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MEASURES TO COMBAT RECIDIVISM

(with particular reference to adverse conditions of detention pending trial and inequality in the administration of justice)

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Contents

I. PREVENTION OF RECIDIVISM AS PART OF A COMPREHENSIVE CRIME PREVENTIVE POLICY

1. The least than can be expected from policies and programmes aimed at the prevention of crime and the treatment of offenders is that they do not themselves contribute to criminality. Yet there are disturbing indications that in many ways and in many countries the problem of criminality is being compounded by the manner in which it is handled. It is acknowledged that even under the best penological policy and practice certain individuals will, due to deep-seated psychosocial impediments, maintain their disposition to a criminal way of life. It is also acknowledged, on the other hand, that an unknown but probably alarmingly large percentage of first offenders revert to criminality in direct response to the adverse, embittering, and even corrupting experiences to which they are subjected as a consequence of their criminal act.

2. A crime prevention programme that pays due attention to the prevention of recidivism stands to reap a double benefit: it diminishes the likelihood of further criminality on the part of the individual involved; it diminishes the likelihood that that individual will entice or otherwise induce additional persons to enter into criminality. A comprehensive crime prevention policy can, therefore, ill afford to ignore or give but scant attention to the prevention of recidivism.

3. This paper will concentrate upon practices, procedures, attitudes and conditions which may contribute to repeated criminality and, conversely, upon measures, positive and protective, that may wisely be taken to combat or eliminate such deleterious influences conducive to recidivism. It is not intended here to deal with individuals whose patterns of criminal behaviour are so complex and personality structures so evidently defective that present-day knowledge of the applied social sciences have not yet been able to devise satisfactory methods for their resocialization. Thus, recidivism is used here in its widest sense to cover any second criminal conviction and is not restricted to a particular category of persistent or habitual offenders, called multi-recidivists in some legal systems.

4. In attempting to make a satisfactory assessment of the nature and extent of recidivism, one is immediately hampered by the lack of the reliable and comparable data needed. It is an anachronism that in an era when scientific enquiry is employed effectively for guidance on many human problems, social defence policy, in a number of settings, continues to be formulated without such rudimentary information. A first and obvious step, therefore, is the preparation of information, both quantitative and analytical, to provide for the social defence policy planner and administrator the basis for appropriate action. Indeed, there have even been frequent calls for the establishment of internationally agreed-upon norms for a working definition of recidivism to assist in its measurement nationally and to allow for meaningful international comparability. It has, for example, been questioned whether a young adult of nineteen, convicted of an offence identical to the one he committed one year earlier but which was dealt with under juvenile court procedure, should be for these purposes regarded as a "first offender". Similarly, it has been questioned whether all second convictions, even if the nature of the offence is distinctly minor, can meaningfully be classified as "recidivism". Clearly, however, while it must be an urgent objective to repair this gap of knowledge, one need not - one cannot - await this action before undertaking a still sound and systematic attack on recidivism.

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5. A major issue touching upon the problem of recidivism concerns some forms of behaviour, classified in many countries as criminal offences, which account for large numbers of recidivists. The views were strongly divided at the Ninth International Congress on Penal Law (The Hague, August 1964) on the advisability of retaining in criminal law certain offences against the family and sexual morality, and of penalizing such acts as adultery, bigamy, prostitution and homosexuality. This question of including within the scope of criminal law such acts of deviated behaviour assumes great practical proportions in regard to two wide marginal categories: the social misfits and the negligent offenders, particularly the road traffic violators.

6. The large group of social misfits includes the victims of alcohol and drugs, the mentally handicapped and sexual deviates, the vagrants and beggars, all of whom form a steady clientele of many lower courts. It is increasingly recognized that such persons, instead of being handled as criminal offenders and sent to penal institutions, should be dealt with in the community by social agencies and behaviour specialists. In regard to drug addicts, for example, there is a noticeable tendency to dispense with prison sentences so as to allow for rehabilitative medical treatment in specialized institutions; this would undoubtedly contribute to the prevention of recidivism.1/ Since in certain countries more than half of the total prison population is composed of drug addicts, the effect of removing this marginal category of offenders from the prison setting and of handling them by curative methods would be most beneficial.

7. The marginal group of negligent offenders, which poses a totally different problem particularly in industrialized countries, covers the large number of violators who appear before the courts for road traffic offences, In some countries, it is estimated that traffic offences represent 50 or even 60 per cent of the total volume of convictions for "criminal" offences.2/ This points to the need for action to relieve the ordinary courts of the heavy burden of traffic offences and to ensure more effective treatment methods for handling this category of lawbreakers. Such measures as the establishment of traffic courts and the setting up of special institutions for these violators have proved successful in many countries.

8. Penologists and policy makers thus become increasingly concerned with this problem and are seeking to reduce recidivism by excluding such marginal categories from the purview of criminal law and by handling the individuals concerned more effectively. In many countries, however, this preoccupation has not yet been translated into appropriate action and the problem of recidivism has remained unduly inflated by the handling of these marginal groups of offenders.

9. It is now generally accepted that the purpose and justification of a prison sentence or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved by rehabilitative measures which could ensure that the offender will not revert to crime upon his release.3/ A punitive

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1/ See the Secretariat paper on topic 1.

2/ Barbara Wootton, Crime and the criminal law, The Hamlyn Lectures, 15th series, London, Stevens and Sons, 1963, p. 3.

3/ See: Standard Minimum Rules for the Treatment of Prisoners (A/CONF.6/1, Annex I, A)

approach can hardly be expected to be conducive to the resocialization of the prisoner who will eventually return to the community - as do almost all offenders. If wise measures are not taken to handle first offenders constructively, society will probably achieve, one might say, the recidivism rate it deserves.

10. Individualization in the treatment of offenders is generally accepted in principle as conducive to ensuring that the most appropriate measures are taken for their resocialization and, hence, for the protection of society through the prevention of further criminality on their part. However, there is often a deliberate decision not to employ what appears to be the most effective measures. This may be ascribed to such various factors as the inflexibility of the law, personal prejudice or inadequate understanding on the part of the judiciary, presumed public hostility, and a philosophy of vengeance, retribution or deterrence. It is not intended on this occasion to take up the whole range of progressive penological practices that have come to be identified as individualization of treatment, but it is appropriate to identify factors which interfere with applying in practice that knowledge of sound treatment measures which the penologists do now possess, as well as remedies to improve the situation. Here, certain still prevailing trends call for attention, in particular, the heavy reliance on imprisonment and the resulting institutionalization effect on the individual, the preoccupation with security and the inflexibility of sentences not allowing of release at an appropriate time.

11. It should be acknowledged that the modern prison has gone a long way towards expanding positive resocializing methods of treatment. Efforts are being made in many countries to lessen the offender's sense of isolation and rejection by preparing him for release through the maintenance of family ties and other desirable contacts with the outside world. Special pre-release programmes, including furloughs and normal extra-mural employment, are carried out under various penal systems and no doubt contribute to the prevention of recidivism since it is at this point that the borderline between success and failure of institutional treatment may be established. There are also a number of post-institutional measures, including vocational guidance and practical aid to assist the discharged prisoners in obtaining work, which have proved successful in facilitating their social reintegration.4/

12. Notwithstanding the application of such progressive treatment measures, the problem of recidivism is still far from being solved and the question is often raised as to the extent to which the rehabilitation of the offender can be effected in the prison setting. It may be noted in this connexion that there are prison regimes which are frankly punitive, and are characterized by enforced idleness, overcrowding, unsanitary conditions, harsh discipline and the like; such regimes are hardly likely to lend themselves to rehabilitation. Indeed, certain criminogenic processes are believed to be generated or intensified therein as a response to strongly repressive methods of control or extreme emotional deprivations. There are also

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4/ For further discussion of post-institutional measures, see the Secretariat paper on topic 5.

some large maximum security institutions which provide a reasonable degree of material comfort and sustenance, and are not merely punitive, but are marked by such impersonality that the prisoner is reduced to the status of a numbered automaton; this again can hardly provide the setting for rehabilitation. As regards prisons with predominantly rehabilitative regimes, it is believed that even they are not immune to criminogenic or potentially criminogenic factors which are inherent in the very nature of imprisonment and cannot be eliminated merely by the introduction of rehabilitative programmes or by relaxing oppressive methods of discipline.

13. These criminogenic factors which appear to be inherent to imprisonment itself, irrespective of whether the regime is punitive or rehabilitative in orientation, have led many specialists to challenge the usefulness of long terms of imprisonment. Over thirty years ago it may have been relatively progressive for a prison administrator to assert that "it requires a superhuman to survive twenty years of imprisonment with character and soul intact... I gravely doubt whether an average man can serve more than ten continuous years in prison without deterioration".5/ This assertion may still be regarded as valid, even acknowleding the various progressive reform measures that have been introduced since then. Thus, it is no longer unusual to express the view that the more excessive a prison term is, the less it represents a positive concept of rehabilitation.

14. Apart from the length of the prison term, there is the prison environment to be considered. Sociological evidence in recent years has indicated that criminogenic influences continue to operate to a considerable extent within prison walls, despite the introduction of certain progressive penal measures. It is widely contended that there exist, especially in large maximum security institutions, two separate social systems, that of the administration and that of the inmates. The inmate sub-culture is dominated by values and norms which are, in general, anti-social and anti-administration, and it is claimed that it is mainly the negative influence of the sub-culture which operates on the individual offender. Furthermore, there are some inmates who, irrespective of the prison environment, immunize themselves against positive resocializing influences. While there is this inmate sub-culture, and while it may be that the inmate generally tends to stay within his sub-cultural milieu, the extent of his receptivity to positive social influences depends partly on his personality, attitudes and experience, and partly on the extent to which he retains constructive family ties, interests or contacts in the outside world.

15. There is also a series of factors which all too often aggravate this criminogenic situation and can be summed up as "the stigma of imprisonment".6/ Public fears, suspicions, prejudices, antagonisms and ignorance arouse resentment and hostility in the ex-prisoner. These may be considered to constitute criminogenic factors which not only contribute to recidivism but even appear to the offender to be an excuse and a justification for reverting to crime.

5/ The late Sir Alexander Paterson quoted in The Economist, 25 April 1964, p. 384.

6/ See Torsten Eriksson, "Society and the treatment of offenders", in: Studies in penology, International Penal and Penitentiary Foundation, ed. by Manuel Lopez-Rey and Charles Germain, The Hague, Martinus Nijhoff, 1964.

16. It would appear from the foregoing that, even if due allowance were made for prison reform, there are serious, inherent limitations in the capacity of the prison to rehabilitate its inmates. Despite the awareness of these limitations, there is still a heavy reliance on imprisonment in the handling of offenders. This is so even in cases where imprisonment will benefit neither the individual nor society. Imprisonment in such cases can hardly be regarded as contributing to the prevention of crime. Could, therefore, a decisive step be envisaged, namely to establish an over-all social defence policy which would exclude imprisonment when it does not serve the purpose of preventing crime? That would probably mean great flexibility in all sentencing procedures. It would also mean screening from imprisonment several categories of offenders and offences.

17. It is recognized that the best method to counteract the criminogenic influences of imprisonment would be to ensure that as few offenders as possible are sent to prison. It is sometimes argued in various countries that prison is already used only as a last resort. But the fact remains that imprisonment, especially for short periods, is, in general, still used extensively in dealing with a wide range of offenders. There are strong indications that, in many countries, only one out of every five or six prisoners held in the traditional closed security prison is dangerous and actually needs this type of regime. A key problem therefore is to identify the really dangerous individuals on the basis of such criteria as the risk of inflicting serious bodily harm, personality disorder, persistent criminal tendencies, etc.[7/], and reserve this type of regime for them.

18. It has especially been argued that, with rare exceptions, first offenders should not be sentenced to imprisonment. An even more decisive step to improve the situation would be to make every effort to exclude from the prison regime altogether the large majority of those non-dangerous offenders who are traditionally sentenced to relatively short prison terms, and to apply to them such substitute measures as suspended sentences, probation, fines and extra-mural labour.[8/] It has been estimated for some countries that the use of substitutes for short sentences could reduce the prison population by one-half. Considering that short-term prisoners, serving sentences of six months or less, form in many countries about 80 to 85 per cent of the prison population, the sociological, penological and financial advantages of such a shift in court practice are obvious. The strong recommendations to this effect made by the Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders (London, 1960)[9/], if carried out by the courts in their daily practice, would have far-reaching consequences on the total number of offenders who have to go to prison.

7/ Sol Rubin, "Sentencing problems and solutions", The Canadian Journal of Corrections, Vol. 4, No. 2, April 1962, pp. 77-78.

8/ See the Secretariat paper on topic 5.

9/ Short-term imprisonment, A/CONF.17/5 and A/CONF.17/20, Annex. I,4.

19. The advocates of substitutes for imprisonment may now gain more support, particularly since rising rates of crime and recidivism in many countries are said to have undermined confidence in the deterrent effect of imprisonment under a predominantly punitive regime. This view, however, is still far from being generally accepted, since there are those who contend that an essentially rehabilitativ and permissive regime fails to instil in the offender fear of the consequences of reverting to crime.

20. Since - fortunately - the value of traditional imprisonment as well as its deterrent effect is being increasingly challenged, this may halt a trend that has been observed ir developing countries towards building up elaborate prison systems along the lines of the developed countries. A note of caution in this respect has been expressed on several occasions, such as the Twelfth International Course in Criminology (Jerusalem, 1962)10/, but has not yet received all the attention it deserves. Policy-making bodies of the United Nations as well as technical assistance experts in the social defence field have consistently advocated reliance upon new and more efficient correctional methods of treatment in an open regime and under conditions of freedom, in contrast with the large congregate penitentiaries which predominated in the past. Indeed, it may not be too much to hope that countries not now burdened with an elaborate system of penal institutions will, instead of taking over from industrialized countries a high degree of reliance on imprisonment, evolve more realistic and effective measures likely to attain the objective of preventing the repetition of crime. Such innovations might even point the way to new correctional methods in the economically developed countries. In this respect, it may be noted that imaginative and successful experiments have been carried out in several Asian countries with open institutions as a more rehabilitative type of penal treatment than the regime of the traditional closed prison: a recent survey provides guidelines for future development.11/

21. In adapting social defence policies to the needs of rapidly changing societies, stress would be better placed on realistic measures, essentially educational rather than punitive. It has already been suggested by Government officials in Africa that imprisonment should be replaced wherever possible and a distinction made between offenders under customary law and those who have not observed the modern laws that have supplanted traditional customs. Thus, it has been urged that all offenders

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10/ "Le système pénitentiaire et la politique criminelle dans les pays en voie de développement", par Jean Pinatel, Twelfth International Course in Criminology, International Annals of Criminology, 1963, first semester, pp. 121-122.

11/ The open correctional institution in Asia and the Far East. Prepared by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, established by the United Nations and the Government of Japan. United Nations, New York, January 1965, Report No. TAO/AFE/14.

against such new laws should be sent to special institutions where they would work and at the same time receive civic education.12/

22. Irrespective of whether the rehabilitative treatment is institutional or extra-institutional, rehabilitation remains a complex phenomenon which depends upon the treatment to which the offender is subjected as well as on a series of factors influencing his receptivity to benefit therefrom. Thus, the prevention of recidivism does not only necessitate improved treatment measures but also requires improved methods of action to counteract the factors likely to render the offender recalcitrant to treatment. The latter aspect, though important, has unfortunately been greatly neglected. Too often the correctional institution alone is blamed for producing the recidivist whereas in truth the blame should fall upon other institutions and agencies involved, directly or indirectly, in handling the individual concerned. Paradoxically, the roots of this criminogenic situation are to be found in the very authorities who are chiefly concerned with the prevention of crime and the treatment of offenders.

23. The attitude of the accused toward society, for example, may depend to a large degree on the manner in which he is handled by the police in the course of arrest, custody and interrogation procedures. In many countries, there is still a police attitude dictated by what appears to be an exaggerated security policy, and punishment may even be inflicted in anticipation of the court decision. Certain tactics of police officials, such as harassment, ill-treatment and brutality, constitute an abuse of normal police functions and contribute to the moral deterioration of the individual concerned. Scandinavian penologists have recently examined safeguards against abuses in police interrogation.13/ Tape-recording (of which the suspect ought to be duly informed) was thought to be an objective modern method of checking up on police examinations, and it was noted that Finland and Sweden have special provisions concerning the presence of a "civil witness" at these examinations. The issue remains controversial, however, since, in the view of some Scandinavian experts14/, lay witnesses are seldom capable of correctly understanding important details and are even less capable of remembering them accurately during the court proceedings.

24. It would appear that the problem can be solved neither by legal safeguards nor by curtailment of the police discretionary power over arrest and interrogation procedures. Perhaps the most effective way to prevent abuse is to impart to the police officers, through modern training, enlightened views about their role and function as part of the total process of the administration of justice. This is a fundamental step towards eliminating from the early stages of police action all detrimental and potentially criminogenic influences to which the accused might otherwise be exposed.

12/ "La mise en pratique des lois dans les nations en voie de développement", par AlphonseBoni, Garde des Sceaux, Ministre de la Justice de Côte d'Ivoire, Twelfth International Course in Criminology, op.cit., p. 96. This proposal shows analogy with the special handling of non-intentional offenders in Belgium, the Federal Republic of Germany, etc.

13/ Nordisk Kriminalistisk Årsbok 1962, Stockholm 1964, English summary, p. XLI-XLVII.

14/ For example, Supreme Court Barrister Buhl of Denmark (op.cit. p. XLVII).

25. The negative influences which evolve from adverse conditions of detention pending trial are even more serious than those deriving from police abuses, particularly since they act on the accused over a much longer period and arouse in him strong antagonistic feelings against society. Likewise, capricious and prejudiced sentencing and treatment procedures, being the opposite of individualization based on the best interests of the individual offender and of society, introduce unwarranted disparities in the handling of offenders likely to produce, in turn, disillusion, bitterness and a persistent antisocial attitude. These two questions which have a direct bearing on the problem of recidivism will be concentrated upon in subsequent sections of this report.

26. A focus on recidivism could be an effective device for reappraising the whole process of the prevention and control of criminality, leading to rationalization and the development of a concerted policy. The resultant closer collaboration between the police, the courts and penal administrations could greatly contribute to counteracting the exposure of the individual to "double standards" and, more generally, to inequality in the administration of justice which may itself be criminogenic. An awareness of the effectiveness of policy and programmes is a pwerful instrument in designing their improvement.

II. CRIMINOGENIC FACTORS RELATED TO DETENTION PENDING TRIAL

27. The cost of pre-trial imprisonment in terms of time, money, human suffering and justice has been described as staggering in a great number of countries. Despite the existence of extensive legal safeguards on the statute books, too little progress has been made in ameliorating the alarming conditions under which accused persons are detained. The almost indiscriminate massing together of many categories of untried prisoners persists even in some countries that have made significant gains in classifying and separating various types of convicted persons. The criminogenic influences arising from such promiscuous association are often intensified by conditions of overcrowding, bad sanitation, enforced idleness and lack of recreational facilities. "The indignities of repeated physical search, regimented living, crowded cells, utter isolation from the outside world, unsympathetic surveillance, outrageous visitors' facilities are so searing that one unwarranted day in jail in itself can be a major social injustice."15/

28. Notwithstanding the adverse conditions under which persons awaiting trial are detained, there is in many countries a heavy reliance on pre-trial detention to ensure the appearance of the accused before the court, even in cases where substitute measures could achieve the purpose equally well. Moreover, the detention period is in many instances excessively long. This is generally due not only to the requirements of investigation, trial and appeals procedure, but also to the plurality of authorities - police, prosecutor, court - which have control over the accused.

29. The inadequate staffing of detention houses is another source of evil in detention practice. In many countries, there exists a double standard as the staff assigned to places of undertrial custody often have no training at all and receive lower wages than regular prison personnel. It follows that the staff in charge of those awaiting trial are distinctly inferior to prison personnel in charge of convicted persons. This is clearly illogical since, if preferential attention were to be given to either group, one might reasonably expect that more favourable handling would be reserved for the unconvicted than for the convicted population being held in institutions.

30. The adverse effects of detention are also seriously felt in the case of juveniles awaiting disposal of their case. In many juvenile courts, criminal procedure has been abandoned in name only, because detention centres are poorly staffed, clinical services are lacking and the premises are most inappropriate. Juvenile detention is said to be "in desperate need of overhaul" as in many places children are detained for long periods, without a hearing, in miserable quarters, often mingled with adults but granted fewer rights and less protection than their elders. Social defence specialists have often denounced the "alarming

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15/ Bail in the United States, 1964, a report to the National Conference on Bail and Criminal Justice, Washington D.C., May 27-29, 1964, p.45

trend toward the indiscriminate use of detention for delinquent children"16/ as well as the practice of virtually automatic detention remands17/. In many instances, children who are removed from their homes through informal processes in juvenile courts often end in jails, reformatories or penitentiaries18/. This unwarranted practice prevails in most countries where there is no other detention place available19/. On the whole, discouragingly little progress has been made in the past decade in reducing the number of juveniles confined in adult institutions. Indeed, it has been observed that the conditions of juvenile detention are often similar to those which, in the community, may be considered most likely to promote delinquency.

31. There is no need to labour the point that the criminogenic influences of adverse detention conditions and the lengthy period during which they operate tend to engender such antagonistic and anti-social attitudes as to render the accused prone to crime, and recalcitrant to rehabilitation if he is eventually proved guilty. Here one may ask whether the risk, perhaps exaggerated, of dispensing with detention in many instances, is greater to society than the potentially intensified criminal attitudes that may result from such deleterious detention conditions.

32. Public indifference may be blamed to a certain extent for improper conditions of pre-trial detention and awakening public opinion to the need for reform will undoubtedly help to pave the way for reform20/ However, policy-makers and administrators should on their part try innovations as pilot projects and interpret them to the public as they develop.

33. The adverse conditions of detention pending trial appear to be the cumulative effects of various factors mainly related to judicial procedures and the correctional process. This means that it would be futile to tackle the problem piecemeal. In fact, adverse conditions in detention houses may be the consequence of overcrowding which, in turn, is generally the effect of unnecessary reliance on detention pending trial and of the slow or inefficient administration of justice. Thus, individual measures intended to improve the situation sporadically are doomed to failure, and it would require a concerted programme of action to break the vicious circle.

16/ Standards and guides for the detention of children and youth, second edition, National Council on Crime and Delinquency, New York 1961, p. viii.

17/ ST/SOA/SD.1/Rev.1, p. 19.

18/ Delinquent children in penal institutions, U.S. Children's Bureau, 1964 (publication No. 415-1964), p. 1.

19/ The treatment of untried prisoners, International Penal and Penitentiary Foundation, December 1961, p. I/17. This publication was submitted to the United Nations Consultative Group meeting of 1961 (MSOA.61/SD.9); it will hereafter be referred to as "IPPF Study, 1961".

20/ United Nations Consultative Group on the prevention of crime and the treatment of offenders, Geneva, 1961, ST/SOA/SD/CG.1, paras. 97-122, and MSOA.61/SD.3 on detention of adults and juveniles prior to sentence or commitment.

34. In carrying out reform measures intended to raise the standard of custodial detention, an overriding objective could well be the prevention of the promiscuous association of various types of individuals awaiting trial, the innocent and unsophisticated with the hardened criminal. The extreme course of isolation, on the other hand, which is taken as a rule in a number of systems, is fraught with the danger of psychological deterioration. The need for careful grouping of those awaiting trial is realized in some countries, and efforts are being made to bring about a diversification of facilities in order to ensure some measure of classification on the basis of such criteria as age, background, educational level, and the nature of the offence. One may ask, however, whether this question is given the priority it deserves.

35. Separate accommodation for those not yet sentenced has been strongly advocated by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955), but discouragingly little progress has been achieved since then. Thus, this measure continues to rank among the first reforms to be yet undertaken in a number of countries. In fact, many countries still fail to comply with such elementary requirements as the separation of those awaiting trial from convicted prisoners, of juveniles from adults, and even of women from men.

36. The isolation from society of the prisoner awaiting trial for the first time poses a particular problem since he may be in special need of family guidance and support as well as other forms of social assistance. This may even be more urgently needed for these individuals than in the case of convicted prisoners, judging by the apparently higher rate of attempted suicide among untried prisoners[21]. The aid extended to untried prisoners by social agencies and spiritual counsellors should be regarded as part of a policy, rather than an occasional privilege.

37. It is generally held that the enforced idleness in which most untried prisoners have to spend their days has negative effects. Notwithstanding the accepted principle that work cannot be compulsory except for prisoners serving a sentence, it is possible to provide occupation on a voluntary basis and to establish a meaningful and remunerative work programme. Here again, it is incongruous that untried prisoners should be generally worse off than sentenced prisoners. Occasionally, in some countries - Belgium, for example - when there is not enough work for all prisoners, those awaiting trial enjoy preferential allotment of work. The opportunity to work for personal gain is open in principle to untried prisoners in many countries, but is not often used in practice[22]. In India, a scheme is under consideration by the Government of Uttar Pradesh whereby untried prisoners would be allowed to have some productive work during their detention period, and the money earned by them could be utilized

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21/ ST/SOA/SD/CG.1 (op. cit.), para. 115.

22/ IPPF Study 1961, pp. II/26 and 28 to 29.

for the benefit of their families. Similarly, some countries have tried to fill the void of the detention period by providing appropriate and meaningful educational and recreational programmes, but there too, the quantity and quality of services fall short even of those provided to sentenced prisoners.

38. Whatever measure is taken to improve detention conditions, the results can hardly be satisfactory unless concomitant action is taken to raise the standards of the staff. The question of personnel is, in many countries, the crux of the problem of pre-trial detention. The integration of the detention staff into the regular prison career service would be a step in the right direction. In some countries, there is a tendency to recruit the staff of detention houses from among the regular cadres of the prison administration, and to give them suitable training. This may help to avoid the exclusive assignment of staff to this work, which in the long run is perhaps not sufficiently varied to interest well qualified officers.

39. Of all the remedial steps which may be taken with regard to detention, it is, however, curtailment of its use that probably calls for primary attention[23/] Curtailment may take the form either of shortening the length of the detention or using substitutes for it.

40. According to indications from various countries, the length of detention before and during trial often extends to two, three or even five years. Delays of two to three years are to be found in certain large urban areas in developed countries, and the same is observed in many developing countries. In some countries where an appeals procedure is mandatory, a two-year duration for cases of no particular seriousness is common.

41. The situation in many countries is also characterized by a discouraging waste of effort. It is observed for example that, in some countries, as much as fifty per cent of the total number of prosecutions result in the case being dismissed or dropped because the prosecution proved unjust or the preliminary investigation defective.

42. There is thus an urgent need in most countries to make the administration of criminal justice more efficient and to speed it up considerably. Instead of building up more and bigger detention houses to accommodate a considerable number of untried prisoners during their lengthy trial and appeals procedures, more radical reforms are called for by revising and simplifying criminal proceedings. Rational systems of procedure do exist and have proved their efficiency in countries which have been able to keep the numbers of untried prisoners within reasonable proportions and to dispatch their criminal trials within limited periods, without

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23/ For research on this matter see: Time spent awaiting trial, a Home Office Research Unit Report (No. 2), London, HMSO, 1960; Time lapse in criminal litigation in Iowa, by Walter A. Lunden, Dept. of Economics and Sociology, Iowa State University of Science and Technology, Ames, Iowa (prepared for the Iowa District Court Judges Association, January 1964; in photo-offset).

thereby impairing the due process of law. A study to this effect could best be jointly undertaken by the judiciary, policy-makers and administrators, with the assistance of comparative law specialists from both the countries needing this type of reform and those able to assist them with their positive experience in the development of efficient systems of criminal procedure.

43. A major part of the problem of slow and inefficient administration of justice may be ascribed in many countries to the insufficient number of judges as well as to inertia, interference, incompetence and inexperience on the part of some judges and judicial personnel. The remedy for such quantitative and qualitative limitations can only be an extensive training programme for judicial personnel and a substantial increase in the number of judges so as to allow for a realistic distribution of caseloads and a speedy course of justice. The question of training assumes great importance particularly in developing countries where there are often large arrears of cases as a consequence of the penury of judicial personnel; elsewhere too this is known to be a serious matter, aggravated in certain countries by an unwillingness of the authorities to appoint sufficient numbers of judges to the Bench, a restriction which may even be encouraged by the judicial fraternity.

44. The responsibility of an independent central authority to counteract routine, inertia and abuses at every level, such as the Scandinavian ombudsman, could bring about the elimination of criminogenic influences from the judicial process. While the functions of such a parliamentary commissioner are primarily remedial, the mere existence of a powerful authority of this kind, which has been called a watchdog against neglect of duty and corruption, can have a direct preventive influence. Sometimes, minor measures are also effective in counteracting delay; it has been observed, for example, that good results can be obtained by requiring judges to make known in their jurisdiction the average period of detention: a method leading to a considerable decrease of the average duration[24/].

45. In general, strict measures are called for, not only to prevent all types of delay and inertia on the part of the authorities, but also to reduce their discretionary powers concerning the length of detention. Remedies are primarily seen in legal provisions prescribing a maximum period of detention including possible prolongations, or at least a periodic review of the need for detention. Many legal systems fix such maximum periods or provide for some review, with considerable variety of details[25/]. To safeguard against excessive extensions of detention, the law may allow that the detention period be extended only once, or only in serious cases, or on specified grounds. It may also require that extensions beyond a certain period be subject to an order of some high official or authority.

24/ ST/SOA/SD/CG.1 (op. cit.), para. 108.

25/ Study of the right of everyone to be free from arbitrary arrest, detention and exile, E/CN.4/826/Rev. 1, United Nations publication, Sales No. 65.XIV.2, paras. 143-150.

46. One practical procedure might be to give trial priority to defendants under detention, and the authorities concerned should cooperate to that effect wherever possible. For those found guilty and sentenced to imprisonment, the laws of many countries allow for, or prescribe, under certain circumstances, the deduction of the whole or part of the period of detention. It may happen, however, that an offender is detained for a period considerably longer than the actual sentence. The excessive use of detention pending trial can perhaps be influenced for the better by legislation granting compensation to persons who have been unjustly detained.

47. In some countries, the excessive use of detention is believed to result from certain tendencies of the police in favour of incarceration, but pertinent measures have been taken in a number of countries to check abuse of detention. In Sweden and Denmark, for example, where the police, the prosecutor and the court employ the same criteria in determining release or detention, such consistency of action between the authorities concerned has resulted in relatively limited cases of pre-trial detention and short average detention periods. In the United States of America, experiments recently conducted have also demonstrated that it is possible to reduce considerably the use of pre-trial detention, since in certain local areas nearly all the defendents who, after careful screening, were released on their own recognizance appeared before the court for trial.

48. A variety of substitute measures for detention are already used in a number of countries with varying degrees of success, including release without any financial guarantee, release against the personal guarantee of a trustworthy person or a group vouching for the suspect, and periodic reporting to the police. In Czechoslovakia, for example, release may be granted if the authority ruling on detention regards as sufficient the written declaration of the accused to appear when summoned. In the U.S.S.R., a guarantee may be required from an organization, such as a trade union[26/]. In Cuba, release is also granted against a guarantee provided by a social group or organization. Restriction to a specific place of residence is imposed on the suspect in the Democratic Republic of the Congo (Leopoldville), and house arrest is used, for example, in Albania, Denmark, Israel, Italy, Poland and the U.S.S.R. The surrender of the passport or identity document and other restrictions on free movement have been regarded by the 1961 United Nations Consultative Group as suitable alternatives to detention. As regards the bail system, which is applied in a great number of countries, its value is held in question as it may well be identified as the prerogative of the wealthier class; those who are detained just because they cannot afford to benefit from this substitute measure may develop a feeling of social injustice, antagonism and frustration which renders them prone to crime and recidivism. This question will be taken up in the next section of this paper.

26/ Study of the right of everyone to be free from arbitrary arrest, detention and exile, op. cit., paras. 200 et seq.

49. In the case of juveniles, it is even more essential to seek flexible and less traditional modes of custody or substitutes for detention[27]. Pre-trial detention of minors for purposes of observation often tends to embrace all kinds of interference with the parents' right of guardianship. Against this broad use, it has been urged that pre-trial detention for the sole purposes of treatment should in no case be allowed.

50. Modern conceptions call for juvenile detention to be used rarely and only by the authority charged with the handling of juveniles in a progressive manner (juvenile or family courts, youth welfare boards etc.). The substitutes for detention, as applied in a number of countries, include: release into the custody of a fit person, placement in a foster family or custody by the juvenile's own parents or guardian or any other reliable person, and release into a probation officer's care. It has been suggested that in developing countries more reliance should be put on the traditional role of the family, the elders of the community and the tribal heads or chieftains, for these could provide care for the juvenile under trial[28].

51. In Sweden, outside supervision of youthful suspects is to be substituted for custody, whenever feasible. The public prosecutor is responsible for arranging the necessary supervision, either at the juvenile's home or at another private dwelling, or at an appropriate institution. Juvenile offenders (up to the age of eighteen) may also be taken into custody by child welfare authorities for a maximum period of four weeks for investigation with a view to the application of measures authorized under child welfare legislation. Decisions as to such protective custody are made by child welfare boards, subject to confirmation by provincial governors or even to appeal to the supreme administrative court.

27/ IPPF Study, 1961, p. I/28-32.

28/ MSOA.61/SD.3, para. 60. The Monrovia Meeting of 1964 put on record that no juvenile should be sent to prison (E/CN.14/328, para. 50).

III. INEQUALITY IN THE ADMINISTRATION OF JUSTICE IN ITS RELATION TO RECIDIVISM

52. Justice, even if harsh, may be tolerated by the offender provided it has been administered without fear or favour; the dispensation of justice with partiality and inequity becomes iniquitous. Such want of justice can also become for the offender a convenient rationalization of his criminal behaviour, or an excuse for reverting to crime. Many offenders seek to attach the blame for their actions elsewhere, and the existence of injustice provides a convenient argument that they are victims and not perpetrators. This heightens and exaggerates their sense of revolt and state of recalcitrance. One demand which can be made, therefore, of a society which seeks to rehabilitate those whom it has convicted is that its processes of justice be impartial and equitable.

53. It is obvious to those who observe criminal proceedings, professionally or otherwise, that there are serious discrepancies in a number of countries in the application of the law to underprivileged and to privileged groups. In many jurisdictions, the majority of the accused is formed of those deprived of economic resources, who are often ill-educated and socially deprived as well. The burden of such a combination of unfavourable circumstances is likely to render them quite unable to take initiatives for obtaining equal and equitable justice. Worse still, with these drawbacks to contend against, it is quite conceivable that they will drift into crime again, as this may appear to them the easiest or perhaps the only way out of a situation which is beyond their capacity to master.

54. The risk that persons disadvantaged in so many respects will be denied equal justice has become a matter of growing concern in many countries. Indeed, this is far more than a humanitarian problem; it involves a State obligation to provide equal justice for all.29/

55. Discrepancies in the application of the law reveal themselves in many areas of criminal proceedings, particularly in differential arrest and detention practices, as well as in disparities and inequalities in sentencing.

29/ Of special interest in this connexion is a study of equality in the administration of justice now being undertaken in accordance with resolution 958 C (XXVI) of the Economic and Social Council, at the iniative of the Commission on Human Rights. Some of the aspects on which particular attention has been asked to be given are:

- the need for a powerful and independent Bar as an essential prerequisite for equality in the administration of justice;
- the cost of the administration of justice, since for large sections of the population the expenses of a trial and the services of counsel are prohibitive;
- the question of immunity from, or increased liability to, legal process of persons belonging to some racial or religious groups;
- the right of a person who has suffered an injustice through police or administrative action to apply to the courts for a remedy.

56. As far as arrest is concerned, it has been observed both in developed and developing countries that the socially disadvantaged are much more liable to arrest than the privileged groups. Thus, in certain countries, police round-ups of suspects are regularly made in poor neighbourhoods, while wealthier districts are relatively free from such police interference. The consequences of arrest, whether justified or unjustified, are serious because they often entail losing a job or being dismissed. Also, an arrest record is often a social handicap for obtaining a new job. These consequences are felt more by the underprivileged individual than by the rich. Yet it is the underprivileged individual who is more frequently arrested, even on mere suspicion of complicity. Moreover, the handicaps suffered by an indigent suspect are most severe especially as he is not often in a position to know his rights, such as the right to consult an attorney, to sue for false arrest, or to have an arrest record expunged.

57. In the matter of detention, it has likewise been observed that it is the poor or less-privileged groups which suffer the most. The criminogenic effects related to detention have been dealt with in a previous section and need not be repeated here. But it may be observed that an awareness of these criminogenic effects has led an increasing number of governments to resort to substitute measures.

58. Release on bail, the amount of which is usually calculated so as to ensure the appearance of the accused in court, has traditionally been one of the main substitutes for detention. The problem, however, is that bail becomes in practice a privilege of the wealthier class while far too many of the poor are detained because they cannot pay the bondsman's premium or put up the collateral asked. Thus, it is the indigent accused who often loses his job because of his detention, and has his family disrupted and economically deprived. Existing procedures in many countries are such as to make bail almost inaccessible to persons with limited resources. Emphasis should thus be placed on using substitutes for bail wherever possible, or simplifying bail procedures.

59. Although the injustices resulting in practice from the use of a bail system have been recognized in many countries, few of them have gone to the extent of replacing it completely. This abolition of the bail system has its ardent advocates who contend that it is both desirable and feasible.

60. That this is feasible has already been demonstrated by some Scandinavian and other European countries.30/ In Sweden, where there is no provision for bail in law or practice, accused persons are generally released pending trial on the strength of their promise to appear in court. The prosecutor may, however, impose various forms of provisional liberty, such as requiring the suspect to report periodically to the police. A proscription against travel outside specified territorial limits may also be ordered in cases where it appears that

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30/ Report on pre-trial release practices in Sweden, Denmark, England and Italy, by Bernard Botein and Herbert Sturz (mimeographed text submitted to the 1964 Conference on Bail and Criminal Justice in Washington, D.C., to facilitate the evaluation of the bail system).

such an order will serve the interests of law enforcement. The travel proscription may be accompanied by a requirement that the suspect hold himself accessible at his home or place of employment, or that he present himself to the police at specified times. In Denmark, bail is never used although the law provides for it. About two-thirds of all prosecutions originate with a summons; in these cases it is not uncommon for a person to be charged, to stand trial and, if found guilty, to await sentence, all while at liberty. England maintains what is technically a bail system but security does not have to be posted in the furnishing of bail; the concept is radically different from that prevailing in some countries, the United States and the Philippines, for example, where bail requirements must usually be satisfied by full security or company surety bond. In Italy too, the bail system is used so rarely that it is practically non-existent.

61. In some countries where bail remains a major part of policy, steps have been taken to ease the burden on the poor. A striking example is the entirely new approach made in New York (USA) through the Manhattan Bail Project. The practical difficulty faced by the courts is that they do not know whom they can trust to be released without bail. In this respect, the Vera Foundation has therefore provided for qualified staff to make a rapid investigation concerning each arrested individual so as to recommend to the court the release without bail of those deemed reliable. This fact-finding service made available to the courts consists of checking in a matter of hours on the previous criminal record of the accused, and on his social background, including residential stability, employment and family neighbourhood contacts. The default rate of those released on their own recognizance, without bail, has been less than 0.7 per cent. It has thus been proved by this experiment which has been carried out over several years that bail can in fact be dispensed with in the majority of those cases for which it has been formerly used.31/

62. Apart from the pre-trial experiences, the accused yet has to face the trauma of trial. Here again, the indigent and underprivileged accused faces the problem of obtaining competent legal counsel and of finding the means to sustain an adequate defence. In many countries, these problems have been partially resolved through legal provisions establishing the right of the accused to counsel, as well as through free legal assistance rendered by legal aid societies and the like.

63. As serious a problem which faces the accused lies in the disparity of sentencing procedures. In most countries there is, admittedly, a varying degree of disparity and inconsistency in the sentencing process, and this tends to engender disrespect and even contempt for the law. In spite of improvements made, the problem of inconsistent and inequitable sentencing remains, in a great number of countries, a vexatious one.32/

31/ For further details see: Bail in the United States 1964, op cit., pp. 59-68 and 70-73.

32/ See for example: "Legislative sentencing in Tasmania", by Stanley W. Johnston, Tasmania University Law Review, Vol. 1(6), 1963, pp. 769-796.

64. It has been observed that the contributions of psychology, psychiatry and the behavioural sciences have helped in the evolution of the law, but that the crisis of "social adequacy of criminal law measures in modern times" has not been overcome in any of the major penal systems.33/ The legitimate limits of penal sanctions and the question of preserving and protecting basic human rights in the criminal law have been discussed at a United Nations seminar in 1960.34/ Public opinion has always been alarmed at obvious extremes in severity and leniency, particularly when these extremes have their origin in racial, religious or other social prejudices. In the context of the prevention of recidivism, it is the general psychological problem of inequality in criminal sentencing that is relevant here as a possibly serious criminogenic factor. The research conducted so far suggests that national analysis of this inequality is of great importance in curbing anomalies and introducing improved policy.

65. In a study conducted in Philadelphia (U.S.A.), for example, the influence of legal as well as non-legal factors such as community attitudes was analysed. Disparities were found to be most apparent in respect to offences of medium gravity. Bias in the sentencing process in regard to minority groups received close attention, and the fact that not all individuals or categories within such groups appeared to have been equally subjected to biased treatment shows the great complexity of judicial attitudes.35/

66. Again, in Israel, significant differences in sentencing policy were found to exist in the attitudes of individual judges towards the deterrent, reformative and preventive purposes of punishment and in regard to offences against property as opposed to offences against the person.36/

33/ Katja Vodopivec, "Kriminoloski pogledi na izbor in odmerjanje kazenskih sankcij", Zbornik Znanstvenih Razprav, Vol. XXXI. (Published by the Faculty of Law of the University of Ljubljana). English summary, p. 195.

34/ Seminar on the role of substantive criminal law in the protection of human rights and legitimate limits of penal sanctions, Tokyo, 10-24 May 1960 (ST/TAO/HR.7); see especially paras. 23 and 28.

35/ Judicial attitudes in sentencing, a study of the factors underlying the sentencing practice of the criminal court of Philadelphia, by Ed. Green. Cambridge Studies in Criminology, Vol. XV. London, Macmillan, 1961. See also: Sentencing in magistrates' courts, a study in variations of policy, by Roger Hood. Library of Criminology, No. 6, London, Stevens, 1962.

36/ Sentencing policy of criminal courts in Israel, by Shlomo Shoham (chapter from doctor's thesis submitted in 1958 to the Hebrew University, Jerusalem).

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67. In an entirely different culture, very real differences were found in Northern Rhodesia (now Zambia) in the sentencing practices of the urban native courts. There was a marked preference for prison sentences in some regions and for fines in others, but in general the courts penalized quite heavily purely technical offences as being directed against State authority while personal assaults were rather regarded as private quarrels of little concern to criminal law.37/

68. The need to modernize a rigid and outdated sentencing system and to fit the sentence to the needs of the offender is widely recognized. In the United States, as far as federal law is concerned, greater flexibility concerning maximum terms has been made possible through legislation enacted in 1958. It might also be mentioned in this respect that a Model Sentencing Act prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency (1963) provides, in the case of non-dangerous offenders, for sentences not exceeding five years, including prison and parole time.

69. In a great number of cases, the handicap of the poor continues even after conviction, particularly when the alternative is either paying a fine which he cannot afford or spending a corresponding number of days in prison. It is increasingly being questioned whether imprisonment in such cases is justifiable at all.

70. Greater consistency in sentencing policy with a view to avoiding gross inequality and its criminogenic influence on the offender can be achieved through organized consultation and by written guidance. Thus, in the United States and Canada, sentencing conferences between judges and other authorities involved in the correctional process have made in recent years an important contribution to promoting mutual awareness of the responsibilities incumbent upon each authority in handling the offender. In the United Kingdom and Australia38/, it has been recommended that judges be provided with guides to sentencing. The British Home Office has issued a handbook on the treatment of offenders "to help courts in selecting the right sentence by providing comprehensive information about the various forms of treatment available to them, and what is involved in each".39/

71. In some European and Latin American countries, the "supervisory judge" or juge de l'application des peines is entrusted with the follow-up in penal institutions of the sentences pronounced by the local court, and with the power to decide on conditional release. This practice tends to ensure a better awareness of correctional problems by the members of the judiciary and their active involvement in the enforcement phase.

72. Reform in the administration of justice is an urgent and compelling task in most jurisdictions. The initiative for such reform can best, it would seem, come from the judiciary itself, not only because of its daily and intimate concern with the interpretation and application of the law, but also because of the position of high prestige it occupies. Such reform requires, however, the concerted efforts of all institutions, agencies and personnel concerned with the common goal of protecting society through the prevention of criminality.

37/ Criminal cases in the native urban courts, by W. Clifford, Lusaka, Northern Rhodesia, Government printer, 1960, pp. 23-25.

38/ "Legislative sentencing in Tasmania", by Stanley W. Johnston, op.cit., p. 785.

39/ The sentence of the Court, Her Majesty's Stationery Office, London, April 1964 (an enlarged edition is in preparation).