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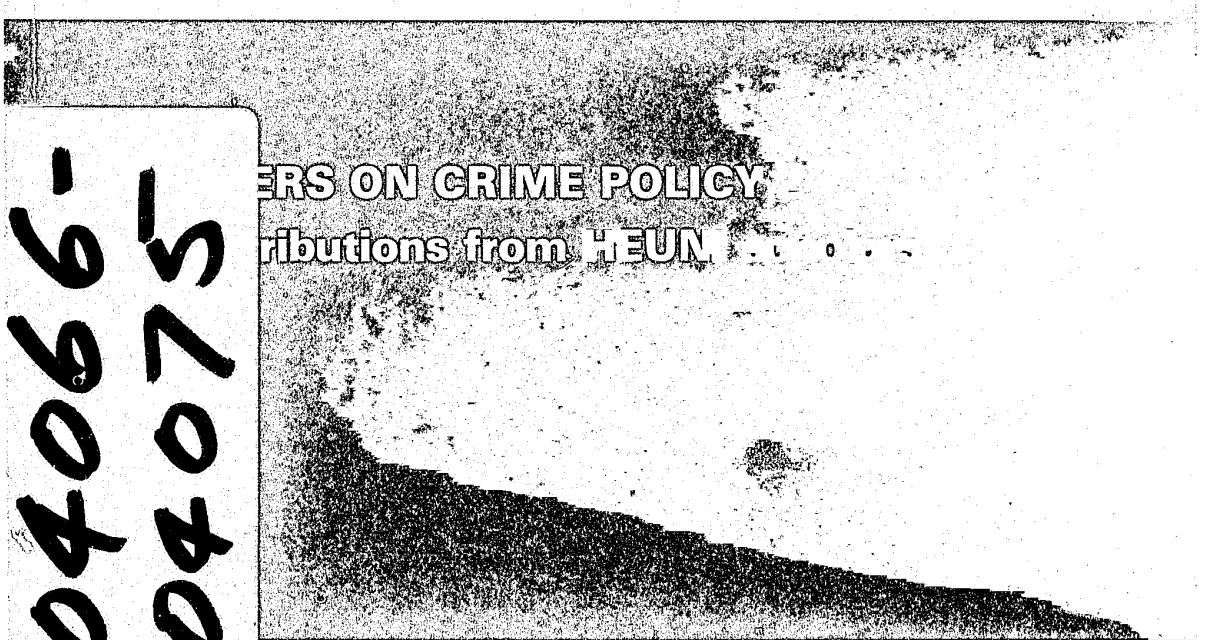

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FOREWORD

Each year, the Helsinki Institute invites selected practitioners and scholars to come to the Institute for brief periods in order to pursue their own studies and to attend various seminars and meetings scheduled simultaneously with their visits.

These visits have been mutually rewarding in many respects. The scholars have been provided with a unique opportunity to meet colleagues from many countries in Europe and to gain new insights in their own interests. At the same time, the scholars have without exception provided new depth to the discussions at the seminars and meetings, and thus enrichened the proceedings.

The present publication adds a new dimension to the contribution of these HEUNI scholars to the exchange of information on crime prevention and control in Europe. Each scholar was asked to contribute one article on a subject of his or her own choosing. The results are impressive: the articles deal with a broad range of topical issues.

The volume was edited by Mr. Panu Minkkinen.

As Director of the Helsinki Institute, it is a special privilege to present these articles to the international audience of experts in crime prevention and control.

Helsinki, 3 October 1986

Inkeri Anttila
Director

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PROFESSIONAL REGULATION AS PART OF THE ACTUS REUS OR MENS REA IN HUNGARIAN CRIMINAL LAW

1. Introduction

In the development of Hungarian criminal law, offences against life and bodily integrity committed through the violation of professional regulations may be classified fundamentally into two theoretical categories. During the last century, criminal offences committed through the violation of professional regulations were taken into consideration on the basis of general provisions (concerning homicide and bodily injury).

In later legal development, special legislations were created for the judgment of these offences. The most significant change taking place during this evolutionary process was that the examination of professional negligence became part of the examination of the **actus reus** instead of **mens rea.**

Behind the violation of professional regulations, of course, there are professional regulations themselves. This is why the above title could be given to this paper, namely professional regulation as part of the **actus reus** or **mens rea** in Hungarian criminal law. The first part of this paper shall deal with the relevant parts of the Criminal Code of Hungary from the last century. The second part shall deal with the

modern trends of legal development and theories related to them.

2. Professional Regulation as Part of **Mens Rea**

The first Hungarian Criminal Code (Act V of 1878) was characterized by a conception according to which the violation of a professional regulation raised the degree of negligence. In European criminal law at the time, a distinction was made between gross and slight negligence (**culpa lata** and **culpa levis**). The slightest degree of negligence, i.e. **culpa levissima** had earlier disappeared from the criminal codes. The advanced state of Hungarian criminal law at the time is borne out of the fact that the establishment of the degree of culpability was almost exclusively entrusted to the judge. It was solely professional negligence that was qualified by legislation as grave **culpa.**

Thus, with the exception of professional negligence, legislators deviated from the earlier practice of enumerating the case of negligence qualifying as grave **culpa.** It was recognized that it was not possible to draw up the dividing lines between the various degrees of negligence through the use of general and abstract criteria. At the time of framing the Hungarian Criminal Code, the individual side of **culpa** came to the fore, i.e. the recognition that the degree of the probability of the outcome, the possibility to foresee the result depends on the personal circumstances of the perpetrator. This implies that the degree of negligence depends on the individual perpetrator's capability of realization. For that reason, the gravity and degree of negligence was established by the judge according to the particular circumstances of the case and individual conditions of the perpetrator.

Professional negligence was an exception, since it was qualified by the legislation as grave **culpa.** However, the reason for this also had its roots in the personal circum-

stances of the perpetrator. The basis of the provision concerning the exception was the realization according to which the personal circumstances of perpetrators may be typified. The situation resulting typically in injuries, the perpetrator's ability to foresee what may happen is predetermined by his position and personal qualifications and, accordingly, society expects different degrees of diligence of the different types of perpetrator. For example, the midwife assisting in a delivery has quite different duties from those of the obstetrician, and the duties of the lay person are different again if, by chance, such a person has to assist a woman in labour.

The legislator was realistic in accepting that the violation of the requirement of knowledge (the expertise) necessary for pursuing an occupation or having a post may lead to the establishment of gross negligence. That expertise or knowledge is the same requirement for every one pursuing the same occupation, independent of personal characteristics. For lay persons it is general experience that determines the degree of care expected under criminal law. In the case of professionals, however, it is professional regulations, which, in general, prescribe special diligence. That special care is of a higher degree than the one to be expected on the basis of general experience.

Professional regulations not only create the obligation of displaying special care but their knowledge also provides the capability to do so. And this means that raising the requirements of care in itself is not to be equated with putting a more severe liability on the person practising an occupation. Criminal law requires average care only: of lay persons, it requires the care that the average person is able to display on the basis of general experience of life, while the practitioner of an occupation is required to display the average care he is able to display on the basis of the professional regulations. The care required on the basis of professional regulations does not represent extraordinary requirements for the practitioner of the occupation. It would mean extraordinary requirements, however, for

lay persons if the care prescribed by professional regulations were required of them.

Among offences committed through negligence against life and bodily integrity, the Code had provisions concerning homicide by negligence and bodily injury by negligence. Both offences carried more severe punishment if the death or bodily injury was a result of the perpetrator's lack of skill in his occupation or profession or the consequence of negligence or the violation of professional regulations. This was the case of professional negligence, which, as soon as it appeared, raised certain questions. The possible answer to these questions determined the development of the views concerning professional negligence. One of the points was that professional negligence carried a heavier punishment than common negligence, although the basis of punishment for both cases was the violation of the duty to display care. The question was raised, whether the legislative position that considered the negligence of a practitioner of an occupation graver from the very outset than that of a layman, was just. The other one was related to the fact that applying the graver consequences for professional negligence may be just only in the case of the perpetrator who may be expected to know the professional regulation. The definition of that group of perpetrator, i.e. determining who can demonstrate professional negligence, required the judicial interpretation of the law.

Soon after the Code was issued, attacks against the attitudes expressed in it appeared in the legal literature. It was pointed out that it was the extent of the expected diligence that was different in the case of common negligence and professional negligence, and it did not mean a difference affecting **mens rea** by necessity. The professional regulation is significant only to the extent that it changes the dividing line between negligence and chance through the expansion of the realm of negligence and, by that, it implies that what is only chance in the case of a layman may be negligence in the case of a professional. Thus, it is only the spheres of obligation that are different, but not

the degree of culpability. The professional's responsibility is increased since he may be called to account for his negligence when a layman would not be liable. All this, however, does not necessarily mean that his culpability should be considered automatically to be higher than the common degree.

Thus, according to the correct evaluation, the distinction between common and professional negligence is significant not from the point of view of grading negligence, but from the point of view of its coming into existence. Common experience imposes a lesser duty of circumspection than special expertise does, but the lesser duty does not mean the person having it is in a priviledged position. He may display gross negligence the same way as it is impossible to exclude the perpetrator's slight negligence in the case of his failure to display special or increased care.

These views eventually lead to the amendment of the Criminal Code. The difference between the punishments carried by common and professional negligence were evened out (Act X of 1928). However, public opinion continued to maintain for a long time that negligence on the part of a practitioner of an occupation is more serious and condemnable. Even more, this belief gives grounds for the view according to which recklessness as compared to negligence is a graver form of carelessness. It is, in general, special expertise, or special training that renders the perpetrator able to foresee what the layman is not able to. However, acting in spite of foreseeing the consequences (i.e. risking the outcome) does not increase negligence by necessity. On the contrary, it may involve circumspection and consideration.

At any rate, professional negligence ceased to be **culpa lata**, and the legislative decision in question expressed the significance of **mens rea** even more fully. **Mens rea** means the effectuation of subjective responsibility. Any solution where the legislator reserves the evaluation of the gravity of culpability for himself and does not give the judge a

free hand to do so is contrary to that. **Mens rea** is not separable from the particular perpetrator's person.

Only the types of perpetrator that have the preconditions of displaying special care can be called to account for professional negligence. If special knowledge and on its basis increased diligence is demanded by the courts of types of perpetrator lacking the necessary preconditions it is essentially strict liability that is effectuated. The violation of professional regulations may be considered as a breach of duty of care only in the case of perpetrators who could be expected to know the professional regulations. Judicial practice had to decide on the criteria for deciding what types of perpetrator were bound by the standard of care laid out in the professional regulations.

There was no doubt that knowledge of professional regulations could be expected of a perpetrator who was engaged in the activity in question as his occupation and for his livelihood. However, beyond that line, the question had a special emphasis already at the early period when professional negligence meant not only that the perpetrator's duty of diligence was determined by the professional regulations but also that his negligence entailed more severe punishment. Understandably, there was a trend at the time which sought all possible limitations on the circle of those in respect of whom professional negligence could be brought up. Judicial practice even tried to give a narrower interpretation of the concepts of "profession" and "earning occupation" and applied the provisions concerning professional negligence to occupations requiring higher theoretical studies. For example, the judicial practice did not consider the negligence of the miller, the wagon driver, the carpenter or masonry worker to be professional negligence.

As a consequence of that interpretation of law, negligence related to the practice of an occupation did not qualify by necessity as professional negligence carrying heavier punishment. It was, of course, beyond doubt that when the masonry worker performing his job broke the safety regula-

tions of his work and thereby caused an accident, he was practicing his occupation and it could be expected of him that he would observe the regulations of his work. In other words, his duty of diligence was guided by the relevant professional regulations. Because he violated these, he was guilty of a breach of the duty of diligence. The regulations of labour safety (accident prevention) in general, i.e. in the case of any occupation, were not considered to require higher theoretical qualifications. For this reason their violation on part of a person bound by them was considered as common negligence and not professional negligence carrying heavier punishment.

With the evening out of the punishment carried by common negligence and professional negligence respectively, the duality that could only cause problems and hinder the formation of uniform judicial practice was justifiably eliminated. "Duality" is used here in the sense that the standard of duty of diligence was raised to the level of the prescriptions of the professional regulations for a broad circle of perpetrator. Their negligence, however, in order to avoid the imposition of a heavier sentence was qualified as "common" negligence. After the duality was eliminated the "professional negligence" term meant mainly that the duty of diligence of the perpetrator was adjusted to special safety regulations. In the framework of professional negligence the violation of special safety regulations was laid to the perpetrator's account as a breach of the obligation of diligence.

Thus, in the process of the examination of negligence, the court first had to decide whether the perpetrator should have displayed the diligence to be expected on the basis of common experience or whether his duty of diligence was heavier than that. The duty was increased first of all if the perpetrator practised his occupation when committing the offence. The violation of the regulations of any occupation was considered by the court as a breach of the duty of diligence if the perpetrator practised the activity as a profession. If practise of the occupation was subject to

professional qualifications or the possesion of a licence, it was not a precondition that the perpetrator engaged in this occupation had these qualifications or such a licence. According to the opinion of the courts, if the occupation of the perpetrator had been regular or specialized, this in itself would have made his responsibility and duty of diligence heavier.

In addition to the cases where the perpetrator could be considered to have practised an occupation, the courts inferred the breach of the duty of diligence from a violation of special safety regulations if this was appropriate in view of the social reality, i.e. if the knowledge of the special regulations and the special diligence prescribed by the regulations could be expected of the type of perpetrator in question. The social reality of such an expectation would have been lacking if, for example, the perpetrator was a layman, or the circumspection could be ensured only by extended practice and the perpetrator was new to the field.

The breach of the duty of diligence that could be inferred from the violation of professional regulations is only the objective element or condition of negligence. Negligence can originate only from the failure of performing a duty, namely the duty of displaying proper diligence. The court must always be very circumspect in examining what degree of diligence a person in the perpetrator's position should have displayed as his duty. The degree and extent of the due diligence depends on the personal circumstances of the perpetrator: his age, education, expertise, experience, etc. and on the circumstances of the particular case. The determination of the duty of diligence could be made more easier for the judge if safety regulations itemized in separate norms prescribed the care to be displayed in the given situation. However, this makes the determination of the duty simple only if the offence had been committed by a person who even in general would be bound by these norms. This was the situation when the perpetrator violated the regulations of his profession. In that case it was clear that the perpetrator also violated his duty of diligence.

3. Professional Regulation as Part of **Actus Reus**

The actual requirements of criminal policy after 1945 determined the increase of criminal responsibility as the aim for a number of spheres. In the sphere of offences against life, protection against the dangers of technology justified the increase of criminal liability. The legislation satisfied this demand by taking out of the statutory definition of negligent manslaughter and negligent bodily injury the cases where the outcome was due to a violation of professional regulations. A new criminal offence was created in order to punish this type of offence, namely endangerment in the course of practising an occupation (Act XLVIII of 1948).

The new offence determined the violation of professional regulations as **actus reus.** Thus, professional endangerment could be committed by a person who caused the outcome specified by the statutory definition through the violation of the regulations of his profession. Certain cases of professional endangerment carried more severe punishment than negligent manslaughter and bodily injury. The punishment, in fact, was more severe than the earlier punishment that had been prescribed for professional negligence, as **culpa lata.**

The increased responsibility was expressed also by the way the legislator formulated certain elements of the statutory definition of the offence. First, the legislator "brought forward" the punishment, i.e. prescribed punishment for the violation of professional regulations even if no injury was caused but a direct danger to the life, bodily integrity or health of others was created.

The other element of the definition of the offence to be mentioned here is **mens rea.** In the case of professional endangerment, intent was also given a role. In a definition of an offence where the violation of professional regulations is **actus reus,** the violation may also be committed intentionally. It is another question, whether or not the intent also embraces the causation of the outcome. As distinct from the general offence of result (where the harmful

result is a necessary constituting element of the act), professional endangerment could be committed both negligently and intentionally depending on whether the perpetrator violated the professional regulations by negligence or intentionally. Naturally, the intent could not extend beyond the causation of the direct danger since the intent that also embraced the harmful result of the conduct transferred the act into the realm of intentional homicide or bodily injury.

The third issue to be mentioned in connection with the elements of the definition of the offence is the issue of the possible perpetrators. Clearly, it entailed grave consequences for the perpetrator if he was called to account for professional endangerment and not for negligent manslaughter or bodily injury. The issue of who can be the perpetrator of professional endangerment is the most sensitive issue in the application of law even today. For this reason it will be discussed in connection with an examination of the law in force at present. However, before that, the most significant changes that have taken place in the period before the promulgation of the present Code should be pointed out.

The Criminal Code of 1961 introduced new regulation in respect of some issues of **mens rea** in connection with professional endangerment. Thus, the new definition of the offence did not attribute any significance to the circumstance of whether the violation of the professional regulations was by intention or by negligence. The possibility of establishing an intentional offence, thus, was limited to a narrow field, more precisely to the case where the perpetrator intentionally caused the direct danger. It is an important feature in the development of law that while the punishment carried by professional endangerment was made even more severe by the Code of 1961, the present Code (Act IV of 1978) has stopped, and in fact even turned, the trend. In the Code in force the legislator prescribes approximatively the same punishment for professional endangerment and manslaughter by negligence and bodily injury by negligence, and these sanctions are less severe than the earlier ones.

The main sphere of application of the provisions of professional endangerment was in the realm of traffic violations up to 1971. However, at that time traffic violations were separated from professional endangerment, and separate offences were defined for these types of act (Law-decree No. 28 of 1971).

The fact that up to the enactment of the present Criminal Code traffic violations were judged as professional endangerment shows that the perpetrator of the offence need not be a practitioner of an occupation. Traffic regulations are professional regulations only for professional drivers, and yet the traffic violations of nonprofessional drivers were judged as professional endangerment. The separation of traffic violations did not simplify judicial practice in respect of the determination of who could be the perpetrator of the offence of professional endangerment.

The core of the problem is to be found in the reasons leading to the definition of the offence of endangerment, namely that the legislator wanted to establish stronger protection of criminal law against the dangers of the technology of civilization. The norms of administrative law that relate to various sources of danger or include safety regulations for the use of dangerous instruments are aimed at preventing technological dangers. Such dangers appear in everyday life and the regulations concerning them penetrate also into the private sphere of human life. In view of all this, the legislator could choose between two solutions concerning the question of what the object of the increased protection by criminal law should be, or, correspondingly, who should bear the increased criminal liability.

The first possibility was to follow the earlier practice, i.e. that criminal law should attach more severe consequences to the violation of the regulations of a profession. The other was to turn criminal law against behaviour violating safety regulations in general, independent of whether the perpetrator practiced his profession or not, and whether

he could be familiar with the special safety regulations or not.

The provisions of the Code of 1961 did not allow any doubt about the acceptance of the first solution. Professional endangerment, according to the Code, was committed by a person who violated the regulations of his own profession. However, the legislator made concessions toward the second solution in two spheres. The Code provided that for the application of the provision concerning professional endangerment, traffic regulations relevant for driving motor vehicles and the regulations concerning the use and handling of firearms should be considered as professional regulations. This meant that the regulations of vehicle driving and handling firearms burdened everyone from the point of view of criminal liability as professional regulations. Thus, conduct violating these regulations always entailed stricter criminal liability. Independent of the personal circumstances of the perpetrator, the violation of the regulation was judged as professional endangerment and not as manslaughter or bodily injury through negligence.

From the point of view of negligence the two exceptions meant that the duty of diligence of any type of perpetrator was raised to the level of observing the special regulations. The question is whether or not this violated the principle of **mens rea**. The answer is negative, since special activities were involved in both cases: both vehicle driving and firearm handling are subject to qualifications and licence. If someone drives a car or handles a gun without qualifications, this very fact in itself is proof of such gross carelessness as to justify the increased severity of criminal law.

Since 1971, owing to an express legislative act, only the regulations on the use and handling of firearms qualify as professional regulations for any type of offender. As far as the regulations on other sources of danger are concerned, the condition for applying the provisions of professional endangerment is that the perpetrator's violation of safety

regulations should be a violation of the regulations of his own profession, i.e. the violation should take place in the course of practising one's profession. For the establishment of that fact, judicial practice first took into consideration the aspects of having been considered also in earlier law in connection with the offences of result in general. That time the courts had to decide whether or not an act violating a safety regulation constitutes a breach of the duty of diligence on the part of the perpetrator. The decisive factor in the final analysis was whether or not familiarity with the regulation in question could be expected of the perpetrator. In connection with professional endangerment, as far as the issue of **actus reus** is concerned, the court has also tried to apply the perspective of expectability. It has been held that the practice of an occupation is to be equated with the regular, not occasional, display of any activity which is subject to regulations. The violation of regulations should thus be considered as a violation of professional regulations, consequently as **actus reus**, if the activity of the perpetrator is regular and not occasional. A person engaged regularly in a type of activity can be expected to have the necessary expertise.

However, in the science of criminal law, there appeared also another idea which gradually had an influence on judicial practice. The scholars representing that idea try to expand the scope of the application of the provision of professional endangerment. According to their views, it is the broader interpretation of the provisions of law that is in accordance with the aim of the legislator, the expansion of liability. For this reason, any act should be judged on the basis of the provisions of professional endangerment if it can be established that the perpetrator's conduct violated special safety regulations. If there are professional safety regulations for the particular activity in existence, the person causing the harmful result should be liable under the provisions on professional endangerment. If the regulations have not been followed, **actus reus** may be established, independent of the personal circumstances of the perpetra-

tor, and independent of whether he has been practicing his own occupation, whether he could be familiar with the regulations or whether the regulations have been otherwise binding on him.

However, the **actus reus** included in the definition of the offence is not simply conduct violating the safety regulations but a violation of regulations committed in the course of practicing the profession. The broad interpretation discussed here expanded the scope of professional regulations as far as the persons bound by it are concerned. Thus, anyone engaged in an activity which is subject to safety regulations subjects himself to these regulations. To accept this position would mean that the exception would make the rule. In other words, the principle which the legislator allowed only exceptionally and for one single sphere, namely the use of firearms, would be generally applied. But judicial practice is not uniform as far as the broad interpretation is concerned. In fact, also a narrow interpretation is known, according to which an impostor pretending to be a physician by using a forged diploma may be liable only for manslaughter or bodily injury by negligence, since he can not be subject to the regulations of the medical profession.

The broad interpretation may lead to undesirable consequences. One of them is that the sphere of applying the provisions of manslaughter and bodily injury by negligence would be extremely limited, since it is very hard to find fields where there are no special safety regulations. The other is that the broad interpretation may lead to a judicial practice contrary to the law. Such an interpretation simply neglects the undeniable fact that the legislator named the violation of professional regulations and not the violation of safety regulations as **actus reus**. In addition, the regulation may be violated only by those who are subject to it. The legislator has not authorized the expansion of the circle of persons falling within the scope of professional regulations. Also, the everyday meaning of the words requires a narrow rather than a broad interpretation. A person who is not subject to certain regulations cannot

violate them and professional regulations may be violated only by one who practices the profession in question.

The legislator could not even authorize an expansion of the scope of persons subject to professional regulations because it would have meant the violation of the principle of **mens rea**: it would have meant that a person could have been called to account because of a requirement he could not be expected to meet.

The identification of safety regulations with professional regulations in connection with **actus reus** results in the violation of the **mens rea** principle because the objective element or precondition of guilt, the breach of the duty of diligence, is lacking. The perpetrator is called to account here for the observance of a regulation which is not a regulation of his occupation. Consequently he may be expected to display the diligence demanded by it. In other words, the measure of due diligence would be the same for the professional and the lay person. The objective duty of diligence would be replaced by a demand according to which everyone is obliged to know every regulation and a person may start any activity only if he is familiar with every regulation concerning it.

According to the arguments of the adherents of the broad interpretation, a person who engages in a dangerous activity without being able to observe the prescribed special rules is negligent by that very fact. Negligence should be understood as the breach of the duty of diligence, but the argument is still unacceptable, because what it includes is, in fact, that criminal law requires the same diligence of everyone. The duty of diligence would not be limited by the personal circumstances of the perpetrator, by his social position, by his profession, etc.

After all this, the question is whether **mens rea** provides stronger guarantees in connection with the statutory definitions of general offences of result where the professional regulation is a part of **mens rea**, in comparison with the

statutory definition of professional endangerment where it is a part of **actus reus.** The answer is negative. One may add that the legislator has to be very circumspect even if the **actus reus** is described precisely. Only such conduct can be defined as **actus reus** where the punishment is not in conflict with the requirements of justness and rationality. The description of **actus reus** should be precise so that there should be no possibility for a broad interpretation that goes beyond the aims of criminal policy

Dagmar Cisařová

THE POSITION OF THE VICTIM IN CZECHOSLOVAK CRIMINAL PROCEEDINGS

The present Code of Penal Procedure provides that the aggrieved shall be given the opportunity to be an active party in penal proceedings, and that he shall be given the possibility to claim compensation for the damages he has suffered by the crime. This uncompromising exercise of compensation for damages within the framework of penal proceedings increases the efficiency of the penal punishment and is in line with the interests of society. A timely and proper judgment of the court of law in penal proceedings concerning compensation for damages contributes to the educational impact of penal proceedings and to the strengthening of legal conscience.

Under the provisions of Section 43 Paragraph 1 of the Code of Penal Procedure, the aggrieved is any person whose health has been injured by the crime or who has suffered property, moral or other damage by the crime. The provisions in Section 12 Paragraph 1 also refer to any person who has suffered damage of the above mentioned nature by the offence.

The present Czechoslovak Code of Penal Procedure does not expressly define the concept "the victim of crime", but it may be subsumed under the concept "the aggrieved". A general definition of the term "the aggrieved" is based on Czecho-

slovak historical experience and has undergone substantial changes in the course of time.

The Code of Penal Procedure (10 July 1950, No. 87/50 C.L.) defined the concept in such a way that it covered any person who had been aggrieved by the crime. He was entitled to claim compensation for damages and he had the right to submit motions at the trial or appeal session.

The procurator and presiding judge were bound to advise the aggrieved of his rights, and if he died, the rights appertaining to him passed onto his legal successor. Commentaries on the Code stated that compensation for damages was governed by provisions of the Civil Code. The provisions of the Act No. 63/1951, C.L., concerning liability for damages caused by motor vehicles might be used as well. The aggrieved had the right to be represented by an attorney (Section 53 Paragraph 1 of the Code of Penal Procedure), had access to the files (Section 66), and he had to be - in the case of proceedings where he could file his claims resulting from the crime - notified of the day of trial and appeal session (Section 141 Paragraph 3 and Section 189 Paragraph 2). He had the right to question persons examined at the trial (Section 158 Paragraph 1). The aggrieved also had the right to file an appeal against the judgment sentencing the defendant both on the grounds of the incorrectness of the part of judgment concerning claims resulting from the crime committed or because the court of law had not issued a decision concerning his claims submitted to it in time (Section 173 Paragraph 1 Point c) The aggrieved had to be advised of his right of appeal (Section 26 Paragraph 1 Point d).

As far as a later version of the Code of Penal Procedure (No. 64/1958, C.L.) is concerned, there is a rather extensive elaboration of the concept "the aggrieved". Section 7 Paragraph 10 states that the aggrieved is any person who has suffered damage by the crime if the compensation for damages

may be filed at the civil-law court, unless he is accused as an accomplice. Under Section 41 of the Code of Penal Procedure, the aggrieved had the right to move that the court, at the trial, decided on his claim for compensation for damages caused by the crime, as well as the right to submit other motions. This right did not appertain to him in penal proceedings dealing with crimes within the competence of the regional court. The organs acting in penal proceedings were bound to advise the aggrieved on his rights and give him a full opportunity to apply them. If the aggrieved had already settled his claims to compensation for damages in civil-law proceedings, the above mentioned rights did not appertain; both the obstacle of res iudicata and the obstacle of litis pendens were involved.

The Code of Penal Procedure of 1961 brought about substantial changes in the status of the aggrieved in penal proceedings as compared to the earlier legal regulations. These provisions were motivated by an effort to further extend the rights of the aggrieved. The provisions in Section 3 of the Code of Penal Procedure state that the aggrieved is a person who has suffered property damage by the crime (offence), or a person whose health was injured (regardless of property damages) and finally, a person who has suffered moral or other damage. The aggrieved is also a person who has suffered property damage but has had his claim to compensation for damages fully satisfied by the offender. Under Section 44 of the Code of Penal Procedure the rights of the aggrieved may not be exercised by a person who is prosecuted in the penal proceedings as an accomplice. In proceedings dealing with crimes within the competence of the regional court (Section 17 Paragraph 1), the court of law may determine whether the aggrieved may be present at the trial depending on the nature of the matter involved. Thus, the only obstacle for filing a claim for compensation for damages under Section 43 Paragraph 3 of the Code of Penal Procedure is the legal basis of res iudicata.

It is, therefore, obvious that the present Code of Penal Procedure gives a rather broad definition of the concept of "the aggrieved". According to the status of the aggrieved in penal proceedings, two categories can be distinguished:

a) the aggrieved who has the right to claim compensation for damages (Section 43 Paragraph 2 of the Code of Penal Procedure); and

b) the aggrieved to whom such a right does not appertain (Section 43 Paragraph 2).

The Czechoslovak Code of Penal Procedure provides for the active participation of the aggrieved in penal proceedings as a party in the case under Section 12 Paragraph 5. These rights appertain to any aggrieved, regardless of whether he is the subject of adhesive proceedings (i.e. proceedings concerned with claims for compensation for damage). An aggrieved who is the subject of adhesive proceedings exercises further rights resulting from the very substance of the mentioned proceedings. The commentary on the Code of Penal Proceedings emphasizes the following rights of the aggrieved:

a) the right to submit motions concerned with evidence (Sections 44 Paragraph 1 and 213 Paragraph 2);

b) the right to have access to files (Section 65);

c) the right to question persons who are being examined by the presiding judge or single judge (Section 215 Paragraph 1);

d) the right to attend the trial, the respective right to be notified of the day of trial at least three weeks in advance for preparation (Section 198);

e) the right to a final speech (Section 216 Paragraph 2);

f) the right to attend a public court session to hear an appeal and to be heard in the matter (Section 236); and

g) the right to be represented by an attorney (Section 50 Paragraph 1).

These provisions define the entitlements of the aggrieved as a party in penal proceedings. These rights are aimed at securing the aggrieved the possibility of properly filing his claims and to have them settled in full if he has suffered damage caused by the crime.

The aggrieved shall exercise all procedural rights in person or, as stated above, through the representation of an attorney (Sections 50 and 51).

In addition to general procedural rights appertaining to any aggrieved who has suffered any damage, the Code of Penal Procedure, in Section 43 Paragraph 2, accords the aggrieved, who is legally entitled to claim compensation for damages, the right to move that in the judgment sentencing the defendant, the court orders the defendant to compensate such damages (Section 238 Paragraph 1). The aggrieved, thus, becomes the subject of the adhesive proceedings.

The decision-making activity of the Czechoslovak courts of law is based on the Directive of the Supreme Court plenary decision of 4 July 1962, concerning interpretation of some provisions of the Code of Penal Procedure dealing with the rights and status of the aggrieved in penal proceedings and his claims to compensation for damages caused by the crime (adhesive proceedings), and also an assessment of the experience accumulated by the courts of law when imposing appropriate restrictions and obligations which are to compensate damages caused by the crime, under Section 59 Paragraph 2, put on the agenda and approved by the Supreme Court Presidium on 27 January 1962. Further judicial decisions may be applied as well in the decision-making activity of the

Czechoslovak courts of law.

In order to fully secure the rights of the aggrieved, the law provides that the prosecutor may move the court on the aggrieved's behalf, with reference to Section 43 Paragraph 3 of the Code of Penal Procedure. It is, thus, a guarantee that if the aggrieved, whatever his reasons may have been, has not exercised his rights to claim compensation for damages, the procurator as the organ for prosecution submits a respective motion on his own initiative. The entitlement of the prosecutor to submit the motion is, under Section 43 Paragraph 2, not limited in any way by the will of the aggrieved, being solely at the discretion of the prosecutor. This right, expressing the principle of the democratization of penal proceedings, varies from the principles applied in civil-law proceedings. It may be seen as the starting point of a change involving the traditional outlook upon the aggrieved and compensation for damages as a civil-law sanction resulting from the crime committed. Thereby, it opens up a way for a variety of prospective considerations in respect of securing the rights of the so-called morally aggrieved person (i.e. one who is not legally entitled to claim compensation for damages).

Judging from the point of view of victimology, the adhesive proceedings have not involved in full the possibility of assessing, in a truly individual way, the relationship of the aggrieved and the accused concerning the issue of compensation for damages. The same applies to the case of excess of justifiable self-defence, and the original offender becomes the aggrieved.

The present Czechoslovak Code of Penal Procedure can be improved in some respects. Some consideration should be given to whether the Code of Penal Procedure guarantees the rights of the aggrieved at all stages of penal proceedings. For example, if, whatever the reason may be, the suspension of penal proceedings is ordered, the rights of the aggrieved

are basically not safeguarded in any way, even though he has filed his claims to compensation for damages already in the preparatory proceedings. It would be appropriate to consider possibilities for improving the Code of Penal Procedure taking into account how other countries have tackled issues in this field.

Helena Coelho

A SOUTH EUROPEAN LOOKS AT THE SWEDISH PRISON SYSTEM (1)

Sweden - myth or reality? It has become a widespread question during the last twenty years everytime one talks about Swedish events. Sweden, the so-called welfare society, where one expects to find a fair distribution of opportunities among its members and a social organization that takes care of almost all individual problems. A society that tends to equality? A world where collective forms of aid and support replace most of the responsibilities of the individual?

The danger of making sweeping statements when referring to foreign realities is always acute. What once was heard about a single place tends to be interpreted as a picture of the whole system. Those of us who live in countries with poorly developed economies inevitably have envious eyes and dreams of riches. The "eager eyes" of the poor start easily fantasizing of "queens and palaces", even when talking about prisons.

What is the most common image of Swedish prisons among people not familiar with Nordic realities? Nice comfortable houses by a lake, where prisoners fish or canoe, have their sauna regularly, eat salmon - this "vision" is usual in the imaginations of those who live in Southern Europe.

Since prisons reflect the models of the society of which they are part, one has to look at Swedish penal institutions putting aside one's own local prejudices. Measuring Swedish realities according to foreign patterns is a common mistake.

No matter what the society, the understanding of a foreign prison system and its own realities always requires some aquaintance with the social and cultural background of the country. One needs to know how people live on the other side of prison bars and be aware of the general standard of living, the meaning of life, the civic and non-civic attitudes amongst the different social classes.

When everybody has access to decent housing "outside", why should we not expect to find prisons with a good standard of accomodations? If the sauna is a widespread habit among the Swedes, why should not prisons provide it? Pea soup and pancakes is a Swedish custom on every Thursday, so why not in prisons, too? If relationships between men and women are more natural and equal compared to Southern models, why not have mixed prisons? If Swedish society has liberal and open-minded attitudes concerning sex, why not allow the inmates private visits?

This paper is not intended to describe the Swedish prison system and the institutions I have visited in detail. This has already been done in Portuguese, with reference to a Portuguese audience. The present goal is a different one. I am mainly thinking of readers with a fairly good knowledge of Nordic realities. It could be interesting for them to see a description of the main impressions one gets when coming from the South. I would mainly like to portray the atmosphere of Swedish prisons as I have sensed it.

This is not a scientific approach, but rather closer to journalism. Nevertheless, as I had been working in the prison field for some time, I knew what a prison was like in my country. This knowledge a journalist often lacks.

During my visits I have tried to keep my "Southern glasses" on. I have tried to keep in mind what is often imagined as a myth by Southern standards. I went to Sweden because I believed that some of the so-called myths were realities. Does not a myth always imply a distance?

Not only have I seen the most open environments, but I have also visited places as closed as special maximum security units. Obviously not all Swedish prisons are houses by a lake, but such prisons do exist. I think of Aspliden, an open local institution. Definitely not all the prisoners are allowed to spend their working (or studying) hours outside the institutions, but a reasonably high percentage of them are (16% of the yearly intake in 1982 began a work/study release in accordance with Section 11 of the Act of Correctional Treatment in Institutions). (2)

When the Swedish Parliament voted on this Act in 1972, the importance of handling offenders without deprivation of liberty was emphasized. When unavoidably necessary, such deprivation could be organized, keeping the inmates in close contact with society. This main principle has inspired many of the solutions provided by the prison system.

Offenders serving sentences of up to one year (about 90% of the yearly intake) are normally sent to local institutions, as close as possible to their own localities. Those serving longer sentences can also be admitted to these local institutions for the terminal phase of imprisonment. Local institutions are small (40-60 places), intended to have open and flexible régimes that enable the inmates to have an intensive contact with normal society. This policy not only facilitates the relationships between the inmates and their own social environment, but also encourages contacts with employers and all sorts of local educational facilities, social agencies and associations. Ties with normal life are thus maintained, and the disruption of social relations, ordinarily attendant upon imprisonment, is at least reduced.

The law emphasizes that prisoners do not forfeit their right to use the general social service agencies while serving their sentences. As a consequence, the prison system does not have to build up its own separate services when the use of community services is possible. These principles have multiple advantages. By releasing the system from some of the responsibilities and transferring them to the wider community, the community is led to assume its own duties towards offenders. By stimulating contact between inmates and society, imprisonment becomes less harmful and painful. Permitting the inmate himself to be responsible for certain contacts with the outside world contributes to making him a less dependent, handicapped and maladjusted being.

Work/study release is only one of the opportunities given to the inmates to be in contact with the outside world. Sojourns away from prison and family placements have also been increasingly implemented. The liberal use of a wide variety of furloughs is another important attempt to facilitate adjustment to society. (3)

The implementation of this wide range of measures of de-institutionalization provided for in the Act seems to be one of the most interesting features of the Swedish system. Coming from a country where law and realities are so often divorced, where one cannot often find many of the advanced and progressive solutions written into the law working in practice, it was surprisingly stimulating to notice how Swedish realities were sometimes beyond the law. One thing is to read the rules concerning the measures of de-institutionalization in the Act, another is to feel, to "touch" some of the realities they have given birth to. For instance, who can understand the special atmosphere of a hostel, Björka, which specializes in the care of inmates granted a sojourn away from the prison under Section 34 of the Act merely by reading that Section?

It reads as follows:

> "If it is possible to provide special assistance to an inmate who can presumably facilitate his adjustment in society by granting him a period of sojourn outside an institution, permission may be granted for him to spend the approximate period of time away from the institution for this purpose when special grounds exist".

Some 500-600 sojourns are authorized every year, which reflects a reasonably high level of implemetation. It has been mentioned that Section 34 not only applies to inmates allocated to local institutions, but also to national prisons, whether closed or open, regardless of the length of sentence. In 1982, half of the inmates who left prison on a Section 34 sojourn were serving their sentences in a closed institution.

This measure of de-institutionalization and its implementation seems to be one of the most progressive, advanced steps of the Swedish system. Obviously it reflects an open-minded vision of corrections. Alternatives to imprisonment are to be found in different ways. Openness and imagination are the keystones of this procedure. A bad conscience about locking offenders up is not enough. It is interesting to see the system itself opening its own doors.

Although the most frequent reason for granting sojourns under Section 34 is the undertaking of a special form of treatment, mainly treatment for drug or alcohol problems (this represents three-quarters of all sojourns), they may also be granted for other purposes. To undertake some form of vocational, educational or social training, which requires residence away from prison, or to perform military service, are among these purposes.

The duration of the sojourns varies considerably. It may be as short as one month or as long as one year. In 1982, in 15% of cases completing a sojourn successfully, the period was from six months to one year.

About two-thirds of all sojourns are completed successfully, and ordinarily they are followed by release on parole. Such a result can be regarded as positive and encouraging enough. Nevertheless, the need to implement more effective measures of help, support and control has been underlined. In measuring results this kind of attitude is often found in the Swedish system. Instead of the traditional placing of blame on the clientele, breakdowns lead to questions about the system's own capacities for support and control. One has to admire such a forward-looking trend of analysis. Past events are only important in terms of helping to delineate future goals. This leads to an extremely dynamic system.

The failures are mostly offenders with drug and alcohol problems with previous correctional experience. The more severe the correctional experience has been, the greater the chances of breakdown. But this knowledge has not prevented the system from offering opportunities to those who have had previous prison experience (60% of the sojourns in 1982). It is thus interesting to observe that Section 34 is by no means a measure intended for the prisoner élite. That is the most progressive aspect of this measure! Regarded as a positive solution, its use has increased by 74% over the last five years. (4)

According to Section 34 an inmate may be authorized to reside either in a therapeutic community, in a family, or in some other "sheltered" place such as a pre-release hostel. I have lived in such a hostel - Björka - for two weeks.

Björka - Birch Tree House - in Bromma, a northwestern suburb of Stockholm, is a pre-release home owned and run by a private organization, the After-Care Society of Stockholm

which, however, functions under the inspection and with the financial support of the Swedish Prison and Probation Administration. With accomodation facilities for 14 residents, Björka has a staff of four social workers, one work leader (a gardener) and two house-keepers (known as housemothers). A consultant psychologist assists the staff.

Since 1974 Björka has received both men and women, both young and old, serving the last period of their sentences there. One fundamental condition for residence at Björka is full-time employment or previously arranged studies. Another is respect for the house rules, inter alia abstinence from drugs and alcohol.

An information pamphlet about Björka is given to inmates in both national and local prisons. A good information system helps the prisoners to know all about their opportunities. I was impressed by the "tone" of this pamphlet:

> "We turn to you, who consciously want to work on your personal and social problems ..., who want to build a bridge from the closed and often rather isolated world of a correctional institution to the more free society outside. But this is at the same time a challenge and a demand; neither the residents nor the staff of Björka like window-dressing talks about treatment matters ... We do not think we - or anyone else working under penal conditions - can "treat" you more than superficially and marginally. But if you are "sick and tired" of penal institutions, you yourself can take a concrete chance to create a new start and a new way of life for yourself."

Although this statement represents Björka's philosophy, it also seems to reflect the basic principles underlying the most liberal solutions of the Swedish prison system.

I lived in Björka for two weeks as a guest. At the time I was also visiting some national closed prisons in the Stockholm area (Österåker and Hall). When I arrived at Björka, I had already been to Kumla and Hinseberg.

The residents received me well. They were interested in my work and they wanted to hear about my impressions of the prisons they had stayed at. They had all been in a national closed prison for a long period. They were also willing to talk about their own prison experiences. During those two weeks we shared a way of living - accomodation facilities, meals and free-time activities. It was easy to communicate. There were no language problems, as they could all speak English quite fluently. No other problems either, because Björka functions like a family. Everybody feels at home! The friendly and open relationships between staff and residents was moving. In my Southern mind I felt I was in "another world", the high social and economic standard of living was so obvious. Even there!

One day I went out sailing in the Stockholm archipelago with the staff and the clients. One of Björka's residents asked: "Do you also take prisoners out sailing in your country?" It was impossible not to feel grateful for such a question because of the many considerations it involves. Firstly, he was still envisioning himself as a "prisoner"; secondly, he was aware of the privileged character of the criminal justice system to which he was still tied; thirdly, he knew that even in Sweden he had been given a privileged opportunity - he was given the chance to experience a new way of living.

Staying at Björka, while studying the closed side of the Swedish prison system, was a most fruitful experience. I could "touch" the extremes of that system at the same time. Not only could I see people living both in open and closed environments, but I could also meet people in different phases of their prison life.

Björka's clients were not chosen from among the easiest prisoners. On the contrary, priority was given "to inmates who had longer sentences and/or were placed in closed institutions". (5) Some of the people had been in and out of the system for a long time, and this could be spoken about openly among them. Without "window-dressing talks", as Lennart Wäliwaara, Björka's warden, liked to say. Everybody was trying to use a clear, direct and frank way of speaking there!

I got the impression that Björka owed a lot to the very special vocation and strong personality of the warden and to the friendly dedication of those who were working there. A kind of parent figure, although not a paternalistic one. A family-like "ambience" was being offered to people who, in most cases, had never had a proper family or any identification models to follow.

Obviously Björka does not make the Swedish system, but places like it also exist and have an important role to play. How many persons with a strong sense of vocation have been lost to the prison systems which do not know how to (or don't want to) profit from their good will?

Björka does not have a monopoly over an open, non-dramatic and unhypocritical language about delinquency and its problems. I have met the same sort of language amongst most of the staff I interviewed in both open and closed institutions. They may no longer believe that they are "curing" offenders, but they are proud of <u>helping</u> them.

The majority of the prison population belongs to the less privileged, no matter what the society, and to help less privileged people and give them opportunities in order to improve their life conditions are important goals in themselves. Some of them will go on breaking the rules, but one has to accept that! Doing nothing will better nobody! Once they get deeply involved in the criminal justice system,

there are risks and difficulties in getting out. Everybody working in the field knows that. Why not say it openly, then?

An open and non-dramatic discourse does not have to be a totally permissive one. The measures of de-institutionalization represent an important set of opportunities for the inmates to make or maintain contact with the outside world. But they also imply duties. Helping also means getting clients to accept resposibility. There are rigid rules concerning this matter, and once the rules are broken, the response is strict. This is another interesting feature of the Swedish system.

Section 34 also permits family placement of an inmate. This does not mean that inmates are allowed to stay with their own families, but that, instead of being in prison, an inmate may live with a private family as a form of treatment assistamce to his drug problem. It is a rather new development in Swedish correctional work and it is only intended for drug misusers. It has, however, also been part of the general social work with drug addicts in Sweden.

In 1980 I visited the Småland Family Treatment Trust in Växjö. Their work was just beginning. The enthusiasm they were putting into their work was enormous and contagious. They told about the careful selection of families and their training. The families selected usually live in rural areas, often running small farms. "Inmates" under this régime accept sharing the families' life and work. Payment is made to the families for the placement, and the "inmates" receive pocket money. They agree to follow the family habits and to live without drugs and alcohol. If the rules are broken, they go back to prison. While listening to all these explanations, my eyes were wide open. I was completely fascinated ... realizing we were in another world!

I returned to Sweden in 1983. Although the programme was still at a developing stage, about 35 inmates were at any one time in family placement. Experience was still being gained in this field. In December 1985 I could read an article in the Council of Europe Information Bulletin, written by Norman Bishop, in which family placement was considered as a "useful substitute to the classical forms of imprisonment".

While visiting the Swedish prison system I was struck by the importance of the drug problem. So much attention seems to be focussed on it. Addiction and drug trafficking problems demand increasing efforts and energy.

Curiously enough drugs justify both the most open and the stricter attitudes. It depends on whether the treatment of drug misusers or the elimination of drug trafficking is being considered. Thus, family placement is only intended for drug misusers and most of the Section 34 sojourns are granted to a clientele with drug problems. But one also finds the use of specially tough measures against drug dealers in prison.

On the one hand, special programmes have been set up for the treatment of drug addiction, or at least to reduce drug misuse problems in prison. The Österåker project and the different kinds of drug-free units functioning in certain establishments are examples of this approach. On the other hand, the development of strict forms of control concerning use and trafficking are becoming a part of the daily prison routine. I am not only thinking of the ever increasing use of urine tests, but also other forms of control such as cell inspections and bodily searches.

At the end of 1982 certain legislative changes were introduced mainly concerning inmates sentenced for serious drug offences. Under the new wording of Section 7 Subsection 3 "A person sentenced to at least two years of imprisonment

for serious drug offences or serious drug smuggling shall be placed in a closed institution if ... it is to be feared that he is particularly liable to continue criminal activity of a particularly serious nature before his prison term is completed". And Section 6 reads: "Placement in closed institutions under Section 7 Subsection 3 shall ... be in national institutions, preferably in such institutions or wings which are specially equipped to meet high security needs."

Since 1982 some liberal measures like those provided in Sections 11 (work/study release), 14 (leisure time activities outside the institution) or 34 (sojourns away from the prison) may not be used with inmates allocated to national institutions under Section 7 Subsection 3. Leaves are very restricted for this category of prisoners, and "special consideration shall also be given as to whether the inmate has used or acted illegally with drugs within the institution or has refused to submit a urine specimen ..."

Even for prisoners in general, the 1982 legal provisions on visits, telephone calls and letters were made more restrictive. Increased possibilities were also given for bodily searches, and it became a disciplinary offence to refuse to give a urine sample when required.

Obviously all these measures were primarily intended to reduce the circulation of drugs within the prison, but with a Southern experience and background, I could not help thinking about the risks of giving such a level of attention to the problem. I do not know enough about its real dimension and gravity when compared with other European countries, but nevertheless, I wonder whether the liberal practice of the Swedish prison system could be endangered by an over-emphasis on restrictive control measures.

The Swedish system can be seen as ranging from the most open attitudes towards offenders (Section 34 is a good example)

to considerably tougher ones. Some prisons have high security levels. Yet, even "on the darkest side of the moon", one can see light! Even if Kumla does not entirely fit in with the liberal model for which Sweden is known and admired, there is also the Norrköping prison - a high security institution that I would dare call an exemplary one.

Kumla is too large a world by Swedish standards (around 200 places). Security and control are mainly based there on a highly sophisticated radar system. Another essential part of its control are the endless underground tunnels connecting the buildings. The tunnels are monitored by television. Strongly criticized as an impersonal and anonymous world, its example has been avoided. Kumla was built as the first of a proposed series of prisons, but it was decided to make the next prison in the series, Österåker, only half the size of Kumla.

By contrast, Norrköping is a small maximum security prison with a capacity of only 38 places. Security and control are mainly based on a personal knowledge and contact with the inmates. Life is organized on the basis of small inmate groups. Instead of sophisticated electronic devices, a good level of communication! Anonymity seems impossible there! The prison in composed of three "normal units" for ten inmates each and two maximum security units for four prisoners only.

When I visited Kumla, prisoners had been given notice of the visit, and they were allowed to "hide" themselves in case they did not want to be seen. Most of them did so and went into their coffee rooms, while we walked around the workshops. Prisoners do not like visits! This is a common attitude, and one always feels guilty when walking around a prison. I have always felt uncomfortable when accompanying visitors in my own country. Surprisingly enough, I have not felt the same way in most of the Swedish prisons. Not even in the high security institutions of Hall and Norrköping,

where I could spend some time talking to the inmates. Especially in Norrköping they were interested in the objectives of my work. A famous prisoner who had been involved in some terrorist action and had been on hunger strike some weeks before suggested: "Please talk about closed prisons. Everything has already been said about open prisons in Sweden." His tone was not of complaint, but of interest. In what way do the prisoners' attitudes toward visitors vary according to the level of communication reached in the prison?

The criticism presented against Kumla and the contrasting situation of Norrköping have given rise to new outlooks regarding security and control. To develop personal relationships between staff and prisoners and to achieve a good level of communication are pointed out as main objectives now.

The system seems to be proud of Norrköping. To consider such a prison as a model for maximum security is a good sign! Gone are the days in which there was a belief that "the bigger, the better". (6)

Even the special internal maximum security unit functions more smoothly at Norrköping prison. I was told it has a better climate when compared to other similar security units. Working in a more relaxed environment may have led the staff to establish a more humane level of communication.

At Norrköping prison senior management was in the hands of women. When necessary one of these women could talk to a prisoner without having any guards present. Norrköping was also the only security prison which had a woman among the prison officers working in the maximum security unit. Inevitably Norrköping seemed like a "feminine miracle"! Are women more flexible than men, more willing to accept new models and implement new ways of working?

Another interesting feature of the Swedish system is the present belief in the capacities of women as prison officers in prisons reserved for male inmates. Not only has the number of female prison officers been increasing, but their roles are not necessarily secondary ones. Women may also be placed either in open or closed institutions, even in high security prisons like Norrköping.

This new faith in the capacities of women in dealing with a more difficult and violent clientele started from the psychiatric milieu, and prisons have followed the example. It is believed that women contribute not only to softening the atmosphere and alleviating tensions between staff and clients, but also to improving the relationships among the prisoners themselves. In general, men behave less competitively and aggressively before women than in the presence of other men.

Are the relationships between men and women more natural and equal in Sweden than in the Southern Latin countries? This sort of question is generally asked when comparing these two types of societies. No matter what the real differences are, I doubt if any of the solutions based on effective equality could work out well in my own system, at present.

Some local institutions I visited were prisons of mixed sexes. I remember Båtshagen, for instance, where men and women live side by side without any special problems. (7) I observed the same during my stay in Björka. Everytime I asked about problems, the answers given made me wonder if my questions were a little ridiculous. If society is made up of men and women, why not prisons, too?

There is also the widespread tendency to place male staff in prisons for women and female prison officers in institutions for men. The placement of women as foremen in the workshops of male institutions is also increasing, as in Tidaholm prison. As an answer to my "oldfashioned" questions, a

local newspaper report on a happy marriage was also pointed out: he was an ex-prisoner, she was an ex-prison officer. But this was not referred to in the paper. Discretion and tactfulness are important concerning these matters. Does all this reflect a different mentality?

I also found another level of respect in everyone's feelings and intimacy concerning the private visit system. Special rooms are provided for the inmates to receive their own visitors regularly. What happens inside the rooms during the visits belongs to the inmates' own privacy. The prison is only interested in that the visitor doesn't endanger the institution's security and control, mainly that he/she does not bring in drugs. Therefore, private visitors are scrutinised prior to the visit and inmates may be bodily searched after the visit. It is the price you have to pay.

Again a non-hypocritical and a practical view of life makes this possible. No one ignores the fact that a prisoner, male or female, has a sexual and affective life. Why inflict the additional punishment of depriving them of it? At least one thing has been achieved. Compelled, violent acts of homosexuality have never been a problem in Swedish prisons.

We all know that the basic grade prison officers make a prison system. Not only are they the most important staff category in the numerical sense, but they also work closest to the inmates. In the Southern countries we are used to the military models of this staff category. Sweden has avoided it. Although a prison officer uniform is used, this does not give a military appearance, nor are prison officers trained to work as a para-military force. One does not breath a military atmosphere in Swedish prisons, not even in the closed ones. Fire arms are not allowed. If, because of some violent incident, arms seem necessary, the police have to be called in - an intelligent policy that makes the "bad guys" always come from the outside. I regard this demilitarization of a prison system as a positive policy. I

believe it improves the communication level between the staff and inmates, making it more humane and personal. But it also implies an organization based on small groups of people, which would be more difficult to achieve in an overcrowded system like ours.

Shall I be criticized for describing some kind of unrealistic Swedish paradise? It was not my aim to depict the Swedish prisons as perfect and having no problems. It is impossible to forget the words of a woman I met at Hinseberg. Knowing that I was coming from a country of poor resources, she told me: "How I envy the women in your prisons. At least they have essential problems to complain about." This reminds me of Ingmar Bergman's films. No one else has been able to describe in such a perfect and poetic way the problems of those who have no essential causes to fight for. Through his films I started to be interested in Sweden. Portrayed as a country of silence, cold and a high rate of suicide, one forgets, or ignores, that it is also a country where the nights are "white" in the summer, a country where many people have a profound and intimate relationship with Nature.

But Sweden is not only the world of Bergman, not only the cold pessimism of Stig Dagerman or the almost schizophrenic lucidity of Strindberg; it is also the world of Selma Lagerlöf. Although I am not Nils Holgersson, I have travelled on a "wonderful trip" through the Swedish prison system. Even Strindberg at the end of "The Ghosts' Sonata" wrote a song which says: "I saw the Sun." Even he, for whom life was a world of madness and delusion, has hoped for the Light of a better life to come.

NOTES

(1) Both in 1980 and in 1983 I was awarded a one-month fellowship by the Council of Europe which enabled me to be in contact with the Swedish National Prison and Probation Administration. In 1980 I mainly studied the Swedish system of sanctions in general together with open prisons and homes or services dealing with the enforcement of the measures of de-institutionalization. In 1983 I tried to understand the "other side" of that system, in order to comprehend it as a whole and to be able to "weigh its extremes". As a result of these fellowships I have written the following reports available only in Portuguese: "The Swedish System of Sanctions" (1981), "Open Prisons in Sweden" (1981) and "High Security Institutions and Units in Sweden - The Closed Side of an Open System" (1984).

(2) Section 11 of the Act reads as follows: "In order to facilitate his adjustment in society, an inmate of a local institution may be permitted to work, to study, or to participate in vocational training or other specially arranged activities outside the institution during working hours. Special efforts are to be made at such institutions to promote these activities." Nearly 14 000 sentenced persons were received into prison in 1982. Of these 70% were sentenced to imprisonment for 4 months or less and 8% to over a year.

(3) In the budgetary year of 1982/1983, no less than 41 945 furloughs were granted!

(4) The data concerning Section 34 was taken from "Measures of De-Institutionalization", an informal paper prepared by the Swedish Prison and Probation Administration at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 1980, revised in

1983, and from Norman Bishop: "Etudes sur les détenus toxicomanes en Suède" in Bulletin d'Information Pénitentiaire No 6, Conseil de L'Europe, Décembre 1985.

(5) These words are from the Björka pamphlet.

(6) Nevertheless, one has to consider that Norrköping is a very expensive prison to run in terms of daily cost per inmate - about twice as expensive as Kumla.

(7) The newly built local institutions have separate sleeping accomodations for women prisoners, but daily activities are shared both by male and female inmates. National prisons, however, are single sex prisons as far as inmates are concerned.

Bojan Dekleva

COMMUNITY POLITICS - BETWEEN INSTITUTIONALIZATION AND INFORMAL MOVEMENTS

1. Introduction

During the years 1978-1983 I was a new collaborator at the Institute of Criminology, engaged in action research (1) concerning community models of treatment and prevention of juvenile deviance. As a psychologist I was but little trained to think about deviant phenomena in sociological and legal terms. The notions of integrity, informality and engagement, on which our work in the community was based, appealed to my own critical reaction to my rather technological professional education. Over the last eight years the perception of the present, its perspectives and the evaluation of the reality of social utopias have changed considerably also in my country. And as it frequently happens, we, too, first acted and only then reflected upon our actions. Only now do we ask ourselves more comprehensively and more systematically, what we wanted to do, how we did it, what was really happening, and what influences have our actions had on society.

2. What Were We Doing?

We have completed two research projects. The first (greatly influenced by the American street-work models) related to the development of the forms of work with naturally formed juvenile delinquent groups (in liberty). The second, using the slogan of prevention, gave an account of our development of different forms of youth activities in the territorial-political context of local communities. In addition to researchers, numerous practitioners (mostly from social service agencies), youth organization activists and volunteer workers from the narrower and wider community (students of social sciences in particular) participated in both research works. Our work was based on different (and implicit) assumptions. They included anti- and de-institutionalization (stressing the importance of informal networks, work with lay volunteers, the work of professionals outside institutions, the inclusion of non-professional agencies), a certain psychologistic optimism (a faith in man's positiveness, taking as a starting point his motivations and activities marked in informal and freely chosen groups), and even a certain degree of under-dog romanticizing of deviants (seeing in the representatives of the delinquent youth who were contacted the symptoms and activists of protesting youth groups at the margins of society). We were not only burdened by the aforementioned elements of personal ideologies, but also by the awareness of the need for a social applicability and usefulness of our results. We assumed that our findings could be best applied in the field of social welfare and social work where the greatest part of our collaborators came from.

The range and mandate of our research was in fact quite modest. We didn't have much money, and the number of researchers and delinquent youngsters was small. Our research efforts were not commissioned by the agencies of criminal policy and were not conceived as, let's say, experiments preparing the introduction of some new formal elements of

criminal and social policy. Even so, the situation in Slovenia resembles the descriptions Scandinavian authors (2) give in writing about criminology and criminologists in small states (3): the inseparability of the personal influence from the formal research publication influence, and greater possibilities for the influence of committed professionals in small circles of action and decision-making bodies.

Let me say something about the social context of our research. Over the last twenty years, for different reasons, no great increase in known or judicially processed criminality has been registered in Slovenia. As the most economically developed Republic, Slovenia also receives a great part of the migratory labour force from the Southern Republics; the rate of unemployment is, however, low. Over the last twenty years a strong network of social-pedagogic and counselling institutions has been developed. This might be the reason why the number of juvenile delinquents in the residential institutions has been constantly decreasing during the last two decades.

Our research was thus not a reflection of a certain actual aggravation of the problem of deviance or of the hardening of criminal policy, but a slightly delayed reaction to social liberalization, democratization, and an orientation to consumer welfare slowly developing after the year 1965. In the course of the research we, nevertheless, started to feel the pressures of the emerging economic and political crisis and to experience the long wave of "moral panics" in the mass media relating to the youth. This wave foretold of the emergence of a social consciousness of the youth crisis, the politicization of the youth, and its more evident appearance in socio-political life. These phenomena made the researchers think more about youth in the time of crisis in general than about the traditional delinquent youth.

3. What Have We Achieved?

What kept us working day after day was the simple awareness that within the frame of local communities we could establish contacts and work with the delinquent youth (criminal offenders) and that they were willing to cooperate. Besides, a number of volunteer laymen and professionals helped us with our work. Thus, we jointly tried to organize youth clubs, street-work, exhibitions, cultural holiday meetings, the shooting of films, etc. Our assumptions have, nevertheless, in many respects proved illusory: although having introduced some more structured forms of interpersonal (counselling) help, we should not have expected to be able to change the lifestyle, perspectives, and motivations of the children in question only by working with them in their spare time. It was equally illusory to expect some structural changes (enabling a further development of the models) in the institutions of social care and others only on the basis of demonstrating possible results achieved by such non-institutional youth work.

We have, however, succeeded in making a diagnosis of the social life in the local community. We noted the fear of the youth (not only delinquent) shown through the restoration of paternalistic relations and the striving for a constant classification and differentiation of the youth into the bad and the good. We recorded the fear displayed by political structures (in particular, the local political structures) of any assembling of people other than the so-called "legitimate" ones, and of the so-called "infiltration" of forces alien to our society, which, in turn, caused the fear of relevant institutions about possible political implications of their work.

Unlike these rather negative attitudes of the institutionalized and political factors, individual citizens, as a rule, showed a great commitment, which pleasantly surprised us. They were prepared to support us and to participate in

the restoration of local life, namely, in the establishment of links among people and in giving a content to life in the community. The local population did not, however, feel strong enough to deal with the issues of street-crime (in our case youth vandalism and unrest, violation of public order and peace). It lacked an agent that would take care of the people's fears, that would consider them, take relevant actions and work with the youth. In a way, our field researchers met their expectations. At the end of our research it was more our half-formal role of mediator, link and advocate in the community than a youth-treating or institution-changing role that we considered to be the success of our work. Sometimes a community worker was able to restore the dialogue between the (deviant) youth and the older community population which had ceased due to a reciprocal fear leading to a reciprocal conflict strategy. Feeling insecure, the people from the community constantly turned to the institutions of social control for the restoration of order, while the young applied their informal strength: illegal and petty destructive vandalism, provocation, theft. Many times our interventions broke this vicious circle of conflicting strategies.

The aforementioned wider social obstacles and limitations have, nevertheless, prevented the institutionalization of the tested forms of our work. Today they are, however, being experimented with in a similar way by many social workers. In my realistic-optimistic evaluation of the aims and importance of our work, I have stated (4) that the search for new models for professionals and practitioners can mean an attempt to understand the nature and the consequences of their work more deeply and more comprehensively. As for my pessimistic evaluation, such a search might, on the other hand, also quickly assume the nature of "opium for the intellectuals" since it limits the depth and width of their search.

4. Community Orientations

The dilemma about the possible achievements of community work (the main subject of our research) has aroused my interest in the similar dilemmas in world literature. (5) The notions of community and the different ways of its application (such as -corrections, -work, -care, -measures, -programmes, -treatment, etc.) have become widely used, the development of the community representing a specific boom industry. Through overuse, the notion of community orientation has become very unclear. It is not defined and has almost no limits. It can mean everything or nothing, and many times it displays an almost metaphysical connotation. Its contradictory meaning is shown in its use in politics as well as in the evaluations of the defenders or practitioners of community orientations. Hoghughi, for instance, sees one of its contradictions in the fact that "these movements which preach many forms of radical liberalization ... in reality have antiliberal and authoritative consequences". (6)

There are two characteristics in the relevant literature that show the professional and political ambiguity, the seductiveness and the attractiveness of the notion. The first relates to the fact that the members of the opposite political groups in defending the "community-like" use almost the same arguments, but accuse one another of unjust and wrong interpretation of the fundamental elements of the orientation and/or see contradictory effects and intentions in the same proposed measures and policies. The second relates to the fact that often the most radical critics of the implementations of community orientations reached so far are also the most fervent defenders of community orientations and expect much of it.

The rhetoric of community orientation and a change in policy, actions, and institutions has in Western countries become more and more present since 1960. Typical fields in

which community orietation first started to penetrate were psychology, pedagogy and others.

Different authors substantiate differently the conditions of the appearance and assertion of the community ideology in practice. They are most concrete in discussing the unsuccesful experiences of the war against crime and the efficiency of institutions, social systems and professional doctrines of pre- and post-reaction to deviance. In their opinion a second practical problem, connected to the first, is the hypertrophied growth of social welfare resulting in an ever growing financial burden and causing the fiscal crisis of the welfare state. The community model orientation should make possible a cheaper and relevant professional orientations based policy, which could relieve big centralized systems of the residential treatment of deviants of different types. The third, a more general and less concrete problem, would be the legitimacy crisis of the modern capitalist state producing an ever growing number of unsatisfied, superfluous, marginalized and dependent people, not being able to offer acceptable visions of development. The legitimacy crisis, the crisis of repressive treatment in particular, along with the fiscal crisis and lesser possibilities and perspectives in the general socio-economic crisis of the 1970s and 1980s, should point to an urgent need for a search for new models of reaction to deviance and ensure a successful, cheap, and humane social reaction to crime (and other forms of deviance).

The development of the kinds of pressures described above was accompanied with a respective development of ideas and orientations in criminology. After the Second World War criminological functionalism and positivism made possible the development of treatment orientations and the "rehabilitative model" directing the search for social responses to criminal acts, substantiated not only by punitive retribution, but also by the positive promises relating to reform and resocialization. Although community orientations were

partly developed alongside the critique of the medical model, the treatment orientation thrust the way to the vision of the possible reform of deviants and methods of work with people.

In the 1970s this perspective was replaced by interactionism. This decade brought about a number of themes, including the critique of the pathological conception of criminology, pointing at the criminogenic role of the institutions of social control, calling for a search for alternatives, a stressing of subjective, existential and phenomenological aspects of interpersonal processes through which a specific under-dog romanticism was developing. Simultaneously with the emergence of the New Left and especially in the years of the emergence of critical and radical Marxist criminology, the conflict perspective developed in criminology. It encouraged the search for (class) interest differences as to the intentions, aims and effects of criminal policies, and influenced the work of practitioners and policy planners. All these changes were taking place at the time of and in connection with the youth movements of the sixties and seventies. These developed their own own protest potentials, alternative services, and conceptions of social liberation.

In the field of criminal policy all these characteristics have generated a number of ideas and slogans. Their practical implementation and/or conceptual integrity varied. So, in the context of community orientation, notions such as diversion, prevention, community mobilization, decarceration, and deinstitutionalization have emerged. The term "diversion" most evidently relates to the criminal justice system. Denoting non-intervention or an intervention in non-repressive institutions, it implies the systematic or unsystematic role of the community. The term "decarceration" represents one of the more frequent elements of the notion of community treatment, i.e. the shift from residential to non-residential treatment, in smaller institutions closer to the community, etc. The term "prevention" is the

least defined. It refers to various activities and sometimes also has a metaphysical and mythical connotation. On the one hand, "prevention" means everything that is done in reaction to deviance, while as a self-assertion it is taken as a guarantee of the good intentions of the agent. On the other hand (in the meaning of intersectoral coordination and planning), it represents a completely new idea whose usefulness has not yet been completely tested. In the majority of its variants, however, it expresses the idea of human activities, carried out not only by the institutionalized professionals, but also by laymen finding themselves on the territory of their domicile or work, i.e. forming a community. The concept of the "mobilization of the community", for instance, implies a greater participation of each individual in the solving of conflicts that might cause deviance, or in treating a deviant person.

If the concepts of diversion and, for instance, the tendency towards smaller, more locally based institutions mostly remain in the domain of professional doctrines, reasons, and assertions, then the mobilization of the community, social prevention and similar forms take the field of action more decisively from the (traditional) profession giving (or returning) it to the community. In addition to the relatively unreal idea of non-intervention, the most radical thesis relating to the denial of the role to the traditional profession is the thesis of informal collective justice, the informal solving of conflicts which should, to a greater or lesser extent, escape a centralized state criminal justice system.

The ideas of community orientation can thus embrace the smallest adjustments of old professional and political frames as well as radical verifications and rearrangements of the relationships between traditional social systems, subjects and institutions.

5. Problems, Dilemmas and Critique of Community Orientations

A severe critique against the utopian implications and actual application of community oriented policies first appeared in the mid-seventies. The most pronounced attack was directed at the promised three advantages, i.e. to the cheapness, the efficiency and the more humane approach of the new forms of intervention. Regarding the cheapness, two most important lines of critique have been formed. The first argues that the eventual small costs of the activities and expenditures of one institution or sub-system actually result either in an unexpected increase in another sub-system or in the creation of an additional sub-system for the treatment of deviance. The second states that the reduction in costs is, in many instances, caused either by their shift from some central sources to the individual private person or by an ignoring of, or a lessened concern for, the people and their problems.

There is a very small number of comprehensive and well-argumented evaluations of community oriented interventions. The same is true also about traditional intervention. Although representing one of the most complex, many-layered and socially committed fields, such evaluations have been the subject-matter of only a small number of research works. According to the critique, the greater efficiency that has been promised has either never been fulfilled or serves only as a cover for old practices and hybrids of the old and new practices and rhetoric.

Similar arguments have also been used in connection with the critique of the more humane approach of community intervention. According to the traditional legalistic critique of community models, the diffusion and broadening of discretion might cause a neglect of justice, equality or the fitness of punishment to crime.

All this critique and all these analyses have, however, a common denominator which refers to the fact that new ideas and attempts have, as a rule, almost always forgotten the complex and unpredictable side-effects of new policies and /or the existence of self-regulating homeostatical feedback effects of a reform generating unpredictable consequences. In our case these consequences were simply denoted the "net-widening and mash thining" effect. (7)

A more comprehensive explanation (or description) speaks of the historical succession of the development of control strategies. Following the tradition of Foucault's analysis, Cohen and Mellosi thus compare recent developmental trends of control with the economic and political characteristics of capitalist states. In his notes on the punitive city, (8) Cohen says that community control represents the central field of the transformations of social control. The reverse trend of desegregation, decentralization and blurring the boundaries between the punitive and the non-punitive generates a more intense penetration of a better masked social control into social life, leisure and family. Mellosi (9) places community orientation into the context of the fiscal and legitimacy crisis of the state after the Second World War, into the context of new capital strategies and changed needs for decarcerization are accompanied by an increase of medicalization and policing, the creation of ghettos as a special phenomenon, and orientations toward new authoritative régimes and right wing populism.

For the majority of the critics of the application of community orientation, the crisis also represents a potential crossroad of future forms of social control and/or domination. As a new pattern of legitimacy, community control has to reckon with the reaction of the public and individuals. A capitalist state in crisis also needs methods of reconciliation and dialogue through which it can communicate with the working class and/or disadvantaged classes (10) constituting and reproducing its power. Discussing this issue

individual authors wonder how long the strategy of power and discipline will last. (11) Taking into account the necessary reciprocity and interdependence of man's acting in implementing control relationships, some authors also see a fundamental ambiguity in community control and suggest solutions such as to take the community rhetoric seriously. Discussing the need for a conceptual separation of different actual models of community control, a third group of authors, in the context of a constant dynamics of state cooptation of original community activities, distinguish between those representing the state and those representing a qualitatively higher, more advanced and more acceptable model of community self-organization.

6. Perspectives of the Community and Activism

Having asserted the heterogenous, contradictory and ambivalent nature of the community, we ask ourselves what a community is, and how it is conceived by individual authors. An interpretation of the community must at least implicitly explain the relationship between the individual, the society and the state. A symptomatic feature of the community defined as a "limbo of the imaginary identifications" is the fact that the discussions about it started at the time it was considered dead.

The term "community" has strong emotional connotations. The most simplistic concept as "we all" and/or its "existence as such" eliminates all differences and borders. Hence the notion becomes analytically inapplicable but politically and ideologically very suitable. Such a conception has granted the term "community orientation" the attractive and redemptive connotation. According to the pronouncer of the word, the fundamental implicit idea of the term "community" is certain compatibility, unification of all interests, general and particular, the person pronouncing it being the sole

legitimate bearer of such general interests and actions related to it.

A somewhat different view (or a variant of the aforementioned view) identifies community with its political and professionally specialized institutions. If, according to the first view, all that is needed is that the legitimate subject (of the "we-talk") only asserts the common interest, then the second depends on the question whether the above mentioned institutions with satisfaction execute the entrusted tasks foreseen on the basis of the participation of individuals in the community and in the institutionalized work.

A conflict perspective of the community does not, however, see in it a common interest, but a splitting of interests. As to it, a community (just as a society) differs from the state, its (real) interest being something potentially different from the state and from the fundamental socio-economic mechanisms forming the state. This potentially liberating subject of the community raises the question of its definition and description, its appearance and assertion, and of how (from the activist's point of view) it can be mobilized, organized and developed. Defining the conception of this subject, material successes of its actions in particular, shows whether a certain community represents a potential for emancipation or whether it is only an instrument or medium of oppressive forces.

This essentially political issue also determines fundamental views of the community and the possibilities of its policies and activism. Let us first consider three conceptual variants which do not foresee antagonistic social conflicts:

- as to the totalitarian view, the community already fully participates in the realization of common interests, and its subject is already most properly organized in the socio-political (one-party) system. Special community subjects or

programmes are not needed and do not need to be opposed to the state.

- as to individualistic liberalism, the community programmes represent only one of the rational answers to community problems, but no relevant policy has, in fact, been applied so far. It advocates the search for the most relevant solutions, the participation and cooperation of community members with competent institutions.

- as to "radical normativism", which at the beginning of our research was in many ways characteristic for my way of thinking, "the revolution has already passed" and a very radical vision (self-management) has already been declaratively and normatively established. In relation to macro-society (the political system and norms), it is still to be completely realized in the realms of micro-society (family, leisure, morals, etc.).

The second group of views assumes that there are (antagonistic) contradictions and a liberation struggle in society, and that the community might be the source of a revolutionary and progressive subject. In this group the variations of opinions are generated by different conceptions of the nature of these contradictions, of the "progressive" and "reactionary" subject, of the struggle and the conception of the relationship between the tactics and strategy of this fight:

- the theory stating that a full realization and fulfilment of human wishes and interests will be possible only in a liberated society; a free and domination-relieved community shifts the fulfilment of needs into the future, into a post-revolutionary, post-transformational and post-liberation time. According to this view a lessening of problems within the community, due to a more relaxed experiencing of social conflicts, might even postpone the revolutionary transforma tion. According to this theory the short-term needs are

subjected to the long-term ones.

- the theory of the community as a dialectically contradictory process and the possibility of evolution sees in the community and its activism a means for the development of society. According to this view the social transformation and the solving of problems are not postponed; activities relating to a possible restruction of the relationships of social power may be carried out for the time being. The representatives of this theory either believe that short-term needs cannot (ethically) be subjected to the long-term ones, or they develop a strategy of oppositional political activity. Nevertheless, they may also be of the opinion that a sensible state social (or other) policy should give consideration to the interests of the citizens and/or to the opposite sides of the decision-making process. This wide spectrum of ideas (on the conception of the degree and nature of conflict situations in society) points to the existence of informal solutions to conflict situations and/or of semiformal, non-centralized institutions stemming from class-oriented positions acting in the field of informal justice and presenting "prefigurative" announcements of the institutions-to-be . (12)

- a variation of the aforementioned sub-groups is the conception which sees in wide social movements the emergence of a new social subject, effectuation of a new social consciousness, articulation of interests not shaped on the basis of a class or a party, and therefore going beyond the limits of classical parliamentary democracies. Similar theoretically oriented conceptions talk about the civil society as a possible democratic opposition in socialist states.

A majority of the aforementioned variants of community orientation exceed the narrower, "technical" purpose of the suppression of crime and refer mostly to its legitimizational aspect, considering deviance in a broader context of

social goals and justice. An element pointing to this widening of perspective and its consequences is the legalistic criticism which sees, in the diffusion of conceptions and practices of the community orientation advocates, above all a danger to the criminal jurisdiction and its centuries-long tradition and achievements. Justice exerted by the criminal jurisdiction and the treatment of deviants is, however, only a part of the global social, economic, political and other forms of justice, which in turn also limit it. The treatment of the community in connection with deviants thus also opens these broader issues. As a territorially limited unit, the community itself proves to be also quite limited by the conditions of its practical application as well as by the social, ideological, economic and political conceptual mediation. As we have already said before, the community is discussed at a time when it does not exist in its classical form any more. The allocation of material goods, mediation of state agencies, mass-media ideologic indoctrination and other phenomena reconstruct the community in a different way. In such circumstances the possibilities of community development are greatly limited by the effects of different macro-social processes and state intervention.

7. Concluding Remarks

The modesty of the concluding remarks is probably due to a general (ecologic, political, economic) uncertainty about the future of mankind, to a strengthening of conservative and right-wing populist tendencies, a corresponding drought of utopias in the field of criminology, and a general unpretentiousness of the positive visions of future social developments.

A strong dependence of living conditions and community contents (as well as other micro environments) on global social characteristics and conditions calls for parallel actions at

micro- and macro-levels. And if the micro-level means a responding to the problems of concrete people, then macro-level signifies the development of sensible policies enabling the solving of the problems of concrete people. This, in social reaction to deviance, means a limitation of (criminal law) repression and the protection of the achievements of the legalistic model. In line with such minimalism of criminal jurisdiction, a search for other ways of solving conflicts among people should be established. These other ways should tend to eliminate the subordination of people to either hypertrophic state interventions or other locally vigilant group interventions.

A great part of interpersonal conflict-resolutions concern the framework of local community. However, it should not be developed only as a reaction to crime or the fear of crime, since basing organization only on this might quickly generate the emergence of dominating subjects who under the guise of protection against crime (or other common interests) organize the community in their own way. The community should, above all, represent a frame for the socialization of people into citizens who can associate, articulate their broader social interests, and develop mechanisms of peaceful dialogue, confrontations, and the solving of conflicting interests. It is another (open) question, whether today's developmental trends strive for the establishment of such mechanisms, and what should be done in order to achieve them.

The essential possibilities of the community are in its "unfinishedness", its contradictory nature, and the part of interpersonal group relationships which escapes institutionalization, different formal forms of incapacitation and canalization. Although a wise policy can be developed and exercised only within an institutionalized framework, the non-institutionalized part of the community (or the public) remains a guarantee for a constant control, correction and resistance to the monopolistic and dominating policies.

Potentials of the community in this process of "unfinishedness" lie in the pre-figurative institutions, the social movements, the permanent struggle for avoiding co-optation, and the possibilities for reflecting relations between the so-called general and particular interests.

NOTES

(1) By action research we understood research in which the researcher, participating actively and trying to change the reality, comes to know its structural and dynamic features, contradictions and developmental perspectives. Our research often took into consideration the work of Kurt Levin and G.A. Gilli.

(2) For instance Törnudd, Patrik: "A more sombre mood". International Annals of Criminology, 23, 1985, p. 67-82.

(3) Slovenia, the most northern Republic of Yugoslavia, has less than 2 million inhabitants.

(4) Dekleva, Bojan et al: Preprečevanje odklonskosti mladine v krajevnih skupnostih (The Prevention of Juvenile Deviance in Local Communities), Inštitut za kriminologijo, Ljubljana 1985.

(5) Because of the language and other barriers, I have mainly used Anglo-Saxon sources and material from international congresses.

(6) Hoghughi, M.: The Delinquent, Burnett Books, London 1983.

(7) Cohen, S.: "Notes on the Dispersal of Social Control". Contemporary Crises, 3, 1979, p. 339-364.

(8) Cohen, op. cit.

(9) Melossi, D.: "Strategies of Social Control in Capitalism: A Comment on Recent Work". Contemporary Crises, 4, 1980, p. 381-402.

(10) Bolgar, S. et al: Towards Socialist Welfare Work, Macmillan, London 1981.

(11) Mellosi, op. cit.

(12) Cain, M.: "Beyond Informal Justice". Contemporary Crises, 9, 1985, p. 335-374.

Ákos Farkas

ALCOHOLISM, CRIME AND CRIMINAL POLICY IN THE HUNGARIAN PEOPLE'S REPUBLIC

1. Introduction

In Hungary during the past years, in research on disorders of the functions of society, a special emphasis has been laid on the examination of the social causes and consequences of crime and alcoholism and their prevention. In this short article I will deal with this complex problem from the point of view of criminal law and criminal policy. It is necessary, however, to begin by considering the problem of alcoholism.

2. Who Is Considered to Be an Alcohol Addict?

Because they have different fields of research, the various sciences dealing with alcoholism define the notion of alcoholism in a different way. Medical sciences consider their task as the search for the biological aspects of alcoholism, sociology as the search for the social aspects of alcoholism. Law, utilizing the results of the above mentioned sciences, plays an important role in creating the objective and institutional conditions of treatment, determining the criteria and specifying the circle of persons being subject-

ed to the treatment of alcoholics and working out the voluntary and coercive modes of treatment.

Since 1960 the notion of an alcohol addict worked out by E.M. Jellinek, the famous American physician of Hungarian origin, has been generally applied in Hungarian medicine. According to this notion, also accepted by the World Health Organization (WHO), an alcohol addict is someone who drinks regularly and excessively, becomes dependent on alcohol, and whose somatical and physical health and social relations will sooner or later be undermined by the consumption of alcohol.

Since the mid-sixties this notion has in Hungary been supplemented with an emphasis on the damages caused by the alcohol addict to his family, his place of work, the economy, and so on.

The central element of the medical definition is the almost irreversible disfunction of the human organism. In this approach the social consequences, as a rule, fall into the background. These aspects are examined in detail by sociology. In Hungarian sociological literature two separate notions of the alcohol addict can be found. (1)

According to the first, an alcoholic is a person to whom excessive drinking causes serious problems in life. These problems can be manifested in his deteriorating state of health or in financial difficulties and loss of social status.

According to the second, the so-called "qualification theory", a person who is qualified by his milieu and the various authorized administrative and public health organs as an alcohol addict is considered to be an alcoholic. It can be seen that the alcohol addict is a person who, in both somatical and social respects, is nearly an "invalid". It also means that it is very difficult and sometimes almost impos-

sible to change this state of alcoholism. Treatment, in social, medical and financial respects, is expensive. The definition of an alcohol addict first appeared under Section 35 Paragraph 1 of the Health Act of 1972. According to this provision, "whoever regularly and excessively drinks and hence through his behaviour endangers his family, the development of his underaged children, the security of the neighbourhood, or repeatedly and seriously endangers public order and discipline at work, is an alcohol addict."

This definition leads to a paradoxical situation. If somebody does not meet the requirement, he is not yet considered to be an alcohol addict, while someone who does can rarely be saved in social and medical respects. In this way the law itself becomes one of the factors in the reproduction of alcohol addicts.

In the past years the validity of this definition has been questioned. The possibility of creating a more effective treatment system and the spreading of the prevention theory require a new definition of alcohol addiction. The utility of social and medical intervention at the earliest possible stage cannot be denied.

This has been reflected in a changing medical attitude during the past years. Its result can be seen in the International Classification of Patients edited by the WHO. As an alcoholic it also considers a person who, on account of drinking, has health problems and problems in adaptation.

3. On the Proportion of Alcohol Addicts and the Cause of Alcoholism in Hungary

There is no exact data on alcohol addicts, but rough estimates are available. This estimate, obtained with the help

of the Jellinek formula, is based on data on persons who have died of cirrhosis of the liver. (2)

Using these findings, the number of alcohol addicts in Hungary in 1984 was 422 640 (100 080 female, 322 560 male). This means that nearly 3.9 % of Hungary's population (altogether 10 658 000 persons) is addicted to alcohol.

This data, based on an estimate, shows that from 1974 to 1984 the number of alcohol addicts has increased more than twofold. (3) The reason for this is not only the increase in the number of addicts, but also a more reliable and exact diagnosis of alcohol cirrhosis. The number of endangered persons, to whom alcohol drinking causes problems in life and who are close to becoming alcohol addicts, is higher (about 500 000) than the number of alcohol addicts. On the basis of sociological research, (4) it can be said that alcoholism in Hungary is primarily due to the following causes:

1) In the behavioural patterns of all strata of the Hungarian society, norms and values can be found that favour the spread of alcoholism. In order to reduce the tensions of everyday life (e.g. in getting together, seeking love, etc.), people often offer drinks to one another, and even more so, it is often almost compulsory to drink alcohol in large quantities.

2) In the past forty years radical economic, social and political changes have taken place in Hungary. The pressure of adaption accompanying these changes produced the erosion of norms and values contributing to the increase of deviance such as alcoholism and crime. In this sense they are the by-products and costs of social progress, proving that results condemned by society may originate from socially rewarded and normalized values.

3) Besides the tensions caused by political, economic and social changes, another significant factor in deviance originating from disorders is socialization (e.g. desintegrating families, etc.). According to the statistical data for 1984, 23 699 persons (29.4 %) of the 80 645 socially endangered underaged were children of alcohol addicted parents.

4. Alcohol and Crime

Alcohol plays an important role in crime. Excessive drinking unleashes internal inhibitions, stimulates emotions. All these may damage the life of families, neighbours and labour collectives. The the degeneration of the personality by excessive drinking, together with the weakening effect in moral norms as a result of the changed personality, and the impulse coming from the immediate social milieu create possibilities for committing crimes.

The statistical data of the past shows that the number of known offences has increased considerably (1974: 111 825; 1980: 130 470; 1983: 151 505; 1985: 165 816). The number of offenders is also increasing, although not at the same rate (1974: 69 517; 1980: 72 880; 1983: 83 324).

Out of the number of offenders between 1974 and 1983, the number of those who had committed offences related to alcohol consumption ranged from 17 000 to 20 000 persons. Their percentage varied from 22.2 to 27.5 %. Out of the number of offenders finally sentenced, the number and percentage of offences related to alcohol consumption had also increased (1974: 23 648 and 33.5 %; 1980: 22 139 and 37.0 %; 1983: 25 235 and 38.2 %).

Among young persons finally sentenced for publicly prosecuted offences, the number of those who had been sentenced for offences committed in connection with alcohol consump-

tion was 1/5 of the total. (In 1974, the total number of young offenders was 5 725. Out of these, 1 003 or 17,5 % were sentenced on account of offences committed in connection with alcohol consumption. The corresponding figures for 1980 were 4 613, 1 001, and 21.7 %; and for 1983, 5 855, 1 280 and 21.8 %.) At the same time, the percentage of adult offenders sentenced for the above mentioned crimes was nearly 40 % (the respective figures for 1974 were: 64 909, 22 645 and 34.9 %; for 1980, 55 300, 21 130, and 38.2 %; and for 1983, 60 282, 23 955, 39.7 %).

The difference between the proportion of young and adult offenders was mainly caused by the high proportion of adults sentenced for drunken driving. If we exclude this crime from the examination, the proportion of sentenced adults decreases. This proves that the structure of traditional crime is already determined in connection with juvenile delinquency.

The proportion of males among adult offenders is four times higher than females. The proportion of offences committed in connection with alcohol consumption is highest among offences against traffic regulations (76 - 79 %) and high among offences against persons (50 %) which are mainly motivated by emotions and anger (the number of persons sentenced on account of offences against persons such as homicide and assault in 1974 was 6 746; in 1980, 5 383; and in 1983, 5 937). The proportion of the above mentioned offenders is also high among crimes against private property (in 1974, the number of offenders was 10 594, the number of offences committed in relation to alcohol consumption was 2 805, and the percentage was 27.5 %; in 1980, the respective figures were 8 866, 2 460 and 27.5 %; and in 1983, 9 869, 2 960 and 29.9 %). It is also worth mentioning that the proportion of offences against property has been increasing also out of the total of offences in Hungary (in 1974, this was 62 591, or 56 %; in 1980, 78 643 or 60.3 %; and in 1983 90 260 or 59.6 %).

If we examine the police records concerning offenders, a close relation can be found between a criminal life-style and alcohol consumption. Among the offenders who committed offences related to alcohol consumption, the proportion of previously convicted offenders is high. Among habitual offenders this proportion is two times higher than among offenders with clean records. (5)

5. Criminal Policy and the Fight against Alcoholism

Act IV of the new Criminal Code of the Hungarian People's Republic from 1978 contains rules related to offenders who have committed crimes in connection with alcohol consumption. On the one hand, it establishes criminal responsibility, and on the other, it refers to the medical treatment of offenders who are addicted to alcohol.

As in most of the European Criminal Codes, Section 25 of the Criminal Code establishes that the responsibility of the above mentioned offender is the same as if he had committed the offence when sober, except in cases of pathological drunkenness which are judged according to mental deficiency under Section 24. The Criminal Code assumes the standpoint of objective resposibility only in one case. Instead of examining the guilt of the offender (intent or negligence) under Sections 13, 14 and 15, the objective characteristics of the offence form the basis of establishing criminal liability. Since Act V of the former Criminal Code from 1961, Hungarian criminal law has considered the treatment of alcohol addicted offenders as its duty. In order to achieve this, the compulsory detoxification treatment of alcohol addicted offenders has been enacted among the measures (this was due to, among other reasons, the worldwide recognition of alcoholism as an illness).

This measure was applied together with, on the one hand, deprivation of liberty or, on the other, some other punishment, e.g. together with reprieved deprivation of liberty, fines or a court admonition. In the first case a medical treatment known as the "aversion cure" was applied two months before serving the non-reprieved deprivation of liberty. According to the second possibility, the aversion cure was applied at out-patient clinics for a required time or in a mental institute lasting for no more than two months. Due to its character, this treatment system had a low level of effectiveness. Since the sixties, a complex treatment system has been applied in the treatment of alcohol addicts in several European countries (with psycho-, socio- and labour therapy).

On the basis of the favourable experiences of this kind of treatment, it semed advisable to change the rules of the Criminal Code related to alcohol addicts. Its timeliness was shown in that the neighbouring countries enacted rules creating the possibilities for complex treatment in their Criminal Codes (e.g. in 1960 in the Criminal Code of the RSFSR, in 1968 in the Criminal Codes of Bulgaria and Poland and in 1974 in the Criminal Code of Austria).

The enactment of Law Decree 10 in 1974 was a decisive argument in favour of amendment. This law decree made the compulsory treatment of alcohol addicts possible, on the basis of a civil court judgment, in an institute for work therapy on the initiative of relatives, the place of employment, etc. At present there is only one institute for work therapy of this sort in southern Hungary, in Nagyfa, near the town of Szegeb.

Persons transferred to the institute do agricultural and, to a lesser degree, industrial work. Besides this they participate in psychotherapic and sociotherapic treatment. The treatment may last for no less than one year and no more than two years.

This form of treatment was partly accepted among the measures of the new Criminal Code. Two forms of treatment can be found in the Criminal Code. One may be ordered together with the deprivation of liberty, the other independently.

According to Section 75, "compulsory detoxification of an alcohol addict may be ordered when the offence is in connection with habitual and intemperate alcohol consumption and the offender is sentenced to non-reprieved deprivation of liberty for a sentence of more than six months". According to Section 76, "instead of sentencing to deprivation of liberty for six months or less, and when the offence is connected to habitual alcohol consumption and the conditions for treatment in an institute as an independent measure are present, the offender may be ordered to submit himself to treatment in an institute for work therapy". Treatment in the institute may last for no longer than two years.

It is worth noting that such orders have appeared in criminal law only during the past twenty five years. For example under the influence of reform efforts in criminal law, marked by the names of Liszt and van Hammel, Section 35 of the Swiss Draft Criminal Code of 1903 contained such rules. According to this section a habitual drunkard sentenced to imprisonment for no more than one year can, on the grounds of a medical advisory opinion, be sent to an institute for drunkards. The court would decide on the question of release when the sentenced person could be declared recovered. The treatment could not take more than two years.

The compulsory detoxification of alcohol addicted offenders under Section 75 of the Hungarian Penal Code is executed during the first period of imprisonment. Its duration is no less than six months and no more than a year. Treatment under Section 76 takes place in the above mentioned institute in Nagyfa. This means that the persons who are ordered to submit to treatment by civil or criminal courts are treated together.

As this form of treatment is a serious restriction of liberty, it may only be ordered on well grounded proof. This is required in Law Decree 41 from 1982 regulating the conditions of ordering treatment by civil or criminal courts. This decree replaced Law Decree 10 from 1974.

As the facts of alcoholism have to be proved in detail, this meets with difficulties in many cases. Hence the order of treatment is limited to cases where the connection between the alcoholism of the offender and the offence is closest. In practice this means offences committed by the offender in order to get alcohol or under the influence of alcohol. This measure is rarely ordered in the case of offences which were committed by an offender whose personality has changed and deformed through alcohol addiction (in this case the connection between alcoholism and the offence is indirect).

It can also be pointed out that courts do not pay enough attention to the disclosure of the offender's alcoholism. This can be attributed to the fact that in court practice compulsory detoxification of alcohol addicted offenders is rarely ordered. For example, in 1983 this was ordered in 103 cases which, compared with the large number of offenders having committed offences related to alcohol consumption, seems an inconsiderable number. (6)

NOTES

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Lenke Fehér

THE MENTALLY ILL OFFENDER IN HUNGARIAN CRIMINAL DOCTRINE

1. Introduction

Human society is not just a simple conglomerate of values. Instead, its values form it into a systematized and relatively permanent unit. The place of certain social phenomena in the value order of a given society largely depends on the level of scientific and social development of the era as well as on the potential, actual and eventual necessity of the object of evaluation. Consequently, the evaluation of human life, the corporal and spiritual power and activities of man, also change. Among others, the borderline between the healthy and the ill, the mentally stable and the mentally deficient, also changes. The level of tolerance of the society towards the latter group alters; the modes of social reaction towards them change.

2. Social Aspects of Mental Illness

At one time during the course of history the mentally ill were considered holy persons with magic powers. At a later stage they were called witches, demonic persons, and were treated accordingly. Depending on the era and culture in which they were born, the unlucky ill persons would meet with respect or gruesome torture and a terrible death at the stake. Fortunately the development of science and society

lead to the result that the character of mental deficiencies as illness was recognized, and therapy went from the hands of the executioner to the physician. The path from the cruel methods of the sorcerer to the application of medical therapy was not straight and direct. It has not only been the mentally ill who have died at the stakes of human cruelty and stupidity, but also mentally stable men condemned to death because of vengeance, envy and hatred.

In the beginning the definition of mental illness did not create problems. Every village had at least one fool and some odd, extravagant personalities. These persons were part of the life of the community. The other members of the community were accustomed to their deviant behaviour. The extravagant persons were not considered mentally ill, and a large quantity of social tolerance appeared towards them. The "oddballs" who showed signs of serious mental illness and looked crazy were the targets of scorn and cruelty. As science - especially medical science - has developed, the symptoms of mental illness have become ever more sophisticated. Deviant behavioural forms have become ever more complex; drawing the line between normal and deviant has become more and more difficult.

Even today the concepts of healthy mental integrity and mental deviance are not easily defined. The healthy state of mind is not identical with the statistical average of normality, but it is not identical with the absence of medical types of behavioural deficiencies either. To a certain extent, illusion, hallucination, conflict, complexus, compensation, symbolism, confusion, incoherentia, phobia, negativism, fear, daydreaming, flying thoughts, etc., all exist in the normal brain as well as in the abnormal one, but there is a difference in weight and extent. (1) This means that, on a certain level, the quantitative differences produce qualitative differences that are not easy to trace. To define normality is easier than the opposite. The behaviour of those suffering from mental deficiencies is generally confused, aimless, with more or less obvious logi cal controversies deflected in their actions. Their be-

haviour is "deficient" or one-sided.

Beyond the question "why", it is also relevant to ask who considers someone else as normal. Is it the opinion of the public, the laymen or the expert that is decisive? And even further, what kind of criteria is used to create such an opinion? Three important aspects exist that should be considered in separating the sick from the healthy: the motivation, the situation and the person making the judgment. (2) The relation, the friendship between the labeler and the labelee, the difference between their cultural levels should also be important. The degree of cosmopolitan culture, societal differentiation or the influence of psychiatric professionals could also be of decisive importance. Some authors assert: "Higher social class, more education, cosmopolitan culture and female gender are all associated with a higher labelling of mental illness". (3) In modern societies the number of psychiatric illnesses is far higher than the number of factually treated persons. Its cause is obvious: treatment takes place in the context of societal and personal tolerance.

Psychiatric illness as a consequence of an organic or functional disorder of the central nervous system differs particularly from all other illnesses in that it has a societal dimension, namely the observation and evaluation of the illness takes place in the social environment of the person. However, the illness itself can be proved only in relation to the person and his personality. The process of the illness can be understood only in a system of comparison.

This is the very reason why T. Szász, a representative of the so-called anti-psychiatric movement, is wrong when he denies the characteristics of illness and deviance in psychiatric illnesses altogether. (4) Szász talks exclusively about behavioural forms because he stops at the social sphere. He argues, "The belief in mental illness, as something other than man's trouble in getting along with his fellow man, is the proper heir to the belief in demonology and witchcraft. Mental illness exists or is 'real' in

exactly the same sense in which witches existed or were 'real'." (5) The observation of mental illness actually takes place in a social-communal sphere, and therefore the illness itself could be of social origin, but the criteria of the illness is never in the social sphere, but in the biological and psychological system of the person.

Psychiatric illness appears in non-conformist behaviour that is without reason and motive in society. Taking into account the experiences, the inner life history and the situation of the person, it is incomprehensible. The ill person begins to behave in a manner which differs from his social status and socio-cultural situation, and apparently without cause. We can evaluate the behaviour of the psychotic person as deviant in the context of social determinations, but it should be evaluated as a behavioural disorder in the context of personal conflicts and personality disorders. The lack of compliance with laws, moral rules, behavioural norms or customs turns the person into a violator of norms. The basic rules of social relations and communication always modify and alter, depending on the interacting groups and the forms of interaction. We cannot follow the communication style which, being a normative system in general, is deviant.

The self-protection of society against deviance is typically a stigmatisation process, and in its course the deviant person or group is depreciated by society. Re-education, therapy, punishment, etc., occurs from the position of practicing the power of superiority. We can talk about psychiatric illnesses with reference to deviant behaviour or subjective complaints, so eventually both of them can be evaluated as psychiatric symptoms. It belongs to the community picture of the mentally ill that the behaviour of the ill person is extreme and unpredictable. He cannot rule his own acts. He is therefore confused, he cannot be controlled or influenced.

Following from the notion of the dangerousness of his behaviour (public or private dangerousness), he cannot be

punished for his acts. The mentally ill can cause societal damages in various ways and modes. Actually only a small segment of these ill persons are dangerous, and only a small part of them require hospitalization. Science, especially psychiatry, can explain the crime by way of a disorder, but it cannot do the reverse. Even more so, the fact that the offender is mentally ill does not mean that the criminal act is a result of his psychosis. On the one hand, the social background which produces criminal behaviour affects both mentally ill and healthy persons, but in a different way. On the other hand, the legal concept of non-imputability and the psychiatric concept of psychosis are not identical. If these concepts were identical, there would be no problem as to whether the person is a criminal offender or mentally ill. This is the origin of a long debate with a long history and numerous problems in criminal law. A mentally deficient person who commits a crime is either brought before the bar and punished, or his responsibility is mitigated and he is only cured. Sometimes even this cure is omitted. Furthermore, even if he is brought before the bar, the punishment can be mitigated without restriction. This is the much debated and controversial institution of limited imputability.

3. The Criminally Insane - A Legal Definition and Responsibility

Among the criteria of becoming the subject of a criminal act, the requirement of mental stability took shape rather early in Hungarian law. In the book "Criminal Law Doctrine" by Tivadar Pauler from 1872, we find the following definition:

> "The subject, the perpetrator of a crime, can only be a person who possesses sanity and liberty and is subjected to criminal jurisdiction as a person who can comprehend compulsory law regulations. Due to his outer wilfullness to consciously and spontaneous-

> ly break the rules, he will therefore be brought to responsibility by the court."
>
> "Mentally deficient persons, little children and people lacking sanity can cause injuries like animals, but these can not be accounted for as crimes. Misdemeanors or crimes cannot be committed by them although in the old times even lifeless things were considered as subjects of crimes." (7)

Even earlier the criminal law draft of 1843 already regulated the problem of imputability. It summarizes the grounds for exemption from imputability and punishment in six points in its Paragraph 73. These are: mental illness, incapability to recognize punishability due to lack of necessary sanity, mental debility and being deaf-mute when it excludes the possibility to perpetrate a crime, violence or threat, and necessity and justifiable defence. Children younger than 13 years of age were not to be punished, but they were to be "disciplined by their parents or guardians, and the competent public organ will ensure that in such a case the deserved disciplinary action is not omitted" (Paragraph 80).

Act V of 1878 (Code Csemegi) regulates in Chapter VII the reasons excluding or mitigating imputability. Among these are an unconscious state, a confused mind, the vis major, threat and justifiable defence, and necessity. With reference to the state of unconsciousness the law does not set any conditions, although some transitional situations, which are not connected to mental illness, were listed (e.g. dream, complete drunkenness, etc.). However, regarding the confused state of mind, the law presribed as a further condition for unpunishability that the perpetrator did not possess a free decision-making capability. The act cannot be accounted for as a crime if the person committed the act under the effect of irresistable duress or threats which have directly endangered the life or corporal integrity of the perpetrator or his relative, and if the danger could not have been eliminated in any other way. According to the

terms of the law, justifiable defence also excludes the punishability of a crime. However, in the case of necessity, the law uses the term "he will not be punished". Regarding the case of persons over 13 years of age but younger than 16 years and deaf-mutes (regardless of age), the problem of criminal capability should be examined. Persons under 13 years of age when committing the act cannot be brought to justice at all.

Act XLVIII of 1948 was expected to redress the most flagrant discrepancies of Act V of 1878 and to put the regulation into line with the development of criminal law and adjust it to the changed social and economic circumstances. According to its regulations a perpetrator who is 19 years of age or older and whose mental illness has excluded the imputability of the crime or misdemeanour should be kept in security custody. This measure can be omitted if the mentally ill has committed a misdemeanour for the first time and his state does not require custody. The security custody lasts for one year, and three months before the end of the term the court should examine the case again. The court may prolong the custody for one more year. This process will be repeated until the recovery of the perpetrator or until the termination of his state of public dangerousness.

Act II of 1950 withdrew from punishability all perpetrators who, due to mental illness or a confused state of mind, were unable to realize the consequences of the act that endangered society or, in accordance with such a realization, who committed the act under duress or threat if the situation of the perpetrator rendered him unable to act in accordance with his own volition. The Act also regulated the institution of security custody, but much more flexibly than the previous Act. Act II prescribes custody as an obligatory measure if, due to the mental state of the perpetrator, more criminal acts can be expected in the future. According to this Act theory had already shaped out the difference between reasons that excluded punishability and reasons which abolished punishability. The former category includes all those reasons that exclude the imputability and the

social dangerousness of the act. In the sphere of reasons excluding imputability, the chance of becoming a subject of a criminal act is excluded by early age, mental deficiency, a confused state of mind, duress and threat, whilst culpability is excluded by error (error in fact or error in social dangerousness).

Paragraph 21 of Act V of 1961 regards as an obstacle to punishability such mental illness, mental debility or a confused state of mind that has rendered the offender unable to recognize the consequences of the act, the dangerousness to society or to proceed in accordance with such a recognition. According to the Act someone who has acted under such duress or threat that has rendered him unable to act in accordance with his own volition cannot be punished either.

The Criminal Code in force, Act IV of 1978, declares that a criminal offence is an act committed wilfully or - when the law also punishes negligent commissions - through negligence, and the act endangers society and the law orders the infliction of a punishment for it. The obstacles of legal responsibility in criminal law can accordingly be classified in three categories, namely the causes excluding punishability, the causes abolishing punishability and the causes which are obstacles to the procedure.

In the case of causes excluding punishability from the point of view of doctrine, a criminal act has not taken place because:

a) the social danmgerousness of the act is excluded (due to justifiable defence or necessity) or is slight;

b) the imputability of the perpetrator is excluded (early age, mental deficiency, duress or threat whilst acting); or

c) the offender is not culpable (because he committed the act under an erroneous assumption or according to the order of his superior).

The causes abolishing punishability include pardon, prescription, the death of the offender and the termination of the social dangerousness of the act. In such cases the criminal act is completed from both a theoretical and a practical view, but the punishability ceases to exist later. Obstacles for the procedure are the lack of reporting or absence of private complaint.

According to Paragraph 24 Subsection 1 of the Criminal Code, "whoever commits an act in a state of mental deficiency, particularly in insanity, mental debility, intellectual decline, schizophrenia or personality defects that render him unable to realize the consequences of the act or to proceed in accordance with such realization, cannot be punished". The ministerial guideline of the Act emphasizes that the biological grounds excluding the capability of imputability are summarized in the collective term "mental deficiency". We perceive that mental illness generally means a permanent illness which causes grave troubles for the higher level nervous system affecting the thoughts, volition and emotion of the ill person. Mental debility is a reduced state of mental capability due to some inborn or received injury during early childhood and has resulted in a low level of intellectual, emotional and volitional conduct. Intellectual decline (dementia) is a partial or complete decline of the developed intellectual capability, final and processing, i.e. irreversible. The confusion of mind is a transitional and passing disorder. Among its causes are the disorders of the central nervous system, the consumption of toxic materials and some biological processes. The most serious type of personality defect is psychopathy which means that a personality structure leads to a behaviour completely inadequate from the view of societal expectations and typically restricts rather than excludes accountability.

The state of alcoholism directly influences imputability, the conscious and volitional processes required to become the subject of a criminal act. Depending on its grade, drunkenness causes various levels of confusion in the mind. The Hungarian Criminal Code differentiates the confusion of

mind caused by a drunken state from the rest of the confusion cases and regulates it differently. If the perpetrator has become drunk or intoxicated by his own fault, then he should be judged as if he has committed the act in his accountable state, in the state of sanity. This regulation has, first of all, criminal policy grounds. Although criminal law is not a primary measure in the struggle against alcoholism, considering the close relationship between criminality and alcoholism (in our country about a quarter of all crimes are committed in the state of drunkenness), it is reasonable to make a distinction between the drunken or intoxicated state brought about through one's own fault and other cases of mental disorders. In such cases fault as moral responsibility seems to replace dogmatically the principle of criminal culpability. In the case of atypical cases of the drunken state, pathologic and abortive pathologic drunkenness, the completeness of imputability, its limitations or absence, is a question of legal application depending on the given circumstances. The Act does not regulate it separately.

When mental deficiency is only limited, the perpetrator, in realizing the consequences of his act and in proceeding in accordance with such a realization, submits himself to a mitigated punishment without restriction (Criminal Code Paragraph 24 Subsection 2).

The essential element of imputability is the decision and the act or, to put it in another way, the capabilities of realization and volition. As it is a general feature of man to possess the capability to decide and act - which means that in committing the act dangerous to society, he generally possesses the capabilities of realization and volition - imputability is therefore assumed. In other words, we examine it only when there is a doubt about its existence.

Minors are an exception to this. The law categorically declares that they do not possess the capacity of imputability, or to put it in another way, they are not to be punished. A minor is someone who is younger than 15 years

when committing the crime.

Imputability may be absent not merely due to personal grounds (mental deficiency). Legal literature, legal practice and, naturally, the law considers threat and duress among the factors influencing the capacity of imputability. According to the reasoning in the Hungarian Criminal Code, "duress and threat are such outside causes that affect the capability of imputability. The influenced person does not behave according to his volition". Duress is physical violence which constitutes a form of physical terror. Threat should take the form of a likely disadvantage which cannot be eliminated without committing the crime. It is not an absolute requirement to cause an extraordinary state of mind, fear or panic as a result of the threat. However, it is important that the victim of the threat should take the content of the threat seriously and that he would therefore rather commit the act than provoke the disadvantage by hesitating. It is the responsibility of the judge to decide on the effect of the duress or threat which excludes or limits imputability. It does not require the contribution of a medical expert.

4. The Treatment of Mentally Ill Offenders

In the case of persons who commit crimes in a non-imputable state of mental illness, the court can apply forced treatment if the existence of certain conditions prescribed by the law are ascertained. Compared to the earlier versions of the Code, the Criminal Code of 1978 curtails the application of forced treatment only to the most dangerous crimes. The purpose of forced treatment is cure and the protection of society. The conditions of its prescription are the following:

1) the perpetration of a crime of violence or another kind of criminal act of public dangerousness;

2) a sanction of more than one year of deprivation of liberty can be imposed in case of a punishable perpetrator;

3) the perpetrator cannot be punished for committing the act due to mental illness; and

4) there is a risk of committing a similar act in the future.

For the application of forced treatment, all conditions should exist and the lack of any one condition would exclude it. Among the possible crimes are offences against the person such as attempted manslaughter, homicide, assault, violence against an official or superior, violent assault in connection with sexual perversion, hooliganism and robbery. Other acts of public dangerousness are primarily offences against public order, but depending on the case also other forms of behaviour can be brought to this sphere. In relation to the category of the committed act in case of punishability, it should be decided upon with referrence to objective criteria. Similarily, the extent of the possible punishment should be determined considering the objective criteria.

If a non-imputable and mentally ill offender cannot be punished due to a reason that excludes punishability, e.g. justifiable defence, forced treatment cannot be applied because forced treatment is not a punishment but a measure aiming at curing the ill person and avoiding future criminal acts. If the conditions of applying forced treatment are missing but the perpetrator requires medical treatment due to his mental state, the court reports this to the appropriate health authorities. The court decides on forced treatment in a trial after listening to two medical experts. The execution of the measure takes place in a special institution where the ill person should receive proper treatment in accordance with the actual level of the medical sciences with the aim of recovering his health. The deterioration of the state of the mentally ill perpetrator should be avoided.

In the institution the supervision, the hospital placement, the material and medical provisions and the social and legal protection of the patient should be secured. Also the conditions which are necessary to maintain the order of the institution must be kept. (8) The time period of the treatment is indeterminate, and treatment should be continued until the danger of the perpetration of new criminal acts ceases to exist. This should be deduced from the character of the illness and the behaviour of the patient. The necessity of prolonging forced treatment should be supervised by the court every year. The punishment of those perpetrators whose imputability is limited and who are sentenced to deprivation of liberty should be carried out in a treatment and educational group, i.e. in a separate department of the penal institution. If the sentenced person falls ill from some form of psychiatric sickness during his sentence, then he should oe relegated to the National Examination and Psychiatric Institute for treatment. The duration of the treatment should be counted in the punishment. If the state of the sentenced person requires it, the remaining part of the punishment should be carried out in the educational and treatment department. (9)

In the case of crimes committed by alcoholics the court has the right, instead of or in addition to the punishment, to order the perpetrator to compulsory detoxification from alcohol if the perpetrator continues to live in an alcoholist way and the alcoholism is connected to the perpetration of the crime. Instead of a punishment this compulsory treatment can be ordered as an independent measure when the perpetrator is to be sentenced to deprivation of liberty for six months or less. The institutional work therapy treatment takes place in the modern institute of Nagyfa, and its longest term is two years (under family law and in civil courts persons may also be ordered into this institute if they, with their habitual intemparate alcohol consumption, endanger the corporal and intellectual development of their children, the security of their environment or the public order).

In addition to punishment, compulsory detoxification in a separate department of the penal institution may be ordered if the offender is sentenced to deprivation of liberty for over six months. In both forms of compulsory detoxification of alcohol addicts it is a basic condition that there is a connection between the crime and the perpetrator's alcoholist way of life. Casual alcohol consumption cannot, however, give reason for such a measure. Furthermore it is necessary that the conditions of institutional treatment are available . (10)

5. Summary

During the last few decades public opinion about psychiatric illnesses has changed fundamentally in Hungary as it has throughout the world. The picture of the mentally ill has altered significantly in the public opinion, moreover in the positive direction. Today community behaviour is not as stigmatizing, excluding and rejecting as it was earlier. This fact has contributed a great deal also to the success of social rehabilitation. In social psychology this means that today the mentally ill do not play a contrary role, they merely fall out temporarily from their roles. (11)

Among the reasons for this positive change we can refer to the increase in an empathic inclination and to the higher level of everyday knowledge of psychology. However, the number of psychiatric illnesses increases each year along with psychiatric knowledge and the needs of society. The effectiveness of psychiatric intervention has increased and the framework of institutional care has been extended. I would like to mention just some of the facts behind this high number of ill persons. Milder cases which were not regarded as illnesses by public opinion previously appear as mental cases with the increase of health culture. The ill person did not receive medical attention. It is a natural consequence of the increase of life expectancy that the probability also of psychiatric illnesses rises. The tech-

no-industrial development, social mobility and the increase of societal expectations increase stress effects. The family, the school and other institutions traditionally qualified to develop adaptation capacities and to transfer them do not work properly.

Probably this behaviour can be traced back to identity problems and the uncertainty of self-evaluation related to these modern symptoms. The substance of psychological health is interpersonal competence; its basic requirement is identity. The modern spirit of the time has brought about a crisis of values, a confusion in evaluation, and people with a weaker personality try to compensate such problems with the consumption of alcohol, drugs and narcotics. They try to solve the problem in this way, but it brings along further damage to the personality. Among the workplace, traffic and household accidents there are a number of cases that are connected to the grave injury of the nervous system.

The behavioural trouble caused by psychiatric illnesses is deviant behaviour. Even so, it can be separated from suicide, alcoholism and criminality. Against this phenomenon there is, therefore, an active social control which involves intervention into the life of the person. However, this intervention, going beyond the interests of society, always happens in the interest of the individual and in the framework of medical crisis intervention. The declaration of illness, the treatment and the rehabilitation are described precisely in law.

In the normal case medical treatment takes place on the request of the ill person himself, voluntarily. This voluntary attitude of the ill person is often due to the proposals and advice of the family, relatives or a narrower circle of friends. The problem emerges when this voluntary attitude, i.e. the comprehension of illness and need for treatment, is missing but the actual interests of both the ill person and society require therapy due to the dangerousness to the ill person himself and society. Treatment against the will of the patient or treatment in a closed

department (security ward) naturally mean the limitation of personal liberty. Only in exceptional cases can such measures take place in a precisely regulated legal framework.

According to the Hungarian Health Act, involuntary psychiatric hospitalization can be imposed only through a tactful legal decision based upon the opinion of medical experts. In practice this generally takes place by transferring the ill person to a mental ward in the framework of crisis intervention. Based upon the opinion of a medical expert, a civil court which decides on his personal status as well regulates the legality of the patient's hospitalization. The medical expert opinion should be prepared within eight days after the transfer of the patient. In case the examinations prove that the state of the ill person does not require compulsory treatment in a closed ward, the patient should be released immediately from the hospital.

Considering the mentally ill, we can talk of a special two-sided criminal law protection. By the penalization of the infringement of personal liberty the legislator saw to it that abritrary hospitalization cannot happen illegally. Practically speaking, this is free of problems. Such cases of infrigement occur very seldom. The other aspect is the problem of criminal responsibility, the imputability of the mentally ill discussed earlier in detail. (12) The main features can be formulated as follows: one who does not possess imputability cannot be punished, i.e. the offender committed the act in such a state of mental defeciency that rendered him unable to realize the socially dangerous consequences of the act or to proceed in accordance with such a realization. The punishment may be mitigated without restriction by law in cases where mental deficiency has only limited the perpetrator in realizing the consequences of his act, i.e. his capacity of realizing and volition.

The existence of imputability is presumed, the lack of it should be proved. When the imputability of the offender is doubtful, a medical expert examination should be ordered in every case. The medical expert gives his opinion on two

issues: the mental state of the examined person and how this condition has affected the recognition and volitional capacities of the person. In case of controversial expert opinions an additional expert opinion should be obtained.

In the case of the mental illness of the perpetrator the Hungarian Criminal Code applies a mixed system: a therapeutical and a penal system creating their own institutional conditions. Simultaneously with the statement of non-imputability, the omission of the criminal procedure brings about the medical treatment of the ill person in a closed institution in a compulsory form. (13) In the case of limited imputability the sentence of deprivation of liberty should be carried out in a health ward of the penal institution as when the perpetrator becomes mentally ill during the execution of his sentence.

Accordingly the Hungarian legislature sees to it, with extraordinary caution, that the rights of the mentally ill persons should be limited only to the most necessary extent and in extraordinary cases exclusively according to their own interest and the social interest altogether for a transitional period until this necessity ceases to exist. An extensive legal regulation takes care of all necessary legal guarantees.

NOTES

(1) Lawrence Guy Brown: Social Pathology, Appleton - Century-Crofts, Inc., New York 1964, quoted by Marshall B. Clinard: Sociology of Deviant Behaviour, Holt, Rinehart and Winston Inc., 1963, p. 374.

(2) Frederich C. Redlich: The Concept of Health in Psychiatry, Exploration in Social Psychiatry, pp. 145-161, quoted in M. B. Clinard, op. cit. p. 363.

(3) Allan V. Horwitz: The Social Control of Menatal Illness, Studies on Law and Social Control, Academic Press Inc., Orlando 1982, p. 90.

(4) László Juszt - László Zeley: A nyugtalan értelem, Budapest 1982, Medicina, p. 112 (The Restless Intelligence).

(5) Thomas S. Szász: The Myth of Mental Illness, American Psychologist, 15:113-118, 1960.

(6) Pál Juhász - Bertalan Peto: Általános pszichiátria (General Psychiatry), I. rész., Budapest 1983, Medicina, pp. 41-42.

(7) Tivadar Pauler: Büntetojogtan (Criminal Law Theory), Pest 1872, I. kötet, p. 70.

(8) 8/1979 Decree of the Minister of Justice § 109 and the following paragraphs.

(9) András Szabó: Az elmebetegek helyzete a magyar büntetojogban (The Situation of the Mentally Ill in Hungarian Criminal Law), Jogtudományi Közlöny, 1986:9, pp. 521-526.

(10) Ministerial Interpretation of the Hungarian Criminal Code (Act IV of 1978).

(11) András Szabó, op. cit., p. 520.

(12) For more information see: Lenke Fehér: A kóros elmeál-

lapotok szociológiai, pszichológiai, pszichiátriai és büntetojogi fogalmának néhány aspektusáról (Some Aspects of Sociological, Psychological, Psychiatric and Criminal Law Terms of Mental Illnesses), Jogtudományi Közlöny, 1985:10, pp. 790-798; Lenke Fehér: A beszámithatóság szabályozása az európai szocialista országok bünteto törvénykönyveiben (The Regulation of Imputability in the Criminal Codes of The European Socialist Countries), Állam- es Jogtudomány, 1977 (XX.) 4., pp. 575-592; etc.

(13) In the case of the existence of the listed conditions of § 4 (1) of the Hungarian Criminal Code.

Michal Jankowski

NEW TRENDS IN POLISH CRIMINAL POLICY

1. General Remarks

If "criminal policy" stands for all the activities of the state agencies (with room for the activities of citizens, too) directed towards crime prevention and control, the division of the aspects of legislation and law enforcement is useful. Measures within both categories may be directed against either criminality in the strict meaning, or the different phenomena of social pathology that do not necessarily constitute an offence, but often create a background for criminality itself. All the above mentioned elements are interdependent.

In Poland, legislative criminal policy lies in the sphere of the competence of the Parliament and, regarding decrees with statutory validity, the Council of State. Obviously the political parties, social organizations and different pressure groups have an effect on these activities.

The "daily" criminal policy applied by the law enforcement agencies arises within three centres: the Supreme Court, the Chief Public Prosecutor's Office and the Ministry of Justice. Each acts in a different way. The Supreme Court acts both through general guidelines that must be followed by the lower courts, and, while trying particular cases, through

the interpretation of the law which should be taken into consideration by the lower courts. The Chief Public Prosecutor's Office acts through internal regulations dealing with the prosecutors' motions concerning a penalty to be imposed. In a broader meaning, it might be said that the policy of using pre-trial detention constitutes an important section of the Chief Public Prosecutor's Office's criminal policy. The third centre, the Ministry of Justice, provides the judges with information on e.g. crime rates, but simultaneously it tries to formulate certain recommendations.

It should be taken into account that in Poland public prosecutors are not subordinated to the Minister of Justice, and hence the latter is not able to influence the penal policy of the courts through the motions of the prosecutor. Both the Chief Public Prosecutor and the Minister of Justice can affect the penal policy of the courts by being entitled to implement extraordinary appeals. The first President of the Supreme Court is also privileged to extraordinary appeal, but he rarely does this and limits his actions to the cases where the provisions of law have been violated. In his hands, extraordinary appeal lacks its character as an instrument of influencing criminal policy.

The multiplicity of decision-making sources influencing criminal policy has jeopardized its results. To coordinate the enterprises undertaken in this field, the Committee of Observing the Law, Public Order and Social Discipline was appointed by the Council of Ministers in 1983, with the Minister of Interior as its chairman, and the President of the Supreme Court, the Chief Public Prosecutor and the Minister of Justice among its members.

Since recently the legislative and non-legislative measures of criminal policy have been bound in a manner stricter than usual.

2. Criminality - A Background to the Most Recent Changes in Criminal Policy

Something that might be labelled as "direct" data on criminality does not exist. The reason is that criminality may be measured only indirectly, through the medium of the activity of the law enforcement agencies, particularly the police, the public prosecutors and the courts. The practice of registering and detecting crimes, as well as prosecuting and punishing offenders, changes continuously, as is shown by the continuous actions against profiteers, road traffic offenders, etc. Hence, the activity of the different authorities affects the statistical data concerning criminality in a high degree. Moreover, not all data is currently accessible; they are, for instance, published at the end of the calendar year. All these factors leave room for contradictions and a differentiation of opinions as to the level and structure of criminality, even concerning estimates. Bearing these factors in mind, one has to regard the following figures not as absolute data.

Table 1 CRIMES ASCERTAINED IN PENAL PROCEEDINGS (1)

YEAR	TOTAL NUMBER	PERCENTAGE INDEX	CRIME RATE PER 100000	PERCENTAGE INDEX
1979	337 302	100.0	957.6	100.0
1980	337 935	100.2	949.8	99.2
1981	379 762	112.6	1 057.8	110.5
1982	436 206	129.3	1 204.1	125.7
1983	466 205	138.2	1 274.8	133.1
1984	538 930	159.8	1 460.0	152.5
1985	544 361	161.4	1 457.8	152.2

Table 2 SOME GROUPS OF CRIMES IN FIGURES (2)

CRIME/ ARTICLE	1979	1980	1981	1982	1983	1984	1985
Murder/ 148§1	498	589	493	472	478	593	671
Bodily injury/ 155§-157§	9422	9556	9242	8560	9690	11015	11048
Brawl or beating/ 158§-159§	3876	3840	3986	3752	4104	5077	4635
Rape/ 168§	1578	1576	1395	1684	1875	2184	2102
Violent possession of stolen goods/ 209§-211§	4570	5149	6304	6231	7357	8689	8511
Burglary (public property)/ 208§	31654	31601	46325	51936	47234	47781	45879
Burglary (private property)/ 208§	36803	39235	65819	74251	85097	93158	92517
Theft (private property)/ 203§	63733	63400	81039	88001	94352	97794	66635
Fraud (public property)/ 134§, 199§-202§	51052	48682	40559	43047	46200	55153	50267
Mismanagement/217§	310	285	400	507	209	355	420
Profiteering within some acts	4727	5229	5729	14934	14723	20829	24171
Traffic offences	16450	17587	18403	15300	17805	17590	17327

Table 3 SOME GROUPS OF CRIMES IN INDEXED PERCENTAGES (3)

CRIME/ ARTICLE	1979	1980	1981	1982	1983	1984	1985
Murder/ 148§1	100.0	118.3	94.8	94.8	96.0	119.1	134.7
Bodily injury/ 155§-157§	100.0	101.4	98.1	90.9	102.8	117.0	117.3
Brawl or beating/ 158§-159§	100.0	99.1	102.8	96.8	105.9	129.7	119.6
Rape/ 168§	100.0	99.9	88.4	106.7	118.8	138.4	133.2
Violent possession of stolen goods/ 209§-211§	100.0	112.7	137.9	136.0	161.0	190.1	186.2
Burglary (public property)/ 208§	100.0	99.8	146.3	164.1	149.1	151.0	144.9
Burglary (private property)/ 208§	100.0	106.6	178.8	201.7	231.2	253.1	251.4
Theft (private property)/ 203§	100.0	99.3	127.1	138.1	148.0	153.4	104.6
Fraud (public property)/ 134§, 199§-202§	100.0	95.4	79.4	84.3	99.5	108.0	98.5
Mismanagement/217§	100.0	91.9	129.0	163.5	67.4	114.5	135.5
Profiteering within some acts	100.0	110.6	121.2	315.9	311.5	440.6	511.3
Traffic offences	100.0	106.9	111.9	93.0	108.2	107.0	105.3

The most considerable growth took place in two categories, namely profiteering (440.6 percent) and burglary (regarding private property 251.4 percent). The following groups have grown more than 150 percent: violent possession of stolen goods (190.1 percent), theft regarding private property (153.4 percent) and burglary regarding public property (151.0 percent). All of these constitute particularly dangerous offences.

The figures quoted above served to justify the deep legislative changes strictly connected with criminal policy, although some other factors were considered, too.

3. The Changes

On 10 May 1985, two acts were adopted by the Parliament. The first one amended the Penal Code, the Code of Criminal Procedure and some other acts connected with penal legislation. These amendments were not of primary importance for criminal policy which, naturally, does not mean unimportance in general. It is enough to state that the Act has raised the amounts of fines imposed for certain categories of criminal acts.

The second act, on Special Penal Liability, introduced the real revolution in criminal policy, understood here as a set of penal measures applied by courts and, with reference to pre-trial detention, public prosecutors.

The binding force of this act has been limited to a three year period; it was described by the Prime Minister as "a radical experiment in criminal policy, the effects of which can not be evaluated earlier than after a three year period ... but can be estimated now as having no basic influence on the rate and structure of criminality".

The act has changed a set of important provisions in the Penal Code, the Code of Criminal Procedure and the Code of Penal Enforcement. The most important general changes can be described in the following way:

- the application of conditional suspension in the execution of the penalty is banned regarding numerous exhaustively listed offences;

- the application of extraordinary mitigation of the penalty is strongly limited;

- the minimum limits of fines have been raised regarding numerous offences;

- the supplementary punishment of the confiscation of the property or part of it is obligatory in many cases;

- conditional release before the expiration of the prison term has been excluded with regard to recidivists;

- the possibility of the revoking of conditional release has been expanded;

- pre-trial detention has become obligatory regarding serious offences (an act threatened by a penalty of 3 years of deprivation of liberty or more) and recidivists with very few exceptions;

- the application of summary proceedings and expedited proceedings has been widened;

- in the event of an interruption of the trial in expedited proceedings, pre-trial detention has to be applied; and

- regarding some petty offences, penal order proceedings have been introduced.

The Act of 10 May 1985 also includes some other changes, but the ones listed above are the most important since they affect the basic principles of Polish penal law, on both substantial and procedural levels.

4. Justification

The decision-makers, both those who have prepared the draft and those that resolved the Act in Parliament, have considered three factors:

1) In recent times an enormous growth in the crime rate, particularly within the most dangerous classes of criminal acts, took place;

2) within society, demands were voiced that penal liability should be more severe, particularly concerning offenders who made unjust profits due to the economic collapse; and

3) the courts' response to the growth of the level of criminality was insufficient, the punishments imposed by the courts were lenient.

5. Critical Remarks

Despite the difficulties connected with the evaluation of the real level of criminality through the medium of indirect data, it should be stressed that a serious growth has occured (see tables 1 and 2). The reason for this phenomenon was twofold. On the one hand, criminality has developed on the basis of the economical collapse; looking at tables 2 and 3 one may state at a glance that the highest growth took place within the categories of crimes connected exclusively or partly with economical traits. On the other hand, in the

recent years a certain drop of social discipline as well as a rise in suspicious and mistrustful attitudes toward state authorities including the law-enforcement authorities can be observed. Some phenomena of social pathology (e.g. alcohol and drug abuse) have also increased.

In my opinion, all these facts did not create the necessity for the changes introduced on 10 May 1985. Many legislative and organizational enterprises had already been applied previously. It is enough to mention the set of acts passed recently to control juvenile delinquency, employment evasion, alcoholism (acts of 1982), profiteering (1981, amended in 1982) and drug abuse (1985). The other act of 10 May 1985, which amended some penal law provisions, should also be taken into consideration. All these acts have created a strong basis for combating social pathological phenomena, and for crime prevention and control. Moreover, social attitudes change continuously. Current trends justify the prognosis of gradual stabilization. Hence, the hypothesis of a general rise in criminality is too weak to be adopted.

As to the "social demands" for more severe punishments, the following has to be considered. Despite the fact that no research has been conducted concerning this matter before the Act was issued, it is clear that the majority of the Polish society is always calling for changes at least similar to those introduced. Such a conclusion is justified bearing in mind the outcomes of sociological research completed in the past as well as numerous statements made in public discussion by the representatives of society. In my personal opinion, adopting these calls as guidelines is misleading. Criminal policy constitutes a sophisticated and subtle set of issues; the shaping of criminal policy has to be based on the opinion of professionals, not on the opinion of society as a whole. The emotional approach of non-professionals should be controlled by the cautious consideration of scholars and the practitioners of law-enforcement. A considerable fraction of both have strongly criticized the

new regulations.

The crucial point lies in the evaluation of the courts' decisions concerning penalties as well as the evaluation of the effectivity of crime detection. The latter can only be estimated indirectly, i.e. through the category of "crimes reported".

Table 4 PERSONS CONVICTED (4)

YEAR	TOTAL	INDEX	DEPR. OF LIB. (UNSUSPENDED)	INDEX	PERCENT OF ALL CONVICTED	COMMENTS
1975	161 286	100.0	58 943	100.0	36.5	
1976	159 363	98.8	48 488	82.3	30.4	
1977	137 847	85.5	49 291	83.6	35.8	(*)
1978	157 463	97.6	52 227	88.6	33.2	
1979	153 026	94.9	48 413	82.1	31.6	
1980	151 958	94.2	44 503	75.6	29.3	
1981	126 403	78.4	32 052	54.4	25.4	(**)
1982	148 456	92.0	38 845	65.9	26.2	
1983	141 768	87.9	40 346	68.4	28.5	(***)
1984	125 132	77.6	41 370	70.2	33.1	(****)

(*) Amnesty.
(**) Decree on Martial Law - Dec., abolition.
(***) Abrogation of the Martial Law decree, narrow amnesty.
(****) Comp. broad amnesty.

Looking at table 4, a distinction into three periods can be made. The first one, up to 1980, was characterized by a comparatively high number of convictions as well as a comparatively high rate of prison penalties in the total number

of convictions. In the second period, the year 1981, a sudden drop of convictions as well as prison penalties can be noted, and finally in the third period, from 1982 to 1984, a simultaneous continuing drop in convictions and a growth in the rate of prison penalties was experienced.

Table 5 PRISON PENALTIES INCLUDING SUSPENDED SENTENCES (5)

PENALTY	1982		1983		1984	
	N	%	N	%	N	%
Total	107 717	100	106 895	100	97 136	100
3 months	408	0.4	264	0.2	189	0.1
3 - 6 months	896	0.8	748	0.7	479	0.5
6 months	5 985	5.6	5 242	4.9	4 038	4.2
6 m. - 1 year	11 529	10.7	11 669	10.9	9 441	9.7
1 year	40 635	37.7	40 757	38.1	35 725	36.8
1 - 2 years	36 277	33.7	37 653	35.2	33 030	34.0
2 - 3 years	2 110	2.0	2 556	2.4	3 568	3.7
3 years	4 407	4.1	3 635	3.4	5 266	5.4
3 - 5 years	4 235	3.9	3 323	3.1	4 205	4.3
5- 10 years	1 133	1.1	904	0.8	1 069	1.1
10 - 15 years	102	0.1	144	0.1	126	0.1

Table 5 shows a certain drop in short-term imprisonment along with a certain growth of long-term imprisonment during the last three years.

Table 6 FINES IMPOSED IN ADDITION TO DEPRIVATION OF LIBERTY (6)

FINES IN ZLOTY	1982		1983		1984	
	N	%	N	%	N	%
Total	79 811	100	78 482	100	72 543	100
Up to 5000	6 526	8.2	2 054	2.6	824	1.1
5001-10000	28 016	35.1	16 861	21.5	9 321	12.8
10001-20000	32 304	40.5	36 072	46.0	29 003	40.0
20001-30000	11 595	14.5	12 945	16.5	16 892	23.3
30001-50000	11 595	14.5	7 036	9.0	10 782	14.9
50001-100000	1 205	1.5	2 946	3.8	4 581	6.3
100001-200000	167	0.2	461	0.6	896	1.2
200001-500000	167	0.2	93	0.1	226	0.3
500001-1000000	167	0.2	14	0.0	18	0.0

Table 6 indicates a growth in the rate of high fines that can partly be explained on account of the inflation.

A comparison of the data included in tables 1-6 gives the basis for some general statements dealing with the period (from 1982 to 1984) that was taken into account by the drafters of the act of 10 May 1985:

- the level of criminality was growing;

- the total number of convictions was dropping; and

- the severity of punishments (the rate of prison penalties in the total number of convictions, the length of prison terms, the severity of fines) was growing.

The correctness of the last statement is not certain. Only some basic indexes have been considered leaving aside, e.g., conditional discontinuations of proceedings, the pace of inflation in comparison to fines and the severity of punishments for specific groups of offences. Bearing in mind all these factors, we can say with a high degree of certainty that penalties imposed by the courts were probably rising, and at least not falling.

All the factors mentioned above justify the statement on the weakness of crime-detection within the chain of actions directed against criminality, but the data says less about penal practice.

In my personal opinion, this statement constitutes one of the main arguments that might be used against the necessity of introducing new, severe penal measures. The drafters probably also considered the structure of the penalties imposed in short periods. The data based on such periods is misleading for two reasons. Firstly, such data is irrelevant. Secondly, when dealing with the growth of criminality, the courts' reactions following it are usually postponed. There is a period of necessary "adaptation" of penal policy to the changed picture of criminality.

Independently of the above mentioned remarks, it must be stressed that the severity of the measures introduced by the Act of 10 May 1985 would have been possible and easy to achieve within the previously existing regulations. In my opinion, the legislative measures do not have to be employed if the desired criminal policy ends can be achieved through a change in practice.

At present, when the new Act is in force, we have to treat it as a "social experiment in criminal policy", as the Legislative Council has expressed it. Hence, we must observe and inquire into its effectiveness in order to obtain knowledge that is useful for the future development of the

legislative and non-legislative measures directed at crime control.

Finally, the possible overcrowding of prisons has to be pointed out. The average prison population, consisting of convicted inmates and pre-trial detainees, was in the years from 1980 to 1984 86 657 (83 385 in 1984). In 1985, under the influence of the new Act, this figure rose to 113 000. Such factors should also be considered along with the positive changes such as the drop in the relative amount of criminal acts in 1985 (see table 1).

FOOTNOTES

(1) This table is based on the data from the "Militia Headquarters Bulletin" presented in Jankowski, Zenon - Michalski, Janusz: The Act of 10 May 1985 on Special Penal Liability, Warsaw 1985, completed by the author as to 1985 and the percentage index based on the crime rate per 100 000 inhabitants. In Poland the statistical category of "crimes ascertained" is currently in use instead of the category of crimes reported.

(2) Ibid.

(3) Ibid.

(4) This table is based on the statistical bulletins issued by the Ministry of Justice.

(5) Statistical Bulletine, Ministry of Justice 1984. The penalty of imprisonment for 25 years is omitted. Penalties up to 3 years can be suspended.

(6) Ibid.

Wayne Morrison

REFLECTIVE CONSIDERATIONS FOR A POST-MODERN PENOLOGY: SCIENCE AND THE NARRATIVES

1. The Criminological Drama

The English sociologist of deviance, Paul Rock, has described criminologists as actors within a play. A drama wherein its chief actors recognise no master script or supporting cast, indeed, often appearing not to understand that they are participants in a play at all. (1) Our modern English word "play" derives from the old English "plezan", meaning to jump for joy, rejoice, be glad. The primary notion is "to bestir or busily occupy oneself", and the dramatical sense, "to perform as a spectacle upon the stage, etc., to set, to sustain the character of". There is a strange duality to the meaning, for to play soon leads to "play out", and thus "the performance is brought to an end, to become obsolete, over and done with, exhausted, worn out, effete". (2)

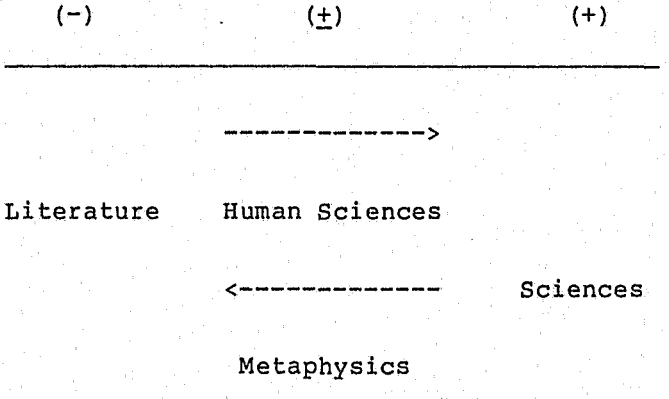
In the action of performing is a uniqueness which is non-reproducable even with the same cast, the same theatre and a similar audience. The factor is time, to play, to perform, is to exist in time. This duality is also present in Rock's essay, with his contention that "the bulk of criminology is composed of pieces which have suffered from being closely tethered to the time, place and concerns of their origi-

nating context. They have offered descriptions which rapidly lose all theoretical and practical significance. In this sense the discipline is a graveyard of excessively concrete thought ... there is little recognition of the mortality of criminological research". (3)

A play needs a time - a historical location; it also needs a place, a site for performance - a social-cultural location. Moreover, to be alive, it requires an audience. We know the actors, they are you and I - who are (or is) the audience? It cannot be ourselves. The French interpreter of Freud, Jacques Lacan, has written of the process of communication, that "whatever its content may be, no wish is really intrasubjective, nor can remain intrasubjective". (4) That is to say, whatever the context of a communicative entity, it cannot remain within the individual but must be expressed to others. Usually the parents are the first "others", and interestingly the "others" also provide the means of communication (they taught the language), and therefore provided the code, in which that, which we want to communicate, needs to be expressed. This is laden with difficulties, for the "other" is both the audience to whom the wish of the actor is expressed, and the bearers or representatives of the code which makes possible the expression of the wish. Lacan further complicates, for as the code is never perfectly ours, communication is constrained by always needing to be expressed to the other. The desire to communicate can never be fully exhausted or contained within the content of the communication. A division occurs, between that which the code allows to be communicated easily, neatly, and that which is problematic to express within the dimensions of the code.

2. The Problem of the Code

The nature of our code is apparent: "Criminology is essentially concerned with the scientific study of crime". (5) Penology is "the scientific study of the prevention and punishment of crime". (6) Our present rules for such a code are outlined via a process the English philosopher Karl Popper termed a "marcation" procedure. This sets out what is to be enabled as the code of science. This problem of (de-)marcation lays down a set of rules for each discoursive character (literature, music, science, etc.), which allows certain traits to be present or absent. Scientific discourse is thus set apart from other kinds of discourse because it fulfils certain requirements - symbolic clarity, logical consistency and the possibility of verifying its claims, which are related to a set of rules. This broad category can be subdivided upon recognition that certain forms have only some of the requirements - the "formal sciences" only having the first two, the "empirical" all three. As expressed in diagrammatical form, this appears as:



Two specific categories of discourse are visible, roughly: "literary" and "scientific". The middle compartment contains hybrid discourses showing both the provisional presence and the provisional absence of the mark of scientificity. (7) These are allocated by what Popper defines as the "rules of the scientific game", demarcating science from pseudo- or non-science (which Popper calls metaphysics). His targets are well-known as Marxism and Freudian theory, but these are just particular examples of the distrust for whatever offers a global, possibly totalitarian theory.

Rock's target was the "impressive and all-explanatory" theories of "the new absolutism", the new or radical criminology. The bearers of knowledge believed to make "truth transparent", and thus provide a position of absolute certainty, where there was "but one truth, and its rivals are decoys and snares". The commonality of Rock and Popper lies in their both being inheritors of the tradition of David Hume, the Scottish empiricist cum sceptic enlightenment philosopher.

Both sides assert their quest for "truth". Popper called this "the strongest (unscientific) motive"; which path to take is the question. The suspicion is also cast that against the slow progress of the empirical methodology, the intellectualist simply "postulates" a positive solution both to the local and total problems of life. The Popperian prefers to quote Bertrand Russel: "The method of postulating what we want has many advantages; they are the same as the advantages of theft over honest toil." Rock argued against a solution occasioned by "ideology, the analytic a priori" and "proclamation alone". "Truth so recognised", for Rock, "lays a road to totalitarianism". Instead, the honest toil of symbolic interactionism was preferred. Both Popper and Rock would argue for knowledges which stay close to the local, to the hopes, fears and aspirations of the individuals and small groups which, at least c one level, we know to constitute our societies.

Historically, criminology has moved within the individualist and holist extremes, producing a vast array of limited literature. Moreover, we have a problem. In the face of the "human realities" of crime, suffering and punishment, it does not seem that our code can adequately express our communicative desires.

In the words of Eryle Hall Williams, "One difficulty which criminologists must face, is that when it comes to making recommendations for practical action, there is very little they can say derived from their scientific studies, ..." (8) The code does not appear able to provide a guide for practical action. For Hall Williams, "... they are left to draw conclusions which derive more from their own particular system of values or political or social philosophy than from any other source ". In contributing to discourse, the criminologist must make "clear that the sources of these ideas or suggestions (for practical action) derive more from their personal philosophy than from their scientific studies", that is to say, the philosophy which derives from their nature per person, not from their nature per criminologist.

This is a multi-faceted problem. One perspective lies in the description of Rousseau, that man in "bourgeois" society is not a unified whole. On the one hand, he is a private individual, on the other, a citizen of the state "enjoying" a specific role, in this case "criminologist". Thus the modern "bourgeois" is neither a citizen in the sense of the ancient polis, nor is he a complete separate individual. "Bureaucracy" and "representative democracy", for their part, further the complexity of citizen roles whose contribution to the professional, technical debate of modern legitimacy depends upon the technical code of their competence. From the Weberian perspective it is an aspect of ends-means rationality, which creates instrumentally applied science simultaneously robbing man of his ability to obtain satisfactory meaning systems. The result is unconnected realms,

where values become arbitrary as does the choice between them. From another perspective this is indicative of the rupture of theorising and practice. Here we can see the legacy of David Hume, for following Hume we are thrown into the dualism of one set of rules for science, keeping an irrationalist theory of practical human action at the same time.

In Hume's particular case, he had demonstrated the rashness and illogical nature of basing science upon a chain of observed regularities (inductionism) but went on to claim that in our everyday life this was not only what we actually do but, indeed, we should continue to do. It seems that nature has simply fitted us out for this judgement. In his reliance upon common sense and custom, we may implicitly feel an underlying natural order.

It is more difficult to accept an underlying natural order in this century - there have been too many wars and too much suffering, all which has provided a new visibility. Yet the code often does not seem to offer much comfort. Reviewing the social science approach to law, Robert Kidder hypothetically asked about Nazi rule and a modern institution which many had hoped to be a peace bringer (9).

AUTHOR	WAS HITLER'S RULE LAW?	IS INTERNALTIONAL LAW LAW?
Black	Yes	No
Holmes	Yes	No
Malinowski	Yes	Yes
Hoebel	Yes	No
Weber	Yes	?
Selznick	No	?
Zinn	Yes	Yes
Medcalf	Yes	Yes
Bohannan	Yes	?

For Kidder within the (predominantly empiricalist) social sciences, only Selznick of the Berkeley School was capable of offering the comfort (and political tool) of judging Hitler's rule as not providing valid law. Kidder saw this as possible, due to Selznick being the only social scientist discussed who favoured the application of jurisprudential principles in the social scientific study of law. We must also note that the position on International Law actually mirrors the traditionally confused picture within jurisprudence.

Kidder implicitly was arguing for the advantages of combining social science and jurisprudence. Are we not led to consider asking for the union of ethics and science? Previous advocates for such a union have been mainly amongst those who saw a common materialist development for both knowledge, ethics and law. (10)

But even if this were attempted, it is no simple question. For what form of jurisprudence? Legal positivism is almost completely based on the empiricist methodology and would itself be unable to provide any criticism of Hitler's law. It was to a reformed natural law that the judgments of the Nazi war trials turned. However, the criteria for natural law in its turn may stand close to the spectrum of the absolute, for "just as the real and the true are one, so too the true and the just are ultimately one. Veritas facit legem ... true freedom consists of being bound by justice". (11) The duality is not lost on Paton from whose text the quotation comes, for he was to say: "Jurisprudence, in the hands of the formal theorist, is always faced with a dilemma: if it is true to the premises on which it is built, it remains in the heaven of logical concepts; if it attempts to descend on earth, then these concepts are explained according to the logical picture of the writer" (12).

In this way "The Nazis employed the higher law theory to undermine the position of certain classes in the community".

Paton can only add: "Is there a theory, however, which cannot be misused?" (13)

3. Demands of the Present

It is one of the cries of the present to return to community living. Unger (14) calls this one of the influences creating a "post liberal" society, and sees this, not in terms of neo-conservatism, but rather as a development which combines the welfare state, corporatism and communitarianism. Unger perceives the move to community as a response to the recognition of the hold elites have on the power centres in our society, a response to the fact that the machinery of liberal society's law, whilst demonstrating a formal equality, has failed to achieve equality in substantive reality. We could propose a thesis reading that, because of substantive failure on the macro level, a series of spontaneous reactions on the micro level occur. Perhaps we can also place the widespread movement to victimology within a similar frame, as indeed the scattered pleas for a new traditionalism, or even consumer criminology. (15) It also seems that the radical criminologist has seen his criticism on the macro level ineffectual, and so sought a new space to be active within. (16) In this way the inability of the code to guide action on the macro level would be overcome. On the community level the face to face informal network would combine action and code, theory and practice, for the knowledge utilized and provided would be localised and responsive to community demands.

Such is the optimistic telling of the story. A more pessimistic tale sees these moves as fitting the demands of the dominant economic interests, as their activities would then be moved from the focus of interest.

Indeed, Unger's analysis is itself tension-filled. Does not corporatism (rise of large multi-national companies) play off against local communities? Indeed, a writer who provides a more pessimistic picture of our times, Jürgen Habermas of the Frankfurt School, would see this as further evidence of the growing divisions between the lifeworld (the realm of personal activities allowed the individual) and the system world (the mechanisms of functional integration, organizational power and exchange relations). Before we move to consider Habermas' attempted solutions to the problem of the code, let us remember the importance of the "knowledge games" of modernity, which have created the twin realities of internationalism and multi-corporatism.

The reality of the former is that internal political-social programmes are unable to comprehensively govern the social conditions of the nation state. Neither are the traditional paradigms of social theory able to account for all these conditions, which find their realities dictated by the activities of a world market and co-existence, the nature of which we are unable as yet to do more than dimly perceive. National social conditions, crime rates, social suffering and state-imposed suffering (which I call social penology), are no longer an internal matter but an international one. As we recognise the lineages of dependency and interaction which bind the various countries of the world together, both rich and poor, we have trouble with the definitions and concepts of our code. We have little difficulty attaching the concept of terrorism to a certain range of activities, yet feel distinctly uneasy at its application to "state terrorism" and have difficulty in the face of the argument that this is but one extreme of a complex interactional process which occasions the presence of a new "terror". The open visible terror of the visitation of the sword is, so the argument runs, replaced by the terror of non-belonging, ff the reality of neglect, and the "penology" of indifference, which swallows both the third world and what some call "the new underclass" of the developed.

The reality in the second is that increasingly large sections of the power of knowledge lie not within the hands of either scattered individuals who would make up these reconstituted communities, or indeed government bodies where they can be politically argued over, but reside within the multi-nationals which span national boundaries, and large investment financed private bodies which respond not to political control, but to the dictates of mercantilization. It may be that the time has come to develop social concepts which can "socialize" the fearsome powers of competition we rely upon.

4. Habermas and the Rationalist Code of Practical Action

To categorise the magnum opus of Jürgen Habermas, "The Theory of Communicative Action", of which only Volume One is available in English, as a wide-ranging and comprehensive work is an obvious understatement. It is a synthesis of Weber, Piaget, Durkheim, Marx, Mead, Parsons, Schutz, his predecessors of the Frankfurt School with the rationalist linguistics of Chomsky, Searle, and Austin, an analysis which reaches for the hope of a total understanding (Verständigung) on the basis of a rationally motivated agreement (Einverständnis). Universality is assumed because of the "innate characteristic of men to use language" and this provides the fundamental bedrock whereby common understanding and a vision of a freely communicating reconciled society provides the route to a new form of peace. A theory of argumentation is provided whereby "Reaching understanding is the inherent telos of human speech ... the concepts of speech and reaching understanding reciprocally interpret one another." (19)

It is a turn to the rational basis of language usage encompassing ethics, politics, images of the self, in short all

communicative discourses, indeed, all "theoretical discourse".

Habermas' work can be viewed as the finest modern attempt to provide a theory of encompassing practical action via the scientific mode. It is the taking on (and for his followers the overcoming) of what the Humean tradition calls the naturalist fallacy.

This demand for the swallowing of ethics may be understandable, for we stand in the century of the embarrassment of ethics - the twin assault of existentialism and Humean scepticism which has reduced ethics to the question of: "What am I to do?" Ethics has lost its social nature and become individual morality. In this, philosophy has failed ethics, and de-socialised moral discourse.

In a recent book entitled "Ethics and the Limits of Philosophy", Bernard Williams began thus (20):

> "It is not a trivial question, Socrates said: what we are talking about is how one should live. Or so Plato reports him, in one of the first books written about this subject. Plato thought that philosophy could answer the question. Like Socrates, he hoped that one could direct one's life, if necessary redirect it, through an understanding that was distinctively philosophical - that is to say, general and abstract, rationally reflective, and concerned with what can be known through different kinds of inquiry."

His conclusion is that moral philosophy simply cannot tell us what to do. It cannot answer the question "how to live". It cannot tell us that the choice of an ethical life is the best choice for a human being. All it can do for Williams is to provide guidelines for those who have already made this choice. In this Williams is partaking in the feast of

Humean scepticism. His invisible opponents are those who seek a vehicle for absolute values. Within this text there has also been some limited discussion of the dream (my words) which Habermas is sharing, that is to say, that practical problems, life problems, problems of practice, await scientific treatment. Williams rejects this within the ethical sphere.

Habermas' project is wider, for life problems located conceptually within the "lifeworld" find their rational solution in the "reconciliation" with the "system world". Within the rhetoric of this conceptual apparatus the dream of the scientific penetration of the entirety of human and social life, the reach of theory over practice, of speech over the silence of an unforeseen becoming, which has been in the making for so long, is announced as mature. The supposition of a realm of universal theoretical competences, whereby the division between acting and thinking, subject and object of system, is overcome, where sense and nonsense become fused to the unidirectional dictates of the sense of reason, is clothed in brilliant colours. For this "communicative reason does not simply encounter ready-made subjects and systems, rather it takes part in structuring what is to be preserved". And this power, this uncovered process, is to an absolute peace. As "The utopian perspective of reconciliation and freedom is ingrained in the conditions for the communicative sociation of individuals; it is built into the linguistic mechanism of the reproduction of the species." (18)

The appearance of problematic practice is, in turn, clothed in the rags of the embarrassed, to be pitied, deplored but reformable, conditions of incomplete theory. Thus for Habermas the "good society" becomes no retreat to localised communities; instead morality, culture, law, become democratised in the extension of what Habermas had called in "Legitimation Crisis" an "institutionalised public sphere": the division of individualism healed via the extension of

individual autonomy by a domination-free communication. Law, which, as Unger analysed, had previously been freed from a religious metaphysic and given to divided man, becomes again a universal "natural law". This time it is a "naturalist" natural law as reason imposes its normative character via dialogical consensus.

How will dialogical consensus be transformed into consensual universal action? By the realization of "universal interests". Thus, man, for so long ignorant of the universality of his condition, becomes united, reason to condition, theory to practice, mind to body.

Of course, the "liberal" defence of the inner private world of the morality of the self will have to be overcome, but Habermas had already announced in "Legitimation Crisis" that the problem of the divided individual could only be resolved "if the dichotomy between inner and outer morality disappears". But what, we may ask, is to guide this? We have seen already the analysis, albeit in literary form, of such disappearance - the negation of reason in Dostoyevskian hyperconciousness. There the removal of tension occasioned chaos, a situation resolved by recourse to faith in God. Habermas asks for faith in reason.

Faith, it is true, supported by a vast accumulation of "science". For Habermas, "The justified claim to universality on behalf of the rationality that gained expression in the modern understanding of the world" is made sustainable by a theory of social evolution which is Hegelian in character, combined to Weberian rationalization. Thus the ideologies of historical development follow a logic related to a combination of modes of production (classical Marxism), and the forms of administration (Weberianism) with the mode of interactionalism provided by American structural-functionalism (Parsons). The key mechanism is the Hegelian sublation (literally, to resolve in a higher unity, Aufheben), which has the dual functions within dialectics of destruc-

tion and preservation. Yet the machinery of sublation can only proceed within a metaphysic of progress which contains the individual act.

It is difficult to see how any total unifier of interest to reason, a true guarantee of universality could be other than the speculative postulation that individual (Humean or Husserlian) phenomenological consciousness is but a partaker of a universal consciousness (the Hegelian "I", ich, ego, which is a "we"), where the individual subject is but part of a universal subject and thereby able to posit values that, though subjective, are similarily universal since they are common to all particular subjects participating in the universality. To turn such a speculative postulate into a rigid scientific claim via the ideal speech situation and so reach peace through speech seems itself only a speculative position. Again Asia can provide some problems, for it provides an alternative mode of reconciliation, not the reconciliation Habermas postulates as the telos of speech, but the way of contemplation, specifically the withdrawal from speech. Reconciliation is achieved not by systems of meaningful utterance, but by the dissolving of speech into silence. Of course, that is mystical understanding. Instead the Greek notion of contemplation (theoria) being theoretical understanding is accepted as superior without question.

In part this can be explained as critical theory in the Frankfurt School was forced into a "disengaged contemplation" which Habermas is seeking to overcome. In the main, it is traceable to the Greek word "logos", which stood for both "speech", "word", and "reason". In effect, we quell metaphysics and return full circle to the Greek secular notion of man as the "rational animal", but in doing so we simply encounter the ancient problem. Man is the rational animal, rationality is the capability to grasp and understand the order of things, and having done this his telos given by nature is to align himself to this order. To do so is the good and the happy, not to do so is misery. Why then

does man constantly not do so? Why did he seem always to be in confusion, to almost wish misery? A different view in contrast to Habermas is that of Michel Foucault who redefines the Greek concept such that man is not the rational animal, man is the political animal. And this is not a politics that is aspired to, but a politics that cannot be escaped. Politics may well be the "unconcious" of reason; "desire" may be to dominate. Power wished, not emancipation. Universality of interest shown to be but a dream. Perhaps we are wise also to treat Habermas' partaking of universality as the dream of sharing the absolute.

5. Meta Science: Meta Absolute?

Although involving the encompassing of present scientific rationality, Habermas' project was in its own way a scientific Weltanschauung (world-view). Alternatives must lie in elaborating a theory, or at least a guide for practical action which is independent of (or in addition to) scientific rationality. But to do so must mean to give up the notion of a master script.

Staying with the German tradition, the non-rational alternative naturalism of Nietzsche proposed that all post-Kant philosophy could not be a philosophy of "being" (as exposed by science) but a philosophy of "willing". Nietzsche cries also the rhetoric of liberation philosophy, but it is not the liberation of perceiving our universality in our subjectivity, but the perceiving of unique indentities in our universality and thus liberating our will to be different. No Aufheben for Nietzsche is possible. Instead of challenging and negating, one affirms the other. From a perspective of identity one affirms the good which is not, and cannot be, ever visible. Therefore, instead of asking what is good, one must ask, who wills the good? This is always a movement, a becoming, the goal is never reached. Those who

write in the influence of such ideas, for example Foucault, Derrida, Deleuze and Lyotard of France, assert the impossibility of any absolute vision. (21) They differ greatly in their optimism/pessimism quota, the most optimistic being Lyotard, whose theory of practical action consists of the reintroduction of the social contract, though not as an original starting position held certain, but as an almost immediately revisable "open" document.

For Wittgenstein, the criminological actors can never read of a master script, the larger context defies any comprehensive theoretical articulation. No critical theory could be created to resolve its tensions and inconsistencies. The later Wittgenstein threw open the question of how "language games" were organised and directed (i.e. the multiplicity of the scripts), and it is to this that we must turn to understand the nature of our current criminological/penological position.

6. The Multiplicity of Scripts: Life within Narratives

The human actor exists in an environment which is at once composed of material factors of physical, economic and geographical constraints, but is also a "semantic" space, a space composed of the effects of interrelations of narratives. Narratives are stories, fables, recounting of past events; the rhetoric postulating of what was, is, and is possible. Narratives tell man what is expected of him and how he is to relate to the lived-in world. Thus, they tell the individual actor how he is to relate to structure. To narrate is to give an account of, to explain the past; at the same time it is to account for the fact of being itself. It is narratives which define what (and who) you and I are and what we are doing here.

Paradoxically, on the one hand, "it is obvious that one of the features that characterizes more 'scientific' periods of history, and most notably capitalism itself, is the relative retreat of the claims of narrative or storytelling knowledge in the face of those of the abstract, denotative, or logical and cognitive procedures generally associated with science or positivism." (22) On the other, it is the grand-narratives or meta-narratives which give a space for science to work within. The very enterprise of "scientific abstraction" occurs and is legitimated within such narratives.

The irony is that the scientific project (reflective critical science) of Habermas to uncover a rational basis for universal pragmatics is only allowed by the "irrational" story-telling of the narratives of emancipation, and that of the uncovering of a secret entity, which holds the key to success.

Regarding the narrative of the secret, the English philosopher Whitehead was to say (23):

> "Without this belief the incredible labours of scientists would be without hope. It is thus instinctive conviction ... which is the motive power of research: that there is a secret, a secret which can be unveiled. How has this conviction been so vividly implanted on the European mind?
>
> When we compare this tone of thought in Europe with the attitude of other civilizations when left to themselves, there seems but one source for its origin. It must come from the medieval insistence on the rationality of God, conceived as with the personal energy of Jehovah and with the rationality of Greek philosophy. Every detail was supervised and ordered: the search into Nature could only result in the vindication of the faith in rationality."

Similarily, the truth of specifying ontology, that is the ability to say what is, and to be correct in saying so (epistemology), was guaranteed to Adam in the narrative of Genesis by God's presence. (24)

To Parmenides of Elea goes the distinction of being the first (in the west) to place as central the question: "What is the nature of true being?" To answer we must distinguish "the way of seeming" from "the way of truth". The poet undertook a chariot journey escorted by the Daughters of the Sun to the home of the Goddess Justice where he was told of "both the unshakeable heart of well-founded truth, and the beliefs of mortals, in which there is no true reliability." (25) Ordinary habits of speech and the data of sense perception are warned against, the way to truth is the way of reason. Truth is not alone, for this is also "the way of persuasion, for she is the attendant of truth".

The poet was fortunate to be guided in his journey by the Sun Daughters. In the long journey of Odysseus, he who spanned the love of the beautiful Goddess Calypso choosing instead to endure danger and suffering to reach at last his home and wife, the Goddess Athena enabled the Princess Nausicaa to aid him. But he also had to visit Hades to receive directions from Teiresias to guide him.

Directions, to know what to do, the role Bernard Williams has quoted Plato giving philosophical reflection. Williams' reference had come from Plato's "Republic" which provides another of the great narratives: Plato's "Allegory of the Cave", (26) the narrative of emancipation and the uncovering of form (true essence).

This was "a parable to illustrate the degrees in which our nature may be enlightened or unenlightened". Unenlightened life, the life of the cave, was in Plato's words a prison wherein man lived in chains. To break the chains was equivalent to the healing of the state of unwisdom. Before the

steep path out of the cave could be climbed, an act of liberation was necessary. Man must be freed from the fetters which confined him, and once freed, drawn up the steep path by force in the main, as he has a horror of the daylight outside. (27) One man was so dragged away out into the sunlight whereupon he realised the reality of the prison within.

As with Parmenides, this is a text for epistemological rationalism. True knowledge, Plato tells us, takes us out of the prison dwelling of unenlightened sight, away from the sensible world of the empiricalists, to the world of "intelligibles". We are warned of the ordering sensible world of our senses and urged to seek a separate world of intelligibilities whose objects must be apprehended by the intellect alone.

Considering the geographical aspects of the allegory, we note that, as with Odysseus (Hades) and Parmenides (home of the Goddess Justice), Plato takes us out of the world to gain the knowledge by which to critique and demonstrate the falseness of the life within. Thus we have the representation of a place, a point like that which Archimedes sought to provide him with the basis from which to move the earth. "Give me a place to stand!" This is the incessant plea of the intellectual throughout the ages, the pulsating urge which runs through Bernard Williams' book. As a Humean he cannot find it. The Humean cannot leave the cave; for him, we must find a way of life within.

John Rawls' "A Theory of Justice" (28) is the narrative of man's creation of an Archimedian point within the cave: the social contract. In so doing he is following what is now a common narrative, a narrative with a history and stories of its previous narrators. The social contract (pactum societas, pacte d'association, Gesellschaftsvertrag) to bring individuals together to form society; the governmental contract (the basis of constitution, pactum subjectionis, pacte

du gouvernment, Herrschaftsvertrag), establishing formal government. Its narrators: Hobbs, Rousseau, Locke, Pufendorf, currently Dahrendorf. Sometimes the contract is presented as a once-and-for-all irrevocable act understood to have been performed in the remote past; sometimes it takes the form of a continuing understanding that is perpetually being renewed, as with Locke where it regarded rather as a trust than a contract. With Lyotard the contract is to be regarded similarily to a scientific research strategy determining the heuristics of where we want our society to develop.

The volume of the debate occasioned by Rawls is staggering. Most of it centres around the creation of this "original position": what presuppositions, what theory of human nature did Rawls (or any other author) bring and utilize in the production of his Archimedian point?

Narratives exist on the attempt to create a presuppositionless position. The existentialist demand for "authenticity", which involves the destructive questioning of all that is, and so "quell the multiplicity of voices". This desire to create an "innocent" position, or at least a position where the inner depths of the self are relied upon, means that to create true "law tables", one needs a "strength to forget the past". Therefore Nietzsche's Zarathustra lives alone in the mountains in preparation of his forging of new law tables. But in another tradition, Moses went alone to obtain the Tablets from God, Jesus alone in the desert to find new strength. The narratives repeat. Each age is new in that its narratives intersect with others in "different" formations. Thus each age demands a "fresh" unpacking. Not only is our vision of the path to truth embedded in narratives, but smaller narratives are situated everywhere, locally in our social systems. The self is composed of narratives, lodged in a background of narrative influences. Social institutions, as for example the prison, are a site constituted by an intersection of narratives (purposes,

economic demands, managerial theories, public expectations, and so forth).

However, the "forgetting of the past" (the removal of presuppositions) needed to obtain "true" law, or the innocent point, cannot be achieved. Neither nihilism nor the "transvaluation of all values" can be endured. For Karl Mannheim, "Only he who immerses himself in his own self in such a manner that he does not destroy all the elements of personal meaning and of value is in a position to find answers to questions that involve meanings." (29) Importantly: "Without evaluative conceptions, without the minimum of a meaningful goal, we can do nothing in either the sphere of the social or the sphere of the psychic." (30) Paradoxically, Karl Mannheim held the elements of the narrative himself. Whilst postulating the inherently ideological (class-based ideology) nature of all knowledge, the intelligentsia could produce true knowledge by creating a specific position for itself, free of class by being of all class, to obtain a relatively free perspective. Karl Mannheim offered the transposition of ideology whereby (31):

> "What was once the intellectual armament of a party is transformed into a method of research in social and intellectual history generally."

The demystification of ideology has subsequently been the most fruitful (and fruitless) social pursuit engaged in. Presently there are so many differing meanings as to what ideology consists of that the enterprise degenerates into complexes of word games. Yet it was the impetus of ideology which added so much energy to the criminological debate of the sixties and seventies. Using the word "paradigm" coined by Thomas Kuhn, William Chambliss announced the ideological struggle whereby "There is, at the very least, a gigantic struggle between the previously dominant functional paradigm and the emergent conflict paradigm", (32) holding out Durkheim and Marx as the exemplars of the functionalist and

conflict paradigms respectively.

But are not these the great meta-narratives of opposition (conflict) and of belonging to an ordered whole which lie in their different narrations in the oldest stories of man as for instance in Chinese philosphy? Social science has continually plundered the narratives, transforming literature into science without realizing the nature of its undertaking. Thus they themselves became language games: that is, systems of relations that reproduce former situations and knowledge of which the "players" were "unaware". This is not to deny a positive and viable status for social science, but to demand that we renounce the vision of natural science as being the model of our enterprise, and to recognise our need to develop fresh canons to those based on such a model.

The realization that social identities, whether institutions or individuals, exist in a mass of narrative interpretations means that they cannot be understood absolutely, and identities which can only be understood against the realization of an intersection of narratives cannot be captured by scientific language which aspires to total detachment. Identities formulated by narratives can only be judged from the "point" of other narratives, objectivity enabled by "awareness" of the narratives that this "point" comprises.

7. Narrative Influence within Criminological "Modernity"

Modernity arose because of a conjunction of narratives - narratives of security which governed the role of the military; narrative change within religion which gave rise to protestantism; and crucially, the combination of the imagery of journey with the belief in ascent through knowledge.

Dramatically, the notion of progress changed. It became the idea that "we" are going somewhere, and this was to be a somewhere within this world. Previously man had believed that the future would either repeat the past (Plato, Aristotle, Epicurus, Cicero, Lucretius, Vico, Ibn Khuldum), or that there had been a "golden age" from which progress was regression (Christian fall from grace, Hesiod, Ovid), change in this life being for the worse, radical change happening suddenly, possibly by supernatural intervention. Hope for the betterment of the human condition was expressed in salvation from this world rather than salvation within it. A key new element was the faith in the possibility of scientific knowledge. The time period is not exact, being simply called the Enlightenment (Eclairecissement, Aufklärung), literally to "free from superstition and prejudice". In all names the root metaphor is of "light". It is the light of Plato's cave. Moreover, after the optimism of Bacon and Descartes, progress became a participatory event. Saint-Simon declared (33):

> "The Golden Age of the human race is not behind us but before us; it lies in the perfection of the social order. Our ancestors never saw it; our children will one day arrive there, it is for us to clear the way."

Two versions of the methodology arose. One was a structure founded upon the model of Newtonian physics. It was a vision of the slow, steady progress in scientific knowledge and culture. Both were viewed as linked, progress in scientific knowledge leading to progress in moral matters. This quite secular vision found its opposition in the more transcendental scheme of Hegel, where a total unity was the final goal.

In the main, criminology was to partake in the first. Its birth came about in the words of the American criminologist George Vold with the transformation of man's vision within

the demonological to the naturalist framework. Science blossomed as "medicine" and "psychiatry" were freed from theologically orientated explanations. Locke and Condillac's primitive psychology enabled the French physician Pinel to advocate insanity as a disease which could be treated. As with insanity, so crime began to be seen as a problem capable of solution. Moreover, this was a technical problem. Devoid of metaphysics, crime was a natural phenomenon - the criminal could be located, he was a real, distinct object. All was not calm, however, as the ambivalence of the reaction of Voltaire's cry "ecraser l'infame" (destroy the Church) illustrates. One lesser paid contemporary replied that it was alright for Voltaire, safe with his fame and money, but outside his gate sat "the mob". And who would control the mob with the power of the Church destroyed? This fear had been voiced before. Machiavelli in "The Prince" had defended Religion as a social bond, even, says he, if it be a false one.

But there were other voices which argued the path of moral and educative reform. Rousseau's voice stated that "vices belong not so much to man as to man badly governed". And now a science of government was possible - social statistics provided a power to be employed.

The spectacle of the mob could be overcome; man's evil, it was argued, was not original but consequential. It did not flow as a result of past acts in relation to God, but from present conditions in the natural world. For Michel Foucault it was the birth of "man" as an object of study, for now man stood complete, no longer part of God but a full being. And now, the world was subject to a crucial difference. If man was to be a complete "presence", then that, which was formally part of him, but now no longer, must make its exit. Nietzsche announced it later in the nineteenth century: "God was dead".

What then was society without God? A new alignment of narratives appeared. They provided a new notion that was a peculiar enlightenment notion: the machine made its entrance. True, it was a machine of living parts, and it changed, evolved, progressed forwards. It appeared very much like a living organism.

If it did not exist in God's sight, then it must only exist in time. And as it appears impossible to judge the present by the future there being nothing analogous to a "memory" of the future, so it came that the past became the guide to the present. History became an entity to judge society by. History provided a natural Archimedian point, but it was to provide various interpretations.

Using a rather crude and oversimplified scheme, these appeared as:

- the "Conservative": the mixture of the narrative of an integrated entity, history and function. Society is seen as the creation of history in a functional hierarchical order. Its present mechanism and laws enabled the maximisation of performance. The legal status quo must be defended and it is the maximisation of the good of society. In England this interpretation is illustrated in the writings of the Victorian judge Sir James Stephen.

- the "Liberal": a somewhat similar mixture, but with society not being organised hierarchically but horizontally. This necessarily implies that diverse social groupings are to be allowed, that is, the acceptance of Pluralism. Competition and tolerance are to be the oil of the machine. This interpretation is illustrated by the open debate J.S. Mill undertook with Sir James Stephen. The legal system is to be value neutral, and to act in the overall interest.

- the "Conflict": a combination of history, with the mechanism of opposition to give a divided whole which moves

through stages to a final unity. Movement to the next results from "oppositions" within the present. Law is seen as the instrument of the power groups dominating the present. This interpretation is illustrated in the writings based on Marx.

Nietzsche had retrospectively said that if God was dead, then morality would have to go "beyond good and evil". Morality would become the highest form of amorality.

The original movement with moral language was to align it to social images. Morse Peckhorn identified three alignments. (34)

The first saw society being a natural product, the customs that society had legalised and institutionalised were natural and must be defended. Thus it would be wrong to commit murder, but right to hang a murderer. The moral task was to adapt ourselves to things as they actually were. The criminal must be unnatural, amoral; punishment is demanded.

The second identified the statistically most frequent with the normal, the normal with the natural, and the natural with the good. The most common custom is good. This notion had more of an allowance of difference. He who was deviant would change when we changed his conditions.

The third identified the changing process of evolution, thus whatever furthered evolution was the good. The bad did not exist absolutely but found its identification by being that which threatened natural development. Intelligence and knowledge are our guide and can identify what action conforms best to the laws of nature. As European civilization is the apex of evolution, the native tribes of Australia, the Americas, New Zealand, and Africa must be shown the "light" and brought from their caves. It is ignorance which prevents the perfection of the human condition. Therefore, the customs which impede man's perfection must be destroyed,

and as the ultimate end is good, your means to achieve those ends are by definition good. Discipline must be installed. Here we have the moral theory of the self-righteous man which Peckham (as Popper was to do) equates as being the most dangerous "solution". Politically, if the historical course of the party or cause was correct, then what is required to bring this about is the good.

Specifically the theories of punishment became tied to the social images. The so-called "absolutism" of Hegel's retribution was in theory an event whereby the criminal was reconciled to the being of the ethical state (punishment), which both simultaneously destroyed the crime and preserved the "right" embodied in the law. This process in turn furthered the historical progression of the "right" which was the spirit of the law. Thus this retribution is not a backward looking event, but a forward "positive" event required by the terms of his historical narration.

Beccaria transformed penology from an arbitrary imposition under a range of laws which mostly specified capital punishment into a rationalised machine. His vision of penal servitude, as Thorsten Sellin tells us, was to be a punishment worse that death, "a living death". (35) Certainty of punishment, not severity, was the proper operational mode for the machine. The "right of the state" to impose punishment was based upon the narrative of the social contract. Society and penology were viewed as instruments of utility to maintain the terms of such a narrative.

Our notions of both general and specific deterrence grew as Bentham developed the narrative to produce "the greatest happiness of the greatest number", a logical impossibility on the macro level, sustainable on the micro by the notion of "Hedonic calculus" (the "calculus of pleasure"). Man's mind appears as if a slot machine calculating the visible factors of utilitarianism. (36)

John Stuart Mill introduced tolerance to the machine which in its original rigid structure threatened to destroy itself. Now the complexity of intermingling justice, utility, symbolic power, individual and social factors began to be recognised and taken into account. Both extenuating and mitigating factors began their history. The machine, designed in the hope that it would drastically reduce if not rid society of crime, began a life of containment and took on a human face.

The relative strengths of the narratives differed and changed over time. In the English context the high point of "Beyond Good and Evil" came with the writings of the social scientist Barbara Wootton. In "Crime and the Criminal Law" (37) Wootton amoralised criminal responsibility. Punishment was argued beyond praise and blame and proposed as an antiseptic social technique.

It had little chance of succeeding, for the judiciary, as Hart and Honoré declared in "Causation and the Law", (38) were acting on the basis of Humean common sense. Theory did not match practice in any unified scheme.

In effect, the system was not a machine, but a loose collection of narratives. The judiciary, the social scientists, the penologists, the Home Office, the reformers, the moralists - all were doing their own thing.

In time a realization of such came about. Certainty was lost, confusion arrived. Nigel Walker of Oxford, writing in 1969, could still title a book a modernist "Sentencing in a Rational Society" and mean it both descriptively and prescriptively. Hall-Williams, writing in 1982, would entitle a paper "Sentencing in an Irrational Society" and mean it descriptively. The juxtaposition intentional, a crucial change evidenced.

8. What Would Post-Modernity Be?

If modernity was the idea that we were going somewhere (the where may have depended upon which vision of change and progress one held, but there was at least a goal), then post-modernity is the knowledge that we are moving, increasingly faster, and with more technic, more global power, but the somewhere seems to drop off the end of the sentence.

If modernity was certainty, post-modernity is post-certainty. Modernity in the English speaking world gave rise to the popularity of criminology over penology. Criminology was certainly a science, penology appeared more like policy, a second-rate enterprise in contrast to the investigation and theorising about the natural object of criminology - crime and the criminal.

The doubt, announced in ideological fashion in the sixties, we can see in rather lighter language as primarily the philosophical problem of the duck arriving in criminology. The duck had a long narrative history. An old proverb had said that "if it looks like a duck, and walks like a duck, and quacks like a duck, then it is a duck". A commonsensical dictum: if something appears or acts like something we are familiar with, then we take it to be, that it is that. However, without God to guarantee epistemology, how can one be sure? Because looked at another way ... the duck is a rabbit!

If that was so, then the question shifted to how was it that we organised our word games. Who had the power to dictate the labels? The criminological position complicated upon the labelling perspective realization, that if you called a criminological duck/rabbit/thing that sat on the water a rabbit for long enough, then it started to go down holes in the gravel. It did not happen all the time, of course, and one could never be quite sure. Furthermore, the suspicion grew as to what were the motives behind calling the names.

Penological history was rewritten. Prior to the mid-sixties few within penology studied history. Instead prediction studies and so forth abounded. The progressive, humanitarian nature was assumed. Platt, Foucault, Thompson, Rotham, Scull, Radzinowicz, Iganatieff, soon the multiplicity of narratives grew. "History", said the professional historian W.B. Gallie, "is a species of the genus story." A lively debate as to truth claims followed. Yet, as I hope to have noted, all historical events, and those of today, are fixated by and deeply rooted in narratives.

On the larger scale, the great meta-narratives started to be doubted. Popper, Berlin and Collingwood had denied that any pattern could be known from history. Others, like Ayer, Ross and Kelsen, denied the validity of any judgements about the pattern of history. But, perhaps, this confusion can give us a space to move within.

9. The Drama Re-Judged

Our audience are the "others" of our crimino-peno-"self", those who are both recievers and legitimators of our logos, expressing a commonality within the brief travelling of mortality. Our play, our code ... what is it, if not a partaker in a larger drama whose function is to preserve, and (hopefully?) enhance, the delicate balance between man and the cosmos?

Over time a variety of techniques for sustaining balance have existed. The most common have been the production and reproduction of narratives which enabled man to have stance, hope and meaning. Call them what you will, but they normally attempted to both give directions about what to do, and solace whilst doing it.

In the original narratives the cosmos dominated man who was at home but a dependent subject. There have been many changes since. Prominent has been the demise of dependence and the assention of the desire to feel in control. Such a desire produces power, but life becomes a technology. A change which has as one price that the turning of life into technologies means the lowering of loyalty and belonging vis-à-vis those institutions which comprise both politics and judico-penal realms.

Most commentators see this process in three phrases. Habermas calls his typology the "mythical", the "religious and metaphysical" and the "modern". My own heuristic typology is "mythical", "mystery", "problem".

Under the mythical the narratives understandably are concrete and localised, enabling the small traditional community to operate. Under mystery the whole becomes unknowable. Multiple but knowable Gods become replaced by an unknowable monotheism. Such lack of knowledge may result in doctrinal stimulation but also the transference of responsibility to the individual. Problem sees the proposition that life can itself be turned into utopia by the uncovering of information, the creation of administrative procedures and the growth of rationality. Seen as the overturning of the "conjectural" basis of legitimation and the placement of "the spiritual power in the hands of the scientists" (Saint-Simon), this grants control via the objectification of the world. The expectation appearing to be that we can then subsume, manipulate and massage life into a series of temporal, spatial, material problems, solvable given the right conditions. The resulting differentiation of activities produces vast information at the cost of meaning.

Maximization of information without meaning is nihilist. But life cannot give itself meaning. After all, even common language is given meaning by custom (Hume). The necessity for meaning guarantors, or systems of signification, cannot,

it seems, be escaped. However, in pursuing meaning, the conceptual realm comes to revolve around a locus of important significance, and the path of action is presented around the pivot of such significance. At its strongest, this dream holds the pivot to be the uncovered secret given meaning, which the political structure could be organised to reflect, and the judico-civil decision making a paradigmated representation. Furthermore, the re-alignment of the political system upon this mode would be a resistance free structure reflecting right values. And so the "system" would strengthen into the guardian of the "right order of things".

The demand for a focus of significance confronts us from many quarters, perhaps never more powerfully invoked within Scandinavian criminology than by the concluding chapter of Nils Christie's "Limits to Pain". (39) Here Christie is specific in providing a point of orientation above Hell. A point of orientation above the confusing immanence of modern criminology: a transcendental pivot. He does it by quoting the Platonic Christian poet Lewis describing the capacity of individuals to experience what Oxford theologians call "blimps". A "blimp" is the experiencing of the immediate, direct, apprehension of the absolute. Christie calls it "Heaven". It is his negation of pain. But then the absolute has always been the soothing embrace that would dissolve immanence and make acceptable mortality. But whenever the absolute is present, as Christie ends his book by "if we lose this, we lose all", all is permissible in the name of it. Christie should have remembered that the inquisitions he recounts earlier were done not to deter Hell, but to reinforce the sanctity of doctrine. In his own way, Kant understood that the price of codifying the absolute was terror, and left his unspecified. Hegel, properly understood, declared the necessity of a transcendental ideal but that it should be left in the realm of speculative reason. His ambiguity, however, lead Marx, as we know, to specify it, and thus action was backed by faith in a historical

absolute. I do not mean to criticise Christie for we need transcendental ideals, but as our need is great, so too are the consequences of misunderstanding.

However, writing such as Christie's, which is essentially penological rather than criminological, is the exception rather than the rule. Our norm is the neutered discourse of a divided criminology-as-problem code. But Christie understands better than most that the division, the marcation of the code, creates a divided consciousness, from which it is a hard task to create wisdom.

The path to that wisdom, I would hold, is to recognise that our project is indeed essentially penological rather than criminological, and self-conscious rather than technical. And in this to recognise that the dream-narrative of "crime" and the "criminal" as real, existent, natural objects whose essence could be located and removed has enabled a code for technical problems, specifying a system of real, objective and independently verifiable relations. A system where meaning is almost entirely coded, locked up in and contained within. Such a utopian dream is untenable. Criminology should surrender to a penology and a code which as presentation is more open to the inexpressable in the expressional, and in doing so, to remember a desire which as representation can never be more than partially coded, but provides a relational field which is open to including the reciever as participant. Indeed, in this sense part of the dialogue narratives. Coextensively consciousness of technique needs to discover the narrative positioning. As it is true that the scientific control of modernity has been enabled by the marcation of "contemplation" (theory creation, the Greek "theoria") allowing thus the detatched disengagement "aiming at" the study of entities "true" to themselves irrespective of our desires, paradoxically this is only enabled by and sustained within narrative surrounding. The freedom of analyticism is only enabled by an implicit and correspondingly unexamined synthesis.

In a television debate of the early seventies, to the Chomsky (Habermas) suggestion that utopia was inscribed in the deep universal structures of language, Foucault replied that the "deep structures" he studied were temporal, specific and rooted in the power-discourse formations of each era. Similarily, I suggest, to create a new code of action we need to investigate the fields of meanings, self-definitions and interpretations, the ebb and flow of the narratives of society. To expose their power, and to engage in them ourselves. As with utopia, so also an innocent place to stand cannot be found. But all this means is that it is our fate to live (be trapped?) in movement and action, in directions which must lie always respectful of the unknown, dressed in the twin clothes of speculation and scepticism, and, above all, self-concious of our own narratives.

NOTES

(1) Paul Rock, "The Sociology of Crime", p. 55 in D. Downes, Paul Rock (eds.), "Deviant Interpretations: Problems in Criminological Theory", Martin Robertson, London 1979.

(2) These definitions are from the Shorter Oxford Dictionary (on Historical Principles), Oxford 1959 ed.

(3) Rock, op. cit., p. 57.

(4) My interpretation of Lacan is derived from Lacan/Wilden, "Speech and Language in Psychoanalysis", John Hopkins University Press, London 1968/1984.

(5) J.E. Hall-Williams, "Criminology and Criminal Justice", Butterworths, London 1982. Emphasis in the original.

(6) Shorter Oxford Dictionary (on Historical Principles); 1959 ed.

(7) Cf. Chapter 11, "Demarcation between Science and Metaphysics" in Karl Popper, "Conjectures and Refutations", Routledge and Kegan Paul, London 1963.

(8) Hall-Williams, op. cit., p. 7, following quotes from the same page.

(9) Robert L. Kidder, "Connecting Law and Society", Prentice-Hall Inc., New Jersey 1983. Table on page 33.

(10) For example, Vyshinsky, "Law in the Soviet State", p. 81.

(11) G.W. Paton, "A Textbook in Jurisprudence", 4th edition, Clarendon Press, Oxford 1972, p. 118.

(12) Paton, op. cit., p. 92.

(13) The reference Paton uses on p. 111 is from Friedman, "Legal Theory", 4th ed., p. 352. He adds this was omitted in the 5th edition.

(14) Roberto Unger, "Law in Modern Society", Free Press, New York 1976.

(15) Note Leslie Wilkins, "Consumerist Criminology", Heineman, London 1984.

(16) Tony Platt, "Criminology in the 1980s: Progressive Alternatives to Law and Order", Crime and Social Justice, No. 21-22.

(17) The main text utilized in this essay is from Jürgen Habermas, "The Theory of Communicative Action Vol. 1; Reason and the Rationalization of Society", Thomas McCarthy Transl, Heineman, London 1984.

(18) Habermas, op. cit., p. 398.

(19) Habermas, op. cit., p. 387.

(20) Bernard Williams, "Ethics and the Limits of Philosophy", Fontana Press/Collins, London 1985. The quotation is from p. 1.

(21) Foucault is of course famous in criminology for his "Discipline and Punish: The Birth of the Prison" and his work in the prisoners' movement in France. Jean-Francois Lyotard's major essay, "The Postmodern Condition: A Report on Knowledge", Manchester University Press, Manchester 1984 is the work referred to here. Of course, the denial of an absolute vision is itself vision.

(22) Fredrick Jameson, Foreword to Lyotard, op. cit., p. xi.

(23) A.N. Whitehead, "Science and the Modern World", Macmillan, New York 1925 (Mentor reprint 1948), p. 13.

(24) Verse 19, Genesis, The Holy Bible, James authorised version, Oxford 1607.

(25) A collection of extracts from early (philosophical) narratives which include Parmenides is Georg Misch, "The Dawn of Philosophy" (English edition R. Hull), Routledge and Kegan Paul, London 1950.

(26) Plato, "Republic", Book VII, Penguin Edition, London 1968, pp. 514-517.

(27) It was these aspects which account for Popper's placement of Plato (among others) as an enemy of the open society.

(28) John Rawls, "A Theory of Justice", Oxford University Press, Oxford 1973.

(29) Karl Mannheim, "Ideology and Utopia", Routledge and Kegan Paul, London 1936, 1979 reprint, p. 15.

(30) Mannheim, op. cit., p. 18.

(31) Mannheim, op. cit., p. 78.

(32) W.J. Chambliss, "Functional and Conflict Theories of Crime". Quoted in "Ideology and Crime: A Study in the Sociology of Knowledge", International Journal of Criminology and Penology, Nr. 6, 1978, p. 32.

(33) Henri Comte Saint-Simon (1760-1825), "Selected Writings", F.M.H. Markham ed., Basil Blackwell, Oxford 1952, p. 68.

(34) Morse Peckham, "Beyond the Tragic Vision", Cambridge University Press, Cambridge 1981, pp. 74-77.

(35) See Thorsten Sellin, "Beccaria's Substitute for the Death Penalty", A Short Essay in S.F. Landau and L. Sebba (eds.), "Criminology in Perspective", Lexington Books, Massachusets 1977.

(36) For an extensive coverage of this process, see Élie Halévy, "The Growth of Philosophical Radicalism", Faber and Faber, London 1952.

(37) Barbara Wootton, "Crime and the Criminal Law", Stevens, London 1963.

(38) H.K. Hart and A.M. Honoré, "Causation in the Law", Clarendon Press, London 1959.

(39) Nils Christie, "Limits to Pain", Martin Robertson, Oxford 1981, pp. 117-118.

Karel Netík

ON THE PROBLEMS OF RELATIONS BETWEEN THE PERSONALITY OF JUVENILE OFFENDERS AND THE PREVENTION OF VIOLENT CRIMES

An integral part of the system of juvenile criminality prevention is the screening of threatened individuals. Firstly it requires adequate diagnostics based on easily identifiable criteria enabling the assessment of the development of personality and of its contingent social deviation. With regard to the fact that the receptors of the so-called signals of socially deviant development of personality are mostly pedagogic and/or social workers and only exceptionally psychologists, it is necessary to look for signals that would be relatively easily recognisable by these experts. These signals can not thus be the personality data acquired with the help of psychological techniques but rather certain formulas of social conduct. But these formulas do not often enable us to distinguish to a satisfactory extent between, on the one hand, the so-called developmental criminality that has a somewhat episodic character reflecting the pubescent and/or adolescent crises and, on the other, the criminality that is a manifestation of a more deeply affected crime-prone personality and that will probably be repeated in the future. This differentiation can be established by the comprehensive diagnostics of the development of personality which will bring into relation the data on the social aspects of the development of an

individual (including defects) and the data on his/her personality.

The starting point of preventive activities will be the noting of signals of the socially deviant development of the subject (defects of conduct) that must be followed up with an examination by a specialist (in the first place psychological and/or psycho-pathological examination) and then with differentiated ways of treatment.

In 1981-1985 a study on the "Genesis of the Criminal Career of Juvenile Violent Delinquents" was carried out by the Criminological Research Institute attached to the Office of the Prosecutor General of the Czechoslovak Socialist Republic. Its objective was - among others - to contribute to a solution of the above mentioned problems in the sphere of violent criminality, on the one hand through the investigation of personality characteristics of the perpetrators of this kind of criminal activity, and on the other hand through the specification of identifiable signals of the risk of future social failure (from the data on the life history of the individuals investigated).

The sample of 100 perpetrators of crimes of murder, robbery, rape, etc., and 100 unpunished control individuals - paired up with the delinquents - was investigated with the help of a number of psychological techniques oriented towards the investigation of relevant personality characteristics (e.g. Cattel Tests CF2a, 16PF, etc.). Then the anamnestic data were ascertained both from the investigated persons themselves and from their mothers, from schools and from the organs of Child Care attached to national committees. In that way two blocks of variables were obtained: personality variables and anamnestic variables. The personality variables were subjected to factorial analysis. For each individual factorial scores were determined and on them a cluster analysis was carried out with the objective of creating

an empirical typology. (1) The personality was described in terms of eight (bipolar) features-factors:

1. emotional disposition (resentment v. balanced emotional experience);

2. social attitudes (hostility v. affiliation);

3. regulation of affectivity (unstability v. stability);

4. orientation of psychic activity (extraversion v. introversion);

5. orientation towards the environment (orientation towards the impersonal world v. readiness to enter into impersonal contact);

6. organization of cognitive activity (adequate v. defective);

7. the level of the formation of inner regulatives of conduct (adequate v. defective); and

8. adaptation to the social environment (anxiety in social situation v. adaptation).

On the basis of the similarity of factorial profiles in all, five personality types were specified, two of them having been merged into one:

i non-socialized type

ii intellectually deficient type

iii + iv neurotic (dysforic and anxious) type

v emotionally adequate type.

Types i and ii are characteristic of our delinquents, type v of the control individuals (the differences in the representation of both samples in the types were tested with the help of the Chi Square technique; the differences were statistically highly significant). All ascertained types (except for the v type) can also be characterised by multiple emotional defectiveness.

From the analysis of life data from the individuals' life history from the point of view of socially deviant development we have differentiated:

- specific signals related to the future perpetration of violent criminal activity and pointing out, to a considerable extent, the development of an aggressive personality. Among them we number different forms of aggressive conduct as e.g. verbal aggression (quarrels, threats), more significant physical aggressions (causing of injury, maltreatment of persons), etc.; and

- non-specific signals pointing in general to the socially deviant development of the personality without relation to aggressiveness, e.g. truancy, vagrancy, frequent visits to restaurants connected with drinking alcohol, contacts with the Public Security, frequent contacts with delinquent juveniles, sexual promiscuity, etc.

In comparing the delinquent and the non-delinquent individuals within the framework of each type in three age categories, in the younger school age (6-10 years), in puberty (11-14 years) and in adolescence (from 15 years to the perpetration of a delict, i.e. 18 years of age at the latest), we ascertained a highly significant increase of specific signals in the case of delinquency of the intellectually deficient type, particularly in the two last formative periods. Non-delinquents of that type displayed in all periods less signals. The highest frequencies of specific signals were registered in the case of the non-socialized type, but

no statistically significant differences were demonstrated between delinquents and non-delinquents in individual periods, not even as to their contingent growth with the increasing age.

The lowest frequency of these signals was ascertained in the neurotic and emotionally adequate type. A statistically significant difference in frequency was demonstrated between delinquents and non-delinquents only in adolescence.

As to the non-specific signals of socially deviant development, we have ascertained that contacts with the Public Security, truancy, vagrancy and the drinking of alcohol are typical of the delinquents in puberty. The occurence of one or more of these signals (regardless of the type of personality) confirms the marked risk of future delinquency (80% of the control individuals had no such signal). During adolescence, in addition, frequent contacts with delinquent peers and a promiscuous life style were noted. Similarily, the occurence of two or more signals in this period is significant from the point of view of the above mentioned risk (89% of the control individuals had only one or no signal).

These briefly described ascertainments enable us to establish a certain basis for the differentiation of developmental criminality and criminality as a manifestation of a more deeply affected crime-prone personality, mentioned in the introduction.

In the emotionally adequate and neurotic type specific signals appear to an increased extent only in adolescence. Their deviant development - registered by the social environment - is of shorter duration, and it can be presumed that it is rather the manifestation of the adolescent crisis of personality. In treating them it is necessary to accentuate interventional techniques in crisis, consultation services, etc., rather than penal repression.

The socially deviant development of the non-socialized and intellectually deficient type is recognizable by the society already in the previous formative periods, mainly in puberty. Their treatment will require a more intensive approach with the elements of the modification of conduct and consistent controls (heteronomous morale).

NOTE

(1) For more detailed data:

Netík, K., Večerka, K., Neumann, J., Válková, H.: Geneze kriminální kariéry mladistvých delinkventu. Závěrečná zpráva z výzkumu. (The Genesis of the Criminal Career of Juvenile Violent Delinquents. Final Report on the Investigation.) Criminological Research Institute, Prague 1985.

Netík, K., Večerka, K., Neumann, J., Válková, H.: Mladistvý pachatel násilné trestné činnosti. K problematice deviantní životní cesty. (The Juvenile Perpetrator of Violent Criminal Activity. On the Problems of a Deviant Life Career.) Criminological Research Institute, Prague (in print).

Peter Polt

THE TREATMENT OF FOREIGNERS IN THE HUNGARIAN CRIMINAL JUSTICE SYSTEM

1. Introduction

Recently the number of crimes committed by foreigners has increased throughout the world, and the authorities administering justice have been faced with more and more crimes involving aliens. This is one of the phenomena that reflect a structural change characteristic of criminality today. The statement made by the United Nations Secretariat in the course of preparing the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, according to which "in certain countries crime also shows a new dimension in terms of the emergence of new groups of offenders, as appears to be the case with growing female criminality and the increasing number of aliens involved in criminal activities" (1) has been affirmed in several national and international studies.

The document just referred to attempts to uncover the reason for the growing occurance of crimes committed by foreigners. "Advances in international transport, coupled with differential economic opportunities in different countries have substantially increased the number of aliens living, either temporarily or permanently, within the boundaries of numerous countries in most regions. As a group, and at least

partially as a consequence of the cultural, linguistic and socio-economic differences that separate these aliens from authochthonous populations, they are often more vulnerable to certain criminogenic influences." (2)

This statement only partially applies to Hungary, as, due to the small number of migrant workers, the number of foreigners permanently staying in the country is rather low. Therefore, in Hungary, the problem of alien offenders is not primarily a criminological one - e.g. the existence of specific subcultures that require special crime prevention measures and treatment - but an issue of substantive law, criminal procedure and corrections.

2. Foreigners in Hungary

The term foreigner covers not only aliens but also DPs if their residence is beyond Hungary. However, those having dual citizenship including the Hungarian one, are not considered as foreigners. Exceptionally in the case of transfer of proceedings in criminal matters, such persons shall be treated as foreigners, provided their residence is abroad.

Basically aliens arriving in Hungary can be divided into three main groups:

a) those enjoying diplomatic immunity or other exemption;

b) migrant workers or students studying in Hungary; and

c) visitors staying either for long or short periods in Hungary.

In the case of persons enjoying diplomatic immunity or other personal exemption, the practice followed is governed by the Vienna Convention, which also Hungary has signed. (3)

This exemption has a double meaning. On the one hand, it means immunity that does not allow the authorities to apply coercive measures. On the other hand, it means an immunity of jurisdiction, i.e. it is only the envoy's country that has criminal jurisdiction while the host country cannot but resort to expulsion. (4)

Those enjoying immunity are determined according to the rules of the Vienna Convention. The other Vienna Convention concerning consuls (5) has not been signed by Hungary. In general, Hungary grants overall immunity also for consuls through her bilateral agreements.

It is mainly the highly industrialized countries that are faced with the problems caused by the legal or illegal mass immigration of aliens looking for a job. It is a widespread view that among them criminality is higher than in the case of natives, due to their their difficulties in adaptation, their different traditions and value judgements. The tension cumulated by such views has not ceased, notwithstanding that e.g. the Conference of Directors of Criminological Research Institutes organized by the Council of Europe in 1967 concluded that "criminality among migrant workers, apart from a few rare exceptions, is not higher than among the population of the host country". (6)

Such problems do not exist in Hungary. The number of migrant workers staying in the country is negligible and they live in sound circumstances. Their stay in Hungary is regulated by interstate agreements that exclude precariousness of existence and eliminate the handicaps deriving from language problems or from the difference in social traditions. It is also to be taken into consideration that usually they are skilled workers whose social background is better than that of migrant workers in general. Fundamentally, the same concerns students studying in Hungary.

The majority of foreigners arriving in Hungary are tourists. Hungary is open to visitors. In recent years considerable mitigations have been introduced. There is no obligatory visa system with the friendly East-European countries and with some of the Western ones (Austria, Sweden, Finland). A citizen of these countries can even apply for admission at the frontier, and by granted this within a few hours. As a result of the developments over the most recent periods, the annual average of foreigners visiting Hungary exceeds in number the native population. (7)

3. Particularities in Crimes Committed by Foreigners in Hungary (8)

The National Swedish Council for Crime Prevention reports:

> " ... the fact that persons who had committed offences are foreigners would be of interest only under one or both of the following conditions: 1) their nationality (or the fact of being a foreigner) accounts for the crime, and 2) the knowledge that they are foreigners is important for criminal policy if it can be used to prevent or hinder offences of a particular kind." (9)

These conditions are not completely met in Hungary. The criminality of foreigners should be reviewed in the light of the following three reasons:

a) these crimes include especially dangerous offences committed by professional offenders;

b) in some of the cases investigation and prevention are faced with increased difficulties; and

c) certain offences have a strong criminogenic influence on offenders in Hungary.

Contrary to former opinions, (10) the ratio of criminality among foreigners who arrive in Hungary does not essentially differ from that of the native population. Over the past few years, out of 70.000-80.000 offenders 2.500-3.200 were foreign citizens (in 1985: 2.548). This means a rate of only 2,5-4 % of foreign offenders.

In accordance with other countries' experiences, certain crimes involve a higher ratio of aliens. Smuggling, offences against foreign exchange policy, often coupled with speculation, are the biggest in number. Illegal purchase and sale of different foreign currencies are typical. Characteristic of these crimes is a close cooperation between foreign and Hungarian citizens.

Recently the number of drug offences has grown. As known, Hungary is a route in reserve for East-West drug traffic. This route is used more and more frequently in road, rail and air transport by drug traffickers, and the number of stupefacients confiscated is increasing. It is feared that in addition to the transit of drugs, they will also be purchased in Hungary. Drug traffic may give a stimulus to other offences, and it may even result in attempts to produce drugs in Hungary.

The counterfeiting of money and the circulation of counterfeit money are typically committed by foreigners. False Hungarian bank notes counterfeited abroad have already been found, though in small quantities. Sales of forged foreign currencies are considerably more frequent in Hungary. It is produced illegally, and in the majority of cases the money is sold to Hungarian citizens who are not in a position to check whether the currency is counterfeit.

Treasure thefts and the smuggling of these treasures abroad are not too frequent, but they are especially dangerous. The theft of seven paintings of inestimable value from the Museum of Fine Arts in Hungary in November 1983 is not a unique case. In almost all offences of this type Hungarian and foreign criminals have acted collectively.

In certain offences against property the ratio of foreign participants has increased significantly. In some cases the offenders are highly organized and technically well equipped. As a further characteristic feature, the methods applied have been little or completely unknown in Hungary. Therefore, the investigation of such matters and the capture of the offenders are rather difficult. The effect of such offences on Hungarian criminality is not negligible either.

Finally, traffic crimes and unlawful crossing of the frontier are committed by foreigners in a great number. The offence rate of foreigners in traffic crimes is equal to that of Hungarian citizens, while unlawful crossing of the frontier is committed in a bigger ratio by foreigners compared to Hungarian citizens.

4. The Legal Status of Aliens and Hungarian Criminal Justice

There are two approaches to the legal status of aliens in international law. (11) According to the National Treatment Doctrine, aliens are entitled to the same rights as the natives. (12) The principle of the International Minimum Standard for the Treatment of Aliens provides that aliens must be treated in a way that meets the general standards of the civilization in question. (13)

On the basis of human rights, attempts have been made to define these two principles. (14) A remarkable draft is the Draft Declaration on the Human Rights of Individuals Who Are

Not Citizens of the Country in Which They Live. (15)

In spite of some problems, we can draw the conclusion that, in general, the basic principles for the treatment of aliens laid down by international law prohibit discrimination and fundamentally call for the protection of human rights. In criminal justice increased attention should be paid to the basic principles for the treatment of aliens due to the repressive nature of criminal punishment.

As to the treatment of alien offenders from the point of view of penal law, two basic principles and some complementary ones should prevail in addition to human rights and fundamental freedom. These two basic principles are the "aut dedere aut punire" concept and the principle of the sovereignity of states.

The classic wording of the "aut dedere aut punire" principle originates from Hugo Grotius, who published his famous work already in 1625. For a long time, however, his ideas were not implemented in practice. (16) Nowadays this concept is more or less accepted although, as M. Cherif Bassiouni correctly states, the "aut dedere aut judicare" drafting can be applied much better in the present circumstances since it offers more possibility of choice. (17) Naturally, this version also needs some tenor amendment since the concept was applied by Grotius only for extradition. Since then new legal institutions have been established with the same purpose as extradition.

The principle of sovereignity also plays an important role. The prohibition of interference in the internal affairs of a country inhibits the oppressive influence on the legislation and criminal justice of individual countries. At the same time, the postulate of reciprocity implies that international cooperation is subject to the mutual behaviour of the states.

In their correlation the three principles mentioned show contradictions that might raise problems in international cooperation. (18) Thus, the main task ahead is to find the right equilibrium among these principles and to guarantee a just legislation and administration of justice satisfactory to all parties concerned.

These principles simultaneously pertain to international criminal law, due to the fact that one of the most characteristic features of crimes of international relevance and pertaining to international criminal law, is that alien offenders are faced with national jurisdictions. (19) No international Penal Code is applicable in Hungary, so the rules of both substantive and procedural laws applied for aliens come from different sources. The relevant international agreements are disproportionally more detailed than the national ruling, but nevertheless the sources of the most important legal institutions are the Hungarian Penal Code and the Code of Criminal Procedure. (20) Hungary's National Report submitted to the 13th Congress of the AIDP reviews these legal institutions in detail, with the exception of extradition. (21)

In this context I believe only the rules connected closely to the treatment of aliens need be mentioned. In the spirit of the three principles mentioned, this treatment implies a tripartite requirement:

Stage 1: Considering both the aim of the punishment and the principles enumerated, the most apt manner is when impeachment of the non-citizen is done by his/her own state. The institutions of the transfer of procedure and, to some extent, extradition have been established for this purpose.

Stage 2: If stage 1 cannot be applied, as a second possibility we should seek the enforcement of the punishment by the non-citizen's own country.

Stage 3: Finally, if there is no way of transferring the enforcement of the punishment either, it should be assured that enforcement will be realized with the least possible disadvantage to the alien.

In all three cases special rules of procedure are also necessary to eliminate the disadvantages due to the alien's non-citizenship, already in the course of the given procedure.

5. Stage 1: The Transfer of Penal Procedure and Extradition

In penal procedures against aliens, the transfer of criminal jurisdiction has the greatest significance. One sixth of the crimes committed by aliens in Hungary are transferred to the offender's home authorities. This means 300-350 cases per year.

Paragraph 8 of the Penal Code provides the transfer of procedure to the authorities of the alien's country, if it is expedient to carry on with the procedure there. The cession of the penal procedure is an institution that equally serves the interest of all parties concerned. It is easier to enforce a punishment if the offender is sentenced in his country, and in addition, this solution seems to be the most humanitarian. The Hungarian ruling makes the transfer of procedure possible also in the case of Hungarian citizens, provided they possess dual nationality or are domiciled abroad.

By virtue of the instructions of the General Attorney, the procedure, if possible, should be ceded to the home authorities of the alien offender. As against former practice, the Penal Code does not stipulate the existence of reciprocity or an international agreement for such actions. Transfer is excluded by law only in the case of "ne bis in idem" or

double criminality.

The procedure is transferable in the event of both misdemeanors and crimes. There are two types of transfer of procedure. (22) Firstly, if the offender returns to his country and his extradition is not expected, the Hungarian authorities have no other choice but to transfer the procedure, although nowadays it is also suggested that the alien be denounced to his home authorities in lieu of conveyance. A much more significant situation arises if the offender remains on Hungarian territory and the procedure is transferred under such circumstances. According to Paragraph 391 of the Penal Code, procedure can be conveyed by the General Attorney prior to accusation, and after that by the Minister of Justice. According to experience, in the majority of cases conveyance occurs prior to accusation. This also means that the alien has to spend the shortest time possible in Hungary.

The term "home authorities of the offender" should not be implemented in the strictest sense. In addition to the country of the offender's nationality, the country of domicile is also acceptable. (23)

In the ruling there is no reference to the case when the country in question, having no contractual obligation to take over the procedure, is unwilling to carry on with the procedure. If so, and if the offender is still staying in Hungary, it is quite probable that the procedure takes place in Hungary.

There is a requirement raised only recently that is worth taking into consideration as well. It suggests that the legal ruling should give a choice to the offender either to have the procedure in his own state or in Hungary.

Extradition is an institution which is somewhat similar to conveyance, though it differs in many aspects. Extradition

is normally applied in cases when a person, either suspected of or sentenced for an offence committed abroad, is staying in Hungary. The Hungarian Penal Code permits extradition of non-citizens on the basis of international conventions or reciprocity.

According to the provisions of the Penal Code, extradition is subject to double criminality only, but bilateral international agreements may also call for additional conditions (e.g. "ne bis in idem", speciality, etc.).

It is not only the domestic authorities of the alien that may apply for extradition, but those of any other country. In the case of equal conditions, preference should, however, be given to the country of which the offender is a citizen.

It is an unremoveable obstacle against extradition if the right of asylum is granted to the alien. According to Paragraph 67 of the Hungarian Constitution, a provision of the Penal Code assures the right to asylum to those who are persecuted due to their democratic behaviour or their activity for social progress and the fight for peace. Regrettably neither the tenor nor the procedure of the right of asylum have a proper ruling, a fact resulting in uncertainty against this institution. (24)

Extraditions occur in a rather small number, only once or twice per year. Since 1981, when Hungary rejoined Interpol, a slight increase in this figure has been experienced. The small number of such cases is due to the fact that applications for extradition are very rarely submitted to Hungary, and even these cases cannot always be met because of the lack of international treaties, reciprocity or other conditions. If extradition cannot be approved but the offender is culpable according to Hungarian statutes, in principle there is no obstacle against impeachment since the Penal Code, in addition to the principles of territory and personality, accepts the doctrine of universal punitive power. In

such cases it is the General Attorney who decides on initiating criminal procedure.

6. Stage 2: The Transfer of Prisoners and the Transfer of Penal Enforcement

It may occur that the conditions for the transfer of penal procedure exist, but the alien is sentenced in Hungary. This can be due to several reasons, e.g. political offences, the pressure of public opinion in cases of serious crimes, joint offences involving Hungarian citizens, localized proof, or sometimes quite simply because the case can be settled quicker and with lesser complications in Hungary.

Paragraph 7 of the Penal Code allows the sentence imposed by a Hungarian Court of Law to be enforced abroad. Nevertheless, the provision that transfer of enforcement can take place only on the grounds of international agreements, seems to be too strict. As a matter of fact, there would be nothing against the transfer of penal enforcement on the basis of reciprocity as well. Certain views go even beyond this concept saying that even double criminality should be disregarded, provided the other state undertakes penal enforcement due to humanitarian considerations.

There is no provision in the Penal Code as to the nature of those punishments where enforcement can be transferred. In principle, all principal and supplementary punishments can be ceded.

There are examples of the conveyance of more punishments than can in practice be realized. For example the Convention with the Scandinavian countries allows the transfer of the enforcement of imprisonment, fines, other economic sanctions, as well as the supervision of a conditional sentence and release on parole. (25) The transfer of penal enforce-

ment is, however, most frequently applied for in the case of imprisonment. A number of international conventions have been dedicated to this subject. (26) Hungary is one of the signatories to the international convention of the European socialist countries (except for Rumania and Jugoslavia) and Mongolia and Cuba, that regulates the transfer and takeover of the enforcement of imprisonment. The aim of this convention is welcome, despite its insufficiencies. Apparently, its greatest shortcoming is that it only allows the transfer of imprisonment. Theoretically it is feared that the courts tend to sentence offenders to imprisonment even when it is not necessary.

On the other hand, the convention does not stipulate the consent of the condemned person as a precondition for the transfer of punishment. One of its positive results is, however, that since the conclusion of the convention, there has been a speedy development in this field. Hungary, in her bilateral agreements, calls for the ruling of the offender's consent if the transfer of the enforcement of punishment is applied. At the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Hungary was also among the nine countries that presented a model agreement for the transfer of foreign prisoners. This model agreement stipulates that the transfer of foreign prisoners must be subject to the offender's consent. This draft was adopted by the Congress and filed as a document, based on the idea that social adaptation of offenders is easier if they are given the possibility to work out their time in the country of their nationality or residence. (28)

With the exception of the shortcomings already mentioned, the Berlin Convention meets the requirements of our modern age. Nevertheless, it still has a number of built-in reservations for application. In practice there are only a few examples of the transfer of the enforcement of punishment. Hungary is aiming at more bilateral agreements of this kind

on the grounds of the model agreement mentioned.

In addition to agreements and to the better adoption of the provisions of the Berlin Convention, a ruling for the transfer of the enforcement of punishments other than imprisonment can be set as a target for the future.

7. Stage 3: Sentencing and Enforcement in Hungary

It is today still unavoidable that offences committed by aliens are judged by a Hungarian court and the sentences are enforced in Hungary. This is primarily due to the lack of double criminality, i.e. an offence can be punished only according to Hungarian statutes. Such cases are very frequent, as typical offences committed by aliens are smuggling, offences against foreign exchange policy or the unlawful crossing of frontiers. Impeachment and enforcement of punishments are exercised in Hungary also due to the lack of reciprocity with other countries.

In the case of aliens, fines seem to be the most proper punishment. It is advantageous for all parties concerned, because as soon as the fines are paid, the alien leaves the country. International practice, however, creates many problems. (29) A foreigner who is considering only a short visit rarely possesses the amount of cash needed for settling the fines, and it may take long to arrange the money transfers. Consequently, it is more probable that the courts eventually make less justifiable but immediately enforcable decisions, e.g. a short imprisonment sentence. In Hungarian legal practice, attempts are continously made to avoid such cases. The transfer of enforcement would be a better solution to this problem.

Expulsion is a punishment explicitly applicable to aliens. According to Paragraph 61 of the Penal Code, expulsion is a

supplementary punishment, but it can also be applied as a principal punishment. Expulsion is subject to the fact that the offence committed by the alien should not be punishable by more than two years of imprisonment. If the purpose of punishment is also attainable in this way, the independent application of expulsion would be the most justified sanction for minor crimes.

There are cases when the application of an imprisonment sentence is unavoidable. If enforcement cannot be transferred to the authorities of the foreign country, the elimination of disadvantages due to foreign citizenship should be assured. In Hungary this concerns 60-100 persons per year, also including those in custody.

I deem the Hungarian ruling to be satisfactory even in comparisons on an international level. A lot of similar provisions can be found in the documents of the Milan Congress and in the Recommendation of the Council of Europe Concerning Foreign Prisoners. (30)

The ruling provides that the rights and obligations are to be made known to the arrested persons in their mother tongue or in some other foreign language known to them. They must not be brought in a disadvantageous position owing to ignorance of the Hungarian language. (31) The convicted persons are allowed to buy papers, periodicals or books published in the languages they know. Such reading material can either be handed over on the occasion of visits or sent by mail. In addition to relatives, a convicted alien can also be visited by consular staff. These visits are governed according to the consular agreements adopted by Hungary.

As to the condemned alien's work, leisure time and education, the same rules are valid as in the case of Hungarian offenders. More attention should, however, be paid to their special position, particularly regarding their education.

In connection with alien citizens sentenced to imprisonment, the greatest problem arises from simultaneous expulsion. In such cases, by virtue of Paragraph 47 Subsection 3 Point B of the Penal Code, the alien cannot be released on parole. This is a detriment explicitly originating from foreign citizenship. The practical reason behind this ruling is that if an offender leaves the country to go abroad, there is no possibility for supervision and enforcement of the remaining part of the sentence. The transfer of the offender's supervision to his domestic authorities would be a solution to this problem. It is not an easy task since it requires the existence of almost identical conditions which, if available, would allow the transfer of either the procedure or the enforcement of the punishment. Yet, in order to find a solution, this approach must be followed.

8. The Main Rules of Procedure

The rules of procedure provide that aliens are not to be put into a detrimental position in the course of the penal procedure. Perhaps the most general and most important of these rules concerns the knowledge of languages. The alien can freely use his mother tongue, thus avoiding the disadvantages that might be caused by the ignorance of the Hungarian language. This rule is included in the basic principles of the Code of Criminal Procedure (Paragraph 8). This means that an interpreter can be asked for, and this request must be fulfilled even if the alien knows Hungarian. The fees of the interpreter are always paid by the Hungarian state.

Another among the most important rules concerns the defence. Paragraph 47 of the Code of Criminal Procedure stipulates the compulsory participation of a counsel for the defence in the procedure if the accused does not know Hungarian.

It is not an indifferent question for the alien how long the procedure lasts. The instructions of the Attorney General stipulate special promptness in procedures against foreign citizens. (32) If the procedure cannot be transferred, the procedure should be conducted in a way that assures the earliest possible conclusion of the procedure. It means that, if possible, fines must be imposed as a penal order without a court hearing (Paragraphs 350-355 of the Code of Criminal Procedure), or the alien should be brought to trial through a shortened procedure (Paragraphs 345-349 of the Code of Criminal Procedure).

9. Conclusions

As a conclusion, the following can be stated:

1) there has been a slight increase in the number and significance of crimes committed by aliens in Hungary, and they must, therefore, be more profoundly dealt with;

2) the substantive and procedural rules concerning aliens meet, in general, the fundamental requirements prescribed by internationally accepted provisions on cooperation in criminal proceedings and the treatment of alien offenders; but

3) a. legal ruling should give a choice to the offender to have the procedure either in his own state or in Hungary;

b. The transfer of prisoners must generally be subject tothe offenders' consent;

c. legal ruling should make the transfer of prisoners on the basis of reciprocity possible;

d. the possibility for transferring the enforcement of other punishments than imprisonment should be examined;

e. legal ruling should give a chance for courts to release foreigners condemned to deprivation of liberty on probation; and

4) domestic and comparative studies are necessary for the realization of the improvements mentioned above.

NOTES

(1) Working paper prepared by the Secretariat A/CONF.121/20, p. 5.

(2) Ibid., p. 10.

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(5) 596 United Nations Treaty Series 269.

(6) Action in the Field of Crime Problems, Council of Europe, Directorate of Press and Information, Strassbourg 1975, p. 11.

(7) Statisztikai évkönyv, Budapest 1984.

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(15) UN Doc.E./CN.4./Sub.2/392/1977

(16) Grotius, H.: A háboru és béke jogáról, Budapest 1960, 2.k., p. 480.

(17) Bassiouni, M. Cherif: International Extradition, United States Law and Practice, New York 1983, Booklet 2, Chapter 1, § 2-1.

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(27) 1979, évi 26. tvr.

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Bernardo del Rosal

ALTERNATIVES TO IMPRISONMENT IN THE SPANISH CRIMINAL JUSTICE SYSTEM: THE CURRENT SITUATION AND OUTLOOKS FOR THE FUTURE(1)

1. Introduction

In this specific field, as in others within the criminal justice system, Spain suffers from considerable underdevelopment. The least we can say is that we still have not joined, nor obviously followed, the main guidelines of what has been called the great international penal reform movement (2) which has been enforced all over the world since the late fifties. It is not easy to put in a few words the complex reasons for this underdevelopment. I should even go so far as to say that it is not easy to find out what the reasons themselves are. We should probably think about the fateful legacy of so many years of dictatorship under Franco's government (1939-1975), which obviously motivated - as this sort of political régime does - underdevelopment not only in many of the criminal justice fields, but also in other social, political, economic and cultural fields.

In this respect, perhaps one of the most harmful effects within the criminal justice system is the way in which our judges face the problem of criminality still remaining a decade after the dictator's death. It is not only a problem of political conservatism ("ultra-conservatism" on the part of many), but also a problem of not wanting anything to do

with the reform of our criminal justice system and its institutions. The latter has even worsened since the Socialist Party came to power in October 1982. Since that moment a substantial (but not vast) majority of our judges (especially those who occupy the top posts of the judiciary levels) form one of the most important obstacles to undertaking a serious reform of our penal system. (3) However, it also has to be pointed out that if the sanctioning system of the Penal Code is the heart of that Code, the place where the trends in criminal policy are more obviously and clearly seen (4) (and maybe this is why it is so difficult to change or reform it), the appalling situation of our criminal legislation in this concrete aspect, (5) as far as it concerns the democratic period (1978-1986), is the incontrovertible evidence of the lack of a determined and brave political will to seriously reform our out-dated criminal justice system. Once more it is true that there are no votes in jail.

Let us have a look at the current situation of the alternative measures to imprisonment in the Spanish criminal legislation and to what may be considered the outlooks and hopes for the future.

2. The Current Situation

We cannot truly speak about <u>alternative</u> non-custodial measures in our penal system because, in fact, there is only <u>one</u> in our Penal Code: the suspended or conditional sentence. (6) The suspended sentence was introduced in our criminal justice system in 1908 with the aim of reducing the rate of the prison population which, at the end of the nineteenth century and the beginning of the twentieth, was terribly high. This serious problem of overcrowding was created by a very high rate of delinquency, produced as a consequence of the economic and social conditions to which

the colonial disaster and the war against the United States of America had led. The policy-makers thought of reforming the prison system by building new prisons and tidying the existing ones, but it was impossible to provide the necessary funds. Even more so, it was very difficult to maintain the rate of inmates existing at that time. This was probably the most important reason, but certainly not the only one, why the Conditional Sentence Act of 1908 came into force. (7) Before the 1908 Act a solution to the problem of overcrowding had been pursued by the continuous use ("abuse", I should say) of the Royal Prerogative of Mercy. The Act was also intended to be an instrument of control and to reduce the exorbitant misuse of the Royal Prerogative. (8) While similar measures were introduced in other European countries to make their systems more flexible in order to improve the individualisation of punishment, in Spain the conditional sentence was introduced to establish a more rigid system for keeping some convicted people out of prison. As has been pointed out, this phenomenon probably provoked a situation in which the conditional sentence was configured more as a judicial pardon or a judicial discharge rather than a real conditional sentence, making it no more than a patch on our criminal administration system. (9)

The conditional sentence system introduced in 1908 followed the Franco-Belgian legislation of the late nineteenth century. (10) After several reforms, the 1908 Act was partially incorporated in the Penal Code of 1932. Now the legal provisions for a suspended sentence are partly in the 1908 Act, still (partially) in force, and partly in articles 92 and 97 of our Penal Code.

Article 92 of the Spanish Penal Code states that a court which passes a sentence of imprisonment or a prison order for a fine default "may" in some cases, and "must" in others, order that the sentence shall not take effect unless, during a specified period of no less than two years or more than five years from the date of the order, the offend-

er commits another offence. Thus there are two classes of conditional sentence: an optional and an obligatory one. The conditions for granting an optional conditional sentence are set in article 93. A court "may" order a conditional sentence:

1) if it is the first time the offender commits a crime, or not being his first time, if he has been - or should have been - rehabilitated. (11) In this respect the court should not consider previous convictions for petty offences (12) nor the first conviction for a reckless offence; and

2) if the court passes a prison sentence of not more than one year, whether imposed as a principal punishment or as a result of a fine default. Under exceptional circumstances - in other words, if there are reasons for a special mitigation or if the offender is under eighteen (13) - the prison sentence may be up to two years.

According to article 93 of our Penal Code the court may suspend a sentence if, having taken into account the age of the offeder, the offender's previous criminal record, the nature of the offence and other circumstances in the committing of the offence, it is expedient to do so.

There are two cases when a conditional sentence loses its optional character and becomes obligatory. This happens (article 94) when the sentence would have met most of the conditions required for exemption from responsibility under the rules laid down by the Penal Code, or when, in cases of "private offences", (14) an offender has been prosecuted on the victim's request and the said victim asks explicitly that a suspended sentence be granted.

The only requirements that the courts must demand of the offnder are: that they must not commit an offence during the operational period, and that they cannot change their address without the permission of the sentencing court (arti-

cle 9 of the 1908 Act). Of course, if the offender fails to comply with the requirements, the court will impose the original sentence of imprisonment.

In practice a conditional sentence is always granted by the courts when the legal conditions are fulfilled. In granting a conditional sentence the courts have transformed this measure into an automatic mechanism of mercy by not considering the age of the offender, the previous record, the nature of the offence or any other circumstances surrounding the committing of the offence as requested by law. However, it is very difficult to give a true evaluation of the results of the conditional sentence within our criminal justice system because of the lack of reliable information. The official statistics rarely show information about the practical developments of this institution, and when they do, we can hardly trust them. Some of the figures they show are merely a joke! (15) What we can say, without a doubt, is that this measure never achieved the aim for which it was created: to reduce the rate of the prison population. I can also add that all Spanish authors who have expressed their opinions about the legal conditions of the suspended sentence and about the current situation of alternative measures to imprisonment have vigorously criticized it. Our legislation is fixed in the past. It is based on philosophical conceptions which are now completely obsolete.

3. Outlooks for the Future

More hopeful outlooks to improve the current situation must be seen in the Propuesta de Anteproyecto de Nuevo Código Penal de 1983 (PANCP 1983). This is the Official New Penal Code Draft prepared by the Minister of Justice of the Socialist Party's Government and published at the end of 1983. (16) The members of the Committee that wrote the PANCP 1983 found it necessary to make some changes and additions to the

(poor) existing range of non-custodial alternatives to imprisonment. The philosophy which lies under the new measures proposed in the draft (17) is that in some cases there may be - for whatever reasons the sentencer may bring into consideration, subject to the provisions of the PANCP 1983 - no need for punishment (18) at all (this is the raison d'être of the new conditional sentence and of the suspension of the judicial decision); or there may be no need for a prison sentence (this is the raison d'être of the substitution of the prison sentence); or there may be no need for keeping a person in prison any longer (this is why the PANCP 1983 establishes the conditional release and the suspension of the execution of the remaining sentence). (19)

Article 74 of the PANCP 1983 states that the criminal courts may - provided they explain their reasons for doing so, according to the legal provisions - abstain from passing a sentence after conviction (the suspension of a judicial decision) or "may" in some cases, and "must" in others, order that the sentence shall not take effect (a conditional sentence). Both possibilities are applicable only if the offender refrains from committing another offence during a specified period of no less than two years and no more than five years. In suspending a sentence or a judicial decision the court must consider "the personal circumstances of the offender", "the circumstances of the offence" and "the sentence which might have been passed (in the case of a suspension of a decision) (20) or which has in fact been passed (in the case of a suspended sentence)".

The courts themselves may abstain from passing a sentence after conviction (article 75) if:

1) there is an optimistic prediction, (21) made by the sentencer, that the offender will not offend again in the future. In making this prediction the sentencer may consider any reports regarded as suitable for this purpose, but, in any case, a criminological report must be considered;

2) the sentence which might have been imposed is not serious; (22) and

3) the compensation ordered by the court has been paid or there is no compensation to be paid by the offender. (23)

Moreover, the court may order that a sentence shall not take effect (article 77) if:

1) there is an optimistic prediction, made by the sentencer, that the offender will not offend again in the future, taking into account any reports considered as suitable including an obligatory criminological report; and

2) the sentence imposed is not serious and does not consist of a prison order imposed as a result of a fine default.

As can be seen, the conditions for granting a suspended sentence are completely different from the ones established in our current Penal Code. On the one hand, in granting a suspended sentence the PANCP 1983 tends to look to the future and not to the past as our legislation in force does. That is the reason why an optimistic prediction is required instead of the requirement of being the offender's first offence. On the other hand, the number of sentences included within the possible cases eligible for suspension and the maximum length limit of the prison sentence have been increased. According to the new provisions not only prison sentences but all sorts of non-serious sentences are included among the ones eligible for suspension. Also, in the case of prison sentences, the length limit has been increased from one to two years. The latter is especially remarkable since the prison sentences which may be imposed by the criminal courts according to the legal provisions of the PANCP 1983 are of shorter duration than the ones which may be imposed now according to the rules of the Penal Code.

Besides this, the PANCP 1983 explicitly excludes from the field of application of a conditional sentence prison orders which have been passed as a result of a fine default. The philosophy which lies behind this decision is the prevention of fine defaults. (24) If the sentencer thinks it necessary to suspend the imposition of a fine, there is the possibility to do so. But once it has been decided that the fine should be imposed and paid (for instance because there is no optimistic prediction about the offender), the offender has to either pay the fine or suffer the consequences (normally a prison order) for not paying.

In relation to an obligatory conditional sentence, there is only one case in the PANCP 1983. Article 79 states that the court must suspend a sentence when, in the case of private offences, the victim explicitly asks that a suspended sentence be granted.

Finally, the PANCP 1983 states in article 81 that a conditional sentence will not be extendable to the victim's compensation.

The main difference between a conditional sentence and a suspension of a judicial decision is that while a court which suspends a decision does not have to send any information about the offence or the offender to the Criminal Records Office unless the offender commits another offence during the operational period, a court which suspends the execution of a sentence must do so with the subsequent stigmatizing effect.

The PANCP 1983 also creates the substitution of a prison sentence. The Official Draft states that when a court passes a prison sentence of not more than two years, and after considering "the circumstances of the offender and the nature of the offence", the court may - provided that it explains its reasons - substitute the prison sentence for a weekend imprisonment (article 82) or for a fine imposed in

the PANCP 1983 according to the day-fine system (article 83). In the latter case each day, week or month of deprivation of liberty will be substituted by a two days', two weeks' or two months' fine respectively. A substitution of the prison sentence must be made on the condition that the original prison sentence will take effect if the offender does not comply with the week-end imprisonment or with the fine.

I must point out that in the PANCP 1983 the week-end imprisonment and the fine (imposed according to the day-fine system) are, at the same time, alternatives to imprisonment and sentences as such. In fact, the Official Draft abolishes short term imprisonment (under six months of deprivation of liberty) replacing it with week-end imprisonment. This decision is based on the grounds that short term imprisonment does not deter or rehabilitate. The proposal was brought out for the first time in Spain at the Third Meeting of the Professors of Criminal Law in Santiago de Compostela in 1975. (25) This Meeting also proposed the introduction of the day-fine system into our criminal justice legislation. (26) Nearly all the Spanish specialists agree with the latter but not with the former. Some of them have stated that the abolition of short term imprisonment cannot be adapted as a general principle because, from a theoretical point of view and considering the necessary proportion which must exist between the offence and the penalty imposed, these short term sentences might be an adequate answer to petty or non-serious offences. (27) In fact, as Inkeri Anttila has pointed out, a short term sentence may serve as an individual warning and as a tool for general prevention. (28) Moreover, some of the criticism in relation to short term imprisonment may perfectly well be directed against prison sentences in general. Nevertheless, and from a practical point of view, it is true that the (bad) conditions of the penitenciary system and the (bad) conditions in which these sentences have to be enforced make the unwanted ef-

fects of imprisonment especially painful in these cases. (29) This is why it has been proposed that, as a general rule, short term imprisonment could be maintained, (30) but the courts must also have the resources to suspend or substitute these sentences in all the particular cases considered appropriate after taking into account the circumstances concerning the offender and the offence itself. (31)

Needless to say, the criminal policy criteria on which the PANCP 1983 is based are far better than those on which the current legislation rests. The legislative proposal of the PANCP 1983 is of course also much nearer to modern trends in penology and criminology than is our current Penal Code. Nevertheless, I would like to point out that there are some critical considerations and problems which may occur when and if the Official Draft reaches legal status.

In relation to the requirement of an optimistic prediction, (32) the problems a predictive science has to face in general, and the problems a criminal justice system has to face specifically when introducing this sort of approach in order to suspend the imposition of a prison sentence or any other sort of sentence, have been wonderfully described by Lucio Monaco with reference to the Italian criminal justice system. (33) There is nothing I can add to what this author has said, execpt to emphasize that although from a theoretical point of view there might be nothing (or only a few things) to object to in the PANCP 1983 proposal, from a practical point of view there are numerous problems which threaten its success. (34)

Moreover, the PANCP 1983 creates two institutions, the conditional sentence and the suspension of a judicial decision, but gives no criteria to differentiate them. Do they serve different aims or do they serve the same purpose? And if they serve the same purpose, do we need both? These questions only try to show that there is a serious risk of judges using the conditional sentence (probably because it

seems more "punitive" seeing the stigmatic effect which the suspension of a decision does not have) and in rejecting the use of the suspension of a judicial decision (probably because there is also a natural resistance to any kind of innovation). This would seem like a very typical reaction of Spanish judges.

The PANCP 1983 has also refused to introduce probation which could have given sense to the existence of the suspension of a judicial decision (plus probation) alongside a conditional sentence. The search for the reasons for this have to be directed towards our "historical memory". Social work has had a sad history in our country. Throughout Franco's régime, and especially during the post-war years (approximately 1939-1950), social work had two political orientations. On the one hand, it was a useful help for the political police (a way of control and a way to search for political enemies), and on the other hand, it was used by the régime as a window into its social concerns. But it was not useful in serving a social aim in either case. The paternalism the social agencies acted with made them unreliable. This is partly why the members of the Committee that wrote the draft refused to introduce probation, discarding what probation could have had in its favour. It is true that we have just started (during the last five or six years) to work seriously in the social field, and we are just starting to have trained people doing proper work in the field of criminality. But I think it would be worth trying to search for the positive aspects probation might offer us. (35)

Besides this, I think the writers of the PANCP 1983 were not rigorous in evaluating the advantages and disadvantages of introducing week-end imprisonment, not only as an alternative to custody but as a sentence itself! There is an absolute lack of adequate penitentiary infrastructure to place all the people going in every Saturday morning. And

at the same time, what use is week-end imprisonment without any requirement to complement it?

The Official Draft has also refused to incorporate community service, despite the relative success this measure is having in other European countries, because of the practical problems which might arise. (36) More problems will probably be caused by week-end imprisonment!

As we can see, these matters involve a number of problems that must be considered. However, let us hope that, on the one hand, this Official Draft reaches legal status in the next few months and, on the other, that all these problems find a satisfactory solution.

NOTES

(1) I wish to dedicate this article to Olof Palme and to all he represented as a "fighter for the peace".

(2) Jescheck, H.H.: Lehrbuch des Strafrechts. Allgemeiner Teil. Duncker & Humblot, Berlin 1978, pp. 79-80; see also "Rasgos fundamentales del movimiento internacional de reforma del derecho penal" in Doctrina Penal, No. 7, Buenos Aires 1979, pp. 465 ff.

(3) Just one example: in April 1983 a reform of the articles 503 and 504 of the Criminal Procedure Code was adopted in the Official Gazette. The object of this reform was to amend the Criminal Procedure Code in order to specify the cases in which the courts may order detention on remand to fix the maximum period of such detention. It was a laudable effort to solve probably the worst problem of our criminal justice system: the time waiting for trial. After the enactment of the reform the judges used it for a political confrontation with the government releasing prisoners demagogically and provoking a significant increase in the rate of criminality. There was a very important campaign against the government, blaming the Minister of Justice for the increase in the rate of criminality, and forcing a "reform of the reform" which took place in January 1985.

(4) Mir Puig, S.: "El sistema de sanciones", in Documentación Jurídica, No. 37-40, Vol. 1, Madrid 1983, p. 185.

(5) Not only because of the system of alternative measures to imprisonment but also, for instance, because of the fine system. A minimum and maximum fine is fixed by the law for each offence sanctioned with a fine (there are not that many), and between these limits the court has to impose the fine taking into account the means of the offender. This is

considerably unfair because this system does not ensure, as the day-fine system does, that the amounts of the fines are not only less than average for the poor but more than average for the rich. Moreover, in our sanctioning system there is an abuse of the deprivation of liberty.

(6) Some say there is also another one: the conditional release. This is not exactly an alternative to custody since it is just a way (as e.g. parole) of releasing prisoners before their sentence is completed. Conditional release does not allow a court, in passing a sentence, to avoid imprisonment. This is the reason why I do not consider it an alternative to custody.

(7) Yanez Roman, P.L.: La condena condicional en Espana, Madrid 1973, pp. 15 ff.

(8) Ibid.

(9) Ibid.

(10) For a short description of this system, see Ancel, M.: Suspended Sentence, Heineman, London 1971.

(11) The legal provisions for the rehabilitation of the offenders are established in article 118: a) not to commit an offence during the rehabilitation period; b) to pay compensation to the victim (which in Spain is always ordered in addition to any other order); c) rehabilitation periods:
- after 15 days of imprisonment: 6 months;
- 30 days to 6 months imprisonment, fines or other non-custodial penalties (disqualification, etc.): 2 years;
- 6 months to 12 years imprisonment: 3 years; and
- 12 years to 30 years imprisonment: 5 years.

There is also a provision obliging the Minister of Justice to expunge names from the criminal records ex officio and not only on an application of the person concerned.

Socialist Party. At the end of August 1983 the draft was finished and in a couple of months published as a working paper of the Ministry of Justice. Several political problems (even some opposition from the government itself) have delayed the presentation of this draft as a bill in Parliament, but the Prime Minister has promised that this draft will come into effect as the new Penal Code in 1987 if the Socialist Party wins the elections of 1986 (which, of course, happened).

(17) As has been explained by professor Luzon, who was the one in charge of the initial wording of this part of the draft; see Luzon Pena, D.M.: "La applicacion y sustitucion de la pena en el futuro Código penal" in Revista de la Facultad de Derecho de la Universidad Complutense de Madrid, monográfico 6, 1983, p. 417.

(18) "Punishment" means here several penal measures, not only imprisonment. A suspension of a judicial decision and a conditional sentence may be passed instead of a prison sentence, a fine, a professional disqualification, a week-end imprisonment sentence, etc.

(19) In this paper I will not consider conditional release or suspension of the execution of the remaining sentence for the same reasons as pointed out in footnote (6).

(20) In the Spanish legal system the maximum and minimum limits of a punishment for each offence are listed in the law. Thus it is not very difficult to know which sentence might have been imposed by the court.

(21) The origins of this formula have been found in the current trends of the German Penal Code (section 56).

(22) According to article 52 of the PANCP 1983 the following sentences are considered as non-serious: a) imprisonment from 6 months to 2 years (prison sentences under 6 months

(12) This is the interpretation given to this provisiom by a majority of Spanish authors, although the Penal Code does not state so explicitly. Petty offences are the ones included in Book III of the Spanish Penal Code.

(13) Criminal responsibility starts at the age of sixteen in Spain (article 8 of the Penal Code).

(14) There are a few offences (especially some sexual offences and offences relating to libel) in our Penal Code which can only be prosecuted at the victim's request. These offences are called "private offences".

(15) Maqueda Abreu has presented some figures which appear in the Official Statistics in relation to reconviction rates. These figures go from 3,35% in 1917 to 6,04% in 1971. Of course this data does not correspond with the real situation because of the inaccurate way of collecting the data and evaluating the reality; Maqueda Abreu, M.L.: Suspensión condicional de la pena y probation, Ministerio de Justicia, Madrid 1985, pp. 171 ff.

(16) In 1979 the Minister of Justice of the U.C.D. Party's Government made a New Penal Code Draft which, after several amendments and additions, was published as a Penal Code Bill in the Parliament Official Gazette (17 January 1980). The political problems and the political situation which the U.C.D. Party had to face made it impossible to discuss this bill at a parliamentary stage, although it was published in the Gazette for that purpose and although all the political groups of the Parliament presented the amendments they were asked for. In October 1982 the Socialist Party won the elections and a couple of months later the Minister of Justice formed a Committee (composed of university professors, judges and lawyers) to prepare a New Penal Code Draft on the basis of the Penal Code Bill of 1980 taking into consideration all the amendments made by the different political groups of Parliament, especially the ones made by the

are abolished in the PANCP 1983); b) special disqualification up to three years (which may imply a suspension of the right to vote and to be elected, a suspension of the right to be employed by the state, etc.); c) disqualification from holding or obtaining a licence to drive any sort of motor vehicle up to three years; d) fines; and e) week-end imprisonment.

(23) In Spain the criminal sentencer always deals with the possible civil measures. A compensation order is always passed in addition to any other order.

(24) Luzon Pena, op. cit., p. 419.

(25) See Beristain, A.: Crisis del derecho repressivo, Cuadernos para el Diálogo, Madrid 1977, p. 112.

(26) Ibid.

(27) Cobo del Rosal, M - Vives Anton, T.S.: Derecho Penal. Parte General, Universidad de Valencia 1984., p. 712.

(28) Anttila, I.: "The Ideology of Crime Control in Scandinavia. Current Trends" in Selected Issues in Criminal Justice, HEUNI Publication Series Nr. 4, 1985, p. 73.

(29) Cobo del Rosal - Vives Anton, op. cit., p. 713.

(30) The minimum length of a prison sentence in our Penal Code is one day.

(31) Cobo del Rosal - Vives Anton, op. cit., p. 713.

(32) In the PANCP 1983 this is also the requirement of granting a conditional release and a suspension of the execution of the remaining penalty (articles 84 and 85).

(33) Monaco, L.: "Le pene sostitutive tra sistema penale 'legale' e sistema 'reale'" in Archivio Penale, No. 2, 1984, pp. 254 ff.

(34) Mainly the lack of a prediction science in Spain, the lack of trained people to do criminological reports, the presumable opposition on behalf of the judges, the unreliability of such reports when they are made for the first time, etc.

(35) In fact there is a private institution in Catalonia, the I.R.E.S. (see the book Probation in Europe, 1981) which has been experimenting with probation with the collaboration of some judges in Barcelona for some years. The I.R.E.S. even presented a Probation Act Draft to the consideration of the Minister of Justice but it was turned down.

(36) Luzon Pena, op. cit., p. 420.

Helena Válková

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THE OPINIONS OF JUVENILE OFFENDERS ON PENAL PROCEEDINGS AND PRISON PUNISHMENT

The educational and preventive function of penal proceedings has become ever more important. This function should thus be an immanent part of all procedural stages, particularly in penal cases involving juveniles. To what extent will one succeed in applying these principles in a concrete case in practice and in bringing about desirable changes in the attitudes and opinions of juveniles already in the course of penal proceedings? The answer, of course, depends on many factors, not least on the actual representatives of the organs involved in the process.

In this category of delinquents, certain specific features appear to be connected directly or indirectly to the age of the offender. These traits can also influence the assessments and opinions of the juveniles as to the course, sense and results of penal proceedings. For example, juveniles, as compared to adults, are more subject to the influence of direct circumstances which they assess more emotionally than rationally. They often judge the conduct of the Youth Care workers as just or unjust only in relation to the fact whether these have improved or worsened the position of the accused, defendant or sentenced. Particularly the organs active in penal proceedings are thus in an uneasy position

as to their mission, which is to have an educational impact on juveniles. The attempt to objectively clear the case simultaneously with the use of all possible means for an educational impact may, in some circumstances, even be regarded as discriminatory by the juvenile. Accordingly, it is only natural that the juvenile will evaluate differently the activity of his counsel for the defense and the activity of the prosecutor. The activities of the former are directed at the clearing of the facts exonerating the defendant or at least mitigating his guilt, whereas the prosecutor may evoke negative feelings merely through the performance of his duty, and this may also arouse a subjective impression of injustice. It can be deduced from the above that the assessments, feelings, opinions and impressions of juveniles on penal proceedings are limited among other thngs by:

- the level of the juvenile's mental and social maturity,

- the contradictions between the juvenile's ideas on the course and results of the penal proceedings in contrast to reality,

- the subjective feeling of guilt for the crime perpetrated, and

- the rights and duties of individual workers in respect of the protection of law and/or other persons participating in penal proceedings.

From these theoretical starting points an ascertainment of the impressions, opinions and assessments of juveniles on penal proceedings was carried out in a study on the genesis of a criminal career. (1) The research sample consisted of about 100 juveniles sentenced to prison for crimes of robbery, rape, bodily injury and violent resisting of official authority (in 10 cases less frequent violent delicts such as murder, blackmail, etc.). The sample was subjected to intensive investigations through a whole number of psychologi-

cal and sociological methods and techniques. Individuals belonging to ethnic groups (gipsies) or to national minorities were not included in the investigation, because the specificity of these cases would affect the homogeneity of the research sample. The object of the research project was not to evaluate the rightness or wrongness of the course and results of penal proceedings and/or of the prison sentences, but to discover possible reservations and imperfections in the educational impact of the proceedings and sentences on juvenile delinquents.

Iin an absolute majority of the cases the impressions expressed by convicted juveniles in their answers were negative. Particularly the testimony of witnesses was subjected to criticism, the comments being directed most frequently at the alleged untruth or the intentional distortion of the testimony to the disadvantage of the accused. Another issue that raised a negative response in a number of convicts was the sentence, particularly concerning the penalty. In contrast to the statement of guilt, towards which reservations were registered only occasionally, the juveniles mostly expected a more lenient punishment and were disagreably surprised by its severity.

A feature connected with this aspect is the juveniles' opinions of the justice and adequacy of court decision-making in general. While an absolute majority of those interviewed (3/4) were convinced of the justice of the court decision-making, half of the juveniles regarded the evaluation of punishments as inappropriately severe, albeit on a general level only. Even more clear-cut were the statements of the juveniles concerning the sentence itself and the punishment imposed. An overwhelming majority (91%) identified themselves with the fact of their conviction either completely (50%) or partly (41%). Only slightly more than 1/3 (38%) were convinced of the justice of the imposed punishment; somewhat less than 1/2 (40%) of the juveniles were partly convinced.

In the opinions of the juveniles a higher degree of sensitivity and criticism can be seen in connection with the punishment as compared to the fact of conviction itself. From this it can be concluded that juveniles are not able to assess their crime in a rational and comprehensive way. On the one hand, the absolute majority of them agreed with their conviction (half of them even unconditionally), i.e. they recognise their guilt. On the other, only a small part of them were able to face the consequences of the offence, i.e. the inflicted punishment. Because, with a high degree of probability, the feeling of wrong due to an "unjustly" imposed punishment hampers the probability of resocialization, it would be useful to pay more attention to questions concerning the mutual relationship between guilt and punishment. A convincing explanation could at the same time contribute to a better apprehension of the consequences of one's own acts and thus also indirectly contribute to a reduction of the risk of recidivism.

According to the opinion of the juveniles the counsel for the defense (91%) conducted himself justly more often than the presiding judge (52%), the people's judge (49%), the social worker (44%) or the prosecutor (35%) in trying the case in court. This corresponds with the fact that the prosecutor (40%) and the judge (28%) were most frequently seen to obstruct just decision-making in court while the counsel for the defense was criticised for this in only 1/10 of the answers.

The research results indicate that the evaluation of the justice of the conduct of the persons mentioned above in the course of the trial is considerably differentiated by the juveniles. These feelings are closely connected to the relation of the juveniles to the conviction and paticularly to the punishment imposed (more than a half expressed a certain feeling of "wrong"). This fact is reflected in particular of the evaluation made of the prosecutor and partly of the judge as well; barriers are often seen in their acti-

vity to reaching a just decision in the case. On the other hand, the activity of the counsel for the defense is evaluated most exclusively in a positive way.

The explanation for this can be found in that almost every offender has a general idea about the outcome of penal proceedings, but only the "experienced recidivist" (which in the case of juveniles is quite an exception) is able to assess both the type and the extent of the penal sanction expected. In particular in the case of juveniles there will thus be a contradiction between the ideas about the extent of punishment and the actual result of the court decision. The greater the contradiction between these ideas and reality, the more negative the evaluation of the organs and/or their representatives (i.e. the prosecutor's office and the court) as the cause of the unexpected result. In this connection it is obvious that the establishment of the objective truth, one of the main tasks of these organs, is as a rule undesirable from the offender's subjective point of view, because in most cases it results in the corresponding "detriment". Correspondingly the positive evaluation of the activity of the counsel for the defense can be attributed particularly to his position and role during the trial. The counsel for the defense protects only the interests of the offender and cannot use anything that would be to the offender's disadvantage and aggravate his position. The reduction of this contradiction and the simultaneous increase of the educational impact of penal proceedings would thus certainly contribute significantly to the preceding preparations of the juvenile for the main trial and for the presumable result of penal proceedings. For the reasons indicated above this could be best ensured by the juvenile's counsel for the defense.

Other impressions of the penal proceedings were ascertained by asking the juveniles whether somebody had <u>treated them in an improper way</u> (e.g. disrespectfully, offensively, rudely, etc.). The absolute majority of the juveniles answered

in the negative. If somebody in particular was mentioned in this connection, it was most often the investigator or the prosecutor (in both cases about 1/6).

The positive impressions of the penal proceedings were ascertained by asking whether somebody had tried to understand them at the time of the trial. About 3/4 of the juveniles believed that the counsel for the defense had behaved in this way, more than 1/3 mentioned the investigator, 1/4 the social worker of the District National Commitee's Department for the Care of Children, 1/6 the presiding judge and only 1/10 the prosecutor. In this connection almost half of the respondents mentioned their parents. The counsel for the defense and the investigator were also frequently named (1/3 of the juveniles) as persons who had indicated to the juveniles the incorrectness and harmfulness of their criminal conduct.

Several conclusions can be drawn from the results mentioned above.

On the whole the reactions of the juveniles to the prosecutor are univocal: he (together with the investigator) is most often mentioned as the person who behaved in an improper way, and least frequently as somebody who tried to understand the juvenile. One can explain this evaluation analogically with the case of opinions concerning the justice of the conduct of the individual representatives of the organs trying the criminal cases in court.

The evaluation of the the investigator can be characterised as ambivalent. On the one hand, he was mentioned by more than one third of the interviewed juveniles as the person who had tried to understand them, but on the other hand (together with the prosecutor) he was most frequently named as somebody who had behaved improperly. These facts probably reflect the specific position of the investigator in penal proceedings as one who can spend relatively the longest

amount of time with the juvenile. At the same time the investigator has the possibility of entering into contacts of a more informal nature compared to the other participants of the trial.

Less clear-cut reactions were noted in respect of the judge and the social worker. Both professions and/or the evaluation of their representatives appeared in the middle of the imaginary scale of evaluation by the convicted juveniles. The judge's profession was situated near the "negative" end at which the juveniles had situated the prosecutor (and in respect of one item the investigator), and the social worker near the "positive" end, where the counsel for the defense was situated.

The counsel for the defense was given the most favourable evaluation by the juveniles in all respects. Although, with reference to the subjective approach of the juveniles to the penal proceedings, one cannot overestimate these attitudes, they do indicate certain unused possibilities for a spontaneous educational influence that the counsel for the defense has at his disposal evidently to a much greater extent than the other professional participants.

The juveniles expressed their overall impressions of the main trial through a selection of positive and negative characteristics that, in their opinion, were more closely related to reality. Most convicted juveniles expressed both positive and negative impressions, with an approximate balance in the amount of the two.

This finding is on the whole satisfactory if we take into consideration the frequency and diversity of factors capable of evoking emotionally differentiated feelings among the juveniles in the course of the main trial. Even so, it is alarming, of course, that such characteristics as "speediness" and deliberate "bias" appeared with relatively great frequency. This indicates at the same time what kind of

measures should be taken to increase the educational impact of the main trial.

The summary presented above of the juveniles' opinions, impressions and evaluations of penal proceedings demonstrate the impact of the role of individual representatives of the organs of court procedure on the attitudes of the juveniles. These judgements suggest at least two possibilities for future decision-making: (2)

- in relation to the counsels of the defense and/or the investigators, a more varied educational influence for which they have the best prerequisites in the course of penal proceedings even from the point of view of the convicted juveniles themselves, and

- in relation to all representatives of the organs of court procedure, an increase of dignity and persuasiveness and an observance of the necessary extent of ceremoniousness in the main trial.

The emphasis given to the educational impact of punishments inflicted upon juveniles coded in the Penal Act is not always reflected to a desirable extent in the process of application. The results of a statistical analysis indicate that in the case of juveniles the prison punishment has for many years represented roughly 1/4 of the sanctions applied for crimes and roughly 1/10 of the sanctions applied for petty offences. Compared to the adult delinquent population, this is a considerably lower proportion. (3)

Although prison punishment is used on a smaller (and as a rule already more crime-prone) part of juvenile delinquents when previous punishments have failed, a more constant educational effect is not achieved in a considerable number of cases. (4) This low effectiveness of the severest punishment possible for juveniles in Czechoslovakia raises questions as to the causes of this situation.

One possibility of understanding this situation - with certain limits - may be through the statements of the convicted juveniles themselves. These statements provide a general idea about how the juveniles themselves perceive the sanction, what influence they impute to it, and how they envisage their future conduct after release from prison. The research project quoted in footnote (1) has provided findings in this direction.

More than 1/2 (61%) of the convicted juveniles regarded the serving of their prison term as useless in respect of themselves and their future life, and 1/4 of the juveniles even denoted it as harmful. This finding is important because it signals the sceptical attitude of a considerable part of juveniles towards education while serving their prison term; no positive sense is imputed to it. A possible explanation of such an evaluation can be found in answers to the question, what do the convicted juveniles regard as the most severe detriment in prison, i.e. what hampers them most. The detriment that the juveniles mention in second place (after the quite naturally most oppressively felt isolation from family and friends) appears to provide a particularly important finding: this detriment is the conduct of some fellow-convicts, often specified as the terrorization of younger or weaker individuals by the older and/or stronger and as a rule also the most crime-prone juveniles.

The second no less important finding is the complaints concerning the work they have to do. The convicted juveniles did not often complain about the quantity of work but rather about its character as "monotonous", "stereotype", "uninteresting", "in the cold", etc.

In both of the cases mentioned above the information is criminologically relevant, as it indicates (although "only" from the point of view of the convicted juveniles) "the weak points" in the rehabilitation and education. It is not difficult to imagine that under an unfavourable constella-

tion of other circumstances these "shortcomings in the serving of a prison term" could become an important factor in the developing criminal career of the juvenile (e.g. the not infrequent cases of conduct between fellow-convicts fulfilling the prerequisites of blackmail in relation to § 235 of the Penal Act, or deep-rooted aversion to work manifested as parasitism in relation to § 203 of the Penal Act and in a mitigated case as the violation of working dicipline in relation to § 8 lit. c of the Act of Offences).

The relatively low effectiveness of prison punishment was also reflected in the attitude of the juveniles towards their potential recidivism. The verbally expressed guarantee not to perpetrate a new deliberate crime after release from prison could be given by less than 2/3 (62%) of the convicts. More than 1/3 (38%) were not able to guarantee their conduct in such a way. As the most probable concrete causes of potential criminal activity, the influence of alcohol and friends was specified.

More than a half of the convicts (55%) pondered their crime and its consequences while serving the prison term, while less than a half (45%) remembered their crime only sporadically or not at all. More than 3/4 of the convicted juveniles (77%) looked forward to being in liberty again after their release from prison, 1/5 (21%) of the convicts looked forward to it with fear. Two convicts did not look forward to being in liberty at all.

Regardless of the all-too-frequent, psychologically insensitive evocation of the fact that the perpetration of the delict could have negative traumatizing consequences as well, it seems to us that the almost one half of the convicted juveniles who did not think about their crime and its consequences at all or who thought about it only sporadically, also constitute an extreme, no less dangerous, situation. In "forgetting" the perpetrated crime they also stop thinking about the reason for their conviction as well, and

thus the punishment imposed may seem to them to be unjust (which confirms the evaluation of the adequacy of the punishment imposed, already mentioned above). (5)

The finding that, with the exception of two juveniles, all convicts looked forward to being in liberty after their release from prison is naturally not surprising. The negative answer given by two convicts is quite unnatural and explainable only with difficulties. However, it is rather startling that 1/5 of the convicted juveniles were looking forward to liberty but were at the same time afraid of it. The research indicated possible defects in a proper atmosphere and in the preparedness of the social environment for the return of the juvenile from prison.

Taking into consideration the findings mentioned above, the prevention of recidivism through a repressive punishment is very problematic in the case of juvenile offenders. On the one hand this exemplifies the justification of doubts about the sense of the prison punishment for this age category (with some exceptions), on the other hand it confirms the necessity to look for other ways of facing the problem effectively.

From the impressions, opinions and evaluations obtained of these selected aspects of penal proceedings and of serving the prison term, we can see a certain collision between the ideas and opinions of juveniles and the reality they have to face as a consequence of their criminal activity. This discordance can lead perspectively to the further intensification of the already existing conflict between the juvenile on the one hand and the society represented by official institutions on the other. Such a situation must be regarded as dangerous because it forms a suitable soil for the inception of further deviant conduct by the juvenile. It would accordingly be appropriate to organize a new project that would cover more comprehensively the problems discussed. The results of such a project could more specifi-

cally locate these reservations, so far only indicated, and would help in their elimination.

NOTES

(1) Netík, K. et al: Závěrečná zpráva z výzkumu "Geneze kriminální kariéry mladistvých delinkventních chlapcu" (Final Report from the Research "The Genesis of the Criminal Career of Juvenile Delinquent Boys"), Criminological Research Institute, affiliated with the Office of the Prosecutor General of the Czechoslovak Socialist Republic, Prague 1985.

(2) A more detailed elaboration of suggestions to increase the effectiveness of the educational role of penal proceedings is presented in the chapter "Analýza vybraných trestněprávních a kriminologických dat získaných na vzorku delinkventu" (The Analysis of Selected Penal and Criminological Data Acquired on the Sample of Delinquents) by Válková, H., Knotek, O. and Stěchová, M., pp. 290-310, forming a part of the final research report quoted in footnote (1).

(3) In more detail, Válková, H.: Struktura a dynamika sankcí ukládaných mladistvým pachatelum ze zorného úhlu statistické analýzy (The Structure and Dynamics of Sanctions Inflicted upon Juvenile Offenders in Relation to Statistical Analysis) in Aktuální problémy kriminologie V (Timely Problems of Criminology V), Criminological Research Institute affiliated to the Office of the Prosecutor General of the Czechoslovak Socialist Republic, Prague (in print).

(4) After release from prison 50-60% of juvenile convicts resume criminal activity again.

(5) The same conclusions are reached by V. Hatala in the final report from the "Výzkum násilné kriminality mladeže" (Research Project on the Violent Criminality of Youth), Research Institute for Children's Psychology and Pathopsychology, Bratislava.

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