreted to mean that no penal fines should be charged by any organisation other than the courts. By contrast, non-penal fines can be imposed without the court's trial procedure. For example, article 223 of the Local Autonomy Law provides that the head of a local political subdivision is empowered to

collect a non-penal fine not exceeding 2,000 yen without a hearing for certain violations of an ordinance.

This difference between penal and non-penal fines is based on the acceptance of the idea for practical convenience, doubtful though it may be in jurisprudence, that the nature of the former offences is anti-social, unethical and immoral in character, while the latter connote no such blame. Therefore, there are essential differences in two aspects, one is the method of levying the fine and the other is the legal consequences of being fined.

First, in regard to penal fines, the accused who fails within the notified period to make full payment may be detained in a work house, which is a place of detention within a prison, where he serves a term in proportion to the amount of the fine he was unable to pay. The legal maximum of such detention is two years. In the event of inability to pay all or part of the fine in non-penal cases, the amount due is collected from the guilty party through compulsory sale of his property by official auction. Should this sale not produce the full amount, the case remains open for the sale at auction of any property acquired in the future. In non-penal cases, work house detention is not applied for inability to meet the fine.

Second, there are many laws impeding one with a criminal record (including a penal-fine) from obtaining various types of employment, licences, and so on. Likewise, those so employed or licensed may lose their job or licence, or have them suspended. These disadvantages do not follow non-penal offences.

4. The nature of traffic violations

Moreover, the substantial nature of a traffic violation has to be considered in the determination of its sanction. Originally, the Road Traffic Law was made not only to control road traffic and to insure its smooth flow but also to punish dangerous acts likely to injure person or property. It is obvious that if the Road Traffic Law was not enforced the number of traffic accidents would greatly increase. Furthermore, hazardous violations, such as drunken driving, speeding, and other serious types of negligent and reckless driving, may approximate in gravity attempts or preparations to commit personal injury, or homicide through negligence as provided in article 211 of the Penal Code (1907). Hence, considering their antisocial and immoral nature, these cases

can hardly be disposed of as simple administrative regulatory offences and should remain, constitutionally, under the jurisdiction of the criminal court.

What then of minor offences, such as failing to have a driving license in the car when a licenced driver is driving? This offence is hardly serious, threatens no one, the license being required chiefly for the administrative convenience of the authorities in preventing driving by unlicensed drivers. The difficulty lies in the fact that placing it in the non-penal category would create an imbalance, since it would also be necessary to place the following offences in the non-penal category: failure to carry a vehicle inspection certificate as required by article 66 of the Road Transportation Vehicles Law; failure to carry a compulsory third party insurance policy as required by article 8 of the Automobile Liability Security Law; failure to carry an alien's registration certificate as required by article 13 of the Alien's Registration Law.

Moreover, other offences then in the penal category, which were less immoral, unethical and antisocial in character, would have to be placed in the non-penal category. Thus, overall revision of all penal provisions, rather than piecemeal amendment, would become imperative. This task is apparently very difficult, if not impossible. It was therefore deemed essential that any alteration to be made in connection with traffic violations should be self-contained and should not affect the legal status of similar offences stipulated in other laws.

5. Adoption of the traffic ticket system

In the meantime, the number of violation cases received by the prosecutors' offices increased further: from 2,914,288 in 1961 to 4,127,541 in 1962. The number of registered motor vehicles also increased – from 3,453,116 in 1960 to 5,198,697 in 1962. These increases compelled the authorities to take some action urgently. A three party study group, consisting of the General Secretariat of the Supreme Court, the Ministry of Justice and the National Police Agency, was organised. It met frequently for about six months and determined to adopt a Traffic Ticket System without changing any existing laws.

The Traffic Ticket System is widely in use in the United States of America. There are wide varieties in the actual operation of the system, but the characteristic features are mainly twofold: ration-

alisation of the process of producing a dossier by utilising carbon paper inserts and simplification of the description of an offence by the use of check marks. These features were introduced with considerable modifications.

Rationalisation of dossier-producing process. Under the practice prior to the adoption of the system, a patrolman drafted and prepared a rather lengthy report. The content of the report was recopied at least, by the prosecutor in the information for requesting a summary order, and by the court in an original and copy of the summary order.

The new form consisted of four sheets with carbon paper inserts. It consisted of one original and three additional sheets which have the same legal value as the original and are used by all agencies concerned. When a patrolman records 'on the spot' the required information as to the name, date of birth, domicile, residence, description of driving licence, description of motor vehicle, and date and place of the violation on the first sheet, he automatically completes the other three sheets. Both sides of the four sheets are so fully utilised that the related agencies need not use any other forms for normal handling. The third sheet is for collection of fines and the fourth is for the use of the Public Safety Commission in its decision for cancellation or suspension of a driving licence.

Simplification of description of an offence. Another characteristic feature of the form is its method of describing the fact constituting an offence mainly by check marks for common violations with a remark column for additional necessary details.

6. Results

Advantages of this form in time and manpower saving were evident. Even in the case of the traffic court in Tokyo, where efficiency had been developed to the maximum possible extent, the total time spent in the building averaged an hour and a half, which is two-thirds of what was required before. In other localities, where the case load is far less, it took only 15 minutes. It was also much appreciated by the patrolmen whose work had been much reduced.

This system was initiated in ten large districts in January 1963 and gradually extended to all other areas.

The third innovation – inauguration of Traffic Infraction Notification System (1968):

1. Emergence of a new problem

Partly due to the increased efficiency, the number of traffic violation cases reached 4,965,062 in 1965, representing 83.8 per cent of the total cases received by the prosecutors' offices. It was ironical that when the criminal justice machinery had done its best to maximise its efficiency, it had to face a problem derived from the very fact of achieved efficiency. A dilemma became apparent. It was increasingly well recognised that there was a conflict between the need for a simplified procedure and the need to maintain the dignity and ordered regularity of judicial processes. Judgments rendered in summary procedure and judgments imposing the death penalty are, in substance, the same in the sense that both are given by a court after trial. However, in this summary procedure the accused meets no judge face to face. If the ordinary citizen forms his view of a criminal trial through his unhappy experiences and unfavourable impressions in the congested and rather noisy atmosphere of the traffic court, it is indeed a serious matter. If the dignity of the court is to be preserved and these misunderstandings prevented, trial procedure in the traffic court should avoid the appearance of normal court procedure and allow some other organ of the State to dispose of these cases, but without running into constitutional problems.

Moreover, it was believed undesirable to produce so-called 'ex-convicts' at a rate of five million persons a year. The impressiveness and deterrent effect of a fine as a penalty have to be preserved. For this purpose, it also becomes necessary to dispose of most violations without charging penal fines.

However, in view of preventing traffic accidents, the new measure to be adopted should be effective enough to retain and exert the same deterrent effect as that of penal fines.

Furthermore, the traffic ticket system was considered to be a palliative but not a cure. It was a help at that time, but it was not certain if it could be the best solution in the days when the annual number of cases reaches ten million. The criminal justice machinery would not be able to cope with the case load without considerably lowering its functions to deal with ordinary crime. The rationale of the criminal policy would be seriously questioned,

should ten million persons out of the total population of 100 millions become 'ex-convicts' every year.

2. Process of examination

Objectives. The new countermeasure to be innovated must therefore attain seemingly contradicting objectives; it must divert a large number of violation cases from the ordinary judicial process, and yet it should retain those elements that are mainly the attributes of subjecting the case to the judicial process, such as moral and social reproach on traffic violations; a deterrent or preventive effect on potential violators; an effective means of executing the sanction; and a systematic guarantee of due process of law.

The three party study group resumed its study sessions so as to find appropriate measures capable of attaining the above objectives. Procedures for disposing of traffic violations in various countries were examined to see if there were any elements that could be used in Japan.

Examination of American and other systems: non-penal fine. First, methods to categorise the traffic violation as an non-penal fine offence were considered. There was, however, little argument on this idea. Such inherent demerits as the difficulties in collecting fines and the criminological unwiseness of declaring traffic violations as non-penal offences far exceeded the merits of reducing the case load of the judiciary. In this connection, it was realised that a system in such a country as the United States of America where there seemed to exist no clear-cut distinction between penal and non-penal fines was difficult to adopt. Moreover, the widely used American system of 'forfeiture of bail bond' at the Traffic Violation Bureau was found unfit for the Japanese setting because two prerequisites of the system were non-existent in Japan. One was the arraignment system and the other was a system giving bail to a person who had not yet been prosecuted. In Japan, the bail system is applicable only after one has been prosecuted.

Examination of German systems: non-penal fine. A German system of collecting a *Gebühr* or fee as a warning to the violator was also studied. If the violator pays, he is no longer liable to prosecution. Such a fee is paid not in cash but by attaching the equivalent amount of revenue stamps to a form on which the violator swears not to commit any future offences. If he pays the

fee, the case is not brought to court. If he does not agree to pay the fee, he is tried in the criminal court according to normal criminal procedure.

However, there are many theoretical difficulties in blending such a system into Japanese criminal law and constitutional requirements. It was particularly difficult to explain why a simple fee should be levied in the event that the violator agreed to pay and why this same fee should be considered a penal fine if the violator refused to pay and the case was referred to a court. If it is a fee, and therefore a non-penal fine, it is illogical that, through refusal to pay, it becomes a penal fine following its handling by the court. On the other hand, should the legal nature of the fee remain as a fee even after the refusal to pay, there would be no effective way to enforce the payment in Japan; detention in the work house can and should be applicable only to penal fines and cannot be extended to non-penal fines as is the case in Germany.

Desirability of empowering the police to charge penal fines. It was therefore considered imperative to retain traffic violations under the category of a penal-fine. The initial effort was to examine the possibility of a non-judicial organ, such as the chief of the police station, being empowered to collect fines. However, the past experience in Japan with such a system was abusive and unpleasant. It was abolished immediately after the war. It was therefore decided unadoptable even before the examination of its questionable constitutionality.

Empowering a senior police official to prosecute violation cases was also examined. It would certainly reduce the case load of a public prosecutors' office. However, it could in no way solve the major problems of over-use of criminal courts and of a serious increase in 'ex-convicts'. Moreover, it would represent a serious exception to the Code of Criminal Procedure which conferred the exclusive power of prosecution upon the public prosecutor. Thus, this idea was also eliminated.

Examination of French and other systems: penal fine. After having eliminated unadoptable ideas from the list of these and all other possible solutions, what was left with the study groups was a system utilising the power of non-prosecution of the prosecutors, similar to those systems found in French law countries. These are such systems as *transactie* (Netherlands) and *transaction* (France Belgium, etc.) whereby a public prosecutor is empowered not to

prosecute an offender if and when he has voluntarily fulfilled the conditions presented by the prosecutor. The conditions usually include monetary payment or waiver of ownership. In Belgium this system was applied even to traffic accident cases, a Penal Code offence. In the Netherlands, this power was partly delegated to the police in disposing of minor offences.

3. Planning the details of the new system

Utilisation of prosecutor's power of non-prosecution. The prosecutor's power of suspending the prosecution even where there is sufficient evidence of guilt has been long and widely exercised in Japan. It was applied to some 40 per cent of non-traffic Penal Code offences. It was therefore presumed that there would be little controversy if the rationale of the innovation was to be centred around this system and awarded to a violator who had voluntarily submitted himself to the administrative disposition of the police. In other words, the police, as the organ responsible for traffic safety by the prevention of hazards on the road, may be empowered to notify the violator that he has committed a traffic violation and he may make monetary payment of fixed amount as a reaction to the violation. If this payment is voluntarily made within a fixed period, it can be regarded as a sufficient indication of the violator's repentance, and of his bright prospect of not repeating traffic violations in the future. The prosecutor therefore has a good reason for not taking any public action against him. Should the violator have failed to respond to the notification, the prosecutor will handle him in the normal criminal procedure.

In planning the details of the new machinery, particular attention was given to: first eliminating doubts of unconstitutionality; and second, devising methods whereby possible a decrease in the deterrent effect might be supplemented.

Constitutionality. In view of eliminating even the slightest doubt of unconstitutionality, particularly in relation to article 31 (due process of law), article 32 (right of access to the courts) and article 76 II (prohibition of the executive organ being given final judicial power), special considerations were given to the following:

a) Giving an entirely free hand to a violator whether he elects to pay the notified amount or to follow the normal judicial procedure, so as to guarantee voluntary submission.

b) Stipulating the substantive and procedural elements of the new machinery in law so as to be in accord with the due process of law.
c) Applying the system only to those types of violations which are normally apprehended red-handed and involve little evidentiary disputes.
d) Providing a systematic guarantee of fairness of the machinery by such ways as eliminating the patrolman's discretion in deciding the monetary amount to be notified to a violator.

Maintenance of deterrent effect: creation of 'point system'. In order to set off the possible decrease of deterrent or preventive effect of a monetary sanction due to the change of legal status of money actually collected (from a penal fine to a non-penal one) careful planning was also undertaken.

First was the creation of the 'point system' whereby the dangerousness of all types of violations was weighed in terms of points, and the accumulation of certain points within a certain period would result in automatic suspension or revocation of one's driving licence. It was believed that this system could minimise the attitude of 'violation for price'. For the purpose of operating the point system effectively, the National Police Agency started to prepare a computerised master file of violation records of all drivers within the past three years. Second, it was hoped that since the new system could be operated without paying attention to the case load of the judiciary, the police would be able to maintain law enforcement at a desirable level which had to be much higher than before. The efficacy of the sanction might not necessarily depend on its severeness but on its certainty.

4. Contents of innovations

Definitions. Based on the foregoing guiding principles, the Road Traffic Law was revised in 1967 to establish the Traffic Infraction Notification System, which took effect in July 1968. The law defines those subjects on which the system may be applied in terms of both the type of violation and the violator. Less serious violations which are normally apprehended red-handed and categorically involve least evidentiary disputes are enumerated in the Road Traffic Law Enforcement Rule as 'infraction'. Drunken driving, speeding exceeding 25 km. of the speed limit,

driving without licence, or accessary to violators, illegal use of the road, etc., are therefore excluded.

'Infractor' is held to mean those violators who have committed an 'infraction' and who are not:

a) An unlicenced or unqualified driver.
b) A repeated violator whose licence was suspended within a year of the infraction.
c) Driving with the alcoholic content of more than 0.25 m.g. per 1 litre of breath (not necessarily a drunken driver); or
d) Causing an accident as a result of the infraction.

The 'infraction fine' is held to mean the money that an infractor has to pay if and when he wishes to be exempted from prosecution by the payment of the notified amount of money. It is for the infractor to determine if he pays the infraction fine or elects to follow ordinary procedure. Thus the payment is deemed to be made voluntarily. However, the financial burden that a violator has to bear can be regarded as having a disciplinary effect.

The amount of infraction fine is stipulated in the law within the maximum penalty originally subscribed for in the same law. The amount differs by the type of violation and by the type of vehicle involved. The maximum amount of infraction fine is 15,000 yen while that of penal fine for the same category is 50,000 yen.

Procedure. Under this system, the police officer apprehending a traffic violation categorised as an 'infraction' gives a written notice of infraction on the spot to the violator. The notice specifies the charge and the amount of the infraction fine. The notice is followed by a formal written notification by the Chief of the Prefectural Police, whose duty is to examine and confirm the appropriateness of the notice issued by the patrol officer.

If this non-penal fine is paid within 10 days of the receipt of the formal notification, or even prior to the notification, to the post office or bank, there will be no criminal prosecution. If the notified amount is not paid within the specified period, the case will be referred to the public prosecutors' office for possible prosecution under the regular criminal procedure.

4. Results and assessment

Because of the establishment of this new machinery, the

number of cases that the prosecutors' offices received dropped drastically from 4,597,663 in 1967 to 1,470,620 in 1969. On the other hand, the number of infraction cases climbed from 2,689,415 in 1969 to 5,707,338 in 1972 and further to 8,401,771 (while formally referred cases to the prosecutors' offices numbered 2,003,277) in 1975. It would be obvious that the traditional criminal justice machinery would be incapable of handling such a large quantity of penal fine offences without causing serious bankrupting phenomena both physically and criminologically.

The main criteria for assessing the new system would be the rate of payment of infraction fines and its impact on the number of traffic accidents. The proportion of those who paid the infraction fine within the designated period out of the total infractors has constantly been higher than 95 per cent. The planners of the system presumed that the system would not be functional in terms of saving manpower, if the rate of payment became lower than 70 per cent. This high ratio is therefore gratifying.

It was also gratifying for the planners of the system that the number of traffic accidents did not increase after starting to dispose of substantial numbers of violators as infractors. In fact, the total number of traffic accident cases started to decline from the peak figure of 720,880 in 1969 to 700,290 in 1971; 586,713 in 1973; and 490,452 in 1974. The number of deaths and injuries per 100,000 inhabitants also decreased from 15.8 and 942.0 respectively in 1969 to 10.4 and 591.9 in 1974, while the number of registered vehicles continued to climb sharply. It increased from 11,275,859 in 1967, to 19,586,502 in 1970, and to 27,710,808 in 1974. Even though it is difficult to single out the real reason for the decrease from among various possible reasons including improvements in engineering and education, it would not be too much to say that the greatly increased certainty of sanction (including the point system) to traffic violators has exerted significant influence on potential traffic offenders.

The total amount of infraction fines collected in 1975 reached 50,000 million yen throughout Japan. This revenue should statutorily be used only for the improvement of traffic safety facilities such as road signs, guardrails, etc. Improvements of these facilities might have also been relevant to the decrease in traffic accidents.

Time-saving for violators is also obvious; the violator does not need to attend anywhere if he pays the notified amount to the post office or bank.

Several years have passed since the inception of the system. There is little criticism about its operation and all related persons and agencies seem to be satisfied with it. It is therefore assumed that the innovations in dealing more effectively and efficiently with traffic violators have been successful, and the authorities will be in need of no other major innovations in this field at least in the near future.

Conclusion

Because of the aforementioned three major innovations in the field of traffic law, prosecutors and judges can now pay more attention to other serious crimes. It is difficult to predict what will be the next major innovation in criminal justice in Japan. However, should needs be the most relevant driving force for innovations, it would be possible to predict one or two subjects.

One of the subjects would be the criminalising of a legal person *per se* without reference to the specific act of natural persons consisting of the legal person. The necessity of more effective suppression of illegal activities of legal persons has long been felt. It is felt more urgently in these days in relation to the violations of various anti-pollution laws. Under the present system, a legal person or a corporation can be punished (only monetarily, of course) under so called 'concurrent punishment clauses', if natural persons acting for the corporation are found guilty of offences relating to its business and the directors of the corporation are at least negligent in allowing them to act unlawfully. In other words, the criminal responsibility of the individual actors within the corporation has to be clearly established in order to inflict penalty on the corporation.

In practice, it is not so difficult to establish the fact that a corporation has, for example, discharged certain harmful substances exceeding the permissible limit. However, it is extremely difficult, particularly when the manufacturing processes are complex and numerous, to identify the acts of natural persons in violation of the anti-pollution laws and to establish the causation between such acts of natural persons, who usually change their

posts rather often within the corporation, and the unlawful results factually attributable to the corporation. Much legal thinking and discussions have yet to be devoted before the legal basis for punishing a legal person *per se* can be established without distorting the general theory and principle of criminal responsibility.

The second subject of necessity is the further development of a rule of presumption. There are several such rules, established both by statute and judicial precedents. A statutory rule established recently has been the Law for the Punishment of Crimes Relating to Environmental Pollution Adversely Affecting Health of Persons (1970) which is acknowledged as representing the most punitive approach in all anti-pollution laws. In a case of concurrent contributions by more than one factory to endangering the public health through their emission of harmful substance, the law has established a presumption rule by which a factory can be presumed to be responsible, should the amount of discharged substance from the factory be proved sufficient by itself to cause such a danger. However, there are many subjects of which the establishment of a rule of presumption will greatly facilitate prosecutorial activities. One such example is in the area of proving *mens rea* of an official accepting a bribe, or of a person knowingly buying or accepting stolen property.

The third point is bridging the gap between institutional treatment and community treatment. Serious efforts have been made by the government to revise prison law and juvenile law partly for the purpose of materialising such innovations, including the establishment of community treatment centres, halfway houses and systems of furlough.

13 Criminal Justice Innovations in Australasia

William Clifford

Introduction

The 'developed' countries of Asia – Australia, New Zealand and Japan, present an interesting contrast. Australia and New Zealand have English common law systems with criminal justice institutions to match. They do not have quite the same alarming problems of crime as Europe and America but they are torn by similar institutional riots, revelations of corruption in the police, drug trafficking, campaigns for human rights and the environment and the divisions on nuclear power which have become typical of the West. Although Australasians are now less emotionally united with the United States and Europe, Western influences are strong. Since they were cut off from the European Common Market (which previously took so many of their primary products) and recently became estranged from the United States by a growing concern about US predominance as well as the inroads made by US investment on Australasian economies, they have been identifying more with Asia and developing closer links with Japan and other neighbours. This has not extended to law and the criminal justice services however and, as yet, Australians and New Zealanders still look to the West for ideas on how to deal with crime and how to update their criminal justice systems.

Japan on the other hand, has a criminal justice system which is largely civil law in character since it was borrowed from the French and Germans with permeations of Anglo-Saxon principles of law and practice mostly introduced after the Second World War. In Japan in recent years the crime rate has either been falling or has not been rising at any alarming rate and there is less discord or heart-searching about the criminal justice systems. Again, as indicated in Chapter 11, one looks to informal adaptations in Japan for the real innovations, whereas in Australia and New

Zealand, it is to law reform legislation and openly determined administrative changes that one looks for innovations.

Australia and New Zealand have a great deal in common. They were originally British colonies (Australia is a union of six former colonies). Some of these colonies and New Zealand itself were settled partly to forestall similar colonies by the French in the Pacific at the end of the 18th century. In their immigrant cultures, both New Zealand and Australia are more mixed than ever before. But they remain predominantly Anglo-Saxon in their outlook, institutions and sentiment. It was this culture which has been gradually imposed in both lands in the course of the last two centuries upon numerically smaller groups of native people inhabiting these countries when the British first arrived.

In Australia, the Aboriginals did not trade with the incoming settlers and so acquire modern weapons. Not being an agricultural people, they had nothing of substance which they could trade for guns. Despite repeated official support for a local policy of conciliation, cooperation with, and protection of the Aboriginals, they were typically killed, driven off, absorbed in service employment and not usually assimilated. As settlers pushed inland, they were invading, and the Aboriginals' need for vast areas in which to roam made their territorial claims wider than if they had been cultivating limited tracts of land. There were atrocities on both sides, but the dispersal and slaughter of the native peoples as the land was settled has left a legacy of guilt in Australia.

The Aboriginals are now less than three per cent of the population and are extremely varied in culture and styles of life. Some are totally assimilated within white culture, they are urbanised and have learned to subsist in the urban economy, to use schools and take special training. Some have qualified in the universities and others are doing so. Then there are those living in the remote areas and following life styles not too dissimilar from the patterns of life of their forebears. They live by their own rules in their own groups, appealing to the white man's law only when they have need of it. Yet it would be a mistake to imagine that their ways are not also changing, or to believe that they are untouched by modern styles of life which they cannot consistently avoid.

Finally, there are groups of Aborigines in between these extremes living either close to settlements in remote areas, or

occasionally drifting into towns. Some have had a measure of education. Here are people with one foot in each culture and they are more likely to get the worst of both worlds. This three per cent of the Australian population accounts for some 30 per cent of its prisoners – and many of the offences can be traced to the influence of excessive drinking which the Aboriginal authorities themselves deplore.

In New Zealand it was a different story. It was true that Abel Tasman's first contact with people on the South Island had resulted in the Maoris ramming and overturning a longboat so that he called the place 'Murderers' Bay'. But relations with the Maoris were generally peaceful. Whaling ships and traders from different countries were putting into New Zealand towards the end of the 18th century and they were soon trading with the Maoris, who themselves had occupied the country, probably from Oceania, at an earlier age. The first New South Wales settlers were not long in crossing the sea to New Zealand and they were soon trading tools and firearms with the Maoris for timber and flax.

Meanwhile, some visitors were staying and, in effect, New Zealand was being rather haphazardly settled by drifters and escaped convicts from Australia. They were often wild and uncontrolled, so that the early New Zealand settlements became infamous for outlawry, piracy and self-aggrandisement. As more people came to stay, there was the same thrust inland as occurred in Australia, but the Maoris were better organised and more capable than the Aboriginals of protecting their land. They were agriculturally productive and had advanced techniques of wood carving and military engineering at the time of their contact with incoming Europeans. Many of them cooperated with the new settlers and problems arose only when there was competition for the available land.

With France making settlement gestures in the area, the white population increasing, and the lawlessness of crews of visiting ships creating problems, the British established a Residency in 1833. But more ambitious thinkers were already organising and in 1837, in England, a New Zealand Development Company was founded to settle the land. Therefore, in 1840 the British formally took possession of New Zealand. The Maoris were pushed back, but fought valiantly and eventually won the Treaty of Waitangi, which, in return for their acceptance of British sovereignty,

guaranteed them equality, the protection of their interests, and gradual assimilation to the new culture. But they did not sell their land quickly enough to satisfy the increasing numbers of settlers brought by the New Zealand Development Company. To resist the encroachments of settlers and the pressure being brought upon them, the Maoris in Taranaki, Waikato and the Bay of Plenty fought again from 1860-72. They were subjugated, but earned the abiding respect of their victors, who once honoured them with the title of 'Britons of the South'.

In New Zealand the assimilation of the Maoris has steadily advanced and there has been increasing intermarriage. Out of a total population of about three million New Zealanders, the Maoris account for about 300,000, over 80 per cent of whom live on the North Island. Nevertheless, New Zealand has more than proportionate numbers of Maoris and island people in the prisons and heavy drinking is a problem.

Australia and New Zealand have also had rather different histories of settlement over the past two centuries. Australia was a penal colony – founded for the transportation of convicted criminals from England. In England at the time, criminals were overflowing the prisons, partly because crime was rising as the population increased and partly because the death penalty had been removed from hundreds of offences, without an adequate alternative being devised. So, from the overcrowded Bridewells where offenders had been kept pending sentence, they were herded into hulks on the rivers, where the dangers of disease and escape were great. The American colonies were now independent, so that a new convict colony was needed. Australia was chosen and the first fleet sailed to Sydney with convicts and settlers in 1788.

Among the Australian colonies, only South Australia and Western Australia began without convicts – and, like New Zealand, they soon had convicts flowing in. They came as they were released from – or escaped from – other colonies in order to obtain a new start. In fact, Western Australia began to ask for convict labour to be imported at about the time when transportation for Australia was brought to an end. In 1830, some 40 per cent of the populations of New South Wales and Van Dieman's Land (later Tasmania) were of convict origin and 90 per cent were convict connected. The transportation of convicts extended into

the 1850s.

New Zealand, as already shown, was more freely settled and had rather less of a tradition of lawlessness and frontier living. It was never a penal colony and was not subject to the peculiar problems which Australia had in developing a free system of government – first out of the prisoners and their military custodians and subsequently out of settlers with grants of land, then squatters, and speculators and goldminers. This difference of history has left its mark on the criminal justice services of the two countries at every level.

New Zealand naturally attracted released convicts and their descendants. It had its Otago gold rush in 1861 and its Westland discovery in 1865, which tripled the population of the South Island. New Zealand did not, therefore, escape entirely the frontier impact. But in general it could develop fairly freely the models of criminal justice from the mother country. The law of New Zealand consists of the English common law, and certain United Kingdom and New Zealand statutes which have, by policy, been kept in general confirmity with each other over the years of development. New Zealand has its Court of Appeal, its Supreme Court and magistrates' courts – all exercising both civil and criminal jurisdiction. New Zealand has no colourful criminal history – as Australia has, and most publications deal with the system as it is, rather than as it has developed from the past. The implication is that of a relatively well settled, largely rural and more or less prosperous community, having to look at its crime as its urban growth has brought it into closer touch with the more serious problems of crime.

Australia on the other hand, long after its convict origins and its problems with escaped prisoners or bolting ticket-of-leave men, remained throughout the 19th and early 20th centuries a basically frontier society. Chance and local circumstance often decided on which side of the law fence a person might eventually be found. Outlaws operating from the bush were originally 'bolters' or escaped convicts. They had escaped from custody or the later control of them while they were licensed to settlers for outside work. Black Caesar, one of the earliest recorded outlaws in New South Wales was a convict shipped out to Australia on the first convoy. But other types of offenders joined these bands as the frontier styles of living re-emerged, as new colonies were opened

up or the boundaries carried further inland beyond effective government control. There was the land rush, with grantees overrun by squatters and both in sporadic conflict with the Aboriginals they were pushing before them.

Then, as order seemed more generally established, there came the gold rush of the 1850s, which recreated relatively disordered conditions. Then came the land speculation of the 1880s, followed by widespread bankruptcies. Some prospered, others paid, defiance of the law was respected in a society where fierce independence was almost a rule of life. The last of the bushrangers was Ned Kelly, the son of a convict who operated in the 1870s. Between Black Caesar and Ned Kelly was an array of bushranging groups, among them an Aboriginal, a Chinese, immigrant Europeans and native born Australians – and they passed into the folklore of the nation. They were self-made heroes whose exploits fired the local imagination however dastardly their deeds. They often had the people's sympathy more than the police, and this was especially true of the Irish people, whose names they often bore. To this day Australians speak of a person being 'as game as Ned Kelly' – a lasting tribute to someone considered to be rather more than an outlaw.

It has to be remembered, however, that the first police in New South Wales, the first colony settled, were in fact convicts given special privileges to provide a night watch. The Sydney Commissioner of Police 1841-48 told a Select Committee of the Legislative Council on the Insecurity of Life and Property that the ex-convicts in his police were more likely to collaborate with the criminals than to catch them. There was opposition in the goldfields to former convict police enforcing laws to control alcohol – especially when the government allowed the zealous officer to keep half of the proceeds of his raids for his own use. The ex-convict police were also allowed to keep half the fines imposed for not having a licence to mine, so that miners felt exploited rather than protected by police. Added to this, the glorification of independence and defiance of authority and the complications of community/police relationships, which sometimes still persist in Australia, are not always surprising.

South Australia had not been settled originally by convicts and felt itself a cut above the convict States. At one time it even supposed that its population 'of purer character than usually

found' could manage without a police force if it had its own part-time militia raised among the settlers. It even began its police, when this seemed necessary, with a small number of special constables recruited in the United Kingdom for the purpose. Of course, until 1852, it was also able to manage without penal institutions since it transported its worst convicted offenders to nearby Van Dieman's Land (later Tasmania). Thereafter it had to erect its own prisons.

Since Australia was itself virtually a prison with offenders from England transported to it, its own first penal institutions were for those convicts needing extra supervision. Interestingly enough, it approached this problem by devising its own type of transportation from Australia and offenders were sent to remote areas – to Norfolk Island far out in the Eastern Pacific or to Port Arthur on Van Dieman's Land (later Tasmania), the southern-most island. As these areas themselves developed normal settlement, they relinquished their role as places of exile. It is perhaps significant that most of the older prisons now in use in Australia date from the middle of the 19th century, when the frontier conditions were at their height with squatters and ex-convicts having been joined by the diggers for gold – but also when transportation had ended.

Conflict with the law, defiance of the law and self-seeking either within or without the law were all characteristics of early Australian history. The earlier arrivals, convict or non-convict, were forced to be adventurous and independent. Sometimes, even as convicts, they were really political offenders but, as settlers, there came the anti-British Irish, inflamed with the experience of their famine and the representatives of non-established Christian religions seeking a better dispensation in a new land. There were Germans in South Australia by the 1880s and some Chinese, Indians and South Pacific Islanders. As settlement widened, the rural worker was far away from the population centres and had to rely more upon his own efforts and ingenuity to protect or extend his interests than he could ever rely upon the authorities. He was not bound by cultural traditions in this new land was was often a law unto himself or part of an independent rural community which was a law unto itself. It was in this style that diggers rebelled at Eureka in 1854 and that Chinese were brutally expelled from their diggings in 1861 by miners who

resented the government protection they enjoyed.

Nor were the urban conditions particularly orderly. There were brothels and gambling dives, as well as pubs and music halls. There was a 'cabbage-tree mob' in Sydney given to assaulting people at night and in the 1920s the Rocks and Woolloomooloo districts had 'pushes' or gangs terrorising the neighbourhoods. Other types of mobs collected for elections or around public issues long before there were police to control them – and feeling ran strongly against the troops often used for this purpose.

Against this background, it was not really surprising that the outlaws should become folk heroes and juries were often stacked as much for the offender as they were representative of local feelings – a practice which could be traced back to the days of the trial of the officers of the infamous Rum Corps by their peers.

In the late 1880s, corporate and white collar crime in its rudimentary state was rife, with everyone trying to become suddenly rich. One writer has referred to it as reaching to the very depths of meaning within the government itself in the State of Victoria:

> Parliament became a sort of land speculators' club [where] a rich state was plundered by the very men who had been elected to advance its interests.[1]

When the crash came, there were widespread bankruptcies and less trust than even in the routine machinery of government.

Australian development is, therefore, an interesting account of order from disorder, with respectability and status deriving more from success than the way in which the success was achieved. Throughout the two centuries of growth, practical rather than idealistic rehabilitation or reintegration of offenders has been the order of the day. As government has been strengthened and the rule of law established, the deep-seated tradition of turbulence and opposition to authority, as well as a fierce respect for unmitigated independence, have asserted themselves. In this situation, it is the steady emergence of order from deep within the structure of a marginally unregulated society which has been striking. Internal conflict and external challenge have been reduced to a manageable structure.

Australian criminal law derives from the common law of England, from State statutes, Commonwealth statutes and decisions of the courts. There have been departures from the

English Common Law. Queensland, Western Australia and Tasmania, for example, have codified their criminal laws, making a break in this way with the prior common law decisions and practices. The Federal Supreme Court is known as the High Court of Australia. At State level, there are Supreme Courts, district courts and magistrates' courts. Each State has its own police force, with State-wide jurisdiction. There are no separate town or country forces as in the United States or the United Kingdom. Each police force has its own district traditions – some, as we have seen, rooted in a convict or ex-convict origin – and most of them coloured by the ambivalent attitude of the public towards the police.

As for prisons, these are an indigenous feature of Australian history and its early growth and they merit a separate section below.

State of Crime

The Supreme Court of New Zealand dealt with the following offenders in the years shown in Table 1.

Table 1[2] **Types of offence 1970 -1974**

Type of offence	*1970*	*1971*	*1972*	*1973*	*1974*
Murder	7	5	2	9	5
Attempted murder	1	1	3	–	3
Manslaughter	6	6	12	10	15
Traffic offences involving death or injury	3	1	5	8	2
Assaults and wounding	58	81	109	117	113
Sexual offences	58	64	57	86	116
Other offences against the person	7	6	7	12	8
Robbery, burglary and breaking and entering	64	75	73	56	79
Theft, receiving and fraud	84	84	110	90	114
Other offences against property	20	19	23	26	13
Forgery and uttering	7	2	8	2	2
Other offences	45	60	67	63	75
Total	360	404	476	479	545

The sentencing of the Supreme Court is shown in Table 2.

Table 2[3] Sentences 1970-1974

Sentence	*1970*	*1971*	*1972*	*1973*	*1974*
Probation (under Criminal Justice Act)	65	40	63	52	89
Ordered to come up for sentence	13	13	16	28	12
Discharged	–	9	9	10	4
Fined	36	54	44	62	72
Imprisoned	233	243	291	267	284
Detention centre (including periodic)	1	17	32	38	59
Borstal training	9	24	20	20	17
Preventative detention	2	4	–	1	2
Detained in mental institutions	1	–	1	1	6

Of course the brunt of crime is dealt with in New Zealand by the magistrates' courts. The figures for these are much higher – but these are for cases, not persons.

The increase in crime over the period 1970-74 is not uniform for all offences, but is quite marked. Thus the Supreme Court in 1974 dealt with about double the number of offenders for assaults and woundings it had dealt with in 1970 and in the same period sexual offenders had doubled. The rises in cases in the magistrates' courts for these categories of offences were marked, but not so striking as the increases in offenders dealt with by the higher court. Murders remained steady over the period, if attempts be included with these, but manslaughter showed a marked rise. Narcotic offences in the magistrates' courts showed a dramatic rise of over 700 per cent, whereas the reduction in shipping is probably reflected in the smaller numbers of deserters from merchant ships.

Sentences in the magistrates' courts are not given for the individual years as they are for Supreme Court offenders, but in 1974, 3,073 persons were sent to prison by magistrates and 2,363 sentenced to periodic detention; 499 were sentenced to detention in a detention centre and 573 sent to Borstal detention. A further 3,565 were placed on probation and 218,693 fined.

Table 3[4] Cases dealt with by magistrates' courts 1970-1974

Type of offence	*1970*	*1971*	*1972*	*1973*	*1974*
Common assault	2,603	3,085	3,405	3,761	3,643
Sexual offences	558	638	693	704	628
Other offences against the person	1,607	1,722	1,874	2,557	2,854
Theft	6,717	7,389	7,456	7,845	8,375
Wilful damage	1,317	1,480	1,751	2,022	2,127
Other offences against property (including forgery)	10,556	11,767	12,321	11,884	12,272
Drunkenness (including drunk in charge of motor vehicle)	4,143	3,758	3,111	3,021	4,488
Offensive conduct	5,847	6,039	5,328	5,444	6,740
Other offences against good order	4,385	6,247	7,472	8,795	9,690
Breach of probation	880	937	819	811	819
Offences relating to narcotics	235	481	532	1,096	1,641
Failing to pay maintenance	1,228	1,318	1,510	1,301	1,339
Other offences relating to administration of justice, drugs, etc.	1,064	1,291	1,123	1,536	1,592
Failing to make returns and making false return of land and income	1,825	1,713	3,302	3,682	2,666
Unlawfully on licensed premises, etc.	6,086	7,254	7,028	6,293	7,080
Deserting merchant ships	173	95	52	37	38
Other offences	6,336	6,487	7,497	7,688	6,770
Total	55,560	61,701	65,274	68,477	72,762

Corresponding figures are more difficult to present for Australia, because of the differences between States, but the latest information on selected crimes reported to the police, which appears in the Year Book for Australia 1975-76, is shown.

There are other figures given for the year 1974, but a comparison with New Zealand would involve deeper research than is possible here. It will be seen, however, that the notable increases in those classes of crime which are included here relate to murder and rape, but not to robbery or serious assault. However, as shown, there are some difficulties in reaching firm conclusions, due to the State differences of compilations over the periods shown.

Table 4 Selected crimes reported to police 1971-1974

Category of crime	*New South Wales*	*Victoria*	*Queensland*	*South Australia*	*Western Australia*	*Tasmania*	*Northern Territory*	*A.C.T.*	*Australia*
Homicide									
1971-2	131	110	44	35	33	13	10	4	380
1972-3	142	122	76	23	29	18	9	6	425
1973-4*	252	137	130	45	62	9	14	4	653
Serious assault									
1971-2	828	2,712	224	126	157	21	131	36	4,235
1972-3	877	1,942**	289	172	112	11	73	40	3,516**
1973-4	886	1,491**	178	168	168	22	64	41	3,018**
Robbery									
1971-2	1,608	877	213	187	112	48	33	21	3,099
1972-3	1,457	872	302	182	89	51	24	19	2,996
1973-4	1,369	891	294	262	130	46	20	22	3,034

Rape									
1971-2	184	181	72	61	33	24	16	6	577
1972-3	206	181	88	46	31	16	15	8	591
1973-4	295	209	66	101	31	17	25	9	753
Breaking and entering									
1971-2	46,873	38,148	14,333	12,109	8,025	3,060	875	633	124,056
1972-3	42,292	34,988	13,627	12,172	9,631	2,742	734	861	117,047
1973-4	39,832	32,888	13,999	13,352	11,563	2,324	1,055	1,236	116,249
Motor vehicle theft									
1971-2	21,112	12,370	4,549	2,990	3,975	1,208	368	349	46,921
1972-3	18,847	11,057	4,739	3,380	4,338	1,148	593	412	44,514
1973-4	20,103	10,953	5,016	4,172	5,214	1,084	677	598	47,817
Fraud, forgery, etc.									
1971-2	13,459	8,686	6,573	3,488	2,619	843	248	293	36,209
1972-3	12,565	7,898	4,796	3,810	2,670	1,100	358	472	33,669
1972-4	12,915	7,889	5,586	5,964	2,489	777	280	426	37,326

* For 1973-4 manslaughter includes manslaughter arising from traffic accidents.

** These statistics not comparable with earlier years because of changes in interpretation and collection procedures in Victoria.

A comparison of the rates of homicides (that is, murder and manslaughter) for all States per 100,000 of population from 1964-72 showed consistent rises, for example, from 2.7 per 100,000 for New South Wales in 1964 to 2.9 per 100,000 in 1972; from 2.3 to 3.7 for the same years in Victoria; from 1.3 to 2.4 in South Australia and from 1.2 to 3.0 in Western Australia. The figures for later years were not comparable, due to the inclusion of manslaughter from traffic accidents in this category of offence. In the same period 1964-72, the rates for serious assaults per 100,000 rose substantially, but there appeared to be a fall in 1973, which suggested a possible change in methods of counting, rather than a real fall.

Certainly the disproportionately high rates for Victoria and the Northern Territory had to mean changes in ways of counting. Robberies increased per 100,000 of population, for example, in New South Wales from 5.1 in 1964 to 31.8 in 1972; in Victoria from 8.1 per 100,000 to 26.4; in Queensland from 3.3 per 100,000 in 1964 to 13.8 in 1972; and in South Australia from 3.6 per 100,000 in 1964 to 13.6 in 1972. Rape showed the expected increase from 100,000 people from 1964 to 1972, for example, in New South Wales from 2.2 per 100,000 people in 1964 to 3.7 in 1972; in Victoria from 3.0 in 1964 to 5.1 in 1972; from 2.0 to 3.1 in Queensland and from 3.9 to 8.7 in Northern Territory. There was, however, a fall recorded in the Australian Capital Territory – from 5.0 per 100,000 in 1964 to 3.2 in 1972 – this rose, however, to 7.1 in 1973.

Clearly it is difficult and unwise to draw general conclusions about the rises of crime in Australia until more precise and reliable information is available. This is a problem on which the Australian Institute of Criminology is now working.

Prisons

Most of the large maximum security prisons in both Australia and New Zealand are over 100 years old and they date from the period when similar institutions were being built in Europe in the first flush of the reformative 'penitentiary' movement. There were some improvements over the years, but generally speaking the expenditure on new institutions relates to the 1960s and early 1970s. Then, the prison population was somewhat higher than it is

today. With crime rising and the older institutions overcrowded, the thought was that more space of a better quality would be required. These were also years of relative prosperity, when public funds could be found even for the less popular investments like prison building. That was also the time when the medical model of prisons as rehabilitative and reformative institutions was at its height, so that prisons and prison work went along with social welfare. Indeed in this period, Victoria actually amalgamated its prison system with other correctional services within a broader based Ministry of Social Welfare.

In fact, the advent of alternatives to imprisonment, the disenchantment with rehabilitation as a purpose and the disappointment with the prisons as a method, have all worked to reduce the flow of offenders to prisons, so that, in terms of physical accommodation, the position is better now than it was. However, with capital punishment abolished in New Zealand and all but one of the States of Australia, there is a general awareness that future prison populations will be smaller but composed of a hard core of dangerous offenders who have to be segregated from society and the problem of how to deal with these humanely, but effectively, is still under discussion. The last execution in Australia was carried out in 1952 in the Northern Territory. The last in New Zealand took place in 1957.

In July 1976 the numbers of prisons and prisoners in Australia are shown in Table 5.

Table 5 Prisons and prisoners in Australia, July 1976

State or territory	*No. of prisons*	*No. of prisoners*	*Males*	*Females*
New South Wales*	24	3,503	3,408	95
Victoria	11	1,560	1,524	36
Queensland	10	1,544	1,513	31
South Australia	8	713	697	16
Western Australia	13	975	929	46
Tasmania	4	282	278	4
Northern Territory	3	182	181	1
Total Australia	73	8,759	8,530	229

* Including A.C.T. prisoners.

New Zealand has 30 institutions – 17 prisons, five borstals, three detention centres and five police jails. A person serving a sentence of not more than 30 days may be detained at any police station in New Zealand. In 1974 there were 2,562 persons held in prison (1st January), comprising 2,465 males and 97 females. The number of prison inmates had reached a peak in 1972, but thereafter declined sharply as alternatives to imprisonment became more readily available.

In 1972 the New Zealand Department of Justice took a census of convicted persons under its jurisdiction at midnight on 4 July. This included persons sentenced to all forms of custody as well as to probation or periodic detention. This revealed a high proportion (especially among prisoners) with previous convictions and penalties: 72 per cent of the male prisoners and 42 per cent of the females had been in penal custody before. This also applied to 31 per cent of those in borstals and to 24 per cent of probationers and parolees, to 23 per cent of the periodic detainees and to 2 per cent of the detention centre inmates.

Seventy-two per cent of the whole census were 24 years of age or less. Only 22 per cent of the males and 24 per cent of the females had completed four years of secondary education. Of the males, 57 per cent were New Zealand born of non-Polynesian stock, 42 per cent were Maoris, 2 per cent were immigrant Polynesians and 5 per cent were other immigrants. Of the males actually in penal custody, 50 per cent were New Zealand born of non-Polynesian stock, 41 per cent were Maoris, 2.5 per cent were immigrant Polynesians and 6 per cent were other immigrants.[5]

Innovations

Innovations in Australia began with the penal settlement itself. Procedures had to be found for controlling convicts and helping them gradually to find a new life in the new country. There was, on the one hand, a massive use of fierce penalties to maintain order, and on the other a widespread use of convicts and ex-convicts in ways which contributed directly to rehabilitation and reintegration.

On 26 January 1788, when the flag was raised, Governor Phillip made his first speech to the assembled people and particularly to the convicts who were sitting on the ground

surrounded by marines. He told them that if they did not work they would not eat; that if they offended they would be punished without mercy; but that if they cooperated and worked hard, they could expect to regain the positions in society they had lost.

At first the convicts were used for 'public works' but as farming spread, they were allocated to private farmers who needed labour. If they got drunk or were disorderly, they would be brought before the magistrates and flogged. For more serious offences, the Supreme Court could hang them or they might be sent to the Norfolk Island or Van Dieman's Land penal colonies. If their behaviour was good, they could be released in various stages. From the earliest period, the Governor could remit the whole or part of a prisoner's sentence – either wholly or conditionally. He could also help a person to settle by grants of land. And very quickly in the colony's history there emerged the ticket-of-leave system to permit a convict to be released to work for himself (even though still under sentence). A person on ticket-of-leave could earn his own living. There were some restrictions: he could not have other convicts assigned to work for him, and he could not run a public house. Also his own behaviour was controlled in that he could have the ticket withdrawn for bad behaviour.

By 1837 about 25 per cent of all convicts had such tickets. In these days of search for community alternatives to imprisonment and for different ways of allowing the reintegration of prisoners, the ticket-of-leave approach has modern connotations. It was indeed a form of parole without supervision. It should be recognised, however, that for this freedom, the prisoners had to earn the ticket by good behaviour as a prisoner for a period of perhaps at least three or four years. It is instructive to note that by 1823 the leniency and humanity of such treatment was questioned and restraints were imposed by the government in London on New South Wales' power to grant remissions and pardons. It seemed to the United Kingdom that the convicts transported were too lightly treated in Australia to evoke the right amount of fear of transportation, and the consequent deterrence of crime at home.

James Stephen, who was at the Colonial Office in 1835, thought that the whole purpose of sending offenders to Australia was to create misery on one side of the globe as a deterrent to would-be offenders on the other side. There were people interested in free settlement, however, who took another view.

They saw convict transportation as a great discouragement to the extension of voluntary emigration – and the free settlers already in Australia began to deplore the use of their new land as a convenient dumping ground for United Kingdom convicts. So, the transportation of convicts came to an end in the middle of the 19th century. This coincided, of course, with the new ideas of an army of penal reformers in England and America, who sought to use the better constructed 'penitentiaries' for the treatment and moral reform of offenders. And it coincided with the gold rush in Australia, which made it quite ludicrous for the United Kingdom to send prisoners to a country where fortunes could be made at the diggings.

Apart from the ticket-of-leave approach to the gradual release and reintegration of prisoners, the Governor had power to discharge a person from his sentence and to grant land – 30 acres for a single man, another 20 acres for a spouse and 10 acres for each child. We are told that 60 prisoners were emancipated and given land by Governor Phillip, but that by 1798 less than 30 per cent were still working their land. Some had sold it to set up in urban work. Many of the first emancipated convicts made good and some made fortunes. The colony's first newspaper was printed by a released convict; a highway robber became a prosperous trader and shipbuilder; a mutineer originally sentenced to death practised as a surgeon and became the first person to qualify in Australia; a woman convict died as one of the richest settlers in the country. Some former convicts were appointed as magistrates, or allowed to practise as lawyers. Not all became honest or reformed however. In 1853 one Frederick Waller, a convict who had served a two year prison sentence in Melbourne for embezzlement, landed a job in Adelaide as 'Superintendent of Convicts' (because his past was not known until he suddenly decamped with $714 of prison funds).

One of Australia's most famous penal reformers and innovators during this early period was Lachlan Macquarie, the fifth Governor of New South Wales. He was a fierce moralist and sought to deal strictly, not only with corruption in temperance and inefficiency, but also with the 'shameful and indecent custom' of working on Sundays. But he opened schools for the young, to avoid them following in the footsteps of their criminal or licentious parents and he used emancipated convicts as teachers. He ended the

excessive and indiscriminate flogging of criminals and ordered that corporal punishment should be used sparingly – and only where there was clear evidence of the offence. He believed that a convict who had paid his debt to society should be free in every sense of the word, and he sought to provide inducements for self and social improvement. He emancipated convicts and even appointed them to high office, as well as inviting them to his table.

Another reformer of high renown was Alexander Maconochie. As secretary to Sir John Franklin, the Lieutenant-Governor of Van Dieman's Land from 1836, he publicly criticised the treatment of convicts there. He wrote that the convict system was:

> . . . cruel, uncertain, prodigal; ineffectual either for reform or example; can only be maintained in some degree of vigour by extreme severity; some of its most important enactments are systematically broken by the Government itself which issues them; they are of course disregarded by the community . . .
> The severe coercive discipline . . . defeats . . . its own most important objects; instead of reforming, it degrades humanity, vitiates all under its influence, multiplies petty business, postpones that which is of higher interest, retards improvement and is, in many instances, even the direct occasion of vice and crime.

This kind of criticism was not acceptable to local officials and when published in London, it led to Maconochie's dismissal by Sir John Franklin. However, his ideas were vindicated by the Select Committee on Transportation set up by the Parliament in Westminster and, as a consequence, the new Governor of New South Wales, Sir George Gipps, offered him the post of superintendent of the penal settlement on Norfolk Island. There, for four years, under great difficulties and convinced, from the outset, that the island was too isolated for his purpose, he sought to implement ideas which still have a modern ring.

His system was based on two fundamentals. First, that cruelty and brutality debase not only the person subjected to them, but also the society which has recourse to them. Second, that treatment of a convict must be designed to fit him for his release into society. Offenders should be punished for the past, but trained for the future. He introduced a merit marks system. Sentences, he thought, should be based on tasks for which merit points could be earned for release – and not fixed to specific time periods. With unpromising material in the double convict types on Norfolk

Island, Maconochie achieved notable success and established his name in the annals of modern penal reform.

For innovations in the criminal justice system in Australia since the early period one has, unfortunately, to recognise that the tendency has been to copy from England and America. Regular police forces emerged on the United Kingdom model after the 1830s, probation, parole and various forms of juvenile institutions, half-way houses, attendance centres, 'on the spot' fining of traffic offenders, diversions from the criminal justice system and restraints on the discretion of police have all followed well known patterns elsewhere.

However, the fact that there are six States and two Territories in the federated country of Australia – each with its own laws and practices – means that even these imported innovations are variously applied. For example, at the time of writing, in the hope of reducing accidents resulting from drunken driving, the State of Victoria is the only one to have introduced the practice of random testing by means of the breathalyser. This is to say that the Victoria Police may stop anyone driving a car – whether he appears to be committing a driving offence or not, and require him to take the breathalyser test to determine the extent of alcohol in his blood. Other States have refused to apply such random tests, considering it to be an undue extention of police powers. And again, there are differences in the levels of alcohol in the blood which are permitted by the different States.

The number of minor traffic offences dealt with by means of a fine in Australia without court proceedings rose from about 1.5 million in 1968 to 2.1 million in 1972, but in the Australian Capital Territory this represented a tripling of such cases, whereas in South Australia there was only a very slight increase. Where compensation is payable by the State to victims of crime, the maximum payment permissible varies. In South Australia it is limited to $2,000, whereas in Tasmania it is $10,000, with the total unlimited if the injury resulted from assistance being rendered to a police officer in the exercise of his duties. Only very recently has parole been applied in the Australian Capital Territory (that is, Canberra and surrounds), whereas it has been available in the States for years.

The suspended sentence is specifically available to first offenders in Queensland, but more generally applied elsewhere.

The 'split-sentence' (that is, a term of imprisonment with the provision for a release on recognizance) is used like parole (but with judicial oversight) in the Australian Capital Territory and Tasmania, but elsewhere parole only is used. Periodic detention has been copied by most States of Australia from New Zealand. This is a device to apply a form of deterrent imprisonment without interrupting a person's life-style – so that he may be required to spend his weekends in prison.

There are also various kinds of 'release to work' orders for prisoners (that is, they can accept regular work outside the prison during the day, but they return to the prison after work) and different forms of 'community work orders', that is, orders to perform certain work of a community or public value instead of going to prison. One recent innovation in New South Wales is that of 'out-residents' – some prisoners are released to live at home and work regularly in the prison industries. They are paid full union rates for the work. Victoria has also introduced the British style of attendance centre, that is, centres to which an offender so sentenced has to report regularly to do unpaid community work or take part in discussions, various forms of training or counselling.

These are practices in adapting the criminal justice system to modern needs which can be found in European countries and in America. It is from these areas that Australians have collected their ideas. Lately, however, there are indications that Australia may be breaking away from established change in the West. The Government of Australia in 1973 established the Australian Institute of Criminology as a statutory authority. This made it the only one of the 500 or so similar institutions around the world which is not dependent directly on a university or a government department. It has been designed to get the best of both worlds and in its research and training during the past four years, it has been encouraging Australia to look elsewhere than to the West for its models. Also each State and the Federal Government itself has its separate law reform commissions or committees seeking to improve and upgrade the criminal justice systems.

In these moves for change, there have been differences and challenging initiatives by the States. All are concerned with the inequity of rape laws and the court procedures associated with them, which seem to penalise the complainant. These have come to public attention more vividly because of the growth of a lobby

for the equality of women. However, whereas one State intends to follow the precedent of the US State which has abolished the crime of rape and replaced it with aggravated assault (thereby avoiding the victim's previous sexual record becoming an issue), South Australia has moved to protect the victim, but also to include the offence of rape by any man – even a husband. One strong reason for this is the widespread disintegration of nuclear family life in Australia and the growing practice of unmarried people living together. The designation 'husband' has therefore become less precise. Whatever the reasons, the move to allowing a husband to be arraigned for the rape of his wife is a startling change which most of the West has not yet contemplated.

In another area there are signs that Australia will come forward with innovative approaches. This is the area of law enforcement with regard to Aboriginals. For so many decades, Australia has been following the New Zealand pattern of one law for all and no concessions to local custom or practice, except in so far as this might be taken into consideration in the mitigation of the penalty. Lately, partly because of the higher than proportional numbers of Aboriginals coming into conflict with the law and going to prison, partly as a response to political agitation for greater recognition of the validity and usefulness for Aboriginals themselves of their own traditions and customs, and partly as a reaction to a tendency developed in some of the courts in Aboriginal areas to 'bind over' an Aboriginal offender to go back to his elders (knowing that the elders will inflict their own punishment which may be corporal), there has been a move to find new approaches.

The Australian Institute of Criminology conducted a seminar of experts to provide recommendations on this subject and the Australian Law Reform Commission and some local State law reform committees are actively involved in the search for a solution in terms of legal change and revised law enforcement. The differences between Aboriginals at their various stages of development and integration and the minority groups demanding attention in North America are likely to make the Australian approaches distinctive.

Queensland has made considerable progress in cutting down the time required for preliminary hearings of cases before trial. Witnesses may not need to attend and a magistrate may work

more on documents if there is no dispute. Many States now have court proceedings tape recorded and there is consideration being given to video-taping. South Australia has up-dated its juvenile delinquency laws to provide for more justice and less welfare decisions, which might be unjust. It has developed a series of 'juvenile panels' comprising police officers and social workers to which police can refer difficult juveniles with their parents, rather than take court action in the early stages of delinquency.

Some innovations in the criminal justice systems in Australia have proved difficult to implement because of trade union pressures. Work for prisoners is objected to, if it is likely to take work from non-prisoners. At the time of writing there is a thrust by the printers in New South Wales to reduce or discontinue the work of a successful printing shop in the prison, because there is not sufficient work for the unionised printers outside. It was a similar union objection to work in the new prison laundry at Parramatta which had led to the 'outresidency' program mentioned above. And with education free up to university standard and time being allowed to all prisoners to concentrate wholly on such studies, there are suggestions of prisoners being more privileged than the people who have not committed crime.

It is interesting to compare this with the feeling, widespread among emancipated convicts in Australia in the early part of the 19th century, against new free immigrants whom they saw as competing with them for work and as interlopers in the new land which was theirs. Later, it was an argument reversed when there was the movement against transportation. This sought to reduce the competition of outcoming convicts.

Occasionally new programs are difficult to apply in Australian prisons because of the resistance of prison officers' unions. Questions of overtime, work rosters and shifts arise and the issue is coloured by the officers' concern that prisoners' rights and interests are being preferred to their own. There have been similar objections by some police unions to the introduction of neighbourhood policing or other schemes which would lay additional burdens on individual officers or affect established systems of responsibility and seniority. On the other hand there are examples of excellent cooperation between unions and management in the criminal justice services, so that the issue may be one of appropriate consultation and involvement.

One final area in which there could be a breakthrough in new ideas in Australia, is that of corporate and white collar crime. In the late 1970s it has begun to attract considerable attention – especially in Queensland and New South Wales. Apart from corporate affairs commissions with specialists in company law to provide law enforcement, New South Wales has recently moved to negotiate legally the standards within the accountancy profession, since it is at this level that problems often begin – and the Australian Institute of Criminology is conducting research.

New Zealand is a unitary state. It has a simple penal system and therefore does not exhibit the variety of laws and practices to be found in Australia. The Minister of Justice has five standing committees, each specialising in a different area of law, to advise him on the need for law reform. There is also a Law Reform Council composed of the Minister of Justice, the five committee chairmen and the permanent heads of the state agencies involved in law reform.

While the police still have power to deal, when necessary, with traffic offences, New Zealand has a special uniformed and disciplined force of traffic officers responsible to the Ministry of Transport. They do not engage in criminal investigations, but have the power to arrest, without warrant, persons driving under the influence of drink or drugs or being in charge of a motor vehicle while under the influence of drink or drugs and refusing to deliver ignition keys. Traffic officers, as well as police officers, have power to administer a breath-test and may require a blood test. Penalties are awarded by the courts for driving and other offences under the Transport Act 1962 – and there is a system in operation whereby points are registered according to a fixed scale against persons convicted of driving offences. The Secretary for Transport has authority to suspend drivers licences for six months where 100 or more demerit points are received in less than one year, or for three months where this number of points is received within two years. Breaches of certain parking, speeding and overloading laws can be dealt with by payment of an infringement fee within a certain time. This permits the offender to avoid court appearance.

In providing for alternatives to imprisonment, New Zealand has usually been in advance of the Australian States. In fact, Australian States have often copied their periodic detention and community work order schemes from New Zealand. For prisoners

there are pre-release hostels from which prisoners can go out to ordinary jobs, and provisions for release to work orders which allow prisoners to take jobs outside the prison during the day. There is 'post-release care' for prisoners, which provides for a period of probation in lieu of institutional detention for certain classes of prisoner.

In general during the last 20 years, New Zealand has been a testing ground for many new ideas in penal reform which have later been studied and adopted by the Australian States. Not infrequently the key personnel have been recruited by Australia for the task of developing the new ideas in Australian States.

---

1. M. Cannon, *The Land Boomers* (Melbourne University Press, 1966).
2. New Zealand Official Year Book for 1976.
3. *Ibid*.
4. Information provided from: D. Biles, 'Prisons and Prisoners' in D. Biles (ed.), *Crime and Justice in Australia* (Australian Institute of Criminology, Canberra, 1977).
5. See New Zealand Official Year Book for 1976 p.247.