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DEJUDICIARISATION (DIVERSION) ET MEDIATION

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II. PREPARATORY COLLOQUIUM

FOREWORD

by Dr. Ryuichi Hirano
President, University of Tokyo

It was a great pleasure for me, in the name of the Japanese national group of the A.I.D.P., to organize the Preparatory Colloquium of the XIII International Congress of Penal Law on Topic III, "Diversion and Mediation," in Tokyo, Japan, from 14 to 16 March 1983.

Although the International Association of Penal Law is a worldwide organization, the participants attending its Congresses have largely come from European and American countries. The desirability of greater involvement of the various countries of Asia and Africa has been pointed out on many occasions.

It is therefore of great significance for the Association that the topic of "Diversion and Mediation," which was proposed by an Asian national group, Japan, was adopted as an agenda item for the next Congress, and that this preparatory colloquium was convened in Tokyo.

To be an appropriate topic for a meeting of this kind, the subject should of course be a matter of interest for European and American participants, but should also be one which is a special characteristic of the penal law of Asian countries, so that the expertise of the participants from those countries can make a distinctive contribution to the discussion. Diversion seemed to be one such topic.

Some years ago, diversion was recommended as a means of facilitating the rehabilitation of offenders and avoiding their stigmatization. However, criticism of this method has been also mounted. The controversy reflects a difference of penal philosophy. In European countries the role of the judiciary in dealing with criminal cases has been paramount, but non-judicial methods have also been considered recently to obviate the overloading of the judiciary by minor offenses. Therefore, discussion of the genuine merits of diversion and its limitations should hold significance for and be worthwhile to the countries of Europe and America.

On the other hand, in Asian and African countries, the control of offenses by communities or intermediate institutions between the state and individuals is more or less widely practiced. At least it is supposed to be so. This may be due to the underdevelopment of legal machinery. Nevertheless, the experience in Asia and Africa of the settlement process by mediation between the offender and victim may be instructive for the European and American countries in developing alternatives to their formal criminal procedure.

In the Tokyo Colloquium, the representation of European and American as well as Asian countries was well balanced, which led to a thoughtful development of the discussion on the problems of diversion. Due to time constraints,

there was insufficient opportunity for full discussion. However, the discussions in the Colloquium represent meaningful steps for further inquiry in the Congress.

As the organizer, I wish to thank the participants to the Colloquium, who travelled from afar to contribute to the Colloquium. I especially extend gratitude to Professor L. Kos-Rabcewicz-Zubkowski for his general report, which paved the way for our discussions, and to Professor B. J. George, Jr., Professor J. Herrmann and Professor K. Matsuo, for their contributions to the drafting of the resolution.

The Japan Society for the Promotion of Science and numerous other Japanese corporations gave substantial financial assistance towards this colloquium. Vice-Minister A. Fujishima and many others in the Ministry of Justice lent their support and cooperation.

The planning and actual carrying out of the Colloquium was possible through the invaluable help of members of the Japanese group of A.I.D.P., notably Professor K. Matsuo, Professor K. Shibahara, Associate Professor M. Inouye and Assistants and Graduate Students of the University of Tokyo, to whom appreciation is warmly extended.

I. REPORTS

GENERAL REPORT

Louis Kos-Rabcewicz-Zubkowski

Association Internationale de Droit Pénal

Diversion and Mediation

(Preliminary General Report—XIIIth International Congress of Penal Law)
Preparatory Colloquium: Tokyo (Japan), 14–16 March 1983
President: Prof. Ryuichi Hirano, President of the University of Tokyo, President of the Japanese National Group of the Association Internationale de Droit Pénal

General Rapporteur: Prof. Louis Kos-Rabcewicz-Zubkowski, LL.D. President, Canadian Arbitration, Conciliation and Amicable Composition Centre 214 Roger Rd, Ottawa K1H 5C6, Canada

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National Reports
(received before February 15, 1983)

Canada	Célyne Riopel
Czechoslovakia	Dušan Kokavec & Josef Žila
Federal Repuplic of Germany	Günter Blau
Finland	Matti Joutsen
German Democratic Republic	Erich Buchholz
Hungary	Ervin Cséka et al.
India	Rajendra Saran Agarwal
Israel	Haim H. Cohn
Italy	Vittorio Grevi
Italy	Centro Nazionale di Prevenzione e Difesa Sociale
Poland	Stanislaw Waltoś & Jan Skupiński
Rumania	Iulian Poenaru
Singapore	John T.L. Koh
Sweden	Uno Hagelberg
Thailand	Sirisak Tiyapan
Union of Soviet Socialist Republics	A. I. Mikhailov & V. M. Savitsky
Venda	M. P. Nthabalala & M. M. Tshishonga
Yugoslavia	Željko Horvatić

I. Concepts

1. Concept of Diversion

Criminal procedure dictates that in the typical case, a suspect: (a) receive an appearance notice from the police or be arrested by the police, or a criminal procedure will be commenced by information sworn before a justice of the peace by anyone (either a policeman or any other person) (b) be prosecuted by the prosecutor, and (c) be tried before a court. If he is found guilty, the court may discharge him unconditionally or conditionally, order probation or sentence to fine or imprisonment.

Obviously this is a simplified statement as the procedure varies from country to country, e.g. a trial must be preceded in some jurisdictions (the federal system and many States of the United States, the Canadian province of Nova Scotia) by a decision of the grand jury (which must be distinguished from the trial jury).

Diversion refers to any deviation from the typical progression of events.

It has been proposed to discuss diversion limited to any deviation from the ordinary criminal process, before an adjudication of guilt by the court, which terminates the case without a judgment rendered by the court, and which provides for the suspect's participation in some form of a nonpenal programme. A nonpenal programme, in this context, means simply one whose purpose is not to punish a transgressor, but to rehabilitate him and/or to resolve the underlying conflict from which the offence resulted. We will not deal with decriminalization and depenalization. Also it is not proposed to deal with administrative justice or with comrades' courts which have the powers to impose enforceable sanctions.

2. Mediation

Mediation involves the active participation of a third party in the processing of a dispute. Some authors make a distinction between conciliation and mediation; others consider that these terms apply to similar tactics. It is proposed to follow in this study the latter concept. Mediators enquire as to the dispute and try to find a solution of the conflict which is acceptable to the parties. They may discuss the issues separately with each of the parties and they may meet with all parties together. Mediation meetings are usually in private but they may be public and in some systems the latter is the rule. Mediators do not have the power to compel a resolution of the conflict; it can be reached only by mutual agreement of the parties. In consequence mediation may be successful, when the parties come to an agreement, or unsuccessful, when the parties fail to agree.

In contrast to mediation, arbitration leads always to a decision by an arbitrator or arbitrators which is binding. Often arbitration is applied only when the preceding mediation was unsuccessful. The arbitral decision is usually enforceable. While in most jurisdictions penal law conflicts are not submitted to arbitration, such practice is known in others e.g. the projects of the American Arbitration Association and of the Institute for Mediation and Conflict Resolution in the United States which receive referrals from individuals and agencies regarding criminal and civil disputes.

Mediation may be useful in the search for a solution of a penal law conflict which

requires consent of involved parties, i.e. of the public prosecuter, of the suspect and possibly also of the victim of the offence. Such an extrajudiciary solution constitutes a diversion. Mediation may lead to the reconciliation of the offender and of the victim of his offence. It may also enable to discover the underlying causes of a penal law conflict and to eliminate such causes by remedial extrajudiciary means. Thus relations between a landlord and a tenant may degenerate from a civil law conflict to a penal law conflict, e.g. from a dispute as to violations of the contract of lease to threats or even assaults. Mediation by a third impartial person may be particularly needed in cases involving persons who remain in permanent relations, e.g. members of the same family, neighbours, colleagues at work, members of the same association.

The consent of the victim is of a particular importance in the jurisdictions which allow for criminal/penal prosecution not only by the public prosecutor but also either: a) by everyone who submits to the judge his information on a committed offence, or b) by a complainant who is the victim of the offence. Thus in Finland both the public prosecutor and the complainant have an individual and independent right to start a penal action before the court. In Canada everyone may act as a prosecutor as to summary conviction offences (Part XXIV of the Canadian Criminal Code, esp. Art. 720(1)).

3. Other Terms

The terms "criminal" and "penal" may have different meanings in various jurisdictions but no distinction will be made in this study. Also the terms "suspect", "accused", "perpetrator", "offender", "defendant", will be used to describe the presumed author of an offence.

II. Limits of the Discretionary Powers of the Public Prosecutor

1. Principles of Legality and of Opportunity

Diversion from the trial before a penal/criminal court is possible only when the public prosecutor has the power to abstain from public prosecution, although he believes that available evidence will be sufficient to prove the guilt of the perpetrator of the offence. Therefore it is of essential importance whether a given legal system is governed by: 1) the principle of legality or 2) the principle of opportunity. According to the principle of legality the public prosecutor has a duty to prosecute if there is a probability of the conviction of the perpetrator of the offence; on the contrary, according to the principle of opportunity the public prosecutor has the power to decide whether it is in the interest of the administration of justice to institute a penal action before the competent court or to abstain from the same. Generally speaking the common law type systems follow the opportunity principle.

The national reports indicate that Canada, Israel, Singapore and Venda apply the opportunity principle. This is also true in the United States where the discretionary powers of the public prosecutor have been used to develop various forms of diversion. Other reports refer to the legality principle but with various exceptions.

2. Insignificant Social Danger

A general exception of an "insignificant social danger" exists in Poland. According to Art. 26 of the Polish Penal Code of 1969, an act of an "insignificant social danger" does not constitute an offence. However, paragraph 2 of Art. 2 states that an "insignificant social danger" of an act does not exclude the responsibility of its perpetrator before a "state organ or social institution or organization" according to their respective jurisdictions. The Polish report qualifies therefore the principle applicable in Poland as "the principle of substantive legalism".

Thus the public prosecutor may abstain from prosecution if he considers that the social danger of a penally prohibited act is insignificant. This rapporteur believes that the wording of Art. 26 of the Polish Penal Code decriminalizes an act causing an insignificant social danger. There is no penal responsibility in such a case. There may remain, however, a disciplinary and/or civil responsibility. Thus, it seems that acts of "an insignificant social danger" are outside the system of the Polish Penal Code. The public prosecutor has the duty to consider whether an act is a penal offence or not; in the former case he has to prosecute and in the latter he shall abstain from prosecution. Should he prosecute, the court should acquit the accused when his act does not constitute an offence (Art. 361(2) and Art. 11(1) of the Polish Code of Penal Procedure). According to the report by professors Skupiński and Waltoś, "The prevailing theory in Poland is that social danger is composed of subjective and objective elements. Subjective elements consist of mental processes leading to the commission of the offence and occurring during that act. These include, mainly, deliberate intent or its absence, incentives, motives, aims of behaviour. As to the objective elements, these are, in the first place, the type of damage caused or threatened and the way in which the offence has been committed".

In the German Democratic Republic only such acts constitute offences which show a minimum of social significance, i.e. which cause harmful social effects.

The 1973 penal code of Rumania states that an act although prohibited by penal law nevertheless is not an offence when in given circumstances it does not cause social danger (Art. 18).

3. Minor Violations of Public Order Contraventions

While there is a general principle of legality in the Federal Republic of Germany this does not apply to minor offences called in German "Ordnungswidrigkeiten" or violations of order. The latter are subject to the opportunity principle. Also in Poland contraventions are governed by the principle of opportunity (Art. 40 of the Code of Contraventions).

In the German Democratic Republic petty offences are excluded from criminal law (decriminalized).

4. Private Complaint Offences

Various systems of law provide for offences which can be prosecuted by the public prosecutor only if the victim of the offence lodges a complaint. They may be called here "complainant offences". This is the case in Finland, the Federal Republic of Germany,

Hungary, Italy, Poland, Rumania, Sweden and Yugoslavia. In Canadian practice libel can be described as a complainant offence. The percentage of complainant offences is generally low in penal codes in comparison to the offences which may be prosecuted by the public prosecutor without a complaint by the victim. Nevertheless complainant offences may constitute a relatively large part of all offences prosecuted in a given jurisdiction. Thus Prof. Ž. Horvatić reports that in the Yugoslav federal penal code among 289 offences there are only 11 complainant offences, or among 634 offences included in the federal penal code in the Republic of Croatia there are only 41 complainant offences.

In fact in 1980 there were in Yugoslavia 159,333 criminal cases submitted to the courts of which 53,993 dealt with private complaint offences, the latter constituting thus 33.9%.

In some jurisdictions the private complainant may withdraw his complaint at any time before the court renders its judgment (e.g. in Finland).

5. Police Powers to Refrain from Reporting a Petty Offence

Matti Joutsen reports that in Finland "if a policeman becomes aware that an offence has been committed, he must report it to his superior officer. However, a policeman has the right to refrain from reporting a petty offence if it was due to understandable carelessness, thoughtlessness or ignorance, the complainant does not wish to press charges, and the public interest does not demand that the matter be dealt with formally."

In the German Democratic Republic police may abstain from criminal proceedings or end proceedings already initiated in the cases where punishment would not be necessary. This applies particularly to situations where the perpetrator of the offence makes serious efforts to indemnify the victim or shows by socially positive accomplishments that he intends to respect law (Art. 25 of the GDR Criminal Code).

6. Juvenile Delinquents

In some jurisdictions the principle of legality applies only to adult offenders while juvenile delinquents are subject to the principle of opportunity (e.g. India). In the Federal Republic of Germany in all cases of juvenile (14–18 years old) and young adult (18–21 years old) offenders, the prosecutor may ask the juvenile court judge to make certain orders to be carried out by the offender: e.g. to perform a determined work or to take part in the traffic-school programme. The judges may so order if they consider that a formal warning is sufficient. If the offender fulfills all conditions imposed on him the prosecutor must refrain from taking further proceedings against him. In the case of a petty offence the prosecutor may, even without consent of the court, refrain from prosecution if an educational measure has already been arranged (e.g. by a juvenile authority). In cases of a similar nature the judge may proceed in the same manner where the prosecutor has instituted already a penal action before the court.

In the German Democratic Republic Art. 67 of the Criminal Code allows the public prosecutor or police to abstain from criminal proceeding against juveniles (14 to 18 years old): a) where the juvenile is a primary offender; and b) where a certain social maladjustment of the juvenile is already evident and it is the main cause of the offence. In the former case it is believed that the juvenile's usual social and pedagogical environ-

ment will exercise the sufficient educational influence; in the latter the matter may be referred to the youth welfare authorities which have socio-pedagogical powers.

7. Drug Offences

In the Federal Republic of Germany the prosecutor may refrain from prosecution where the drug consumer committed an offence subject to a maximum punishment of less than two years imprisonment. The suspect must submit to a therapy of at least three months duration. Under the same conditions proceedings already instituted may be temporarily suspended by the court.

8. Specific Powers of the Prosecutor to Terminate the Case

Even in jurisdictions governed by the principle of legality there are some possibilities for an irrevocable termination of the case by the prosecutor. Thus in the Federal Republic of Germany Art. 153 of the German Code of Penal Procedure allows for such a termination either by the prosecutor or, when the action has been instituted before the court, by the latter if the defendant fulfills certain conditions. The defendant may be required: 1) to perform some task for the purpose of reparation of the harm he has caused by his offence; 2) to pay a sum of money either to a nonprofit organization or to the State; 3) to do something else for the public good; 4) to pay money in order to fulfill his obligation of support (alimentary payments). The fulfillment of imposed conditions within a fixed period of time bars the prosecution in the corresponding case. Prof. Blau reported that in ca. 75% of terminations of cases the suspect is ordered to pay money.

In the German Democratic Republic the public prosecutor may abstain from prosecution where he considers that the attitude of the offender shows that he intends to respect law (compare powers of police under II. 5).

Furthermore Art. 24(2) of the GDR Criminal Code allows to terminate criminal procedure without punishment when a judgment of the civil court condemning the offender to pay damages is sufficient a) for the purposes of the necessary educational effect and b) for the satisfaction of the victim.

III. Types of Diversion

1. Simple Diversion

Where a case is simply dropped by the police or by the prosecutor it may be described as simple diversion. In the jurisdictions following the opportunity principle the police and/or the public prosecutor decide whether it is in the interest of the administration of justice: a) to prosecute, or b) to abstain from prosecution. To a certain extent this is possible also under the regime of the legality principle although, at least theoretically, this is limited to the cases where the public prosecutor believes that he will not be able to obtain a conviction of the accused, or where special provisions of law on exceptions from the legality principle apply.

2. Diversion with a Covert Intervention

The prosecutor may take no action expecting that the offender will voluntarily compensate the victim or make amends. There is no agreement reached in this matter but the offender knows that the prosecutor may prosecute him if he does not compensate the victim. Such or similar case may be considered to constitute a diversion with a covert intervention.

3. Diversion with Intervention of the Community—Mediation by Private Persons and/or Social Bodies

Some penal law conflicts may be settled by the community without intervention of police and/or public prosecutor. Rajendra Saran Agarwal reported that in India family elders try to settle petty conflicts. Haim H. Cohn reported that diversion with intervention, by making use of mediation procedures, is still in experimental stage in Israel. In some wards of the City of Jerusalem panels of mediators have been set up, composed of persons who do not reside there. Such panels have been organized with the cooperation of the municipal authorities, of the local committees administering the affairs of the ward, of the social welfare authorities and of the police. The mediators are mostly retired social workers, psychiatrists, psychologists, lawyers or ministers of religion, but no formal education and no professional experience is regarded as a prerequisite for their appointment. The paramount qualification is a humanitarian approach to the problems of life and the capability to find practical solutions. The mediators are volunteers; they are not remunerated but they are reimbursed for their out-of-pocket expenses. The mediation project occupies an office in a community centre within the city ward and a clerk of the local committee or of the community centre is always at hand to receive complaints and to answer enquiries. The clerk brings the complaint to the attention of that mediator who first appears at the office. The mediator may try to solve the complainant's problem by proper advice. Otherwise he will either summon both the complainant and the party complained against to appear before him at the office or he may —especially where the other party is recalcitrant—visit him at his home. The mediator will ask the other party to agree to mediation. Failing such an agreement the mediation will not proceed. According to Cohn's report refusals to agree to mediation have been very rare. In cases of such refusals, the mediator will advise the complainant of his or her remedies in law or refer him or her to a lawyer or to a legal aid bureau or to the police. In many cases, the intervention of a lawyer or of the police caused the party complained against to think twice about the matter and to agree to mediation.

In mediating between the parties a mediator is free to determine his own procedure. He is authorized to promise the parties that if the mediation succeeds and they comply with his directions, criminal proceedings will not be instituted against them or, if already pending, will be stayed. He may also make it a condition of his mediation that the complainant sign and lodge the application for the noninstitution or for the stay of the criminal proceedings if and when a settlement is reached. He will not normally make it a condition precedent that the complainant first withdraw any complaint he or she may have lodged with the police—the reason being that pending mediation the status quo should not be disturbed.

The object of mediation is not so much to provide an extralegal and extrajudicial

remedy to the complainant for any wrong done to him or her, but rather to remove the causes underlying the criminal behaviour in any specific case, including not only the grievances of the complainant but also the grievances of the party complained against. To achieve that end, the mediator may enlist medical or psychological help and intervene on behalf of the parties with labour exchanges and other economic and administrative agencies.

The offences for which mediation is regarded suitable are, first and foremost, those in respect of which criminal proceedings may be initiated by private complaint, and among those principally offences of violence between spouses and between neighbours, as well as insults, nuisances and trespasses. In cases in which criminal proceedings may be instituted by public prosecution only, the main area of mediation is domestic, too, such as cruelty to children and all the graver offences between spouses (short of uxoricide). In the latter cases, prior notice of the mediation will be given by the mediator to the police, who may consider that in the public interest criminal proceedings should take their due course: in that event the mediator will first advise the parties accordingly, before entering on the mediation; but he may on his own motion apply to the Attorney-General for the ruling of the police to be overruled.

In Thailand there is an informal diversion in rural areas. It is possible when both parties agree to an informal settlement of the conflict. Mediation may be effected by a person respected in the community, e.g. the local school headmaster, or a high-ranking monk. The solution is usually based on local custom and practice; it may consist of the offender's formal apology and sometimes of payment to the victim of compensation in the sum fixed by the arbitrator to cover the damages caused by the offence. Diversion may be applied as to compoundable offences, e.g. trespass, defamation, seduction, cheating and fraud, rape.

Mediation in Poland is possible within the framework of social conciliation commissions organized in city wards and villages. Professors Skupinski and Waltos reported that penal law conflicts were referred very infrequently to social courts in plants and offices and that at present this has ceased entirely.

Pursuant to Art. 436 S. 2 of the C.P.P. the president of the State court, rather than designating a conciliatory session to precede the main trial, may, if he thinks it advisable, refer the case to a social court to conduct the conciliatory proceedings. The idea at the roots of referring the proceedings in question to a social court was to make the procedure more informal, in order to facilitate mediation. Experience has shown that often a better understanding can be reached between the litigant parties and the social court teams than between the professional judges and the parties.

Professors Skupinski and Waltos point out that there are some important arguments against referring cases on private accusation to social courts for reconciliation.

Thus, the injured person files his complaint, incurring serious expense, not to a social court but to a state court, and the case is referred to a social court for reconciliation without obtaining the injured person's consent.

It may be added, however, that nobody can be forced to approve an agreement before a conciliation commission.

Also social courts may be unable to cope with legal complications involved in the reconciliation in more intricate cases.

Nevertheless, so far there is nothing to indicate that in spite of all these objections social courts would have to stop conciliating penal cases on private accusation. It must

be realized that such referring of the case to a social court to a great extent unburdens public courts, the more so as cases on private accusation, difficult to settle because of the frequently hostile attitude of the parties, are certainly not among the "favourites" of the professional judges.

Conciliatory proceedings before a social court can be concluded in two ways only: either the parties reach a reconciliation or not.

Reconciliation before a social court may assume the form of a simple reconciliation, i.e. an agreement is reached between the private prosecutor and the accused in which both parties state that they take upon themselves the obligation not to advance claims reciprocally about the offence and agree to have the proceedings on private accusation discontinued accordingly or of an agreement providing solution of some or all of the claims connected with the accusation.

After the closing of conciliatory proceedings (simple reconciliation or agreement, or a negative result) before a social court, the files of the case are returned to the State Regional Court, and, according to the outcome of the proceedings, either it shall be discontinued at the session of the Regional Court, or the president of that latter court shall designate the time for the main trial.

It has to be stressed that an agreement concluded before a social court is equally valid as one concluded before a State (Regional) court. In fact, the Regional Court may grant it an execution clause making it by the same an execution title (Art. 200 S. 3 of the Code of Penal Execution, and Art. 777 sect. 1 of the Code of Civil Procedure).

Unless the case is referred to a social court for reconciliation conciliatory proceedings before a State (Regional) court (the Regional Court being competent to examine cases on private complaint in the first instance) must always precede the main trial of private complaint cases.

A conciliatory session may be conducted, either by a professional judge or by a lay assessor. This depends on the decision of the President of the Court (Art. 437 S. 1 of the C.C.P.).

Professors Skupinski and Waltos suggest that mediation carried out by a lay assessor may give rise to serious objections. He is of course much less experienced in solving disputes than a judge, and he has no adequate knowledge of law to be able e.g. to construe an agreement properly or to settle sometimes highly complex problems related to civil and/or administrative law.

Of vital importance in this mediation is the attitude adopted by the judge or the lay assessor conducting the trial. It is important to refrain from forcing the parties to reach a reconciliation; in fact, such a reconciliation under pressure may be of short duration.

The fact remains that about 50 per cent of cases on private accusation are terminated in Poland by reconciliation and/or agreements. Thus, diversion with intervention in proceedings on private complaint plays a most significant part. It cannot be asserted that the only objective pursued when diversion with intervention is applied is to protect courts against overburdening with work. Mediation is sought mainly because it is thought that reconciliation will be of a greater prophylactic significance than a court judgment.

This latter motive has found confirmation in the fact that most of the attempts of reconciliation proved to be successful. Thus, a research carried out a few years ago has shown that only in a small number of cases have litigations which have ended in an agreement been resumed.

In Polish legislation, social courts may enter the diversion procedure in three situa-

tions. Firstly, when a public court has referred a private complaint case for conciliatory proceedings. Secondly, when the procedural agency has established the insignificance of the social danger of the act bearing the character of an offence (Art. 25 S. 2 P.C.), and has referred the case to a social court. And, thirdly, when an organ authorized to conduct the proceedings in a case of contravention has referred the case to a social court recognizing that proceedings before that court would fulfill an "educational" rôle (Art. 40 and 41 C.C.).

Social courts in Polish legislation are a specific institution differing in character rather vitally from that of such courts in the other European socialist states, with the exception of Yugoslavia. Their specific feature consists in the fact that the citizen is not under obligation to participate in the proceedings before such court, and the execution of the decision issued by such a court cannot be enforced by the State. It is for that reason, too, that the decisions of the social courts are not subject to appeal. For, in fact, the main rôle of these courts is to assure preventive and educational actions (Art. 3 sect. 2 of the Social Courts Act) and to reconcile the parties (Art. 12).

The sphere of activity of social courts is vast. Art. 3 sect. 1 of the Social Courts Act provides that the social courts shall hear cases about breaking the rules of co-existence in the community or of the social order, such as, for instance, neglect of civic duties or of duties with respect to one's family and employers, an improper attitude towards employees, disturbing the peace and order at the place of one's employment or domicile, transgressing upon social property or the principles of its protection, transgressing upon other citizens' property, conflicts between neighbours in towns and villages.

Irrespective of the character of the case, a social court may resort to educational measures and, wherever possible, perform the part of mediator.

Cases about acts liable to prosecution (offences and contraventions) can be examined by a social court upon its own initiative, upon citizens' motion or upon a motion of the agency conducting the criminal proceedings. It cannot, however, examine a case in which criminal proceedings are pending (with the exceptions of cases on private complaint, in which the social court has to conduct conciliatory proceedings, when the case has been referred to it by the State court). Yet, when a case about a prohibited act has been referred to a social court it will not be under obligation to examine such case. A social court "decides whether it will examine the case, and to what extent, taking into consideration the real chances such examination of the case may have to exert an educational and preventive action" (Art. 3 sect. 2 of the Act).

The participation of the perpetrator of the prohibited act in the proceedings is entirely voluntary and the decision of the social court cannot be enforced.

In Yugoslavia diversion by mediation is used as to private complaint offences. Mediation in criminal cases according to Yugoslav law can be classified as:

a) Mediation before a State criminal court and mediation before a self-management court, and

b) Mediation on the initiative of the victim who has the right to make a private complaint and mediation on the initiative of a State criminal court before which a private complaint has been brought.

According to the federal constitution and the constitutions of the federal republics there are in Yugoslavia State courts and self-management courts, the latter established as courts of associated labour, arbitration courts, mediation councils, appointed courts, as well as other forms of self-management courts (Articles 217 and 225 of the Con-

stitution of the SFRY and the pertinent articles of the constitutions of the socialist republics and autonomous provinces).

Each republic has its own law on mediation councils. There are no essential differences between these laws.

Mediation councils are self-management courts to whom working people and citizens in local communities, organizations of associated labour, other self-management organizations and communities can entrust mediation in disputes concerning their rights. The members of mediation councils are appointed and relieved of such duties by the working people and citizens, every four years. An adult citizen enjoying a good social reputation in the community where he resides or works can be elected as a member of a mediation council. A mediation council, when mediating disputes, consists of three members, one of whom is the president of the council. The procedure before a mediation council is oral, direct and public. (The public may be excluded in order to protect morals or for some other justified reasons, and must be excluded when at least one party so demands). Mediation before a mediation council is entirely voluntary. If one or both parties do not respond to the summons of a mediation council, or refuse mediation, the mediation council states in writing that mediation was not successful. Mediation councils act without the advice or aid of legally trained persons, are independent in their work, do not apply laws and do not impose sanctions. They are not organized according to hierarchy, and mediation, for the purpose of conciliation in criminal cases, does not come under the control of State courts.

Parties can be reconciled before mediation councils or before a criminal court and in both cases the result is the same: the victim refrains from prosecution which he intended to undertake or has undertaken already. In the course of reconciliation, the parties can conclude an agreement on the rights of which they can freely dispose, and most frequently, they agree on compensation for damages. If such an agreement is reached before a mediation council, it is formally concluded, which signifies that on request of one party, it can be enforced by organs of a State court, in the same manner as an agreement concluded in proceedings before a State court.

The initiative for mediation may be given by both parties or by any well-meaning person who is familiar with the conflict. Reconciliation may be reached at any moment.

The victim and the offender can apply to a conciliation council for the purpose of mediation or to some other arbitrator. However, in the Yugoslav Law on Criminal Procedure, we find regulations which concern only those cases where the initiative for mediation comes from the victim. This is understandable because only the victim is an authorized plaintiff for criminal offences which are prosecuted on the grounds of a private complaint, and it depends on him only whether he shall divert from prosecution or not. Thus it is prescribed that a private complaint shall be submitted to a State court within the delay of three months from the day when the person authorized to submit the complaint learned of the criminal offence and of the perpetrator. However, within the same delay, the victim can apply to a mediation council or to another self-management court authorized to mediate, and then the term for submitting the complaint is extended; namely, the delay commences from the day when the case is unsuccessfully ended before a self-management court, or, if it is not terminated, then within three months after the lapse of three months (Article 52 of the Law on Criminal Procedure). Thus, the victim, when applying to a mediation council, gains up to three months' time for lodging his complaint with a State court.

M. P. Nthabala reported that mediation is used in the Republic of Venda in the following cases: 1) minor offences within the family (e.g. when the husband assaults his wife, the husband's parents or, when they are not available, elderly relatives or neighbours act as mediators); 2) juvenile offences (parents act as mediators).

In the German Democratic Republic the solution of penal law conflicts may be diverted to conflict and dispute commissions. They were established by the first law on social courts of 1968, replaced by a new law of 25th March 1982 which extends the scope of activities and the powers of the commissions. The consent of the offender and of the victim are required. Nobody can be forced to appear before the commission. Procedure in and decision making by the commissions are public and everyone present may express his view on the conflict and on its suggested solution. The prerequisite is that the offender admits the commission of the penally prohibited act and that there is no doubt as to facts (no contradictory evidence) (Art. 28 GDR Criminal Code).

Once the parties appear voluntarily before the commission they are subject to the decisions of the commission. Thus the latter may order the offender to pay a fine (from 10 to 500 marks—Art. 29 GDR Criminal Code and Art. 20 of the Social Courts Act of 1982). However, the solution may consist in material and/or moral reparation, i.e. in payment of money or in work in favour of the victim. The offender may be requested to perform a socially useful work in his leisure time and/or apologize to the victim. The commission may decide to pronounce a reprimand. The decisions of the commission are not entered into the criminal record of the offender.

Furthermore the commissions are expected to search for causes of conflicts and they may give recommendations aiming at the elimination of such causes. Conflict commissions are set up in nationally owned enterprises. Dispute commissions are established in socialist cooperatives and in residential areas. Their members are expected to enjoy the esteem of the citizens.

The decisions of commissions may be enforced by State district courts. Such decisions are also subject to review by State district courts.

Experience has shown that in 20 to 30 per cent of all criminal matters the commissions reached a final clarification or settlement. Such cases dealt with petty offences against property, with assaults which caused minor bodily injuries and with unauthorized use of motor vehicles. Recidivism did not exceed two per cent.

Where there is no good will shown by the offender his case may be subject to criminal proceedings before the State court.

In Canada diversion projects developed in the 1970's. Their functioning is based on the discretionary powers of police and of the public prosecutor (Crown attorney). The projects are organized according to local initiatives and subsidized from State funds. According to the "Community Kit for the Development of an Adult Diversion Program", produced by the federal Ministry of the Solicitor General in 1979, referrals to programmes are made by the police, by the public prosecutor and by the citizens (the latter less frequently). Among 28 programmes in existence at that time only six are described as "Post Charge–Pre-Court". The process specific to diversion in Canada is mediation—an intervention to promote reconciliation, settlement or compromise (op. cit. p. 1).

As Célyne Riopel mentions in the Canadian report, the diversion agreement is made preferably in writing. It specifies the undertakings which the divertee agrees to respect. The duration of the diversion programme is usually from 60 days to six months.

Even when the matter was already in the hands of the police and/or of the public prosecutor, the diversion agencies, staffed by professionals and simple citizens, play an essential rôle in diversion programmes. In some programmes probation officers take part in diversion.

Dr. Iulian Poenaru reported that in Rumania the judgment commissions ("commissions de jugement"), qualified by him as extrajudiciary, have among their aims and powers also the aim of conciliation of the parties.

The commissions are created in State enterprises and offices, in cooperatives, other civic organizations as well as at executive committees of people's councils in cities and rural commons (law No. 59 of 1968). The commissions intervene principally before penal prosecution. However, they are not limited to mediation but they may apply measures of social influence, such measures including also fines. Thus they differ e.g. from the social conciliation commissions in Poland which are limited to voluntary conciliation.

In the United States the American Arbitration Association and the Institute for Mediation and Conflict Resolution have developed projects which provide services to the general public and arbitrate a wide range of types of disputes. The Rochester, New York Community Dispute Services Project is sponsored by the American Arbitration Association and the Dispute Center in New York City by the Institute for Mediation and Conflict Resolution. Both projects receive extensive referrals from individuals and agencies regarding criminal and civil disputes. Citizens representative of the local communities have been trained by the projects to serve as arbitrators. These citizens serve on a rotating basis and are paid for their services by the project. Hearings are generally scheduled within ten days of the initial referral and involve attempts by the arbitrators to serve as conciliators and mediators in the early phases of the hearing. The arbitrators impose an agreement only in cases in which the mediational efforts are not successful. The arbitrator's awards stipulate the actions required of the disputants, and failures to adhere to the conditions of the award are enforceable in the civil courts. The majority of the States have modern arbitration legislation which provides the legal basis for the arbitrator's agreement. The table in annex presents a summary of the characteristics of the Rochester and New York projects. The American Arbitration Association has developed additional "Arbitration as an Alternative" projects in Cleveland, Elyria, Akron, Ohio, and San Francisco. The AAA Philadelphia project has been institutionalized into the city's court system. (Daniel McGillis & Joan Mullen, "Neighborhood Justice Centers", 1977, pp. 16 & 17).

In the U.S.S.R. Art. 9 of the Code of Penal Procedure of the Russian S.F.S.R. states that the decision to dismiss the case and to release the offender on surety must be approved by the public prosecutor (procurator). The court issues in such cases an order to dismiss the case. The victim is informed about the corresponding decision. He may lodge his complaint against the decision to the public prosecutor of higher rank or against the court order to the court of higher instance. If the offender released on surety objects he shall be tried in the usual order. In case of breach of the promise given by the offender or when the offender quits his work in the collective which acted as surety, with the purpose of avoiding the corrective educational treatment, the social organization or the collective of working people may withdraw its surety by a written notice addressed to the agency which issued the decision to dismiss the case. In consequence, criminal proceedings may be resumed and the offender may be tried.

Release on surety is possible only under the following conditions:

a) the person released on surety was not previously convicted for an intentional crime;

b) the person had not been previously released on surety;

c) the crime committed by the person being released on surety does not constitute a great social danger and has not caused a grave harm;

d) the person released on surety confesses to his guilt and is open-heartedly remorseful of having committed the crime;

e) there is a request from a collective of working people or social organization expressing the wish to stand surety for the person.

4. Diversion with Intervention by the Public Prosecutor

The broad discretionary powers of public prosecutors in the United States and in Canada enabled the development of diversion from the criminal trial. In the United States the prosecutorial discretion was upheld by the courts, e.g. in United States v. Cox (1965): "It follows, as incident of the Constitutional separation of power, that courts are not to interfere with the exercise of discretionary powers of Attorneys of the United States and their control over criminal prosecutions" (at 171). The 1967 President's Commission on Law Enforcement and the Administration of Justice regarded the exercise of discretion by prosecutors "as necessary and desirable, but suffering from several handicaps in addition to generally unfavorable working conditions" (Challenge, 1967, p. 133). The Commission recommended "early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required" (Challenge, 1967, p. 134).

The 1971 American Bar Association Standards Relating to the Prosecution Function and Defense Function (Standard 3.9) state:

The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist (exists) which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disposition of the authorized punishment in relationship to the particular offenses or the offender;

(iv) possible improper motives of a complainant; prolonged non-enforcement of a statute, with

(v) community acquiescence (ABA Standards; Prosecution, 1971, p. 92).

The Law Reform Commission of Canada has been engaged almost from its inception in exploring and developing the possibility of diversion and has conducted a major experiment which is described in its background volume, "Studies on Diversion". Subsequently it published in 1975 its working paper 7 "Diversion" (the French language version's title: "La déjudiciarisation"). It states the reasons for the examination of diversion in the following way: "Too many forms of socially problematic behaviour have been absorbed by the criminal law in recent history and this trend needs to be reversed. One way of doing so is through the process of decriminalization—the elimination of offences. This approach unfortunately has not shown itself to be always successful. Even when offences are eliminated, problematic behaviour often remains, has to be dealt

with, and may lead to the use of other charges. Diversion, in this context, represents an approach which recognizes that problems exist and cannot just be defined away but seeks solutions which minimize the involvement of the traditional adversary process and maximize conciliation and problem settlement. The full force of the criminal process can thus be restricted to offences which raise serious public concerns" (p. 1), (Diversion, Working Paper 7, 1975, Law Reform Commission of Canada).

The Commission's paper maintains that "Most criminal incidents do not end up in the courts. Decisions by the victim or a by-stander not to call the police or the exercise of discretion by police not to lay charges, but to deal with the incident in another way, or a decision by the prosecutor to withdraw the charges are as old as the law itself. In some cases, dealing with trouble in a low key is far more productive of peace and satisfaction for individuals, families and neighbourhoods than an escalation of the conflict into a full-blown criminal trial. In resolving conflicts within the family, between landlords and tenants, businessmen and customers, or management and labour, citizens and police have always been reluctant to use the full force of the criminal law. This absorption of crime by the community, police screening of cases out of the criminal justice system, settling of incidents at the pre-trial level, or using sanctions other than imprisonment are examples of what is commonly referred to as diversion."

It states furthermore that instead of automatically proceeding from complaint to arrest to charge, trial, conviction and imprisonment, it makes sense to pause and justify proceeding to the next more serious and costly step (p. 3).

As to the absorption by the community, it is to be noted that in Canada large businesses have private security forces and may deal with thefts, frauds and other damage as management problems without referring the matter to the courts. Housing developments, too, are turning to private security forces to handle an array of problems independently of the official criminal justice system. Indeed, private security forces now outpace the police in numbers and growth (p. 5).

Organized attempts to use community-based alternatives to the criminal justice system are becoming increasingly common and are used by police and others as a means of diverting offenders from criminal processes. Detoxication centres, drug crisis centres, family crisis centres, youth service bureaus and various mental health clinics, among others, offer care, information, advice, counselling or referral services to people in trouble (p. 6).

Police in Canada exercise their discretion to screen cases out of the criminal justice system. Very often this may be the case with juveniles or young offenders. It is not a new function for the police. They have always exercised a discretion not to lay a charge but take a youthful offender home to his parents and let him go with a warning. Similarly, in some driving offences, cases involving alcohol or drugs, incidents of disorderly conduct, or deviant behaviour suggesting mental illness, among others, the police have used their discretion to reprimand, counsel, mediate or settle cases, or to refer the incident out of the criminal justice system to health, welfare, or other agencies without further action being taken. Such screening is a recognition that the community does not always expect the police or others to deal with minor conflict or trouble through arrest and prosecution (p. 6).

Is police discretion in screening cases out of the criminal justice system consistent with the ideal of equal justice under law? If A and B come to the attention of the police and the circumstances of the two are not distinguishable, then A and B should be treated

alike. If A is screened out it would be unjust to proceed with charges against B unless different circumstances warrant a different disposition. In other words the decision to lay charges in one case and to screen out in the other must have some rational basis that will stand up to examination. The policies upon which the decisions are based should be stated publicly and followed in individual cases. Such policies should, as far as possible:

(a) identify situations calling for charge rather than screening out;

(b) establish criteria for the decision to charge rather than screen out;

(c) require a charging option to be followed unless the incident can be screened out.

Situations that might well be screened out rather than dealt with by charge are identifiable from current police practices, and include among others:

(a) incidents involving juveniles or the elderly;

(b) family disputes;

(c) misuse of alcohol or drugs;

(d) incidents involving mental illness or physical disability;

(e) nuisance-type incidents.

Criteria to be considered in deciding that a charge should or should not be laid might include:

(a) The offence is not so serious that the public interest demands a trial.

(b) The resources necessary to deal with the case by screening out are reasonably available in the community.

(c) Alternative means of dealing with the incident would likely be effective in preventing further incidents by the offender in the light of his record and other evidence.

(d) The impact of arrest or prosecution on the accused or his family is likely to be excessive in relation to the harm done.

(e) There was a pre-existing relationship between the victim and offender and both are agreeable to a settlement (p. 7).

In Canada it is the Crown prosecutor, not the police, who has legal responsibility for laying charges and conducting prosecution. In practice the day-to-day business of deciding whom to prosecute and on what charge is left to the police. Often the prosecutor will not know anything about a case until he walks into the courtroom and is handed a sheaf of cases for prosecution that morning. If he has time, considering the evidence and the law, he may then decide that the charge ought to be changed or the prosecution discontinued. For the most part, however, experienced police officers have developed a professional expertise in these matters that enables busy prosecutors to delegate to them the day-to-day decisions in laying charges. In serious cases or cases otherwise raising a doubt, the police will consult the prosecutor as to the correct charge. The existence of prosecutorial discretion to select cases for prosecution, to pick the appropriate charge, to vary or withdraw charges, delay or simply stay proceedings is not in doubt (p. 9).

On an ad hoc basis the Crown, in some areas, does withdraw charges upon representations by lawyers for the defence indicating that the accused is deserving of leniency and has agreed to make restitution and pay back the harm done. Particularly where the victim is agreeable to such a disposition, the Crown may then decide that the public interest does not demand a prosecution and agree to drop the charges. Not only cases of damage to property, but cases revealing an element of mental illness, very youthful

or elderly offenders, or cases which under the circumstances are more a social dispute than a major criminal offence, may, with the consent of the victim and the prosecutor, be dealt with by way of settlement. The agreement by the offender in such cases may be to make restitution, to undergo counselling or treatment or to take up training, education or work programs for a stated period (p. 9).

Particularly where there has been a prior relationship between the victim and offender and where such relationship is likely to continue despite the criminal event, pre-trial settlement or diversion may be appropriate. Indeed, the policy underlying pre-trial settlement should permit settlement without restriction as to specific offences, but impose a limitation in those cases where the public interest is so great that pre-trial settlement would depreciate the seriousness of the offence or the general preventive effect of the law (p. 10).

The paper suggests that the following factors are of importance:

(a) the incident being investigated cannot be dealt with at the police screening level;

(b) the circumstances of the event are serious enough to warrant prosecution, and the evidence would support a prosecution;

(c) the circumstances show a prior relationship between the victim and offender;

(d) the facts of the case are not substantially in dispute;

(e) the offender and victim voluntarily accept the offered pre-trial settlement as an alternative to prosecution and trial;

(f) the needs and interests of society, the offender and the victim can be better served through a pre-trial program than through conviction and sentence;

(g) trial and convictions may cause undue harm to the offender and his family or exacerbate the social problems that led to his criminal acts (p. 11).

As to the problem of admission of responsibility, the paper of the Law Reform Commission of Canada suggests that "Entry into a pre-trial settlement program should not be conditioned upon an admission of "guilt", but on an informal admission of the facts alleged against him. While seeking a guilty plea may be explained as a means of getting the accused to accept his responsibility in the matter and hence an element in his rehabilitation, the same end may be achieved by less drastic means. All that is needed is an informal and out-of-court acknowledgement of partial or full responsibility for the harm complained about. In addition, to require a pre-trial admission of "guilt" overlooks the fact that it is mediation and settlement, not adjudication, that is needed in some cases and that is why they are considered for pre-trial settlement in the first place" (p. 17–18).

IV. Issues and Recommendations

Introduction

In order to suggest recommendations it is essential to consider the aims of diversion. Among the latter are: 1) search for the causes of conflicts and an effort to eliminate such causes in the future; 2) resocialization of the divertee; 3) reduction of the impact of arrest on the family of the divertee; 4) avoidance of criminal record; 5) reconciliation of the divertee with the victim and/or satisfaction of the victim; 6) satisfaction of public

opinion; 7) general deterrence; 8) reduction of the work load of investigative bodies; 9) reduction of the work load of courts.

1. What should be the function of diversion in the administration of criminal justice in the future?

There are voices stating that the court and correctional processes are not able to deal with many of the cases. The victims, offenders and witnesses who are exposed to criminal processes frequently find them impersonal, frustrating and difficult to understand. Criminal trials are directed towards the discovery of guilt but not necessarily to the search for causes of criminal law conflicts and to the reconciliation of involved persons. Reconciliation is especially important when the transgressor and the victim are in permanent relations, e.g. members of the same family, neighbours, colleagues at work. Diversionary practices may in an informal way lead towards learning what are the causes of criminal law conflicts and try to eliminate the same. Finally, diversion decreases the work load of courts, which enables the judges to devote more time and energy to the examination of serious criminal cases.

Recommendation

Diversion shall be applied where the public interest does not require a trial in a criminal court. It shall be directed towards the search of causes of the criminal law conflict and to the elimination of the same. It is advisable to provide for the restitution by the divertee and/or for the compensation of the victim by the divertee either in money or by repairing by him of damages caused by his act. Diversion shall be applied where it is probable that keeping the transgressor out of the criminal courts system will be more conducive to his future legal behaviour than a criminal trial.

2. Should a charge be laid in order to settle a criminal matter out of court?

It would appear that there is no need to lay a formal charge in order to reach the aims of the diversion. However, there may be cases where for the sake of public opinion and possibly of the general deterrence charges should be laid even when it is intended to divert the transgressor. The latter method may be useful for purposes of the general deterrence and in order to satisfy public opinion. Nevertheless several diversion programmes function without laying of charges (e.g. in Canada).

Recommendation

Criminal law conflicts may be settled without laying a formal charge. However, in some cases it may be opportune to lay a charge and subsequently proceed by way of diversion.

3. Should the consent of the offender be the basis of pre-trial settlements?

It is believed that the term "settlement" itself indicates a meeting of wills of at least two parties. Undoubtedly the most important parties in the criminal procedure are the investigating body or the prosecutor on one side and the offender on the other side. The situation of diversion may be compared to the situation of probation. In both cases

the cooperation of the offender is essential. The only exception would be in the cases of transgressors who are mentally ill and therefore unable to give their consent. However, in this last situation such persons shall be declared unfit to stand trial and therefore the diversion is the only available method. While procedural details may vary from country to country, the general principle of the criminal irresponsibility of such mentally ill persons seems to be universal.

Recommendation

The cooperation of the transgressor and his consent are essential for a diversion.

4. Should the consent of the victim of the offence be the indispensable basis of pre-trial settlements?

Generally speaking the victim has no standing of a party in criminal trials. However, there are exceptions. In some jurisdictions the victim may act as prosecutor in cases of minor offences (in fact in Canada everyone, not only the victim, may act as prosecutor in summary conviction trials although this happens infrequently). Therefore it may be prudent to assure the consent of the victim for the purposes of diversion. It is unlikely for a person who is not damaged by the offence to decide to assume the burden of prosecution.

In other jurisdictions the victim may act as "partie civile" in criminal trials (e.g. in France). His consent to diversion may be useful especially when it leads also to a settlement of civil law claims based on damages caused by the offence. In the countries where there is the category of private complaint offences it seems prudent not to deprive the victim of his right to request a criminal trial of a perpetrator of such offences. Settlement by the diversion agreement also of civil law claims resulting from the offence may contribute to the success of diversion. Also it saves the time of civil courts, witnesses etc. ("économie processuelle").

Recommendation

The consent of the victim may be indispensable for diversion in some jurisdictions as to certain offences. Even where such consent is not indispensable it is beneficial. Mediators should try to obtain the consent of the victim. When possible and appropriate the diversion agreement may include the settlement of civil law claims based on the damages caused by the divertee.

5. Should the offender be required to admit responsibility in order to settle a criminal matter out of court?

A difference should be made between: a) the plea of guilty i.e. the recognition by the defendant of his criminal responsibility, and b) the admission of facts. In the latter case such an admission leaves open the question of criminal responsibility as there may be still a defence or exception which could be pleaded, e.g. legitimate defence, provocation, negligence of the victim. In civil law there is a practice of settlements without admission of responsibility or ex gratia.

However, in criminal law it may be maintained that a frank admission of facts by the

transgressor is an important or even indispensable basis for a decision to abstain from a criminal trial.

There are differing opinions and practices in this matter.

Recommendation

While there is no need for the recognition by the divertee of his guilt as an indispensable basis of diversion, a frank admission of facts constitutes an important reason in favour of a decision to choose the diversion method.

6. How are cases to be terminated by the public prosecutor or by the private prosecutor?

In the jurisdictions where the public prosecutor has discretionary powers either to prosecute or to abstain from prosecution, the successful diversion should bar subsequent prosecution. Even in absence of specific provisions such prosecution would be recognized by courts in several jurisdictions as an abuse of process. Nevertheless, specific provisions of written law may be helpful in this matter. This applies a fortiori to the jurisdictions where public prosecutor may abstain from prosecution only when authorized by specific provisions of law. Finally the same rationale applies to private prosecutors in the countries which allow victims or even other private individuals to prosecute certain offences.

Recommendation

Successful diversion shall bar subsequent prosecution based on the same facts which have been dealt with by diversion. Where the matter was already formally investigated by the investigating agency or the public prosecutor he shall declare formally that the investigation is closed in consequence of diversion.

7. Where breach of a pre-trial settlement is followed by resumption of criminal proceedings, does the offender stand in double jeopardy?

There is a universal principle that a person should not be tried twice for the same act committed by him. However, that does not necessarily mean that any criminal procedure bars a new trial. Thus e.g. the liberation of a defendant by the judge presiding at a preliminary inquiry in Canada does not bar a new preliminary inquiry and a subsequent trial. This does not constitute a double jeopardy because this person was not tried previously; he was not an accused in a trial.

A fortiori, a diversion cannot be considered a trial, and the problem of double jeopardy does not arise.

It is true, however, that during the negotiation of a diversion settlement the divertee may reveal elements of evidence which could be used against him in a trial. It may be submitted that it is not a problem of double jeopardy but rather the problem of evidence. In order to assure frank declarations in diversion negotiations the divertee should be assured that his declarations will not be used against him in court.

Recommendation

The declarations of the divertee during diversion shall not be used against him as evidence in a subsequent trial.

8. Should pre-trial settlement be conducted in public?

Negotiations in public are difficult. There are psychological problems. If the method of mediation is applied the mediator or mediators should be free to confer in private with each of the persons involved, i.e. the prosecutor, the divertee and the victim. Mediation may result in changes of attitudes which are easier when they are not publicized.

However, the outcome of the negotiations, the diversion settlement, could be and in most cases should be public.

Recommendation

Diversion proceedings and negotiations shall be conducted in private. The diversion agreement may be public.

9. Who should act as mediator in diversion?

It is difficult to establish a general rule as to the qualifications of mediators. It may be said that they do not need to be professionals active in the system of criminal justice. Generally, they are persons enjoying the esteem of the community. Their offices and all out-of-pocket expenses should be paid from public funds. In some systems mediators are voluntary but they receive special training. Mediators may be remunerated, although in several countries they serve without pay.

Recommendation

Mediators shall be persons enjoying the esteem of the community, having a good life experience, excellent common sense, good knowledge of the community, stability, some training in mediation techniques and sensitivity to participants.

10. Should the same person act as a mediator and as an arbitrator in the same case?

While mediation is used in many jurisdictions, arbitration of criminal law conflicts is relatively rare: it is used mainly in the United States. The rôle of the mediator differs from that of the arbitrator. The mediator may counsel and make suggestions; he may confer separately with each of the participants in private; he has no power to impose a solution of the conflict. The consent of participants is indispensable in order to reach a diversion agreement by way of mediation. Arbitration is used in cases of unsuccessful mediation but only if the participants agree to arbitration. Decision of the arbitrator is binding for the parties. The civil law type arbitral award, e.g. as to compensation of the damages suffered by the victim, may be enforced against the transgressor by the court. The arbitrator is not supposed to confer separately with each of the parties: an arbitration hearing must be open to all involved parties.

Recommendation

One person shall not act as mediator and, subsequently in case of an unsuccessful mediation, as arbitrator of the same conflict.

11. Withdrawal from the diversion programme

There are opinions that both a) a participant should be able to withdraw from the diversion programme at any time prior to its completion and elect ordinary criminal justice processing and b) the diversion programme should retain the right to terminate service delivery when the participant demonstrates unsatisfactory compliance with the service plan. (Performance Standards and Goals for Pre-trial Release and Diversion, The Board of Directors of the National Association of Pre-trial Services Agencies, U.S.A. 1978, standards 5.1 and 5.2).

This stresses the entirely voluntary character of diversion. These standards are very important and merit international approval.

Recommendation

A participant should be able to withdraw from the diversion programme voluntarily at any time prior to its completion and elect ordinary criminal justice processing.

The diversion programme should retain the right to terminate service delivery when the participant demonstrates unsatisfactory compliance with the service plan.

12. Types of diversion programmes

Adult diversion programmes lead in practice, as a result of mediation, to: 1) community service settlements and 2) compensation to the victim settlements. In the first type of settlement the offender voluntarily undertakes to do a specific amount of work, without pay, for the community. It is applied for victimless offences or when the victim of an offence prefers that voluntary work be done for the community rather than directly for the victim. In the second type the offender voluntarily undertakes to compensate the victim through the payment of a sum of money or by doing a specific amount of voluntary work for the victim.

Diversion programmes may also identify areas of stress for the offender which require direct service resources by other agencies and, in consequence, refer the offender to such agencies.

Recommendation

The mediation process in diversion shall lead in most cases to: 1) community service settlements or 2) compensation to the victim settlements. However, referrals to specialized agencies and other undertakings by the divertee may be necessary (treatment in a detoxication centre, undertaking to refrain from visiting the victims, etc.).

13. What categories of charges and defendants should be eligible for diversion?

This is a controversial subject. Generally speaking diversion seems to be limited to minor offences and/or to occasional offenders or only to first offenders. Some jurisdictions do not exclude automatically other offences and offenders from diversion but allow for decisions on diversion on a case-by-case basis, depending on the probability of the rehabilitation of the defendant. There is e.g. a significant decision of the New Jersey Supreme Court in a case of State v. Leonardis 71 N.J. 85 (1976) on selling hard drugs

where the Court declared: "We find the exclusionary criteria accord misplaced emphasis to the offense with which a defendant is charged and hence fail to emphasize the defendant's potential for rehabilitation" (p. 95). As to the offenders who have already a criminal record many jurisdictions exclude them from diversion. Whether previous convictions should always bar a diversion is, however, an open question. Certainly such a record has its weight but in some cases the defendant may be still suitable for diversion. This matter could be solved on a case-by-case basis. As to non-residents their diversion may cause some difficulties when there are no available diversion services in the places of their residence.

On balance it is suggested that standard 22 of the United States National Association of Pre-trial Services Agencies, 1978, adjusted, may be considered as being broad enough.

Recommendation

Eligibility criteria should be broad enough to encompass all defendants who can benefit from the diversion option, provided that those cases will be excluded for which the community demands full prosecution.

14. Should the offender have the opportunity to consult with counsel prior to his consent to the diversion agreement?

The suspect should have the possibility to make an informed, voluntary choice to enter the diversion process. Therefore he may need the assistance of a professional counsel. Furthermore in certain jurisdictions the divertee has to waive some of his rights, e.g. in the United States the right to speedy trial, the right to have the government prove its case beyond a reasonable doubt, and in some cases the right to trial by jury.

Recommendation

Potential divertees should have the opportunity to consult with counsel prior to consenting to diversion.

15. Should the diversion records be open for examination?

Records of diversion procedure should not be open to third persons because e.g. they may influence prospective employers of the ex-divertee, credit bureaus, etc. On the other side it is essential for the future diversion purposes to learn about prior diversion programmes of the offender. Therefore such records should be sealed and access to them should be permitted only when a defendant applies to participate in a diversion programme.

Recommendation

Records relating to diversion should be sealed upon successful completion of the diversion programme. Criminal justice personnel should be permitted access to such records solely in case of a new application for diversion of the former divertee.

ANNEX

Table
Major Characteristics of the Six Sampled Dispute Processing Projects

(Neighborhood Justice Centers. An Analysis of Potential Models. Daniel McGillis & Joan Mullen, 1977, Washington, D.C., U.S.A., U.S. Government Printing Office.)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Project Name	Boston Urban Court Project	Columbus Night Prosecutor Program	Miami Citizen Dispute Settlement Program	Institute for Mediation & Conflict Resolution Dispute Center	Rochester Community Dispute Services Project	Community Board Program
Start-up Date	9/75	11/71	5/75	6/75	7/73	In planning stages
Community Served						
Name	Dorchester District, Boston, Massachusetts	Franklin County, Ohio	Dade County, Florida	Manhattan and Bronx, New York	Monroe County, New York	Selected Sections of San Francisco
Population	Dorchester: 225,000	County: 833,249 Columbus: 540,025	County: 1,267,792 Miami: 334,859	Manhattan: 1,539,233 Bronx: 1,471,701 Total: 3,010,934	County: 711,917 City of Rochester: 296,233	San Francisco: 715,674
Sponsoring Agency						
Name	Justice Resource Institute (non-profit)	City Attorney's Office, Columbus, Ohio (Contractor: Capital University Law School)	Administrative Office of the Courts	Institute for Mediation & Conflict Resolution (non-profit)	Rochester Regional Office of the American Arbitration Association (non-profit)	Community Board Program (non-profit)
Source of Funds	Law Enforcement Assistance Administration	Originally Law Enforcement Assistance Administration. Now city-funded	Law Enforcement Assistance Administration	Law Enforcement Assistance Administration	Law Enforcement Assistance Administration	Foundation Funds

Table (continued)

Features	Cities						
	Boston	Columbus	Miami	New York City	Rochester		San Francisco
Location	Private storefront near the court	Prosecutor's office	Government building which also houses court & district attorney	Office building in Harlem, not near court	Downtown office building near the court		Likely to have offices in the neighborhoods
Case Criteria							
General Rationale	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants and bad checks	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants	Generally ongoing relationships among disputants		Generally ongoing relationships among disputants
Types of Cases	36% family disputes; 20% neighbor; 17% friends; 10% landlord/tenant; 17% miscellaneous	39% interpersonal disputes, 61% bad checks	Statistical data are not currently available. Many assaults, harassments, neighborhood problems, domestic problems	Statistical data are not currently available. Cases include both misdemeanors and felonies	Approximately 2/3 are interpersonal criminal matters, 14% city regulations, 5% bad checks & miscellaneous. May begin to process family court cases		Not Applicable
Referral Sources							
Walk-ins	See Other	(to prosecutor)	20% approximately	6%	1975 14%	1976 18%	(likely to be high)
Police	2.2%		20% approximately	42%	—	1%	(likely to be high)
Prosecutor	See Bench	Most cases received through this office	60% approximately		6%	11%	
Clerk	33.4%			52%	66%	70%	
Bench	57.4% (including district attorney)	10.15% approx.			11%		

Table (continued)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Referral Sources (continued)						
Community Organizations	See Other				— —	"Third party" referrals will be encouraged
Other	7%				2% 0%	
Screening/Intake Procedures	Staff member attends morning arraignment sessions; staff also answer calls from bench. Interviews conducted at court or project office	Staff members of district attorney's office & intake staff of project refer disputants to project. Respondents are requested to appear at hearing or face possible charges	Intake staff are located at the project office & interview clients referred to the project from other criminal justice agencies	Cases are received from intake workers at summons court, criminal court, & police desk of district attorney's office	The project intake worker screens and refers cases at the clerk's office. Walk-in cases are screened at the project's office	Currently being developed
Resolution Techniques						
Type	Mediation	Mediation	Mediation	Mediation followed by imposed arbitration if mediation is unsuccessful. Only 5% of cases have required imposed arbitration	Mediation followed by imposed arbitration if necessary. In 1976 40% of cases heard required an imposed arbitration award	Mediation
Enforceability of Resolutions	Court cases continued pending follow-up after mediation	Disputants are informed that case charges will be filed if case is not satisfactorily resolved. Respondents are occasionally placed on prosecutorial probation	Disputants are informed that case charges may be filed if case is not satisfactorily resolved	Arbitration agreements are prepared at the end of all hearings & are enforceable in the civil court	Arbitration agreements are prepared at the end of all hearings & are enforceable in the civil court	Peer pressure

Table (continued)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Resolution Techniques (continued)						
Time Per Hearing	2 hours	30 minutes	30 minutes	2 hours	One hour and 45 minutes	Not Applicable
Availability of Repeat Hearings	Rarely more than two	Rarely used	Very rare	Most cases are completed in one session. Small number require two	Rarely used	Not Applicable
Use of Written Resolutions	Yes	Rarely used	Yes	Yes. Resolutions are binding	Yes. Resolutions are binding	Yes (unsigned ones are planned)
Hearing Staff Qualifications and Training						
Type	Diverse group of community members	Law students	Professional mediators	Diverse group of community members	Diverse group of community members	Diverse group of community members
Form of Recruitment	Widespread advertising, group contact	Contacted by staff at Capital University Law School	Through community contacts	Contacts with community groups and agencies	Contacts with organizations	Widespread effort to contact. Community meetings
Number Used Per Session	2.3	1	1	1.3	1	5
Rate of Payment	$7.50 per night	$3.75 per hour	$8.10 per hour	$10 per session	$25 per case	Not determined yet (may be same as jurors)
Training	40 hour training cycles originally conducted by IMCR, and now by local staff	12 hours of training conducted by the Educational and Psychological Development Corporation	Discussions and co-mediation with experienced mediators	50 hours of training conducted by IMCR	40 hours of training conducted by AAA	2 day training cycles are planned

Table (continued)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Follow-up Techniques						
Appeal/Rehearing Availability	Yes, but rare	Rarely used. Disputants can return on new charges	Yes, but rare	Only if both parties agree. Parties can appeal under state law if they feel award was arrived at fraudulently	Yes, if both parties agree	Probably appeal to new board
Follow-up Contacts	Disputants are contacted two weeks after hearing and again three months later	Disputants are contacted 30 days after hearing to see if resolution is being maintained	No. Project plans follow-up in summer of 1977	Yes. 30–60 days post hearing to see if resolution is being maintained	Assist in maintaining resolution if contacted. No systematic recontact	Some follow-up planned
Case Preparation for District Attorney/Court	No	Yes. Charging material is prepared and filed if necessary	Court is contacted regarding outcomes	No	No	No
Overall Costs and Unit Costs						
Annual Operating Budget	$105,268****	$43,000	$150,000	$270,000	$65,000*	$167,500
Total Annual Referrals	350	6,429** (1976)	4,149 (1976)	3,433***	663 (1976)	Not Applicable
Cost/Referrals	$300	$6.69 plus in kind costs	$36.15	$78.65	$98.03	Not Applicable
Total Annual Hearings	283	3,478 (1976)	2,166 (1976)	649***	457 (1976)	Not Applicable
Cost/Hearing	$372	$12.36 plus in kind costs, approximately $20	$69.25	$416 (recently $270)	$142	Not Applicable

Table (continued)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Goal Achievement						
Total Annual Referrals	350	6,429 interpersonal disputes in 1976; 10,146 bad checks; total=16,575	4,149 (1976)	3,433 extrapolated from 15–18 months through November, 1976	663 (in 1976)	Not Applicable
Percentage Having Hearing	71%	54% of interpersonal disputes	54%	46% hearing scheduled, 19% held due to clients resolving disputes	69% (in 1976)	Not Applicable
Rercentage of Hearings Resulting in Resolutions	89% (i.e., written agreement)]	Not Applicable	Project reports 97%	100%: 95% mediated, 5% arbitrated	100% due to arbitration provision. 60% mediated agreement; 40% arbitrated agreement	Not Applicable
Percentage of Failures to Uphold Resolutions	15%	10% (survey of 892 1976 cases)	Not Available	9% according to a follow-up	Unknown	Not Applicable
Percentage of "Resolved" Cases Returning to Court	Unknown	2.2%	Not available	Less than 1%	5% seek enforced agreement	Not Applicable
Project Organization						
Total Number of Project Staff	4	Approximately 5 full-time equivalents	8	10	6	$5^1/_2$
Administrative	Supervisor	Coordinator, Director	Program Director, Administrative Officer	Executive Director, Center Director, Summons Court Supervisor, fiscal officer	Project Director, Coordinator, Tribunal Administrator	Project Director Program Manager
Intake	2 case coordinators	6 senior clerks, 6 clerks	3 intake counselors	Intake Coordinator, Intake Worker, Police Liaison	Intake Worker (partly by Tribunal Administrator)	$2^1/_2$ organizers

Table (continued)

Features	Cities					
	Boston	Columbus	Miami	New York City	Rochester	San Francisco
Project Organization (continued)						
Social Service	Case coordinators provide referrals	6 social work graduate students	Social worker	Social worker		
Mediation	Approximately 50	Approximately 30	Approximately 20	Approximately 50	Approximately 70	Will train approximately 50
Clerical	Administrative Assistant	None	1 secretary, 1 receptionist	Receptionist, Administrative Assistant	Administrative Assistant, Receptionist	Evaluator
Project Models	IMCR Dispute Center		Columbus Project Rochester Project	Rochester Project, Columbus Project, Jewish Conciliation Boards, Bronx Youth Project	Philadelphia Arbitration As An Alternative Project	Danzig's model of Community moots
Additional Services Provided	Disposition program/victim service component	Problem drinkers' group, battered wives' group			Community Group Dispute Resolution, training programs	Community Group Dispute Resolution

NOTES:

* Total budget is $126,723, including additional components (community group resolution and community organizational training).

** Interpersonal disputes only—bad check cases add an additional 10,196 referrals but involve very little project case processing time.

*** Extrapolated from aggregated data on initial 18 months of referrals through November 30, 1976.

**** Based on portion of larger Urban Court Budget attributed to the mediation component; case figures are estimates for the corresponding years (6/77, 6/78).

NATIONAL AND INDIVIDUAL REPORTS

India
DIVERSION AND MEDIATION

Rajendra Saran Agarwal

I. Introduction

India has infant democracy and is emphasizing the need for overall development. Being an over-populated and one of the most criminally infested areas of the world, it has to take bold decisions. There are two things which are to be considered, firstly how to prevent the occurrence of crimes and secondly, how to treat the offenders who have been convicted after a legal trial. India is pledged to establish a welfare State and in this world also many reforms have been done. The introduction of western type correctional institutions required considerable modifications to suit Indian conditions. For economic reasons a wide preventive programme was considered more desirable in developing countries than institutional treatment; the latter should only be used after preventive social work methods had failed.

An Act "Probation of Offenders' Act" was passed by Indian Parliament in the year 1958. This Act was passed by Indian Parliament to unify the various local Acts in force in different States of India. This Act has been very wisely interpreted and frequently used by the Indian Courts. In the year 1963, explaining the objects of the Act, Their Lordships of the Supreme court of India observed, "The object of the Act is to prevent the turning of youthful offenders into criminals by their association with the hardened criminals of mature age within the walls of a prison." The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. This object would make it clear that the question of the age of the person is not relevant for determining his guilt but only for the purpose of punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. Where, therefore, the learned court finds the offender is not under the age of 21 years on the date when the court found him guilty, Section 6-1 has no application to him.

Questions and Answers

1. Practice of Diversion

a) Q: Is there a large number of offences being absorbed in the community in your country? If so, in what manner?

A: In India the reported crimes are tried and decided by competent courts. We do not have Family Courts like Japan but the family elders try to subside petty quarrels and disputes. The administrative authorities have no power to drop the cases.

So the large number of cases are not absorbed in the community in any manner.

b) Q: Has your country adopted the opportunity principle or the legality principle in prosecution? To what extent is simple diversion used in practice?

A: In India the opportunity principle is applicable only in cases of children below 15 years. The children are kept under the Children's Act in protection homes, established by the government.

c) Q: Is covert diversion practised? If so, by what method?

A: In India covert diversion is not practised.

d) Q: What types of diversion with intervention have been adopted in your country? Please specify the kind of offences for which it is used, the stage(s) of the criminal procedure at which such diversion is likely to occur, and the types of intervention that are practised.

A: In India diversion is in practice when a finding is given by a competent court. The offender is kept under the supervision of the police or Probation Officer according to the directions of the court.

e) Q: If your country is already using diversion with mediation, or if there are proposals for its adoption, please describe the procedure in detail.

A: In India diversion with mediation is in practice, under section 360 of the Code of Criminal Procedure, 1973: "When any person not under 21 years of age is convicted of an offence punishable with fine only or with imprisonment for a term of 7 years or less, or when any person under 21 years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the court before which she is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties to appear or receive sentence when called upon during such period (not exceeding three years) as the court may direct and in the meantime to keep the peace and be of good behaviour." In India Probation Officers have been appointed by the government to keep a watch and provide help to the offenders released on probation during the probation period and to help them to become good citizens.

f) Q: Do « comrades' courts » or other non-state courts or commissions in your country serve the function of diversion?

A: No.

g) Q: To what extent is rehabilitation through labour arranged without a court order?

A: In India the offenders who are convicted for long-term imprisonment are kept in prisons at different places. A few prisons have agricultural farms where the convicts are put to work and they are paid for their labour. This is being done without the order of the court.

h) Q: What kinds of controls are existing to guide discretion in the making of diversion decisions?

A: In determining the diversion the court takes into consideration the age, character, antecedents and of course the severity of the crime committed by the offender.

i) Q: What procedure, if any, is followed on condition that measures taken for intervention prove to be unsuccessful?

A: If the offender commits a breach of any condition or direction given by the court, the offender is sent to prison.

j) Q: What are the reasons of the diversion in your country?

A: In our country the offenders are released on probation, fine and admonition when they are found guilty of offences not punishable with death or imprisonment for life.

k) Q: What is the philosophy underlying diversion in your country?

A: In our country the philosophy underlying diversion is to make an offender a good citizen because a man is not a born criminal. Secondly, we try to keep the offender away from the prison walls so that he may not get the company of hardened criminals.

2.

a) Q: Is diversion in your country evaluated favourably or unfavourably?

A: In our country the diversion is taken favorably and the results are quite encouraging. The number of offenders released on probation is increasing.

b) Q: What kinds of criticisms are made of diversion in your country?

A: In our country we have full time paid Probation Officers. We do not have voluntary Probation Officers as in Japan. So these government servants sometimes are not very sympathetic to the offenders put under them.

c) Q: What kinds of control of diversion are suggested in your country?

A: In our country we feel that voluntary Probation Officers may be appointed and more than 50% of Probation Officers should be women. All the Probation Officers should get special training to deal with children and offenders of different ages. The voluntary social welfare organization may be assigned a role in this diversion.

d) Q: In countries where diversion is not used at all what are the reasons?

A: Not applicable.

e) Q: Is diversion likely to be expanded or restricted in your country?

A: In our country diversion is likely to be expanded day by day.

f) Q: What should be the function of diversion in criminal justice administration in the future?

A: In our country we feel and suggest that diversion should be made more effec tive in the criminal justice. For this we suggest that in all cases relating to the offenders below the age of 21 years a special machinery may be appointed to investigate the cases; special courts may be established to deal with these cases. Probation Officers may be given the work to do the background work and to submit their reports to the special Courts. The Probation Act of 1958 may be made more effective. The Probation Officers, Judges, Prosecutors and Advocates may be given special training to deal with these cases. All the offenders below the age of 21 years may be defended at the expense of the government.

Federal Republic of Germany
DIVERSION AND MEDIATION

Günter Blau
Einhard Franke

I.

Diversion in the sense of the commentary on topic III ("any deviation from the ordinary criminal process before an adjudication of guilt by a court, which results in the suspect's participation in some form of non-penal programs") exists in the Federal Republic of Germany—though this term is not common—especially on levels of formal social control by *prosecutors* (Staatsanwälte) and the *courts* (but not by the police):

—in the field of juvenile delinquency,
—in the field of petty crimes committed by adults,
—irrespective of the age group of the suspect, in the field of drug crime as far as drug consumers (not dealers) are concerned.

Furthermore a theoretical reception of "Diversion" in the American sense of the term has taken place—mainly in academic circles.[1] However this reception has hardly penetrated the practical administration of criminal justice. Nevertheless, there are a few experimental pilot studies in which professors and practitioners are cooperating in order to test new kinds of diversional programs *praeter* but not *contra legem*.[2] There are also some new successful agencies privately operated, that are trying to put diversion ideas into practice within the framework of the sanctions established by penal statutes.[3]

II.

In the Federal Republic of Germany the legality principle (i.e. the principle of compulsory prosecution) is in force.[4] However, German law provides for some exceptions to this fundamental duty of the police and prosecutors to enforce the law by investigating all crimes which come to their knowledge.[5]

The most important exceptions will be outlined below:

1.

With respect to any minor (but not serious) crime the prosecutor may refrain from prosecution; in the case of a misdemeanor against property he may so refrain without consent of the court. One method is simply "screening" (in American terminology), a procedure which could also be labeled as "simple diversion". Intervening diversion is a rather new method which may be effected only with the consent of the defendant. It is used in cases in which the guilt of the accused would be considered minimal (if proved) and where the imposition of certain conditions to be carried out by the accused is appropriate to eliminate the public interest in prosecution. All possible instances of intervention are enumerated by law.

2.

The prosecutor may also refrain from prosecution in the case of certain minor crimes —enumerated by law—where the victim may initiate criminal proceedings by private action (Privatklageverfahren). In such cases predominantly private legal rights will have been violated (so called "Privatklagedelikte"), e.g. trespassing and other forms of breach of domestic peace, defamation, damage to property committed intentionally, petty cases of bodily injury committed negligently or with intent and some offences under secondary criminal law (Nebenstrafrecht).[6] The prosecutor will inform the victim that he may try the suspect by private action in the criminal court.

3.

An exclusively therapeutical indication for refraining from prosecution is provided by the Drug Act (Betäubungsmittelgesetz) in cases of drug offences. The prosecutor may in the proper exercise of his discretion refrain from prosecution where a drug consumer has to expect a prison term of less than two years. Furthermore, the suspect must have been undergoing long-term therapy for at least three months with some chance of rehabilitation.[7] Under the same conditions proceedings may temporarily be suspended by the court if an indictment has already been filed with the court.

4.

In all cases of *juvenile and young adult delinquency*[8] in which the suspect has confessed his guilt, the prosecutor may ask the juvenile court judge to make certain orders to be carried out by the offender: e.g. labor according to judicial instructions or participation in a traffic-school program. The judge may also just give a formal warning. If the offender fulfills all conditions imposed on him *the prosecutor must refrain from taking further proceedings against him.* In the case of a petty offence (see 1. supra) the prosecutor may even *without consent of the court* refrain from prosecution if an educational measure has already been arranged (e.g. by a juvenile authority) thus making judicial action unnecessary.[9]

In cases of a similar nature the judge may proceed in the same manner where the prosecutor has nevertheless filed an indictment.[10] In contradistinction to adult criminal law the question of the minimal gravity of the crime is of less importance as a criterion for *intervening* diversion than the question of pedagogic indication.

III. Kinds of Diversion and Practice

1. Simple Diversion

1.1

As simple diversion we may designate the above-mentioned (II. 1.) *suspension of the case* without attachment of conditions to be fulfilled by the offender, a procedure which may be applied—either by the prosecutor or (after indictment) by the court—to adult offenders in cases of minor crime and presumptive minimal guilt.[11]

1.2

This legal possibility of avoiding a formal trial and judgement is very often used by practitioners as a sort of regulator of the legality principle in cases of adult suspects.

However, in *juvenile cases*, simple diversion is of less importance. The primacy of the notion of education led to the consequence that the—from a pedagogic point of view—disfavorable suspension of the case on account of minimal guilt without any educational influence on the juvenile or young adult defendant has become nearly meaningless for practitioners. However, the procedure of suspension of a case after a prior and informal warning by a juvenile prosecutor or judge[12] (supra II. 4) is very frequently used, and the number of cases disposed of in this manner is high.[13]

Thus, by way of example, the so called "Integ-Program"[14] which is being tested in Moenchengladbach aims at keeping juvenile or young adult first-offence shoplifters away from any formal social control by adopting the following method:

In arranged conversation on a voluntary basis and backed by a pedagogic concept (but not ordered by the juvenile prosecutor) the relevance of the confessing suspect's misbehavior will be talked over with him. In this way an attempt is made to awaken an insight into the need for lawful behavior.

2. Covert Diversion

2. 1.

Covert diversion in the sense that the prosecutor may temporarily suspend the case —perhaps because the suspect has made an offer of, for example, restitution—is not provided for by the Code of Criminal Procedure (StPO) or the Juvenile Court Act (JGG). Nevertheless, this form of diversion is used in practice occasionally and then called "suspension on probation".

> A juvenile court judge may also suspend the case (§ 228 StPO) in order to see whether the young defendant fulfills probational conditions agreed upon by the judge and the defendant himself (e.g. labor, participating in a traffic-school program etc.). After successful completion of the probation period the temporary suspension will become final by decree (§ 47 JGG). However, this constitutes intervening and not covert diversion.[15]

2. 2.

On the other hand waiver of prosecution by the prosecutor and the suspension of the case by the judge in drug cases (§ 37 Drug Act—Betäubungsmittelgesetz) can be labeled as covert diversion. However, if the drug offender discontinues voluntary therapy the case will be continued.[16]

3. Intervening Diversion

3. 1.

In adult criminal law § 153 a StPO provides for the irrevocable termination of the case either by the prosecutor or, after prosecution, by the court if the defendant fulfills certain conditions.

The catalogue of intervening measures under this fairly recent rule (effective since January 1, 1975) and to which objections have been raised in scientific discussion[17]—provides for four possible conditions which may be imposed on the defendant:

The defendant may be required by the suspending authority to

— perform some task for the purpose of making good the harm he has caused,

—pay a certain sum of money either to a non-profit-making organization or to the treasury,
—do something else for the public good,
—pay money in order to fulfill an obligation of maintenance.

The suspending authority will fix a period of time during which the suspect has to fulfill all conditions. After successful fulfillment of all requirements and orders the suspect cannot be tried again in this case. In nearly 75% of all cases of this kind of intervention the suspect is ordered to pay money.[18] From a criminal policy point of view this kind of diversion is aimed at reducing case-loads in the courts and also at avoiding a stigmatization of the suspect which could hinder rehabilitation. However the suspect still suffers—other than in the case of a withdrawal of the criminal law (e.g. decriminalization in shoplifting cases in favor of a settlement arranged in a civil court, as supported by some authors)—the social disapproval of the authority suspending the case. Thus, protection of others and their legal rights is still ensured, even if in an attenuated form.

> The procedure described here, however, is not comparable with the American practice of plea-bargaining although some formal parallels cannot be denied. A comparison is not possible because aim and structure of both kinds of procedure are basically different (e.g. we don't follow the adversary system in our criminal procedure). Moreover the procedure according to § 153a StPO aims at final suspension of the case whereas the method of plea-bargaining aims at a modification of the indictment or the judgement.[19]

3. 2.

Under the Juvenile Court Act (JGG) there are besides the above-described yet seldom used measures according to § 153a StPO[20] a lot of methods of intervention that can be imposed either by the prosecutor or the court. Thus e.g. suspension on probation (supra II. 4.) in cases of juvenile and young adult offenders may be connected with any measure suggested by parents, other persons acting in loco parentis, the youth welfare authorities or possibly by a guardianship court, which holds out a promise of compensation for the lack of education apparent from the offence.[21] In practice these possibilities of intervening diversion are especially important in cases of misdemeanors such as shoplifting or fare-dodging. However, the seriousness of an offence should not (in the light of the postulated educational effect of judicial reaction) become an argument for the exclusion of diversion.[22]

Recently, a special kind of aid to socialization, called "social labor" (Sozialdienst), has become particularly important: it is derived from diversional orders to work in public facilities e.g. parks, orphanages etc.; moreover, this order can also be made by the Juvenile Court after finding a defendant guilty (§ 10 JGG). A private association, "Die Brücke (The Bridge)", has recently developed model projects which are being run under the slogan "Labor for the public good instead of punishment (gemeinnützige Arbeit statt Strafe)". The association also offers short-term intensive care (from six months to one year) in the form of special aid according to the requirements of the individual case. It further provides group therapy for unstable juveniles and young adults. These projects are being sponsored by private foundations and by state governments and local

authorities.[23] Besides these there are also other projects: e.g. the University and Polytechnic (Gesamthochschule) of Wuppertal offers as an alternative to weekend detention (Wochenendarrest)—but also as a kind of diversional measure—social-training courses, such as imparting group experience e.g. by living in a log cabin in the mountains, or on an island or ship.[24]

4. Diversion by Referring to a Process of Mediation

This kind of diversion is provided by law for cases of violation of private legal rights where the prosecutor refers the victim to the path of private criminal proceedings (Privatklageverfahren—supra II. 2). First of all an obligatory hearing with the purpose of conciliation has to be held before a mediator (Schiedsmann). Only citizens enjoying a good reputation will be appointed to such a position. Although the "Schiedsmann" neither investigates crimes nor has the power to convict and sentence an offender, he is entitled e.g. to summon witnesses and experts. Nearly one third of all cases heard by the "Schiedsmann" conclude with a settlement.[25] This kind of diversion may be compared with models of mediation or reconciliation which have been developed in the U.S.A. Proposals for their reception in our legal system have been aimed however at a reduction of cases heard in the Civil Courts.[26] A repercussion of this lively discussion on the administration of *criminal* justice is imaginable from several points of view: on the one hand through strengthening and developing the above-mentioned institution of the "Schiedsmann", and on the other hand through reducing the number of cases in which victims bring criminal charges (Strafantrag)—which are necessary for offences against private property and of bodily injury and start a private action (Privatklage) for penal conviction. Maybe such victims will in future prefer the conflict-resolving methods of mediation which have been developed on the perimeter of civil justice.

In this connection experts speak of victim-orientated diversion as opposed to educational or treatment-orientated diversion.[27]

IV.

The forms of diversion outlined above fit in to the *formal* program of social control through criminal procedure. Since the legality principle is generally in force in the Federal Republic of Germany, diversion is as a rule only possible within this formal framework. Informal disposal of a criminal case *within the local community* is therefore impossible.

However, this does not exclude the possibility of carrying out rehabilitative programs on the perimeter of criminal justice—especially in cases of juvenile delinquency. These programs can formally be compared with programs of diversion conducted in the U.S.A. Sometimes the latter are even consciously imitated. However, they belong to the field of criminal prophylaxis and the field of primary or secondary *prevention*, or sometimes to the field of after-trial-care of offenders. Consequently, they cannot be discussed here.[28]

On the other hand it must not be overlooked that there are de facto methods which are similar to diversion.

Crimes committed at a place of employment in a big company or firm are often tried —without the interference of public law enforcement authorities—by "*courts*" *established by the company or firm itself* (*Betriebsgerichte*). They may issue a warning or exclude a

delinquent employee from the social benefits of the company, reduce wages or salary or even order dismissal.[29]

This very controversial mechanism of regulation, which is partly derived from criminal law but also partly from labor law, has nothing to do with comrades' courts which are encountered in socialist countries, since we do not find a group of fellow-employees or -workers deciding the case but usually the management of the company acting as a "company court".

There is another non-legal form of diversion on the *police level* which is used in cases of petty and medium-range crime and also for certain kinds of frequently-occurring theft. Once a crime has been reported there is—as described above (except in cases of administrative penal law: "Ordnungswidrigkeiten")—no room for any exercise of discretion by the police as far as the question of processing the case is concerned. However, de facto, an economic regulator compels the police to filter out petty cases from the formal system, whether by defining the reported actions as noncriminal, or by just doing nothing, that is to say by refraining from any further investigation or law enforcement, thus creating a simple form of "covert" diversion contra legem. This practice can be considered a result of overwork caused by increasing crime and insufficient staff resources. In spite of much recent research by social scientists concerning the police,[30] only a few empirical results are yet available regarding the extent and structure of these covert diversional modes of police action.[31]

V. Discussion

1.

This survey has shown that diversion has been the subject of recent discussion by theorists in our country as a new strategy of informal social control in the field of criminal law.

However, public prosecutors and judges do not consider—as in the U.S.A.—diversion as a pioneering innovation since they have practised diversion (though they do not call by that name) for a long time already within the context of the formal program provided and prescribed by law.

There is little chance, however, of transferring diversional measures to the field of the community or neighbourhood or even to the police level for the following reasons:

First of all, the strategy of leaving the solution of disturbances relevant to the criminal law to the conflict-resolving potential of fellow-citizens demands a conception of state and society which does not conform with German tradition.

In spite of recent trends to the contrary in politics (e.g. within the environment movement) and in the field of criminal law philosophy,[32] the German people are essentially more state-oriented in their thinking than the people of the U.S.A.

Thus, in spite of some noteworthy initial attempts,[33] we do not find such a broad and differentiated spectrum of private "agencies" in the Federal Republic that could perform diversional programs.

2.

In the U.S.A. there seems to be a significant need for diversion especially in the

group of 14-to 18-year-old juveniles. This need derives—as far as we can see—from three phenomena not present in the Federal Republic, or at least not to the same extent:

1) the very wide concept of "juvenile delinquency" including a number of status-offences that do not burden our juvenile jurisdiction since we have a rather limited construction of this term;

2) the elaborate, laborious and time-consuming formalities of ordinary juvenile court procedure which have to be taken into account since the "in re Gault" decision of the U.S. Supreme Court (compared to the more informal possibilities of German juvenile court procedure);

3) the overcrowded prisons.

Since there is almost no pressure in the Federal Republic for solving problems deriving from these sources and as the Juvenile Court Act (JGG) provides for a broad spectrum of easy and quick-to-handle diversion measures with an educational impact, there is—if any—only a limited need for more (informal) diversion, e.g. in order to avoid a labeling effect. However, there has been a lively discussion for a long time whether juveniles from the age of at least 14 to 16 or even 14 to 18 could be fully or partly excluded—with exception of cases of serious crime—from juvenile jurisdiction by surrendering them to juvenile authorities (e.g. guardianship courts or youth-welfare authorities). The conception behind this idea was that of repressing thinking in terms of criminal law in favor of pure pedagogic thinking; thus leading to a replacement of juvenile prisons (which may be considered only in cases of most serious guilt or deeply rooted inclination to commit crimes even de lege lata) by educational institutions and non-custodial educational measures (the latter take precedence anyway, even in the field of juvenile criminal law).

Today, however, nobody still demands such a radical and total diversion of these age groups from juvenile criminal law. Interest has rather been focused on better securing the objectives of socialization within the system in the fields of juvenile aid and juvenile criminal law, thus avoiding or at least reducing the effects of stigmatization which would still be a problem if there had been a formal exclusion of possibilities of intervention from criminal law and a transfer of the same to juvenile aid authorities. Instead an attempt has been made to take greater advantage of diversional alternatives provided by the Juvenile Court Act (§§ 45, 47 JGG). Here there have been concrete suggestions, for example explicitly to empower the prosecutor to order educational measures which would make a prosecution dispensable.[34] Praeter legem this reform suggestion is—not seldom—being followed in practice already.[35]

Objections which could hinder an extension of "suspension on probation" arise from a juvenile-criminological point of view to the effect that prosecutors—due to a lack of information about the suspect and his criminal record—are mainly oriented towards measuring the amount of damage caused by the defendant; thus even those persons who might become professional criminals enjoy suspension since they remain undiscovered even though there is a need for effective socialization aid. This lack of information could be overcome by more frequent intervention of the "Jugendgerichtshilfe" (social workers attached to Juvenile Courts), which—however—seldom takes place already during *this* phase of the procedure.

The committee on diversion of the 18th Assembly of German Juvenile Court Officials including judges, social workers etc. (Göttingen 1980) suggested empowering the

police to suspend cases—in accordance with certain rules on how to exercise their discretion—instead of handing them over to the prosecutor, which has been obligatory up to now. A specially trained police officer could perform such duties.[36]

However, this suggestion was rejected after vigorous discussion[37] in the General Assembly even by the police officers, who claimed that they would be overstretched by such a power of decision. They further argued that they do not have the special knowledge required for diversional decisions in cases of petty crime, which cannot be defined exactly. The Assembly also objected to this proposal for fear of "hollowing out" the legality principle to an even greater extent.

3.

Diversion by the *prosecutor* in adult criminal law has only been codified since 1975 (§ 153a StPO, ante II. 3.) and has been similarly controversial. Some claim that there has not been another law of such fundamental importance to our criminal law for the last hundred years[38] as a new kind of procedure has been established—in many cases without judicial participation—which is inconsistent with the system, in so far as a suspect may be "sentenced" by a prosecutor without a conviction, though with consent of the suspect.

However, this argument cannot be advocated from a theoretical and systematic point of view since voluntary consent to fulfill orders is not "sentencing" in the sense of criminal law. Practitioners scarcely understand this criticism because the new law simply legalizes subsequently a praeter-legem procedure (suspension of a case according to § 153 StPO if the suspect promises to fulfill certain requirements fixed by the suspending authority, e.g. paying money to a non-profit-making organization, paying damages to the victim or the costs of the trial).[39] Just as unconvincing is the commonly heard objection that § 153a StPO has established a privilege for the rich, for only well-to-do people are able to fulfill obligations which merely consist of paying money. These critics overlook that the suspending authorities, when fixing the sum to be payed by the defendant, will obviously consider how much he is able to pay.[40]

The basis for suspension is not a "conviction without judgement" but a prognosis of the presumable outcome of the case. If the suspect does not agree with the prognosis because he claims to be innocent, he will hardly give his consent to a suspension of the case on condition that he pays a certain sum.

Thus, the legal position of a suspect in the case of an intervening diversion according to § 153a StPO is basically not more detrimental than in the case of a "simple" diversional decision made by the prosecutor (§ 153 StPO), since the latter decision is also based on a prognosis that the case would presumably end with a conviction. However, simple diversion (§ 153 StPO) does not depend on the suspect's consent; consequently, his legal position is not as strong as in the case of a diversional decision according to § 153a StPO, the more so as the subject to diversion according to § 153 StPO as a rule has to carry the burden of the costs of his defense, which has been law for a long time already (see § 467 subparagraph IV StPO). Many critics claim, however, that there is no "voluntarily" obtained consent in a case of intervening diversion by the prosecutor (§ 153a StPO) since the only alternative open to the suspect is to be prosecuted. But these critics do not consider that an innocent suspect has—at least in most cases—no reason to fear being convicted and sentenced since there are effective legal rights in our system of criminal procedure he can rely on (e.g. the rule "in dubio pro reo").

Nevertheless, it cannot be denied that some suspects just give their consent because they fear the trial itself. On the other hand, one must not forget that absolute voluntariness in social life is very seldom. People mostly act and decide under some social compulsion. We may leave open the question whether there are constitutional objections—e.g. stemming from the principle of separate powers.[41]

Even if there were a basis for such claims they would not give cause for doubting the legality of the diversional competence of the prosecutor since the principle of separate powers is nowhere strictly followed.

In point of fact practitioners do not feel too uneasy about these theoretical objections and make considerable use of all diversion methods described above.[42]

However, some suggestions for the improvement of our diversional system in the field of Adult Criminal Law should be made:

1) The terms "minimal guilt" and "public interest in law enforcement" should be defined more precisely in the context of crime with the aim of limiting the prosecutor's power to define these terms and with regard to a unification of criteria for diversional decisions, which presently differ from town to town.[43]

2) The catalogue of diversional orders should be expanded to include non-financial orders so as to refute the argument that the suspect merely pays for not being prosecuted or bothered by any other procedural measures. There should be room for an adequate reaction in cases where no damage to property has occurred (e.g. traffic school in cases of traffic offences).

However, criminal-pedagogic orders aimed at reducing the "deficit" in the socialization of adult criminals—as encountered in juvenile criminal law—should not be adopted, since such an expansion of prosecutorial powers would rupture the system of distribution of duties between the prosecutor and the judge in Adult Criminal Law. In conclusion one might say that there is a partial equivalence between reality and objectives in the U.S.A. and in our country, which have led to "diversion" as a new mode of reaction to minor and medium-range crime. However, the German form of diversion is more strongly bound to statutory regulations, which provide ex lege a highly differentiated set of instruments. The efficiency of such a formal diversional strategy can only be presumed as far as the future legal behavior of suspects is concerned. However, this presumption is based on the experience that—at least in the case of first offenders—a spontaneous rehabilitation is more often observed where there is no form of labeling the offender by a formal criminal trial.

As far as trial economy is concerned, the advantages of diversion are undoubted since even "nondiverted" defendants profit by the diversion granted to others as their cases will take less time owing to the reduction in judicial case-loads caused by diversion.

The last objection which is raised from time to time, namely that the program of diversion might even be a more intensive form of social control and thus might contribute to an increase in social control of deviant behavior in general, has not—considering conditions in the Federal Republic—been empirically confirmed.

Notes

1. *G. Blau,* Kustodiale und antikustodiale Tendenzen in der amerikanischen Kriminalpolitik, GA 1976, 33 ff; *G. Blau,* Neuere Entwicklungen im Jugendkriminalrecht der USA, Evan-

gelische Akademie Hofgeismar, Protokoll 128, 1977, 31 ff; *Eidt*, Behandlung jugendlicher Straftäter in Freiheit. Eine Untersuchung der typenspezifischen Behandlung im "Community Treatment Project" in Sacramento, Göttingen 1973; *H. Jansen*, Restitution als alternative Reaktionsform im Jugendrechtssystem der USA, Bewährungshilfe 1982, 141 ff; *Jescheck*, Die Krise der Kriminalpolitik, ZStW 91. vol. (1979), 1037 ff; *G. Kaiser*, Role and Reactions of the Victim and the Policy of Diversion in Criminal Justice Administration, in Festschrift für W. H. Nagel, Deventer 1976; *G. Kaiser*, Kriminologie. Ein Lehrbuch, Karlsruhe 1980, 162 f, 327; *Kury/Lerchenmüller* (ed.), Diversion. Alternativen zu klassischen Sanktionsformen, 2 vol., Bochum 1980; *Raben*, Die §§ 45 und 47 JGG — Eine Betrachtung der Anwendungspraxis und der Möglichkeiten, and *Sonnen*, Die §§ 45 und 47 JGG — Eine Betrachtung der Anwendungspraxis und der Möglichkeiten, both in: Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. (ed.), Die jugendrichterlichen Entscheidungen — Anspruch und Wirklichkeit, München 1981, 190 ff, and 177 ff; *Weigend*, Anklagepflicht und Ermessen, Baden-Baden 1978.

2. Special mention must be made of a diversional project on shoplifting in the city of Moenchengladbach (information on this project by *Ferdinand Kirchhoff*, Moenchengladbach) and of a study on practicability and efficiency of social training-courses, see *M. Busch*, Soziale Trainingskurse als Alternative zum Jugendarrest und als neue Interventionsform bei Frühkriminalität, in: Kury/Lerchenmüller (note 1), 622 ff; further *Bietz*, Erziehung statt Strafe; Überlegungen zur Weiterentwicklung des Jugendkriminalrechts, ZRP 1981, 212.
3. Especially important are the "Brücke"-projects in large cities and other towns with a large population; see III. 3. 2.
4. The legality principle is prescribed in our Code of Criminal Procedure (§§ 152 subpar. 2, 160, 170 StPO). However, in cases of misdemeanors that are reduced to so-called "Ordnungswidrigkeiten", the principle of discretionary prosecution is in operation.
5. They are described more exactly in §§ 153–154b, 376 StPO; §§ 45, 47 JGG; § 37 subpar. 1 Betäubungsmittelgesetz (Drug Act).
6. See the catalogue in § 374 StPO.
7. § 37 Betäubungsmittelgesetz (Drug Act) of Jan. 1, 1982; see *Katholnigg*, Neue Verfahrensmaßnahmen in Betäubungsmittelstrafsachen, NStZ 1981, 417 ff; *H. Körner*, Bekämpfung von Drogensucht und internationalem Drogenhandel, ZRP 1980, 57 ff; *Slotty*, Das Betäubungsmittelgesetz 1982, NStZ 1981, 321 ff.
8. According to the Juvenile Court Act persons who are 14 to 18 years old are considered juvenile, and persons from 18 to 21 years are called young adults. Both groups are within the jurisdiction of the juvenile court. As juvenile crimes are considered all offences which are described in part II of the German Penal Code (StGB) and in secondary criminal law (especially in the traffic regulations and Drug Act). "Status offences" in the American sense of "juvenile delinquency" are unknown in German law.
9. See § 45 Juvenile Court Act (JGG) of Dec. 11, 1974.
10. See § 47 JGG.
11. §§ 153 and 153 b StPO. Further instances of simple diversion are provided for by §§ 153c (offences committed abroad), 153e (voluntarily averting the effect of an offence).
12. § 45 subpar. 1 JGG (informal judicial procedure with the purpose of education) or § 45 subpar. 2 No. 2 JGG and the "Directives" for juvenile court prosecutors on the exercise of their discretion in cases of suspension; see *R. Brunner*, Jugendgerichtsgesetz, Kommentar, 5. ed. Berlin, New York 1978, *Eisenberg*, Jugendgerichtsgesetz mit Erläuterungen, München 1982, both with notes on § 45.
13. 14% of all juvenile cases are disposed in accordance with § 45 JGG. More often a simplified juvenile trial takes place. See *Nothacker*, Das Absehen von der Verfolgung im Jugendstrafverfahren (§ 45 JGG), JZ 1982, 57 ff.
14. See note 2.

15. On these kinds of diversion see *Bietz* (note 2), 212 ff; *Marks*, Weisungen gem. § 10 JGG — Intensivierung sozialpädagogischer Hilfen im Bereich unterhalb der Jugendstrafe durch "Brücke"-Projekte, in Kury/Lerchenmüller (note 1), 614 ff.
16. See note 7.
17. See the discussion V. 3.
18. Only rudimentary statistics are available on the frequency of this kind of diversion; see *Ahrens*, Die Einstellung in der Hauptverhandlung gem. §§ 153 Abs. 2, 153a Abs. 2 StPO, Göttingen 1978; *Kunz*, Die Einstellung wegen Geringfügigkeit durch die Staatsanwaltschaft; eine empirische Untersuchung, Königstein/Ts. 1980; *Riess*, Statistische Beiträge zur Wirklichkeit des Strafverfahrens, in Festschrift für Werner Sarstedt (ed. Hamm), Berlin, New York 1981, 253–328 and *Riess* in Schreiber (ed.), Strafprozeß und Reform, Neuwied, Darmstadt 1979, 113 ff (133 f, 147 f).
19. See *Kerner*, Normbruch und Auslese der Bestraften. Ansätze zu einem Modell der differentiellen Entkriminalisierung, in Göppinger/Kaiser (ed.), Kriminologische Gegenwartsfragen vol. 12, Kriminologie und Strafverfahren, Stuttgart 1976, 137 ff, especially p. 148; further *K. F. Schumann*, Informelle Strafjustiz — Plea bargaining in den USA, Kriminologisches Journal 1972, 284 ff; *Dielmann*, "Guilty plea" und "Plea bargaining" im amerikanischen Strafverfahren — Möglichkeiten für den deutschen Strafprozeß?, GA 1981, 558 ff; *Weigend*, Strafzumessung durch die Parteien — das Verfahren des Plea bargaining im amerikanischen Recht, ZStW 94. vol. (1982), 200 ff.
20. The juvenile court prosecutor only acts according to § 153a StPO if he considers juvenile court orders unnecessary for educational purposes and if only measures according to § 153a StPO should be chosen though they are considering the educational effect very problematic. See rule No. 5 to § 45 JGG to be found at *Eisenberg* (note 12), Annex 1.
21. See §§ 45, 47 JGG.
22. *Blankenburg/Sessar/Steffen*, Die Staatsanwaltschaft im Prozeß strafrechtlicher Sozialkontrolle, Berlin 1978, especially 103 ff; *G. Kaiser*, Möglichkeiten der Entkriminalisierung nach dem Jugendgerichtsgesetz im Vergleich zum Ausland, in Kury/Lerchenmüller (note 1), 103, especially 112 ff; *Greus*, Das Absehen von der Verfolgung Jugendlicher in der Praxis, Heidelberg 1978, 190 ff.
23. See *Marks*, mentioned above note 15 and in Bewährungshilfe 1982, 126 ff; *Ch. Pfeiffer*, Das Projekt der Brücke e.V., München, Kriminologisches Journal 1979, 261 ff; *Gerhardt/Vögele*, Die Betreuungsweisung nach § 10 JGG, Zbl. JugR 1979, 371 ff.
24. See note 2. An example of such alternatives may be found in the American "outward bound" programs; there are also German examples in the form of the "Kurzschulen" (short-term-schools), founded by *Kurt Hahn*, see e.g. *W. Schulz*, MschrKrim 1976, 17 ff (28).
25. An example from the literature on the "Schiedsmann": *Bierbrauer*, Factors affecting success in the Mediation of Legal Disputes: Third Party Conciliation through the German Schiedsmann, in S. Bostock (ed.), Laws and Psychology, London 1981, *Driendl*, Wege zur Behandlung der Bagatellkriminalität in Österreich und in der Schweiz, ZStW 90. vol. (1978), 1059; *Hirsch*, Gegenwart und Zukunft des Privatklageverfahrens, in Festschrift für Richard Lange (ed. Warda et al.), Berlin 1976, 815 ff; *K. Peters*, Strafprozeß, 3. ed. 1981, 543 ff.
26. See *S. Röhl/K. F. Röhl*, Neighborhood Justice Centers in den USA—eine Alternative zur Justiz?, DRZ 1980, 421 and Alternativen zur Justiz, DRZ 1979, 33; *Gottwald*, Streitbeilegung ohne Urteil, Tübingen 1981.
27. Similarly *Kerner*, Diversion—eine wirkliche Alternative? in Kury/Lerchenmüller (note 1), 688 (704).
28. See e.g. the project "Präventionsprogramm Polizei/Sozialarbeiter (PPS)" which is similar to the practice initiated by *Harvey Treger* in Chicago (see *Treger*, in Treger et al. (ed.), Crime and Delinquency, 1970, 281 ff); *Schwind/Berckhauer/Steinhilper*, Präventive Kriminalpolitik, Hannover 1980; *Steinhilper/Kreuzer/Plate* (ed.), Polizei und Sozialarbeit, Wiesbaden

1981, 62 ff, and *Treger*, in Federal Probation, Sept. 1980, 3 ff. However, *Steinhilper* does not call the German form of this project "diversion"; not so clear *Wilhelm-Reiß*, Modellversuch Hannover: Eine neue Form der Zusammenarbeit zwischen Polizei und Sozialarbeitern wird erprobt, in Kury/Lerchenmüller (note 1), 575 ff.

29. Summarized by *Kaiser/Metzger/Pregizer*, Betriebsjustiz — Untersuchungen über die soziale Kontrolle in Industriebetrieben, Berlin 1976.
30. *Feest/Blankenburg*, Die Definitionsmacht der Polizei. Strategien der Strafverfolgung und soziale Selektion, Düsseldorf 1972; *Feest/Lautmann*, Die Polizei, Soziologische Studien und Forschungsberichte, Köln, Opladen 1971; *Steffen*, Analyse polizeilicher Ermittlungstätigkeit aus der Sicht des späteren Strafverfahrens, Wiesbaden 1970.
31. See *Kürzinger*, Private Strafanzeigen und polizeiliche Reaktion, Berlin 1978.
32. Especially *Maihofer*, Diskussionsbeitrag auf der Strafrechtslehrertagung in Bielefeld 1981 at *Weigend*, Tagungsbericht, ZStW 93. vol. (1981), 1271 (1283 f); on the other hand see also *Lüderssen*, ZStW 94. vol. (1982), 47, who correctly considers it impossible to "resocialize" social conflicts in modern mass-society.
33. See the "Brücke"-program, note 23 supra.
34. On these refom approaches see *G. Kaiser*, Jugendstrafrecht oder Jugendhilferecht?, ZRP 1975, 212 ff, *Knapp*, Der Referentenentwurf des Jugendhilfegesetzes und die Reform des Jugendhilferechts, ZRP 1978, 136 ff and *Bietz* (note 2). On the question of using the instruments of the JGG see: *G. Kaiser*, Entkriminalisierende Möglichkeiten des jugendstrafrechtlichen Sanktionsrechts, NStZ 1982, 102 ff.
35. See *Kaiser*, NStZ 1982, 102 ff (104); *Bietz* (note 2), 218.
36. Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. (ed.) (note 1), Tagungsbericht, 202.
37. Ibidem 535–546.
38. *Hanack*, Das Legalitätsprinzip und die Strafrechtsreform, Festschrift für Gallas (ed. Lackner et al.), Berlin, New York 1973, S. 347; on the pros and cons see especially *Ahrens* (note 18) *Hirsch*, Zur Behandlung der Bagatellkriminalität in der Bundesrepublik Deutschland, ZStW 92. vol. (1980), 218 ff and *Naucke*, Gutachten D für den 51. Dtsch. Juristentag Stuttgart 1976, München 1976, D 77 ff, all with references to literature on this subject. In spite of the previously unanimous rejection positive evaluation is now beginning to gain ground. Convincing is *Riess*' opinion in Festschrift für Karl Schäfer (ed. Hassenpflug), Berlin, New York 1980, 199: "If one considers the final decision of the prosecuter as a decision evaluating character which is comparable with a judicial decision, then disposal using orders in accordance with § 153a StPO is not inconsistent with the system but part of a step-by-step system of reactions to deviant behavior and thus as a special sanction located on the perimeter of punishment. The retention of this type of reaction corresponds with criminal policy and procedural-economic needs."
39. See e.g. *Meyer-Großner*, in *Loewe-Rosenberg*, Die Strafprozeßordnung, 23. ed., Berlin, New York 1978, note 3 on § 153a.
40. See *Kunz* (note 18), 104.
41. But it does not violate the nulla poena sine lege scripta rule in Art. 10 sect. II of the Constitution of the Federal Republic of Germany (Grundgesetz), as *Roxin*, Strafverfahrensrecht, 17. ed., München 1982, p. 67, believes, since these orders may not be considered as punishments. As to the constitutional objections see *Kausch*, Der Staatsanwalt, ein Richter vor dem Richter? Berlin, 1980.
42. See the statistical references in note 18 supra.
43. In this respect see *Kunz* (note 18), 104 ff. (even if sceptical as regards the distinction of types); in a more concrete manner *Weigend* (note 1), pp. 169–180.

German Democratic Republic
DIVERSION AND MEDIATION

Erich Buchholz

Preliminary Remark

As different as the forms, attempts and experiences of "diversion" in the various countries are also the concepts and purposes underlying them. The concept and shaping of diversion are considerably influenced by such facts as the belonging to an Anglo-Saxon or continental-European legal system, the reception of European law in (formerly colonially dependent) developing countries, religions as the carriers of civilization like that of Islam, the development and advancement of socialist systems of society (on different development levels and with different traditions), and also such legal concepts as the legality and opportunity (or mixed) principle, a material and formal view of the concept of crime (punishable act), the position of and division of labour between juridical and other state authorities within a social system, and others. Realizing all this the "orientation paper" quite rightly proposed a relatively broad view of the concept of diversion to be the subject of discussion: "Diversion refers to any deviation from the typical progression of events . . . as any deviation from the ordinary criminal process". Then, for further limitation phenomena had to be excluded which enumeratively do not belong to this subject.

As is known there is also growing hesitation as to the acceptance of the concept of diversion (as developed in the USA since the middle of the 1960's), first of all when seen from the angle of respect for the individual's interests, and legal security.

I. Underlying Concept

Before explaining the concrete legal forms and the experiences gained in the GDR with the methods of diversion it seems to be appropriate and necessary to look into the concept underlying all this, that is our "philosophy" of diversion which quite differs from those of other countries, also socialist ones. Furthermore, some basic ideas of our concept of criminal policy shall be pointed out:

a) The interest of the society as a whole, including protection against and prevention of punishable acts, is not enforced, on principle, at the expense of the individual (incurring penalty). On the basis of the attained high measure of conformity of interest between the individual and society it has increasingly become possible and will also form the conceptional basic line in the future, to solve the individual-social *conflict* between the offender and the socialist society which finds its expression in the criminal act, in a possibly optimum way so as to promote a positive development also of the offender's personality, and to integrate him into society as its free member, and to enable him to do so also by himself.

b) Consequently, punishment pursues the aim neither to retaliate or take revenge nor to make somebody suffer. The legal prejudices connected with punishment, infringe-

ments of the rights and interests of the individual are by law limited to a minimum and as far as possible shaped so as to reduce unpleasant side effects.

c) According to this concept, punishment in the GDR for quite a long time has no longer been an indispensable consequence of a punishable act. Thus, punishableness is no longer an absolute characteristic of punishable acts. Reaction to a punishable act and settlement of the conflict or dispute connected with such an act instead widely assume other forms.

d) Consequently, criminal (court) proceedings do not form an absolute consequence of punishable acts. In a large portion of cases a different regulation or settlement is found neither involving indictment nor placement of the suspect in the position of the accused nor making him appear at the bar. Here, it must be stressed that this is not to be considered as a deficiency, weakness or incapacity of GDR justice, and neither as a trouble solution to avoid a heavy commitment of the courts (the number of court proceedings in penal matters, after a considerable decline in the period 1945–1960, has further decreased in its basic tendency during the past 25 years). We rather have to do with a basic consequence arising from the character of socialist social conditions and the relationships to the offender, to remove disturbances, conflicts and differences linked up with (not very serious) offences in any case possible in a non-judicial way without ordinary criminal procedure and without punishment.

e) The offender, in accordance with GDR criminal law, is not merely regarded as the object of punishment, of criminal justice, but as the subject playing an active role. On the one hand, we consider the offender (at the age of discretion, capable of guilt) to be a self-responsible being who is able to decide by himself, to assume responsibility for his (also criminal) acting. On the other hand, we also comprehend him as a being who by his own positive social performance, by probation and compensation is able, with social support, to settle the conflict, to restore normal social relations and to become an active member of society again. In this way there will not be success unless the offender cooperates in all efforts. Socialist conditions offer good prerequisites in this respect because they afford the individual the opportunity to "shape his life in complete safeguarding of his liberty and human rights and in conformity with the rights and interests of the socialist society, the state and its citizens" (GDR Criminal Code, Article II).

f) Beside the offender's responsibility there is, on the other side, the responsibility and assistance of the society for the individual, for each of its members. What matters is *jointly* to solve the conflict and thus to bring about genuine re-socialization and integration also of the offender into socialist society as its free member. This comradelike, collective working-together, at the same time, represents an essential basis for preventing stigmatization as well as social (socio-psychological) labelling.

g) It corresponds with the nature of the socialist society that social relations are arranged in an orderly, conscious and systematic manner thereby making use of the specific social regulating instrument, that is law. Consequently, *law* and *legality* take a *high rank* within the socialist society. Their role and significance are growing. There is no space for legal nihilism or any other devaluation of law and legality. Therefore, also such essential social relations as the settlement of conflicts in connection with punishable acts must assume an adequate legal form, be arranged so as to meet the requirements of legality and legal security, also and just in the interest of the individual. Dispensation with legal forms such as court (ordinary) proceedings must not mean dispensation with law, legality and legal security in general, must not lead—in view of such a serious subject

as criminal acts—to a vacuum of law, an unlawful state. For this reason a minimum of defined legal requirements (legality, the issue of fact, reliability, uniformity, equality, verifiability, objectivity) shall be fulfilled in an appropriate manner—also without the special procedural requirements of court proceedings. There are the following principles: If there is no criminal act or nobody guilty there must not be, as the alternative to or other deviation from criminal prosecution, the treatment of a human being as an offender; his case must not be treated as being "close to criminal law". Equally, an unpopular person must neither be subjected subjectivistically and arbitrarily to improper treatment nor privileged for purely local or group interests. The principle of equality before the law, of equal treatment as a basic human right and element of justice, must be observed without restrictions and not be sacrificed to some seemingly human alternative to or deviations from punishment and criminal procedure. Simultaneously, such a way of settling conflicts connected with lesser crimes outside a court and without punishment, a way that is committed to law and legality, also ensures a sufficient survey of the overall tendency of criminality and of what turns out to be indispensable for social management, for active strategies of crime prevention. The unavoidable latency of parts of criminality must not be enhanced further by uncontrolled extrajudicial solutions (diversion).

h) In this connection it shall be pointed out that, according to GDR criminal law, only such acts (materially) are conceived as criminal acts (cf. Art. 3 GDR Criminal Code) which show a minimum of social weight (significance)—of harmful social effects. As to violations of law beneath this threshold of criminality, GDR law contains other specific forms of response and solution outside criminal law which, consequently, do not fall within the scope of this article. As in the GDR petty cases largely are excluded from criminal law anyhow (decriminalization), those quite serious violations of law remaining within the scope of criminal law require due attention by the society. Excluding from this circle further cases—as diversion—consequently makes high demands on legal security and legality.

i) The above basic statements moreover explain that our concept of diversion neither is limited to juveniles nor to defined kinds of offences or groups of offenders; we rather have to do with a *general and fundamental principle* of a specific non-judicial (though carefully regulated by law) intervention serving the successful settlement of a limited individual-social conflict between the individual incurring the penalty, and society.

This fundamental principle has been developed, in theoretical as well as practical terms, step by step together with the development of a socialist society and a criminal law conformable to it since the middle of the 1950's. Since the 1968 codification its basic structure has taken on solid forms and further improved in practice. It is widely applied (to a large number of offences of lesser weight) and has fully stood its test in the course of the past 25 years.

II. Forms of Diversion in the GDR

The following remarks focus on the forms of diversion and mediation which are practiced and applied in the GDR to solve the conflict which arises with actual lesser crimes committed by people at the age of discretion who are responsible and capable of guilt, i.e. forms which are applied neither in nor after ordinary criminal proceedings:

1) acting of conflict and dispute commissions;

2) waiving of prosecution in the case of juveniles (Art. 57 GDR Criminal Code);
3) dispensing with measures of criminal responsibility (Art. 25 GDR Criminal Code).

Expressly excluded are

—the various possibilities to stay (preliminary) proceedings by the procurator or the investigating authority (police) which in the end may equal a diversion;

—the forms, possibilities and measures of a medical nature, including the transfer to a psychiatric institution, in accordance with the Act of 11 June 1968;

—the imposition of special obligations by an ordinary court as a special educational measure towards juveniles which is pronounced as a result of court proceedings (Art. 70 GDR Criminal Code);

—the imposition of the obligation not to change one's place of work, to perform socially useful work in one's leisure time, and other obligations to be stipulated by the court in connection with sentences on probation, as well as the taking over of pledges by collectives of working people which require confirmation by the court (Art. 33, 34 and 31 GDR Criminal Code).

1. Acting of Conflict and Dispute Commissions

1.1.

The basic idea underlying the acting of conflict and dispute commissions consists in seeking for a solution that in the best possible way corresponds with the interests of the concerned and *settles the conflict*, to do this *together with the offenders*, thus avoiding the complicated court procedure with its special regulation of taking evidence and decision-making. Consequently, the free will and the preparedness of the offender for this way to a solution, the *consent of the victim* (injured or concerned person), too, are typical of this treatment of criminal matters. Conflict and dispute commissions are not subject to any state-administrative coercion in their deliberation and decision-making: nobody is made to appear before these commissions by the police, neither does non-appearance entail any legal-coercive consequences. Deliberation and decision-making by these commissions are public. Anybody present may express his view on the matter, particularly as regards the appropriate and optimum solution of the relevant conflict (e.g. between citizens, or between a worker and his enterprise).

It corresponds with the character of this treatment that it is only possible if the offender admits his act freely and frankly, if there is no doubt, no want of clearness or evidence problems (cf. Art. 28 GDR Criminal Code) (as a rule, the police, for instance on the basis of a charge, have already clarified the factual circumstances and handed over the matter together with this information to the conflict or dispute commission).

Serving the settlement of the conflict are—in accordance with the kind of offence —various forms of material or moral reparation, for instance compensation for the damage in the form of money or restoration (e.g. through own work in agreement with the injured person); the performance of socially useful work in one's leisure time, or apologizing to the injured person or the collective of working people concerned. The conflict and dispute commissions may—provided that the given case allows them to do so —exercise a moral influence on the offender by pronouncing a reprimand (disapproving criticism). Finally, they can satisfy the public interest by ordering the offender to pay a fine (from 10 to 500 marks) (cf. Art. 29 GDR Criminal Code or Art. 20 of the Act of 25 March 1982, on Social Courts).

All these stipulations are not penalties, and there is no entry in the criminal record. They are stipulations (made by mutual consent) of a social body to settle a conflict and strengthen social responsibility in general. Serving the same aim is the special interest the conflict and dispute commissions take in the causes and conditions leading to violations of law. They have been expressly entitled to give recommendations to involved persons (officials or managers) in order to liquidate these causes and conditions, and in this respect they also can rely on the support of the people in the social environs of the offender as far as his education or social integration is concerned (Art. 21 and 20 par. 2, Art. 2 and 3 of the Act on Social Courts).

1. 2.

The strength and efficiency of the successful acting on the conflict and dispute commissions just consist in their being social bodies which exclusively on the basis of their moral authority and the unprejudiced, comradelike deliberation on the offence or conflict and arriving at a solution. Thus, they rely on the preparedness, good will and understanding of all concerned people who completely voluntarily cooperate. Conflict commissions are set up in nationally-owned enterprises or departments of enterprises. They are not enterprise or trade union bodies, though enterprises and trade unions are in duty bound to render to them material and social assistance. Dispute commissions are set up in socialist co-operatives and in residential areas. They get the technical and legal support of judges and public prosecutors. Also the local popular representative bodies pay special attention to their work. Conflict and dispute commissions possess such an original moral power because

—their members are freely elected people who enjoy the confidence of their fellow-citizens, who are held in high social esteem and moral authority, whose words count due to their general behaviour and their intangible, unselfish personality;

—in the socialist society and especially in the social sphere which is of interest here, there are neither social antagonisms nor deeply rooted socio-economic contradictions between the society and the individual or among the individual people;

—the daily acting and conduct of the citizens is characterized by basic social interests which largely coincide;

—the conflict and dispute commissions for more than two decades have stood their test in practice and have become such natural social bodies as the mayor or the chairman of the parish council, as a shop stewart or a clergyman for religious people.

Many people trustfully address themselves to members of conflict or dispute commissions also in other matters. The role and position of conflict and dispute commissions furthermore is enhanced by the fact that they focus their activity not only on lesser crimes. They also settle conflicts or offences coming within the scope of labour law, civil law and such as affect the public order. About 90 per cent of all labour law disputes are finally settled by conflict commissions. On the other hand, both forms refer to tradition: the present conflict commissions continue on a by far higher level a tradition once established by commissions set up on a footing of equality whose purpose was the (preliminary) conciliation of labour disputes between employers and workers; the dispute commissions refer to the tradition of the former arbitrators who represented an instance of conciliation applied in matters of libel and defamation prior to a court of justice in civil action proceedings.

1.3.

Although the informal element, immediate social moral authority, is the dominating element in the activities of conflict and dispute commissions, for reasons of legal security and legality the following is laid down in a legally binding form:

—In their activity these commissions—with their members being independent at the same time—are bound exclusively to legislation, particularly penal legislation, to statements of criminal facts. In this specific sense the Law on Social Courts speaks of "administration of justice" by these "social courts", which, however, fundamentally differs from administration of justice by ordinary (state) courts within the framework of ordinary criminal proceedings. The conflict and dispute commissions are not and must not be "small courts" for lesser offences, probably for discharging justice. They are original social bodies.

—In the appropriate circumstances, for instance on account of an objection lodged to the district court (lowest instance of ordinary jurisdiction), and also on the request of the public prosecutor's office, decisions passed by conflict or dispute commissions must be verifiable. Likewise district courts may be applied to for executing decisions passed by conflict or dispute commissions.

1.4.

For more than two decades the work of conflict and dispute commissions in matters (offences) of lesser social weight has fully stood its test as an important form of diversion corresponding with the conditions prevailing in our country. In 20 to 30 per cent of all actual criminal matters they are successful in achieving a final clarification or settlement. In these cases they predominantly deal with lesser punishable acts against property; acts of detriment to individual citizens as well as nationally-owned (state-owned) enterprises, in particular trading establishments (department stores, supermarkets); infliction of lesser bodily harm and libel; unauthorized use of motor vehicles, and similar offences.

Recidivism (repeated commission of punishable acts) hardly occurs. The corresponding portion is indicated with 1 to 2 per cent. Thanks to the specific character and style of these bodies' work aimed at settling conflicts, there hardly are negative socio-psychological consequences, annoyances, ill feelings or a bad atmosphere within collectives of working people or in residential areas. As a rule, these deliberations lead to a clearing up of the social atmosphere. If there is no preparedness and good will, i.e. the prerequisites to such a settlement, criminal proceedings before an ordinary court can be resorted to.

1.5.

At the end of the 1950's, only some first provisions of law existed; in 1968, in connection with the codification of criminal law, a first law on the social courts was enacted. Practice and the great number of experiences made it necessary to enact the new Law on Social Courts (25 March 1982) which generalizes these experiences, fixes them in law, extends the scope of activities and the powers of the conflict and dispute commissions, and highly appreciates their work.

2. Waiving of Prosecution in the Case of Juveniles (Art. 67 GDR Criminal Code)

In conformity with the human character of the socialist state, Art. 67 of the GDR Criminal Code provides for the additional possibility to desist from ordinary criminal proceedings before an ordinary court in the case of juvenile offenders at minor age (14-

to 18 years) who committed offences which are not considerably injurious to society. In this way in a great measure minors (pupils or apprentices) are prevented from being brought before a court. Here the mentioned provision distinguishes between two cases:

a) The case where the development of a juvenile before the commission of the offence particularly has been free of problems and the offence can be considered to be his first and probably only faux pas. Here, it is assumed that the juvenile's usual social and pedagogical environment, school, enterprise—together with his parental home, as well as further social forces, for instance the youth organization—in a sufficient degree will be able to exercise the necessary educational influence on the young offender. His personal and social prerequisites plead for his ability to realize the responsibility he undertook towards society and his fellow-citizens, and to learn from the incident. Under this condition the public procurator or the examining authorities (police) desist from further criminal prosecution (Art. 67 par. 2 GDR Criminal Code).

b) The case where a certain social maladjustment of the juvenile is already evident and the offence mostly resulted therefrom. Regarding lesser crimes it proves useful but also sufficient to resort to the specific state authorities competent for working with socially maladjusted minors, i.e. the youth welfare authorities. They are vested with the corresponding socio-pedagogical powers, dispose of specifically trained people who work on an honorary or professional basis, and thus possess the best prerequisites to take the appropriate and necessary socio-pedagogical measures in connection with or on the occasion of an established offence, to make measures already taken more precise, or to supplement them. What matters in the case of these juveniles is to ensure their socio-pedagogical correction or the overcoming of their social maladjustment by the youth welfare authorities. Besides, a further educational influence is not considered to be necessary if the offence is less significant (Art. 67 par. 1 GDR Criminal Code). Under these conditions the public prosecutor or the investigating authorities desist from a charge.

However, it is significant that the juvenile through socio-pedagogical measures taken by the youth welfare authorities realizes that he committed a punishable act for which he carries responsibility and that in case of (repeated) more serious offences ordinary criminal proceedings leading to a judgement will be unavoidable. In the GDR also the youth welfare authorities rely on social forces, honorarily working welfare officers or sponsors, on the cooperation of parents and youth organizations which all contribute towards re-integrating the maladjusted juvenile into society.

In GDR practice resorting to the possibilities of this provision and to conflict and dispute commissions has the effect that in merely 40 per cent of all criminal matters involving juveniles a charge is preferred and a trial held. Also this practice, which started as early as in 1952 on the basis of the GDR Law on Juvenile Courts, has proven to be stable. Especially as regards the first mentioned group of juveniles (cf. Art. 67 par. 2 GDR Criminal Code) in which the commission of a punishable act mostly turned out to be an incident happening but once, recidivism hardly occurs and, therefore, these juveniles are spared criminal proceedings at all.

Regarding maladjusted juveniles in whose cases surmounting this social maladjustment takes priority, things are different. Correction of this social maladjustment by means of the socio-pedagogical measures available fails with not a small part of them on account of extremely unfavourable family conditions. So punishable acts may occur again, sometimes even being of such a gravity that court proceedings cannot be averted any longer.

Nevertheless these problems are proof of a weakness neither of criminal law nor of the provision of Art. 67 par. 1 of the GDR Criminal Code—i.e. of this form of diversion —but they are a matter of adequately educating young citizens who are offspring of parents who are unable or too weak to do so, or who even are unsocial themselves. Anyone is aware of the difficult nature of that task. Despite of all headway that we were able to make in this field it surely will take still more enduring work and the lifetime of several generations until the relics of the past will be completely abolished.

Anyhow, the provision of Article 67 of the GDR Criminal Code in both of its forms essentially contributes to preventing in the majority of cases juveniles under 16 years of age from being brought before a court.

3. Dispensing with Measures of Criminal Responsibility

This provision contained in Article 25 of the GDR Criminal Code represents a very specific consequence of the rejection of the idea of retaliation, of this abstract and unrealistic concept that any punishable act must entail punishment. In cases where due to prerequisites of a social (sentence 2) or personal (sentence 1) character punishment would be deprived of its sense, one further criminal procedure shall not be carried through for merely formal, abstract reasons. Particularly in cases where the offender after the commission of the punishable act decides by himself to make serious efforts in order to liquidate or indemnify for the harmful effects of his acting or in some other way by socially positive accomplishments shows that he has drawn the required lessons and proves that he wants to make up for his guilt there is, according to our concept of criminal policy, neither the need for punishment for a criminal procedure nor even for deliberation by a conflict or dispute commission. In such cases the public prosecutor or the police (investigating authority) end proceedings possibly already initiated.

Certainly, such cases are not so numerous, the more so since also indemnification has to be related to the gravity of the punishable act. When compared with cases of mitigation of punishment, in accordance with Art. 62 par. 2 of the GDR Criminal Code, dispensing completely with measures of criminal responsibility, therefore, will be practical only with not too serious offences.

This regulation has to be considered in connection with a very interesting legal possibility which—in my opinion—is applied too seldom yet, i.e. the possibility provided for in Art. 24 par. 2 of the GDR Criminal Code, to end criminal procedure without punishment when a sentence (for instance pronounced by a civil court) to pay damages can be considered to be sufficient in that sense that the interests and the need for satisfaction of the injured party as well as the necessary educational effect are observed or, respectively, secured. Practice shows that there is not a small number of cases in which the socially and individually desirable purpose can be served in this way also without criminal procedure.

Italy
DIVERSION AND MEDIATION

Centro Nazionale di Prevenzione e Difesa Sociale*

Introduction**

To the Italian scholar, *diversion* poses primarily a problem of correctly identifying the meaning and motives of the choice of penal policy which inspires such an institution. Standing apart from the cultural debate in our country, and indeed from the preoccupations of penalists in other *civil law* countries, the thematic of *diversion* finds its place in the juridical and criminological context of North America, where programmes have been developed to give effect to this new perspective. The theoretical and practical aspects of the institution can only be sufficiently appreciated by analysing the experience of the systems in which it originated and in which the idea of controlling deviant behaviour outside the framework of the criminal justice system has to some extent been realised.

Starting with this consideration, the report of the study group set up under the auspices of the National Centre of Prevention and Social Defence, Milan, begins with a comparison of the prevailing trends in the system of the United States and the principles underlying the Italian system. Such a comparison gives rise to two indications whose importance cannot be ignored. At the same time, American doctrine is becoming aware of the risks implicit in renouncing recourse to the courts, which may certainly be advantageous in terms of the economics of justice, but which obviates or diminishes the guarantee of a fair hearing of matters, whether in family or other affairs, implicit in the principle which makes penal proceedings mandatory. Recognizing the norms which derogate from such a principle, as well as the breadth of discretion exercised in practice

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by the public prosecutor, it might well be said that the mandatory nature of criminal proceedings is a cornerstone of the structure which in many points is eroded and crumbling.

Proof of this may be seen not only in the second part of the report, which assembles the instances of genuine *diversion* to be seen in our system, but also in the third part which reviews mechanisms providing an alternative to penal proceedings together with instruments of mediation. Even if one could not truly refer to these as *diversion* insofar as they involve the police and the courts, they represent measures which are intended to lighten the load of judicial work and promote the social reintegration of the offender in such a way as to demonstrate the awareness of our legislator towards the typical objectives of *diversion*.

One could thus conclude that the Italian system is making progress in its recent reforms towards techniques analogous to *diversion* albeit within the criminal justice system, while practice is showing even further advances such as to preclude recourse to criminal proceedings, by the discretionary use of placing incidents on the record for no further action or deferring the institution of prosecution.

PART I
DIVERSION: A COMPARISON BETWEEN THE ITALIAN SYSTEM AND TRENDS IN U.S.A.

1. The Impact of Diversion Policy on the Italian System of Criminal Justice*

Since the term "diversion" has as its immediate reference-point the choice of a course which deviates from the customary route, the meaning of the word has to be studied, enquiring first of all what is the route which is abandoned or is intended to be abandoned.

In reply to the question: diversion from what?—one may submit, in summary, the concept of "removal from court proceedings" as equivalent to *diversion*: in a sociological approach, reference is made to controls of deviant behaviour dependent on instruments other than prosecution and punishment. This approach thus implies an abandonment or refusal to make use of the penal system, comprising therein the police, the judiciary and the prisons, employing instead non-repressive means of intervention which are intended to achieve the same objectives of prevention and reintegration into society that are traditionally ascribed to legal sanctions. Instead of prosecution and imprisonment, the emphasis is on forms of treatment capable of turning persons away from deviant trends and available for resolving conflicts.

If one views the concept of *diversion* in such a restricted perspective, there are obviously severe impediments to its making great headway in our system. There are three main reasons for this, interlinked with the normative trends and practices characterizing the system. First, the constitutional principle of mandatory penal proceedings makes it all the more difficult to introduce a form of rejection of penal process, whose motives of appropriateness are linked with the individual and social "costs" of the repression system. Even more stultifying in this respect are the provisions of Art. 13 of the Italian

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Constitution, which prohibit placing any citizen under measures restricting his personal liberty without due order of the court. Finally, it has to be noted that there has been a strong trend over the last decade to deal with matters through the courts, the judiciary feeling themselves obliged thereby to fill the vacuum created by the inertia of the administrative authorities. In matters of public safety and other collective interests, the scope of judicial intervention has even extended to sectors where the laws in force merely provide for administrative powers, which, seen simply as such, already constitute *diversion* in the sense proposed by the summary of measures undertaken in Anglo-Saxon writings.

It seems, therefore, at least at the present stage of development of our system, that there is little scope for the insertion of "dejurisdictionalisation" into it. A different problem, however, is to determine whether, and to what extent, despite the stranglehold existing on the normative plane, mechanisms to control deviance, other than those of the penal system, have been introduced in practice by the organs of the penal system and by other authorities. This is the direction followed by the contribution of the Italian group, seeking to highlight those elements within the system which show potential for non-penal modes of intervention.

At the same time, it is important to draw attention to certain innovative pressures which are coming to the fore in our system. Albeit far from amounting to a radical abandonment of penal repression for less serious offences, our penal reform policy is moving distinctly towards a regime of sanctions alternative to imprisonment and towards procedural mechanisms graded according to the gravity of the offence, which in themselves are an expression of that same need to reduce the inevitable deviance/prosecution sequence of events which underlies the idea of *diversion*. For instance, Law 689 of 1982, with its alternative penalties, plea bargaining measures and areas of decriminalization, serves to show how the idea of moderating the impact of the penal system has been making progress in our country, even if not in a form amounting to the total removal from court proceedings which is made possible, *de jure*, in the *common law* countries, due to our prevailing principles of mandatory prosecution for offences and non-removal of personal liberty without a court order.

After dealing with general problems on the meaning of diversion and the limited scope for its insertion into our system, it seems useful and responsive to the different stages of evolution characterizing the *civil law* and *common law* countries, to divide the treatment of the subject into two parts, dealing respectively with *true diversion* and with alternatives within the penal system. In the second part, all those mechanisms of criminal law, both substantive and procedural, which aim to reduce recourse to prosecution and imprisonment, with a view to promoting the social rehabilitation of the deviant subject, are examined.

2. Diversion in American Practice*

"*Diversion*" is the ambiguous linguistic term used to describe one of the institutions of greatest significance in the reforming fervour of the United States, but at the same time one which, perhaps more than any of the others, has divided scholars, especially in evaluating its effectiveness.

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Yet *diversion* belongs to a juridical and cultural tradition strongly characteristic of the *common law* system. The institution derives from the sociological field, where until now it has been treated in greater depth. In juridical language, the term is used without giving thought to the many implications it has acquired among proponents of the sociology of deviance and criminology. The jurist's intervention has come late in the day and draws upon the intermediary work of the judges, who day by day are in touch with social workers and have been the first to adopt the term, albeit without a clear appreciation of its content and ground rules.

An idea of *diversion* may be gleaned from the etymology of the term, tracing back to the latin root of *devertere*, the act of turning aside or deviating from the path first chosen.

One reads, in the basic report presented in 1967 by the Presidential Commission for studying problems in the administration of Justice:

> "The formal sanctioning system and pronouncement of delinquency should be used only as a last resort. In place of the formal system, dispositional alternatives to adjudication must be developed. . . in accordance with an explicit policy to divert juvenile offenders away from formal adjudication and authoritative disposition and to non-judicial institutions for guidance and other services."

Leaving aside the purely practical aspects and concentrating on the theoretical features of the institution, one sees that it represents a convergence of sharply different trends.

The most striking manifestation of the phenomenon is to be seen in the techniques specifically devised to deal with the problem of juvenile delinquency, centred on the doctrine of *parens patriae* and on the ideal of "rehabilitation", the connecting thread between the "old" and the "new" in this particular sector of justice. Such a final objective, while intermingled with other concepts—such as the retributive principle of punishment—is not on that account extraneous to the normal field of criminal justice. It helps to explain the progressive osmosis of *diversion* into that sector, although there are also probably other factors, traceable to the chronic overload of business which for some time has afflicted courts of every grade.

Moreover, it represents a scheme of action which is congenial to a system which endows a wide range of discretion to its practitioners in matters of identifying and prosecuting crime: "flexible" or "open structure" cases, at least up to the most recent reforms and, still today, dramatically, in the juvenile sector; abundant prerogatives given to the police organs; "principle of expediency" in the initiation of prosecutions, to which must be added the uncertain accountability of the practitioners. Indeed, it could be argued, not without some justification, that the real criteria of "deferred prosecution" represent an attempt (which has not fully succeeded) to unify the prevailing practice, which has been increasingly criticised for its inconsistency of treatment of situations which present similar features.

In the theory of legal process, two alternative procedural solutions by way of *diversion* come face to face. On the one hand, the classical *adversary* paradigm, pivoting on the triad of crime-guilt-punishment (in proportion to the gravity of the proven offence) is perceived. It looks back to the past, with its ideal task of recompensing for the legal principle that has been violated. The fact of the crime, in its external manifestation, provides the hinge upon which, above all, the procedural dialectics turn. The personal

attributes of the offender are, to a great extent, irrelevant; they become of interest only *after* the finding of guilt, when it is necessary to determine the penalty.

The system of *plea bargaining* is perfectly compatible, in principle, with such datum points. The debate still turns mainly on what precise violation demands the *plea bargaining*: to be consistent, the subsequent jurisdictional control must ascertain the specific factual basis of the *plea*.

A totally different type of valuation assumes importance in the model frequently designated as *community-welfare*. It looks to the future rather than the past and takes account of factors over and above the individual case. The specific details of the offence are not exclusively important in themselves, since the emphasis is placed on the nature of the offender and the factors contributing to his psychic or social lack of well-being. The system is interested in that specific person: justice cannot ever be "equal", because each person is different from his fellow. Consistent therewith, the focal point is no longer the punishment but the "treatment", often of indeterminate duration, which is specifically aimed at achieving a change in the person's mode of behaviour.

The content of *due process* is mitigated in an atmosphere characterized by its informality. One passes from "jurisdiction" to "administration", even the exterior features of which are repeated in the procedures.

Diversion is homogenous to this sytem of values: according to the intentions of its authors, it is not *reactive*, like punishment, but *pro-active*, because it looks to the future and to the interpenetration of the well-being of the individual and of society; it does not cultivate the rigid symmetry of *adversary* proceedings, which pursue formal regularity as an autonomous value, without concern for the fate of the person once it has finished with him by application of the legal sanction.

In order to make this determination of an essentially political nature both effective and efficient, it is necessary to confer almost unlimited discretionary powers on the relevant organs. This is a fundamental point, forcefully made in the line of argument maintained by constitutional judges, for whom there is an essential link between the ideal of "rehabilitation" and the liberation from the formality of ordinary court procedures, calibrated by the "good sense" or "intuition" of the judge. *Diversion* also signifies, to some extent, "deformalizing" and "decentralizing" the administration of justice. And thereby, the institution, in its most solid form, becomes integrated with the most recent scheme, which brings with it the idea of what may be called an "alternative" system of justice.

3. The Ideology of Diversion Programmes: The Label Theory in Action*

Diversion seeks to correct the errors of the criminology of the sixties, basing its validity on the label theory which, supported more than any other from the empirical point of view, provided the way of thinking of sociology in the nineteen sixties.

An approach which departs from the implications of the thought of the labellers allows us at once to evaluate considerations on the limits and functions assumed by the treatment in this "alternative measure to jurisdiction". The fact that symbolical interactionism has provided the conceptual bases of the labelling theory is well known. For Mead, reality is not objective; "social objects" are therefore constructed by men through

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meanings which emerge from symbolical forms of conduct (such as language) and are not endowed with an intrinsic value. That implies that the development, the formation and the self of the individual are fashioned within the process of social experiences, through the constant relationships with other people. *Socialization* is therefore understood as the continuing procedure which occurs in consequence of the role-taking of others' attitudes and events.

The individual becomes conscious of his real, single self, as of an "object", whose meaning, built in the course of time, is the result of the point of view of others and remains constant so long as the empathy relations remain unchanged. When Becker asserts that it is the social groups which create deviance, by imposing and applying norms to people who become labelled as "outsiders", he can do no more than include this last element among the objects which have an importance and a value.

If, therefore, deviance is the product of a social construction, society itself should strive to confine it within the functional limits which correspond to its interests, relying on sophisticated mechanisms to maintain a general situation of homeostasis or equilibrium.

It is on the basis of these considerations of theory that the concept of *diversion* has progressively been built. In keeping with a viewpoint of the dependant as a victim, there has developed the concept of him as someone who must be directed, and indeed who should be better directed, by a bureaucratic machinery of public welfare authorities. Criticism is thus levelled, not at the main institutions which "produce the suffering of the deviant person" but at those which provide assistance. Indeed it is sufficient to relieve the subject of the interaction which leads to labelling and to change the relationships between the control agencies and the individuals, in order to make an appreciable reduction in the stigma and to permit the subject, inserted in a context which does not change his *self* in negative terms, to be treated with modes of intervention which are devised more in a social than in an individual environment.

By 1967, in the Report of the President's Commission on Law Enforcement and Administration of Justice, these impulses had been recognized in some of the recommendations, which urged a change of role for the police, who, rather than follow the long tradition which admits the discretionary release of the subject, are invited to identify and immediately entrust to other communities those cases which clearly require a certain form of treatment but for whom the submission to an institutionalized experience would be particularly detrimental. One thinks in particular of juveniles, first offenders, drug addicts, the mentally deranged, the alcoholics and those who have committed acts of violence within the family. Apart from reducing the risk of stigma as an offender, which becomes automatic as a result of contact with certain institutions, the aim is to offer help and support within special organizations, to avoid the "criminal infection" of imprisonment, to reduce recidivism, to reduce the costs of legal process and to restrict the number of relatively trivial legal proceedings.

It is important to explain the particular features which identify the concept of *diversion*: the decision to apply *diversion* must not, above all, be coercive, but must be based on free admittance in order to avoid the impression of being an ill-concealed extension of the penal system. The existence of a "receiving agency" which offers certain supportive services distinguishes *diversion* from the so-called "screening" undertaken by the police with the use merely of discretionary release without any programme for further support. Such receiving agency may be an institution which forms part of the system

of justice, but the programmes strongly recommend contact with public or private bodies "external" to the system itself (true diversion) in order to give the subject the chance of enjoying the advantages available from these properly structured environments.

Even if the aim is to solve the problems of young persons in an informal setting, by giving opportunities for work and other services at the temporary lodgings, as a measure of support therapy pending legal consultations and seeking at the same time to influence against attitudes harmful to the community, the lack of an initially clear statement as to the relationship with the police, seen, in whatever manner, as being "on the other side", suffices to recreate the situations which lead normally to the usual legal processes.

Greater consistency with the ideological premises of the movement has been shown by the attempts to provide remedies for serious conflictual situations within families.

When a case has been notified, whether by the police, the school or the parents, arrangements are made as soon as possible, which normally means within two or three hours, to have a family meeting to discuss the problem.

The use of the family counselling technique serves precisely to put the family system into a condition to solve the problems through their own resources. After the first session, the families are encouraged to return for a second one and even, according to the seriousness of the matter, for a third, and so on. Such subsequent sessions are voluntary.

In another type of operation (the Neighbourhood Youth House), the "House" obtains temporary accommodation for anyone who is not yet adjusted to return to the family home. As soon as that minimum degree of reconciliation has been reached, the young person is invited to return home with a commitment then to participate in Family Counselling. If reconciliation is not possible, an application is put to the Juvenile Court for lodgings away from home to be found.

Yet other programmes deal with subjects accused of being "social disturbers", with a view to directing them, with some small impingement on their rights, towards treatment in mental health centres (Family Mental Health Service).

In regard to the young, it does not seem that recourse to *diversion* has reduced the problems of stigma attached to the family, school and work environment, while some differences are traceable to the relationship with their peers. Those who have been in prison tend to find their friends among those who have had the same experience. A potential disadvantage of the broadening of *diversion* could, on the other hand, be an increase in control on the part of the State.

Consequently, it seemed to be an "exemplary leap forward", as we have seen in this field, to propose the abandonment of the old way of interpreting every act according to moral, psychiatric and psycho-pathological canons. But these theoretical impulses, once turned into practice (there are those in fact who have defined *diversion* as "labelling theory in action") seem to have betrayed their aspirations.

4. Criticism of Diversion Programmes in the U.S.A.*

"Instead of justice: diversion"—these are the significant opening words of a recent study; they summarize admirably the tone of the criticisms which have been levelled at the institution.

* Cinzia M. CAMPANINI, Researcher, University of Bologna.

Hailed at the outset as the beginning of a new chapter in the *corrections* within which to wed together the irreconcilable, even among the protagonists of the "nouvelle vague", *diversion* is now generating a measure of disappointment at least equal to the enthusiasm which first heralded it.

It is probably too early to draw final conclusions: only recently has the emphasis moved from apologia to informed assessment. But even the closest studies suffer from the lack of methodological strictness that afflicts this type of research.

However, maturer experience enables one to put forward a number of observations of a general sort. At the outset, one must stress the need to recognize, in constructing plans for the reform of sectors of the administration of justice, the variables provided by the behavioural models of the practitioners who have to put the reform into effect.

The comment may seem banal: yet, a recurring motive in stifling the objectives which typified the first reformist generation who promoted the design of a new system of juvenile justice and continued up to the most recent protagonists of *diversion* and similar institutions, will be found to have been an inability to stimulate an exchange in the values which model the directives of concrete action.

In a different perspective, some of the premises which have guided the reformists have been questioned: the omnipotence of the law as the agent for behavioural modifications; faith in the progress of the sciences and technology; the illusion that social problems can be solved with minor surgery without tackling the fundamental structures of economic relations. Mills wrote: "Many personal troubles cannot be solved merely as troubles, but must be understood in terms of public issues and in terms of the problems of history making." Perhaps the aim of penal justice in a society rife with injustices is no more than a fleeting idea of utopia.

Paradoxically, the failure of *diversion* opens the way to two very different trends. On the one hand, the last protagonists of free market theory advocate a strategy of "non-intervention", in which society should find, through the antagonism of forces within it, a new and tolerable point of equilibrium. On the other hand, the supporters of a strict retributive policy in the crime-punishment relationship are to be seen along with those who for some time have been suggesting the need to promote a massive new campaign of general prevention, together with stricter penalties and greater emphasis on imprisonment.

PART II
DIVERTING OFFENDERS AWAY FROM FORMAL ADJUDICATION IN ITALY

1. Compulsory Prosecution and Its Normative Limits*

Art. 112 of the Italian Constitution lays down that the Public Prosecutor has the duty of bringing criminal proceedings. Art. 1 of the Code of Criminal Procedure provides that "criminal proceedings are public and, when a summons or complaint by the public prosecutor ("richiesta") or by an individual ("istanza") is not necessary, they are official-

* Giulio UBERTIS, Researcher, Institute of Law and Criminal Procedure, University of Milan.

ly initiated as a result of a report, a doctor's reference, an information laid or other notification of a crime.

In Italian criminal procedure, therefore, the prosecution is not subject to any discretionary choice and as a general rule is initiated by an official. Nevertheless, there are circumstances where the Public Prosecutor may not initiate prosecution, either because, for some crimes, there has to be a *complaint* ("querela") on the part of the victim, or because the prosecution of certain offences committed abroad is subject to an application by the Minister of Justice ("richiesta") or by the person affected ("istanza"). Art. 15 of the Code of Criminal Procedure then provides for certain prosecutions which have already been started but which, to continue, need the grant of a special *authorization to proceed*, usually from the Minister of Justice or Parliament and inevitably characterized by the fact that it is discretionary and not subject to question.

To these normative elements, one should add that under Art. 74, pars. 3 and 4, of the Code of Criminal Procedure, the investigating judge, on the application of the Public Prosecutor, and the stipendiary magistrate for offences within his jurisdiction, may pronounce the so-called decree of "filing the papers" ("archiviazione"), if it is considered that "for this case there should not be a prosecution".

From these systematic outlines, then, there emerge a number of areas where derogation, in practice and not formally, may be considered to take place from the principle of mandatory prosecution, as a result of recognizing that the proceedings may be prevented by the discretionary exercise of authority vested either in the prosecuting authorities or other persons. In the first instance, when the stipendiary magistrate or public prosecutor becomes aware of a crime, sometimes as a result of a press publication, it is difficult even to imagine institutional control mechanisms to govern the failure to prosecute, since there is no procedurally identifiable fact upon which to establish that the moment has arisen to initiate the prosecution.

The only means of getting the case to court, left to the goodwill and civic sense of the *quisque de populo*, is to present a *notitia criminis* in the form of a complaint regarding the commission of an offence. At this point, the Public Prosecutor must either prosecute or, at least, ask the investigating judge for an order to file the papers. If the investigating judge rejects such an application, he may order the commencement of the formal court investigation (Art. 74, par. 3, Code of Criminal Procedure); while the stipendiary magistrate who rejects such an application must inform the Director of Public Prosecutions "who may call for the papers and order the commencement of criminal proceedings" (Art. 74, par. 4, Code of Criminal Procedure).

The importance attached to private intentions, in providing for crimes that may be prosecuted on the complaint of the victim, allows a type of *diversion*, identified in the means of settling a dispute between the author of a crime and its victim.

In fact, unlike the rules governing private and official applications (Arts. 129 and 130, Code of Criminal Procedure), it is possible not only (and obviously) to choose not to lay a complaint, but also, usually, to withdraw a complaint already made, with the resulting extinction of the offence (Art. 152, par. 1, Code of Criminal Procedure). Moreover, the provision whereby the withdrawal of the complaint is ineffective if not agreed by the other party (Art. 155, Code of Criminal Procedure) may be considered a further incentive for the parties to vary their attitudes so as to obtain reciprocal satisfaction.

2. Diversion Opportunities Given by Italian Law in Defamation and Sporting Law*

In looking at the solution of disputes out of court, by giving juridical effects, of a sort to block a prosecution, to choices made by the parties involved in an offence, reference should be made to Art. 596, par. 2, of the Penal Code. With regard to insulting behaviour and defamation, both punishable on information laid (Art. 597, par. 1, Penal Code), it provides that "when the offence consists of the attribution of a given fact, the person injured and the person responsible may, by agreement before the final sentence is given, remit to an expert lawyer the question of ruling on the fact of the allegation." In such a case, "the complaint is deemed to be withdrawn or put aside" (Art. 597, par. 2, Penal Code), as a result of which the proceedings are suspended (such faculty being considered to be exercised when the parties have accepted the nomination of the expert lawyer: Art. 9, par. 1, Preliminary Dispositions of the Code of Penal Procedure) as if no complaint had previously been laid or laid subsequent to such proposal.

A further example of the technique of *diversion* in special Italian legislation may be seen in sporting law.

In almost all the regulations of the Sports Federations there are clauses—called "arbitration clauses"—requiring members to submit to the federation organs any dispute of a technical, disciplinary or economic character which arises between members and to abide by the resulting decision (see, for all such cases, Art. 26 of the Regulations of the Italian Football Federation).

From this clause arises the obligation of members—obviously in cases where there is evidence of an offence which could lead to a prosecution if a complaint were laid—to look solely and exclusively to the sport's own organ of justice, on pain of being expelled from membership.

These "domestic" organs of justice thus result in the withdrawal of business from the ordinary courts. Disputes of limited importance are settled within the sports' ruling bodies, with the faculty of applying "sporting sanctions" which certainly prove effective.

Finally, mention should be made of Art. 8 of the Law of 8th February 1948, No. 47. This imposes upon an editor the duty to insert freely in the newspaper, magazine or publication in question, statements or corrections by persons whose pictures have been published or to whom have been attributed acts, thoughts or statements which they consider harmful to their dignity or untrue—provided that those statements or corrections themselves do not contain material capable of giving rise to criminal proceedings.

The publication of the correction at the request of the interested party or the denial of earlier statements at the instance of the editor serves to nullify the negative effects of an injurious printed item or to re-establish the objectivity of the information, thus acting as an instrument to restore the balance under the law of the media.

The particular relationship linking the person who requests the correction and the person obliged to publish it seems to come close to the form of *diversion* called *avec intervention*, where emphasis is laid on the fact that between the two a sort of compromise

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arises, which, by meeting the requirements of the offended person, relieves the party responsible from prosecution for defamation. It may also be compared to the form of *diversion* called *couverte*, where emphasis is placed on the fact that publication of the retraction, serving as a moral vindication of the interested party, provides a form of settlement of the dispute, provided directly by the party responsible for a publication that is untrue or injurious to another's dignity.

Even if the publication of the retraction does not prevent the offended party from laying a complaint for defamation, there can be no doubt that the legislator sees this form of making amends as appropriate to prevent the dispute leading to criminal proceedings.

3. Discretion Not to Invoke Criminal Process in Labour Law*

Art. 9 of the Presidential Decree of 19th March 1955, provides that: "In the event of breach of rules of law whose application is subject to the supervision of the Inspectorate, the Inspectorate is empowered, when it thinks fit and after assessing the circumstances, to give a warning with appropriate directions and to fix a time within which matters must be regularized."

The warning, as understood in both the courts and legal theory, is not an act embodying legal obligations, but a formal notice with which the Inspector of Labour, after confirming the breach of a penal norm, requires the persons subject to the norm to act as required, without adding to or modifying its scope.

It has been held that under Art. 9, cited above, the Inspector of Labour, while having the powers of an official of the Judicial Police, has the more special and qualified duties thereof only when, after a preliminary judgment on the merits of the matter, he has exhausted the administrative procedure of the warning without success and brings forward the "*notitia criminis*" to commence criminal proceedings.

The Constitutional Court too, in Decision No. 107 of 1965, dealing with the question of the validity of the said Art. 9 in the light of Arts. 3 and 112 of the Constitution, held that "the power vested in the Inspector of Labour to order the employer who fails to fulfil his legal duties, to "regularize" matters within a given time, does not violate the principle of the official and mandatory nature of prosecution". This is either because the power of the Inspector and of the public prosecutor operate in different fields, or because Art. 112 of the Constitution does not prevent the system, apart from the duties of the public prosecutor, from laying down conditions for initiating or pursuing prosecutions—also recognizing thereby the public interests promoted by the Public Administration. The Court thus comes to hold that in this case, as in others, the State declines to exercise the *jus puniendi*, insofar as the general interests which it promotes institutionally may be safeguarded by other means than the simple recourse to prosecution and punishment.

If one adopts this trend, which is certainly prevalent in legal doctrine, the institution of warning, accompanied by directions, may provide an instance of *diversion*, seen as an avoidance of normal criminal process, which leads to the engagement of the person liable in a non-penal programme of action. This amounts to "*diversion avec intervention*", insofar as the liable employer, instead of being immediately prosecuted, becomes

* Giovanna ICHINO, Magistrate.

subject to a "*non-penal programme*" in which he undertakes to regularize the unlawful situation which he brought about. Suspension of prosecution is made conditional on his proper fulfilment of the prescribed programme and, in particular, his completing within the given period the instructions given to him by the Inspector of Labour.

It is the administrative organ, appointed to look after public interests and enforce social legislation, which, in carrying out its work, promotes the "resocialization" through regularizing the unlawful situation, with the consequent elimination, immediately or within a brief period, of the harm or danger; it is still the same organ, and not the judicial authority, finally, which controls the fulfilment and execution of the programme itself.

The institution has met with general approval in legal doctrine, either because it gives the opportunity of not prosecuting immediately for breach of labour laws, caused sometimes by the economic problems of the employer and sometimes by his limited or mistaken knowledge of the constantly changing laws, or because the welfare of employees may be better promoted by the prompt satisfaction which this system brings.

4. Criminal Prosecution in Practice: Elements of Discretionary Justice*

The sector in which *diversion* has had greatest play in our system is that where the papers concerning a criminal offence are filed without any action being taken. Although the Constitution excludes any area of discretion regarding the institution of a prosecution, the fact is that the organs concerned frequently do not take any action, either because the complaint laid is without foundation or because the reasons prompting it are not recognized by the law. No specific research has been done on this point, but there are a number of striking examples of the practice. For instance, the "register of applications" kept in a number of judicial centres contains "the extremes of complaints which are considered at the outset so lacking in penal relevance that they are not even submitted to the investigating judge for an order for them to be filed without action being taken" (as stated by the Undersecretary of Justice replying to the 16th March 1981 session of the Chamber of Deputies enquiring into current irregularities in the recording of legal proceedings entrusted to the public administration). The scope of the public prosecutor's discretion under these practices is clear: beyond the control of the investigating judge, there has arisen a practice of filing papers without action, undertaken by the prosecuting organs, identical to the system prevailing before the reform in 1944, which authorized the public prosecutor to decide, without any further authorization being needed, to file papers without action being taken on them.

It may be relatively easy to provide for interventions on *whether* to proceed, so as to make the "obligation" to proceed synonymous with "automatic" prosecution, but the prosecuting authority remains in control of *how*, *when* and *for what cause* to take action.

It thus remains to the prosecutor to decide the way in which he organizes his work, giving precedence to one rather than to another case for instituting proceedings, which can lead to those given the lowest priority falling out of time under the rule of limitation of actions or becoming eligible for probable future amnesties. It is he who will decide

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the relative importance of investigations and the order in which they are undertaken, who will emphasize one type of situation rather than another, who will prefer one line of interpretation to another, so as to embrace one charge rather than another or decide that one is a particularly serious case while another is a trivial one. Beneath such modes of operation a genuine form of *diversion*, specifically chosen, is concealed.

5. Diversion in Dealing with Petty Theft from Stores*

Shoplifting is one of the offences for which a *diversion* procedure has been adopted.

The extent of the offence in Italy can only be assessed from the information provided by its victims: the proprietors and managers of supermarkets and department stores. They always refer to the "inventory shortages", namely the difference between the recorded value of stock and the values resulting from a physical inventory. Such a discrepancy can result, without doubt, from a number of causes, including staff dishonesty and accounting errors. Nevertheless, even without a "breakdown" of the inventory deficiencies according to their causes, it is generally acknowledged that shoplifting is by far the greatest factor in stores organized on a self-service basis.

In absolute terms, the inventory deficiencies in 1980 totalled over Lir. 164,000 m—dealing only with major stores and supermarkets.

Yet, even without any institutionalized form of *diversion*, only a modest proportion of such offences ever reach the courts.

A significant factor for this is the widespread reluctance of the victims to lay a complaint. Statistics show that the number of prosecutions varies between 1.5% and 5% of those "detected and stopped": a derisory proportion when one considers that the relationship between crimes discovered by the victim and crimes actually committed in this sphere is wide (it has been estimated that for every detected theft there are at least seven which escape discovery).

This attitude by the proprietors and managers of the victim stores may be traceable to customer-relation considerations (stricter controls could impinge on commercial policies) and to the need not to divert employees too often from their duties, such as would be involved if they were required constantly to attend court to give evidence.

Even in the courts, there has often been a marked tendency to avoid convictions through *escamotages* of various sorts: artificial delays are introduced to extend the already protracted Italian legal processes, even to the extent that a case will lapse either through the limitation of actions rules or by amnesty. Sometimes cases are not qualified as theft, or even aggravated theft, preference being shown for treating shoplifting as a matter of civil liability (contractual failure by the purchaser to pay the price for the goods he has taken); sometimes they are dealt with as matters of fraudulent insolvency or unjust appropriation, punishable by way of summons.

The "deflection" of prosecution does not always result in the guilty party returning the goods or paying for them. Sociological studies on the behaviour of the victim have, in fact, shown a tendency to find a substitute for prosecution, usually through sanctions of a "private" or social type. So, the store manager frequently warns the shoplifter to

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keep away from the store in future; if the offender is a child, the incident is notified, whenever possible and appropriate, to its parents. Finally, compensation is often demanded for the damage that has been suffered, which may take the form of return of the goods together with a sum representing their value, sometimes making such satisfaction a condition for refraining from laying a complaint to initiate a prosecution.

6. Article 10 of the Italian Banking Law (Royal Decree Law of 12th March 1936, No. 375)*

Art. 10 of Royal Decree Law of 12th March 1936, No. 375, provides that: "All notices, information or data concerning credit institutions under the control of the Inspectorate are deemed official secrets even relative to public authorities. Officers of the Inspectorate in the exercise of their duties are deemed to be public officials: they are required to refer exclusively to the Head of the Inspectorate all irregularities coming to their attention even when they amount to criminal offences. The officers and employees of the Inspectorate are bound by the official secrets provisions."

Decree Law of 14th September 1944, No. 226 abolished the Inspectorate referred to above (Inspectorate for the protection of savings and credit operations) and its functions passed to the Treasury Minister, with powers of supervision over the credit agencies being delegated to the Bank of Italy. This was confirmed by Decree Law of 17th July 1947, No. 691. The ongoing functions of the Inspectorate were thereby transferred to the Governor of the Bank of Italy.

The duty of the officers and employees of the Bank of Italy to refer exclusively to the Governor of the Bank all irregularities, including criminal ones, and the duty to preserve official secrecy are justified by the need to protect savings by preserving confidence in the Credit Institutions. There is always the risk that if details of offences committed by employees of such institutions were to be divulged, panic might spread among the depositors, prompting them to withdraw their funds, so embarrassing the institutions called upon to meet such a massive outflow of deposits. The banking undertakings, receiving deposits and lending monies, cannot, nor are licensed to, hold all the deposits in cash or in quickly and reliably realizable assets (such as State bonds), but they are required to have, and do have, liquid funds equivalent to a prescribed percentage of their deposits. The Bank of Italy is institutionally bound to avert the risk of widespread demands for withdrawals.

A functional interpretation of Art. 10 cited above has consequently concluded that the Governor of the Bank of Italy was not placed under the obligation to advise the public prosecutor immediately of all offences coming to his notice, but was given the power and duty to examine what consequences would flow from release of information about offences and to take the necessary steps to meet demands for withdrawals greatly exceeding normal levels and to reassure depositors as to the solvency of the Institutions; only after taking all the necessary steps in this regard was he required to make a report to the judicial authorities.

A contrary view points to the fact that Art. 2 of the Code of Criminal Procedure obliges all public officials (and those undertaking public duties) who "in the exercise or course of their duties or service become aware of an offence . . . to report it . . . to

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the public prosecutor or local stipendiary magistrate" ; and it is argued that this provision responds to the general principle of our system from which no derogation is possible.

On the juridical plane, however, it has been contended that Art. 10 of the 1936 Law came into force after the Code of Criminal Procedure (1931) and Arts. 2 and 4 thereof, so that it constitutes a special derogation from the general rule. Both norms, in fact, represent the same grade of authority and consequently, in the event of conflict, the provisions of the later one in time should prevail.

The opposed viewpoints typify two different mental approaches. The first belongs to the banking world and acknowledges the practical exigencies of savings and loan transactions. The other is characteristic of jurists, bound by logical-dogmatic methods of interpretation which look upon the letter of the law as paramount.

The solution proposed by the bankers presents the risk of being used for purposes different from those which justify it. The aim of concealing as long as possible the misdeeds of bank officers (such as granting loans to bodies without proper security or lending money to political parties or politicians on an effectively irredeemable basis) even on the recommendation of government officials, and sometimes for motives that may be labelled as purely political, is not far-fetched.

On the other hand, while official secrecy is observed within the ambit of the Bank of Italy and even of the other credit institutions, it is frequently broken, either by organs of the judicial police or by magistrates acting officially, in press conferences and releases. Consequently, the supervisory organs and Governor of the Bank of Italy may be justified in fearing that a report to the judicial authorities could be divulged, with devastating repercussions for public confidence in the institutions and their solvency. Nor can it be denied that the expedients of the "wastepaper basket" and the "pending file" for reports and complaints, on the part of the open-minded public prosecutors, although contrary to our procedural system (see Art. 74, Code of Criminal Procedure), lead to delays in the initiation of prosecutions that are little different from those which one part of the judiciary denies as being granted to the Governor of the Bank of Italy.

The reasons and the limits deriving from a functional interpretation of Art. 10 of the 1936 Banking Law, which are discussed above, highlight the differential characteristics of "*diversion et médiation*" which provide the theme of the Conference. Art. 10's aim is to protect savings by means of provisions which take time to fulfil and necessitate delaying the presentation of the report to the judicial authorities which is imposed on all public officials by Art. 2 of the Code of Criminal Procedure. "*Diversion et médiation*" imply the adoption of specific procedures different from judicial procedures and measures different from criminal sanctions, in order to lighten the work of the criminal courts and to avoid the negative effects and costs of criminal proceedings.

PART III
ALTERNATIVE PROCEDURES AND MEDIATION INSIDE THE CRIMINAL JUSTICE SYSTEM

1. New Sanctions to Replace Short Terms of Imprisonment and Bargaining in Italian Criminal Procedure*

A wide range of models and solutions is to be found in the field of alternative measures within the penal system itself. A number of distinct groups may be identified: cases where non-detentive measures are applied, in order to reduce the prison population and assist at the same time in the reintegration into society of the offender; cases where the court assumes powers to apply administrative sanctions; rules which limit judicial intervention simply to enquiring into the premises which would permit other, administrative, authorities to apply social security or public health measures. As may be seen, assuming as a parameter the *quantum* of the power of the criminal court, the range is from a comprehensive jurisdiction excluding only measures that involve imprisonment to a sort of *administration guaranteed* by the presence of the judge.

In the first class should be mentioned sanctions alternative to brief periods of detention (semi-detention, controlled freedom, fines) introduced by Law No. 689 of 1981. There is no doubt that these are genuine sanctions under the criminal law applied by the judge, after finding the accused guilty, in exercise of his discretionary power, under which he is required to choose the sanction "most apt to achieve the reintegration of the offender into society" (Art. 58).

Controlled freedom and fines come into a different category, being applied on the application of the accused supported by the agreement of the public prosecutor. Art. 77 of Law No. 689 of 1981 provides in fact—for crimes punishable by imprisonment not exceeding three years (employing therein a somewhat controversial interpretative extension) or with a fine alone or with a combination of the two—that "from the beginning of the judicial investigation up to the first completion of the opening of the case, the judge, when he considers as a result of his examination of the facts and the evidence to be brought, that there are elements justifying an alternative sanction of controlled freedom or fine, may, on the application of the accused and with the acquiescence of the public prosecutor, order such alternative sanction . . . in such a case, the order of the court is deemed to extinguish the offence." This then is not a conviction by the court, since the judge declares the offence to be extinguished and applies a sanction which cannot fail to have an administrative nature since it operates on the basis of no crime now subsisting. The affinity to *bargaining* in the *common law* is undeniable, even if its consequence is, in effect, a practical form of decriminalization. The accused withdraws from a declaration by the court of the substantive merits of the charge against him and the system rewards him by relieving the incident of criminal implications. The same Law speaks of "benefit" (Art. 80) to underline that the advantage gained in terms of judicial economics, thanks to the attitude of the accused, justifies the choice

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of a sanction that is less afflictive and more conducive to social reintegration than a punishment under the criminal law.

The contribution of the judge almost disappears entirely, so as to give the idea of being on the threshold of *diversion*, in *interventions* (as termed by the legislator) which come within the province of the stipendiary magistrate, concerning the possession, for personal use, of modest quantities of drugs (Art. 80, Law No. 685 of 1975) (see below at section 4).

2. Powers of the Police to Mediate between Parties in Dispute*

Among the instances of *diversion* that are specifically mentioned in Italian law, a prime position must be given to the role of the police in mediating between parties in dispute. Under Art. 1, par. 2, of the Consolidated Text of the Laws on Public Security (Royal Decree of 18th June 1931, No. 773), the Police Authority "through its officers and at the request of the parties, may promote the amicable settlement of private disputes"; it will explain to the parties the questions of fact and the rules of law applicable, without imposing any judgment based on these, and, apart from situations which prove to come within the exclusive competence of the court, will adopt, as appropriate, either "a provision which will prove acceptable to the parties or an equitable resolution of the matter such as to forestall any possible incidents" (Consolidated Text of Police Regulations, Art. 6). This intervention is specifically described by the law as "mediation attempt" (Art. 5 *idem*).

In the absence of available sociological studies, it is difficult to define the areas in which the practice has been applied and the results that have been obtained. Nevertheless, it is certain that in regard to offences which would result in prosecution after a complaint has been laid by the victim, and especially in small centres of population, the mediation work of the police has "soaked up" a considerable proportion of petty offences. In fact, where the mediation work of the police is well integrated into the local community, it comes to have a notable effect on the exercise of the right to lay a complaint, the prerequisite for the initiation of a prosecution, inducing people to withhold from such an act or at least to defer it. As a result, the mediation effect prevents an offence coming within the ambit of the judicial authority.

The extension of prosecution following the laying of a complaint contained in the recent Law No. 689 of 1981 should give a further impulse to the mediation process, especially in relation to offences violating duties of family support and petty deceptions, in which the restoration of the item or money taken from the victim may, thanks to the intervention of the police, lead to the victim withholding or deferring his official complaint.

3. Avoidance of Prosecution by Paying a Fine**

The institution of "*oblation*" (tender of money in lieu of criminal proceedings) is made

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available (Art. 162, Penal Code) as a general possibility for all minor offences—whether under the Code or special laws—which are punishable only by a fine. The amount required is one third of the prescribed maximum penalty and the payment is to be made before the opening of the hearing, or before the sentence is given, and has the effect of extinguishing the offence.

The institution finds its justification in the convenience to the system of quickly settling proceedings for offences of minor social importance, while at the same time satisfying the punitive requirements of the State by exacting the payment of a sum of money. Before the decriminalization Laws of 1975 and 1981, the institution mopped up a large proportion of the most trivial offences, fulfilling a role of "creeping decriminalization". Currently, following those decriminalization Laws—which have diverted into the administrative sector the offences punishable only by a fine—its field of operation has become minimal.

Yet, just at the moment when its sphere of application seemed likely to vanish, the legislator has sought to revive this instrument in order once again to reduce the load on the penal system. In fact, Art. 126 of the Law of 24th November 1981, No. 689, introduced Art. 162(b) of the Penal Code, enabling the judge to permit "oblation" also for minor offences for which there is an alternative penalty of detention.

However, the differences between the two types of "oblation" should be noted. Art. 162(b) of the Penal Code provides that the offender *may* be permitted oblation by depositing a sum of money equivalent to half of the maximum fine. This bestows on the judge a measure of discretionary assessment—in deciding whether to accept the request —which seems to be referrable mainly to the criterion of the "gravity of the offence". Moreover, again under Art. 162(b), the application is not available to a person of a specified criminal status (Art. 99, par. 4 and Art. 104, Penal Code) nor when there may be harmful or hazardous consequences of the offence which the accused is in a position to make good.

4. The Magistrate's Role in Determining How to Help Offenders in Cases of Drug Abuse*

When dealing with people with a high rate of recidivism, the need for medical treatment and social support to enable them to escape from the dominance of the drugs seems paramount. Moreover, it is well known that the reluctance of those dependent on drugs to submit to such treatment is common. *Diversion* permits the possibility of offering to them a choice between the penal solution (prosecution, sentence, imprisonment) and an extra-penal solution (detoxification, social service, retraining).

The Single Convention on Drugs of New York (in the text amended at Geneva on 25th March 1972) provides in Art. 36(i)(b) the possibility of placing people who have been guilty of drug abuse under measures of care, correction, aftercare, rehabilitation, reintegration, in place of prosecuting and sentencing them in criminal courts. That Convention became law in Italy on 5th June 1974.

Yet this way of dealing with the unlawful use of drugs conflicts with the principle of mandatory prosecution for crime, from which derogation is not permitted, which is

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implicit in the Italian system. Consequently, no form of renouncing or abandoning prosecutions is permitted when dealing with drug addicts who agree to undertake treatment.

Such rigidity in the procedural system, in the face of the practical exigencies mentioned above, has induced efforts to achieve the same results through the use of *diversion* by means of instruments which are not yet procedural but derive from substantive law.

In the drug field, Italian legislation provides that personal use of drugs is not a basis for punishing their possession, provided that only modest quantities are involved (Art. 80, Law No. 685 of 1975). Such exemption from punishment is always declared by the judge after the initiation of the prosecution. The judicial authority may, moreover, order the drug addict, who is in need of care and support but refuses it, to be forcibly placed in hospital or become an outpatient. The two levels of intervention, however, are totally distinct, at least in formal terms, from each other.

If one looks at current law, in the field of drug addiction it is easier to perceive practices which might be seen as coming close to a form of "covert" *diversion*. This, for instance, is the case with young persons controlled by the police and found for the first time in possession of small quantities of drugs (hashish, marijuana), who are simply subjected to confiscation of the drugs and then released without any further action being taken.

On other occasions, when the magistrate has to decide whether the quantity of drugs held by an addict for his personal use is "modest", so as to exempt him from punishment, he may be "convinced" to give a favourable decision if the accused "chooses" to undergo a detoxification course and subsequently co-operate with the social services.

XIIIth INTERNATIONAL CONGRESS OF CRIMINAL LAW
1984
DIVERSION
HYPOTHESES FOR AN ITALIAN SYSTEM OF DIVERSION

by
Mario Valiante

1. "Diversion" in Our System

OMITTED

2. Limitations on Prosecutions in the Latest Legislation

1) Under the Italian Republic, it has been seen that the paramount way of giving complete protection to human rights lies in proceedings in the law courts. Consequently, provision has been made for the intervention of the courts in a vast range of instances, even where basic questions of individual rights have not been at stake, with the result that the judicial apparatus has become overburdened to an intolerable degree.

The consequences of such legislative policy in the field of criminal justice have been particularly marked.

Thus, infractions of negligible constitutional or social importance have been classified as crimes, necessitating in every case a judicial sentence.

2) The need to rationalize the system, which has also been prompted by the excessive and sometimes unjustifiable "cost" of the work of the courts, has for some time provoked an opposite trend.

In particular, ways have been sought to relieve the judge of jurisdiction in a number of situations, thereby reducing the number of cases coming before the criminal courts.

3) A reduction in the need for judicial intervention has been promoted mainly by the expedient of *depenalizing* minor offences.

In this connection, mention should be made, in particular, of the Law of 3rd May 1967, No. 317, and the Law of 24th December 1975, No. 706, and, even more importantly, the Law of 24th November 1981, No. 689, all of which brought about reforms of the penal system.

Even though, in formal terms, these Laws merely converted penal sanctions into administrative sanctions, substituting the imposition of a fine by the court by a monetary payment outside court, the underlying principle has been to establish an objective criterion to distinguish events which must be treated as crimes from those falling in the province of public administration.

This criterion is referable to the more or less direct type of protection guaranteed by the Constitution to those injured by crimes and the importance this has to the conscience of the community and general public policy.

4) Moreover, the latest Law has brought about a restriction to the intervention of the judge at particular moments in the penal proceedings: generally in the conclusive ones of investigation and sentence.

Indeed, it has permitted *oblation* (settlement of offences by a monetary payment without trial) even for offences punishable by detention or fine; it has made possible a *judicial decree of guilty* when the court deems it appropriate to impose a fine instead of a sentence of imprisonment; finally, it has authorized, at any time even during the judicial investigation right up to the conclusion of the formalities of presenting the prosecution case, the imposition of *alternative sanctions at the request of the accused.*

The same theme could be said to apply to the *extension of prosecution on complaint laid* to offences of special importance as between individuals.

5) Although contained in a single legal instrument, these institutions are the result of an extensive debate which has involved legal scholars, legal practitioners and politicians, and they express—however tentatively so far—a new type of approach to penal justice. They support the hope that the administration of justice may become simpler and quicker, more effective and fairer. The new trend will thus be able to establish itself on the basis of the positive results it subsequently achieved.

More specifically, the development of this line may open up an interesting debate on the theme of *diversion* and lead to further adjustments in our system.

3. A Possible System of "Diversion"

1) In a penal system such as ours, based upon the mandatory institution of prosecution (*per* Art. 112 of the Constitution) and thus of judicial intervention (or legal proceedings), there is no scope for *diversion* in the strict sense attributed to it by the 3rd Session of the Congress.

In effect, if the infraction amounts to a crime, there is no way to avoid the intervention of the judge, other than by a declaration that the case may not be prosecuted or by ap-

plying the sanctions under an abbreviated procedure. Neither the public prosecutor nor the police, even less the administrative organs, can adopt provisions which somehow will settle proceedings consequent upon the crime without some judicial pronouncement. Yet, if the judge intervenes, this takes the matter out of the realm of *diversion*.

On the other hand, if the infraction becomes depenalized, it is withdrawn from the province of criminal law and may be transferred by the law to another authority.

In such a case, the judge does not intervene because the event falls outside the ambit of crime, even if it still stands outside the field of *diversion*. Moreover, when an administrative infraction is objectively connected with a crime, in the sense that to establish the former it is necessary to determine the fact of the crime, the penal judge is also given the task of applying the administrative sanction, while the civil judge is empowered to resolve the contested matter by an order of specific performance or injunction.

2) A practical application of *diversion*, in a form that is compatible with our system, may be achieved by following the trend, on the one hand, to reduce as far as possible the field of criminal justice, and, on the other hand, to limit the cases where judicial involvement in criminal proceedings is indispensable.

For the former purpose, *decriminalization* seems the most effective expedient. By a timely revision of the special part of the Penal Code and of special penal laws, meanwhile extending decriminalization to other offences punishable only by a fine, whatever penal instrument they fall under, it is possible to transform into administrative infractions acts which really amount to an abuse against the normal course of the life of the community, and to reserve for the civil courts acts which trespass upon predominantly individual interests or transfer to other special systems (corporate, professional, political, religious, etc.) acts which are not considered to fall rightfully into the area of interest to the State. Some hypotheses of minor infractions against public administration, and even against the administration of justice or the public economy, could well become cases of administrative offences, the sanctions for which are more timely and burdensome than purely criminal fines; similarly, minor offences against property and even against persons may be downgraded to the status of civil torts, for which the injured person could take civil action for restitution or damages, which in most cases is what he wants and in effect achieves in the course of criminal proceedings.

The imposition of administrative sanctions satisfies the exigencies of the public administration, to which is generally entrusted the care and control of interests offended by administrative infractions, as well as the collective expectations of society. The pursuance of civil actions re-establishes or compensates private interests.

The effects of administrative sanctions or civil judgements are also more immediate and complete than the more protracted and costly results that may be obtained as a result of criminal proceedings. The system of "savage prosecution", on the other hand, ends up by making it impossible to repress the excess of criminal acts and so destroys belief in the system ("loose-leaf system").

3) The reform of the special penal system could obviously be a timely opportunity for criminalizing—*rectius* "penalization"—of other undesirable or illicit forms of behaviour for which other systems now make provision.

The threat of punishment and severer stigmatization of the criminal law may provide the most efficacious instrument for the pursuit of a policy corresponding to the due needs of society.

However, the need is for a rational and consistent "penalization". Criminal acts must

represent a violation of the interests of individuals or of society, directly or indirectly protected by the Constitution or at least the subject of concern to it. This can be the only objective yardstick, valid for all cases.

Other criteria of a different nature (philosophical or moral, ideological or political), precisely because they are not juridical, would not be relevant and binding upon those who do not share them, while the criterion of "value" embodies too much of personal, political or religious inspiration to provide a single valid basis for decision.

The most recent legislation and the attitudes of legal scholars and practitioners coincide with this trend.

Due account must be taken of it for fear of submitting to the temptation to criminalize, even harshly, all those expressions of fancy and "anarchy" to which our people are prone, on the very limits of acceptable conduct; or those which orchestrated demagogic campaigns periodically denounce as dangerous for society, only to forget them as soon as new themes for propaganda are identified.

Here too, one should not ignore the greater efficacy and more appropriate convenience of administrative, fiscal or civil sanctions.

4) The reduction of the judicial task in criminal proceedings may be realized above all by extending the applicability of the *pecuniary penalty*, even as a simple alternative for imprisonment, so as to give greater scope for "oblation" on the one hand and the penal order on the other.

The use of the pecuniary penalty, moreover, satisfies the wish to reform our punitive system. With its requirement of assessing the means of the offender so as to fix the amount of the fine, and adjust it up or down (Art. 133(2), Penal Code), the pecuniary penalty presents no problem of constitutional validity.

In this connection, a case may be made for periodic payments and interest on late payments, as has been tried in West Germany, not only to make the payment of fines more effective, but also to impose, as necessary, a severer burden.

5) For resolving proceedings before the case is opened and up to the investigatory stage, use may be made of the new institution of *applying alternative sanctions on the application of the accused*.

If the experiment is successful, it could well be extended to cases where "semi-detention" could be applied.

For this purpose, it would be necessary to remove the limitation of alternative measures to offences falling within the jurisdiction of the stipendiary magistrate.

Then, it might be possible to allow, similarly, the application of principal penalties on the application of the accused: above all, of fines, which currently is not permitted because of the infrequent use of alternative sanctions; subsequently of other penalties, at least for minor offences.

The fact that it is a matter of free choice by the accused but is subject to approval by the prosecutor, should overcome doubts as to the suitability of such an institution. Eventually it would be possible to lay down the pre-condition that the damaging or hazardous consequences of the offence be removed, when this is possible for the accused to achieve, so realizing a form of *diversion avec intervention*. Nevertheless, one should stop short of ordering the payment of damages, which would be too great an impediment for the accused and even a motive for the prosecutor to harden his attitude; this matter should be left to the civil courts.

6) Further attention should be given to the possibility of empowering the public

prosecutor and attorney-general—similar to the power given to the attorney-general in the juvenile courts (Art. 14(1), Royal Decree Law of 20th July 1934, No. 1404)—to ask the court with jurisdiction in the matter not to proceed against certain persons for certain minor offences, even when it is not possible to plead the manifest lack of grounds of the *notitia criminis*, to which reference was made in the old Art. 74 of the Code of Criminal Procedure.

Reasons such as the insignificant nature of the offence or the damage done, the circumstances or motivation of the act, the spontaneous elimination of the damaging or hazardous consequences of the offence, the reaction of public opinion, the personality of the offender and the harm that he could suffer from imprisonment, and other relevant objective circumstances, could lead to the conclusion that criminal proceedings are not appropriate, especially in certain situations. And the head of the public prosecutor's department, in his capacity as representative of penal policy delineated by the competent constitutional organs and as interpreter of the conscience of the community, should be able to undertake similar evaluations. The removal of the restriction of placing papers on the file without action being taken to cases where the summons is manifestly unfounded, which was introduced as far back as 1944 but rarely used and then only for cases where proceedings were impossible (the offence becoming time-barred or the offender untraceable), provides an indication of the trend which should not be ignored.

The recognition of such a power would not even require any legislative amendments. Support would be found in the directing criteria of Arts. 37 and 41 of the (now expired) law bringing in the new Code of Criminal Procedure, which, by legalizing the current practice, had arranged to link again the filing of papers without action to the manifest lack of justification of the summons. The power to order *nolle prosequi* for opportunistic motives does not infringe the rule of mandatory prosecution under Art. 112 of the Constitution, because the application needs always to be made to the judge, so that formal proceedings would thus be taken and the judge would go on to make the necessary enquiries in order to reach his free and autonomous decision on the matter.

7) A form of proceeding similar to *diversion* could be provided by the application of *correctional measures*, as an alternative to a criminal sentence, for certain types of crime and offender in given situations.

In utilizing such supplementary sanction, as an instrument which in some cases could fulfil a more effective function of specific retribution and thus of special prevention, correctional measures could serve as a first immediate sanction against crime. Obviously the measures should not impinge too directly on personal freedom; rather they should impose some limitation on the exercise of individual rights.

Such an order could be applied to abuses against proper standards of behaviour in society, as in many minor infractions contained in the Penal Code and the consolidated laws on public safety, for which detention is provided simply as an alternative to a fine.

Correctional measures should be used in those cases where the offence has not provoked any significant alarm in the community and a criminal sanction does not seem appropriate to the damage that has been done. In some systems—as in Spain—positive experiments in this field have been undertaken.

It would take the place of the principal sanction for a temporary period. If the terms were disobeyed or if further offences were committed in the prescribed period, the normal criminal proceedings would be reinstituted. If properly fulfilled, the offence would be extinguished. It would therefore be a case of equally penal measures, to be placed in

the gap between supplementary penalties and supplementary administrative sanctions, the function of which would be immediately to punish certain minor offences with a special procedure similar to a penal judgment and with a conditional sanction, thereby freeing the judge from the burden of normal criminal proceedings.

Correctional measures would, in fact, be applied directly on the authority of the police or the public prosecutor, or on the authority of the judge acting in an administrative capacity. In the first two cases, a form of control should be instituted, respectively by the public prosecutor and by the judge. The accusation would be examined by the judge, acting in a judicial capacity: perhaps as an alternative to the civil orders of specific performance or injunction or to the punishment sentence of the criminal court.

Israel
DIVERSION AND MEDIATION

Haim H. Cohn

I. Practice of Diversion

(a) The number of offences diverted from the process of the courts is relatively small insofar as substantive crimes are concerned. It is relatively high insofar as petty offences are concerned.

(b) i. Israel has adopted the opportunity principle.

The discretion as to whether or not to institute criminal proceedings in respect of any offence is constitutionally and nominally vested in the Attorney General, but is in individual cases mostly exercised by prosecutors answerable to him (the State Attorney and his deputies, district attorneys, municipal attorneys, and duly authorized police prosecutors). While no statutory causes are prescribed for the exercise by the Attorney General of his discretion not to institute criminal proceedings, the causes for which district attorneys and police prosecutors may refuse to proceed in any given case are laid down by law (see under iii, infra).

Several Attorneys General have in the past exercised their discretion also by way of "depenalization" of certain offences generally. Thus, by general direction of the Attorney General, no person is prosecuted for the offence of sodomy or any carnal knowledge of another person "against the order of nature", when committed in private by consenting adults.

A ruling by the Attorney General not to institute criminal proceedings either generally or in any individual case is subject to the overall control of the Supreme Court sitting as High Court of Justice (for particulars see under ii, infra).

ii. The Attorney General is also empowered by statute to stay any pending criminal proceedings. The law contains no indication as to the nature of the considerations or causes which may justify or necessitate a stay of proceedings: free discretion is vested in the Attorney General to grant or refuse a stay on whatever grounds he deems adequate.

The Attorney General is, however, subject to the jurisdiction of the Supreme Court sitting as High Court of Justice, which has power to quash any stay ordered by him or to order him to grant a stay. The Court will exercise this power only if satisfied that the Attorney General has acted not in good faith, or upon irrelevant or illegitimate considerations, or as a result of a mistake of law or of fact; but the question which considerations may be relevant to the issue, is in the first place for the Attorney General to decide, and his decision will be interfered with only if it is manifestly unreasonable.

iii. Where the commission of an offence has come to the attention of the police, an investigation must be initiated, unless a senior police officer is of the opinion that the matter is not of public interest.

Upon completion of the investigation, the police dossier is forwarded to a prosecutor

who may decide to bring the case to court or to abstain from prosecution either because of lack of sufficient evidence or because of lack of public interest.

On any decision not to start an investigation or not to prosecute, an appeal lies to the Attorney General (who may delegate his powers in this respect to the State Attorney).

iv. There are certain offences to which the provisions set out under iii above do not apply, because the aggrieved party may himself institute criminal proceedings and himself conduct them. These offences include criminal trespass, nuisances, threats, insults, blackmail, assaults and affrays, woundings, copyright and trademark violations, election offences, and violations of privacy.

A district attorney may decide to take over the conduct of a criminal case which had been initiated by private complaint, and the Attorney General may order the stay also of private prosecutions.

(c) Some *covert diversion* is practiced, but no publicity is given thereto.

In applications coming before the Attorney General either for the non-institution of criminal proceedings or for their stay, the decision thereon is often suspended until after compensation would have been made to the victim or some other such condition precedent fulfilled.

In cases coming before district attorneys it frequently happens that the decision as to whether or not there is any "public interest" in a given prosecution is made to depend upon whether the victim has been compensated or pacified, or whether the party aggrieved insists on the matter being prosecuted.

(d), (e) *Diversion with intervention* by making use of mediation procedures is still in the experimental stage. This report deals with an experiment at present under way in some quarters of the City of Jerusalem.

With the cooperation of the municipal authorities, the local committee (administering the affairs of the Quarter), social welfare authorities, and the police, a panel of mediators is set up in each such Quarter, composed of persons who are not themselves residing there. They are mostly retired social workers, psychiatrists or psychologists, lawyers, or ministers of religion, but no formal education and no professional experience is regarded as a prerequisite for appointment. The paramount qualification is a humanitarian approach to the problems of life and the (reputed) capability to solve them by practical wisdom. They volunteer for mediation work and are reimbursed only for their out-of-pocket expenses (but efforts are now under way to find the necessary funds to enable mediators to be compensated also for their loss of time).

The Mediation Project occupies an office in a Community Center within the Quarter, and a clerk of the local committee or of the Community Center is always at hand to receive complaints and to answer enquiries. If a mediator happens to be at the office when a complaint is or is intended to be lodged, he may hear the complainant on the spot; otherwise the clerk will bring the complaint to the attention of the mediator who first appears at the office. Mediators take turns in attending at the office, care being taken to have at least one mediator available every working day.

If the mediator considers the problem to be soluble by talking to and advising or consoling the complainant, he will use his best efforts to achieve that end. Normally, however, he will either summon both the complainant and the party complained against to

appear before him at the office, or he may—especially where the other party is recalcitrant —visit him at his home (which is, more often than not, identical with, or in the immediate vicinity of, the home of the complainant). He will ask that other party, and may use his best efforts to persuade him, to agree to the mediation: failing such agreement the mediation will not proceed. Refusals to agree to mediation have been very rare. In cases of such refusals, the mediator will advise the complainant of his or her remedies in law or refer him or her to a lawyer or to a legal aid bureau or to the police. In many cases, the intervention of a lawyer or of the police caused the party complained against to think twice about the matter and to agree to mediation.

In mediating between the parties a mediator is free to determine his own procedure. He is (subject to the exception described below) authorized to promise the parties that if the mediation succeeds and they comply with his directions, criminal proceedings will not be instituted against them or, if already pending, will be stayed. He may also make it a condition of his mediation that the complainant sign and lodge the application for the non-institution or for the stay of the criminal proceedings if and when a settlement is reached. He will not normally make it a condition precedent that the complainant first withdraw any complaint he or she may have lodged with the police—the reason being that pending mediation the status quo should not be disturbed.

The object of mediation is not so much to provide an extralegal and extrajudicial remedy to the complainant for any wrong done to him or her, but rather to remove the causes underlying the criminal behaviour in any specific case, including not only the grievances of the complainant but also the grievances of the party complained against. To achieve that end, the mediator may enlist medical or psychological help and intervene on behalf of the parties with labour exchanges and other economical and administrative agencies.

The offences for which mediation is regarded suitable are, first and foremost, those in respect of which criminal proceedings may be initiated by private complaint (see under (b) iv, supra), and among those principally offences of violence between spouses and between neighbours, as well as insults, nuisances and trespasses. In cases in which criminal proceedings may be instituted by public prosecution only, the main area of mediation is domestic, too, such as cruelty to children and all the graver offences between spouses (short of uxoricide). In the latter cases, prior notice of the mediation will be given by the mediator to the police, who may consider that in the public interest criminal proceedings should take their due course: in that event the mediator will first advise the parties accordingly, before entering on the mediation; but he may on his own motion apply to the Attorney General for the ruling of the police to be overruled.

(f) Many organizations and societies have their own domestic tribunals (in some instances known as "*courts of honour*").

Some domestic tribunals have won statutory recognition: they exercise jurisdiction over their members by virtue of, and as defined by, law (to this category belong the disciplinary courts of the Bar, and similar disciplinary courts established for accountants and auditors and for private investigators). The law is that disciplinary proceedings instituted before a disciplinary court established by statute do not affect any criminal proceedings which may be initiated in respect of the same cause; but the disciplinary court may stay its proceedings until after completion of the criminal trial and ought to

do so where the accused so requests. Acquittal in a criminal trial does not preclude conviction in a disciplinary proceeding for the same cause, nor does the principle ne bis in idem apply to disciplinary following criminal proceedings or vice versa.

In the case of domestic tribunals without statutory powers, the law is that where in the course of proceedings before any such tribunal a criminal offence amounting to a felony (punishable with more than three years' imprisonment) or affecting the rights or the property of the State is disclosed, the tribunal may not proceed further without notice having first been given to the Attorney General, who may then either allow the tribunal to proceed or order it to await the outcome of any criminal proceedings instituted or to be instituted. This law was enacted because it was apprehended that a good many domestic tribunals took it upon themselves to try criminal matters within the precincts of their own organizations, so as to protect their members who had committed criminal offences from public exposure and stigmatizing punishment. If the offence was one properly regarded as coming within the concerns of indoor management of the organization, the Attorney General would normally give his fiat to proceed with the domestic disciplinary trial; in all other cases, however, such domestic attempts at "diversion" would be deprecated and restrained.

(g) Rehabilitation through labour (community services) requires a court order, which will not be given without a recommendation of a probation officer.

(h) i. A diversion decision made by the police (as it normally is) may be reviewed and overruled by a district attorney.

ii. A diversion decision made or confirmed by a district attorney may be reviewed and overruled by the State Attorney.

iii. A diversion decision made or confirmed by the State Attorney may be reviewed and overruled by the Attorney General.

iv. A diversion decision made or confirmed by the Attorney General may be reviewed and overruled by the Supreme Court sitting as High Court of Justice (for particulars see under (b) ii, supra).

v. There are as yet no guidelines as to the considerations upon which the discretion in making diversion decisions is to be exercised. It may, however, safely be assumed that the success of intervention, especially of mediation, will always be accepted as sufficient ground for diversion.

(i) Where mediation proves unsuccessful, the decision as to whether or not to institute or to continue criminal proceedings will depend on all or any of the following data:

1) the period of time which has elapsed since the commission of the offence;
2) the nature and gravity of the offence;
3) the need for individual or general deterrence;
4) the measure of responsibility of the accused for the failure of the mediation;
5) any contribution or compensation the accused may have made in the course of the mediation;
6) the insistence or non-insistence of the complainant on the institution or continuation of the proceedings;
7) the opinion of the mediator.

(j), (k) i. Insofar as diversion with mediation is concerned, it is considered that the diversion will serve the overall purpose of restoring peace and tranquillity in a much better and much more effective manner than any criminal sanction could ever achieve. Moreover, in the cases of those offences for which mediation is eminently suited, real guilt is generally not confined to the actual offender but is shared also by the victim: the prosecution and punishment of the offender must in these cases only give rise to a sense of grave injustice and may well deepen the frustration and animosity of the offender rather than cure or subdue them. Successful mediation augurs well for the suppression of criminal aggressiveness and for the non-recurrence of criminal transgressions, for reconciliation between hostile adversaries, and for imbuing them with a sense of their own worth and dignity to replace their fear and contempt of each other.

ii. The following considerations apply to all diversions, with or without intervention:

1) In many cases, the jeopardy and hardship involved in the institution or continuation of criminal proceedings is not reasonably proportionate to the gravity of the offence or to the public interest in a prosecution. This applies not only to minor offences, but (for instance) also to property offences in which the victim has been fully compensated or in which no damage has actually occurred, as well as to such offences as are no longer considered to involve any moral turpitude or blameworthiness (for an example see under (b) i, supra).

2) In other cases, the jeopardy and hardship involved in the institution or continuation of criminal proceedings may constitute a danger to the life or health of the accused, as when he is of great age or suffering from a grave disease; or any punishment to be imposed on him may be fraught with such disaster for himself or his next of kin as to jeopardize life or health, as when he is the sole supporter of a great number of small children.

3) The offence, though formally and technically completed, may have been committed for purposes, or from motives, which may be considered praiseworthy or at least justifiable; or it may have been committed in misconception of the limits of legitimate self-defence; or while a criminal offence at the time it was committed, it has meanwhile been wholly or partly legitimized or its legitimation is under way.

4) Apart from considerations arising from the nature of the offence or the personality of the offender, there are some general considerations which, in our submission, should be—but as yet are not—taken into account, namely, the ever increasing overcrowding of prisons; the ever increasing overloading of court calendars; the ineffectiveness and inadequacy of judicial and penal processes; and the desirability of decriminalization in modern society.

(l) A conciliation agreement is always enforceable as a civil contract. It does not enjoy the status of a judgement unless a competent (civil) court has made it an order of the court. This happens only when the agreement is reached in the course of (civil) proceedings pending before that court.

II.

(a) There have not so far been any evaluations of diversion with intervention. As far as the power to stay criminal proceedings is concerned, it is, both by the courts and by legal writers, considered to be one of the constitutional bulwarks of the liberty of the

citizen, in that it is an effective instrument of protection against unfair and cruel prosecutions.

(b) The criticism voiced from time to time is that the power to stay criminal proceedings is too wide or not sufficiently defined and circumscribed. In particular, criticism has been widespread about the use of this power for purposes of depenalization (for an example see under (b) i, supra). Your reporter does not subscribe to these criticisms.

(c) The control of diversion as exercised by the Supreme Court sitting as High Court of Justice (see under (b) ii, supra) appears quite satisfactory.

(d) Diversion with intervention is now, as aforesaid, in its first experimental stages, but is expected to be widely expanded.

(e) Among future functions of diversion the following should be given priority:

1) a maximal degree of decriminalization and depenalization;

2) relief of courts and other judicial and investigating agencies and the promotion of their ready availability and accessibility for major matters of legitimate public concern;

3) clearance of prisons and other penal institutions to ensure optimal living conditions for dangerous criminals whose imprisonment is imperative;

4) prevention of prosecution in cases where it would cause disproportionate hardship or would no longer serve any useful or reasonable purpose.

As to the Additional Questions:

(A) The answer is in the negative: if a criminal matter is a priori worthy of or suitable for diversion, the activation of police and prosecution agencies might prove superfluous and a waste of manpower and other resources.

(B) The answer is in the positive: there cannot be any obligatory settlement without the consent of the parties except only by an order of a competent court.

(C) The answer is in the negative: in many cases it will be much easier to arrive at a mutually agreed settlement if the offender is not required to admit, but may be allowed to insist on denying, formal responsibility. This is a matter, however, which ought to be considered and decided on the merits of each particular case.

(D) The relevant considerations are set out under 1 (j) (k), supra.

(E) Double jeopardy can be involved only where a person is twice formally charged with the same offence. Where a charge has already been laid and subsequently mediation proceedings are initiated which eventually prove successful, diversion in the form of a stay or the withdrawal of the charge will supervene; where mediation eventually proves unsuccessful, the offender will have to be prosecuted (if at all) under the original charge laid prior to the mediation. Where no charge was laid prior to the mediation, the offender will only be prosecuted under a new charge laid (if at all) after the mediation has proved unsuccessful.

(F) It appears axiomatic that all out-of-court proceedings should be conducted in private.

Hongrie
DÉJUDICIARISATION (DIVERSION) ET MÉDIATION

Ervin Cséka
Géza Katona
Tibor Király

A

I.

Le but de la sanction pénale, notamment d'être juste, adéquate, individualisée, et en sus appropriée à la resocialisation et à la prévention, peut et doit être réalisé, en matière des infractions graves, totalement dans le cadre du système de normes et de sanctions du droit pénal. Cependant, les problèmes de l'établissement de la responsabilité sont plus compliqués partout, dans le cadre des infractions moins graves. Une question contestée est la réglementation de la limite inférieure [initiale] de la responsabilité, respectivement de la sanction pénale, en théorie, comme en pratique.

Au cours d'une période donnée, l'état du développement des conditions sociales peut déterminer le système tel ou tel des modalités de la responsabilité pénale inhérente aux infractions moins graves. Si la situation de la criminalité d'une part, et les indices d'efficacité d'activité des organes de poursuite criminelle et de la justice d'autre part permettent — à une étendue large et avec une efficacité suffisante — l'emploi de sanctions d'ordre pénal et à la fois de caractère éducatif contre les auteurs d'infractions moins graves dans la procédure pénale elle-même ; il n'est pas absolument nécessaire d'établir un système, dans lequel la procédure est divertie, au-dessous d'un certain niveau d'importance de l'infraction, de la voie pénale, à une autre voie judiciaire ou sociale. D'autre part, si l'état de la criminalité, respectivement les expériences de la poursuite pénale et de la justice criminelle vérifient que — malgré une décriminalisation préalable éventuellement effectuée — les infractions moins graves mais se produisant à haute fréquence ne peuvent être reculées à une efficacité capable d'assurer la resocialisation aussi, il est opportun de compléter et de mettre à la disposition de la lutte plus efficace contre violations de droit les institutions de déjudiciarisation — par des dispositions additionnelles appropriées.

II.

Dans la législation et la pratique judiciaire de la République Populaire Hongroise, des expérimentations ont été faites à toutes les deux des solutions susmentionnées, respectivement à l'application combinée des deux solutions. C'est justement les expériences pratiques, et leurs leçons, qui ont amené à la stabilisation de la situation présente, ne connaissant les moyens de déjudiciarisation que dans une sphère très restreinte.

Au cours de la deuxième moitié des années cinquante et dans les années soixante,

dans la pratique de l'application du droit l'attention s'est dirigée aux problèmes du jugement des infractions moins graves. Dans cette période c'était une conception plutôt rigide et unifiante qui prévalait, et il n'y avait qu'une sorte d'infraction : le crime [délit]. Les sanctions relativement sévères fixées aux crimes rendaient difficile de différencier l'établissement de la responsabilité relative à des infractions moins graves. C'était la décriminalisation qui paraissait être une solution viable et qui signifiait avant tout l'élargissement de la sphère des violations des règles [contraventions]. Les nouvelles règles de loi ordonnaient de juger quelques formes de la perpétration plus légère de certaines infractions moins graves de crimes, plutôt que de violation de règle [contravention]. De tels cas étaient dans la sphère de délits contre la propriété : le vol, la fraude, le détournement moins graves, le vagabondage dangereux, prostitution, insulte contre l'agent de l'autorité, etc.

Les possibilités données par les dispositions de loi ont apporté un certain soulagement à la surcharge des organes d'application de droit, mais n'ont pas présenté une solution entière au problème. C'est pourquoi la réglementation introduite dans les années soixante a permis dans une sphère relativement plus étendue la déjudiciarisation dans les cas des comportements déviants réalisant un crime mais moins dangereux à la société. Ainsi, elle a permis de diriger ces cas au procédé disciplinaire ou aux tribunaux des camarades. Dans ces cas les comportements de caractère criminel d'ailleurs étaient jugés par les autorités disciplinaires de poste de travail de l'auteur, dans le cadre de son pouvoir disciplinaire, en appliquant des sanctions disciplinaires, respectivement par une cour constituée des membres de la collective du poste d'emploi au tribunal des camarades des sanctions de caractère "social". La méthode de divertir le cas à la voie disciplinaire était possible dans le cas d'un inculpé étant en rapport de travail avec un organe public ou une coopérative ou étant membre d'une coopérative, et ayant commis un délit contre la propriété sociale ou des personnes privées, ou des infractions de moindre danger à la société. [En général des infractions à être punies d'une réclusion de moins d'un an.] En vertu des dispositions de la loi une telle diversion n'a pu avoir lieu que dans le cas où selon le jugement des organes poursuivants ou judiciaires "un jugement disciplinaire suffisait". Effectivement il ne s'agissait pas d'une réglementation de caractère obligatoire, mais d'une réglementation qui dans les cas concrets a soumis la diversion ou l'omission de celle-ci au jugement du procureur ou du tribunal. Les mêmes conditions existaient concernant la diversion à un tribunal des camarades. La diversion n'était possible que dans les cas d'auteurs employés de la même entreprise, ou un tribunal des camarades fonctionnait, mais même dans le cas d'un tel délinquant, ce n'était qu'au sujet d'infractions moins graves contre la propriété sociale ou des biens d'individus: ravages, délits outrageant ou exposant au danger l'intégrité corporelle, usage illégal ou justice arbitraire, que le tribunal des camarades pouvait procéder. Ces infractions moins graves n'étaient menacées par la loi pénale qu'avec une réclusion de trois ans au maximum. Et même dans le cas de l'existence de ces conditions, le procureur ou le tribunal prenait sa décision relative à la diversion à la base d'une appréciation.

III.

En Hongrie au commencement les possibilités susmentionnées de la diversion de la voie pénale ont été appliquées dans la pratique avec plus ou moins de succès, mais dans la suite les expériences négatives se sont multipliées. D'une part, les procureurs et les

juges manquaient de la circonspection nécessaire dans le choix des cas à être déjudiciarisés, en déjudiciairisant souvent des cas plus importants et compliqués, et en omettant la déjudiciarisation dans les cas de moindre importance. D'autre part, les autorités disciplinaires et les tribunaux des camarades, partiellement à cause de l'insuffisance de leurs connaissances de la matière, partiellement à cause de leur aversion "de principe" de juger des cas d'infraction, n'étaient pas toujours à même de trouver les modalités justes de l'établissement de la responsabilité. C'est pourquoi dans la majorité des cas, ils cherchaient à s'en débarrasser en retournant beaucoup de tels cas aux organes judiciaires sous divers prétextes [ce qui était d'ailleurs permis par les dispositions de la loi].

Cependant la situation où certaines infractions sont jugées par des organes sociaux, c'est-à-dire en pratique par des corporations composées des collègues des délinquants, plutôt que par un tribunal pénal, n'a pas été acceptée même par les citoyens, par l'opinion publique. Celle-ci était difficilement accordable avec la conception enracinée dans la conscience juridique, concernant le caractère juridique des conflits appartenant à la sphère pénale. C'était le cas, bien que les sanctions applicables par voie disciplinaire ou par les tribunaux des camarades ne fussent relativement pas graves [réprimande, amende, déplacement à un champ d'activité inférieur, ou éventuellement le licenciement etc.]. A part des préoccupations de caractère social et de politique de droit, les expériences de telles actions et le jugement de l'opinion publique ont amené à l'opinion que le jugement des infractions moins graves par voie sociale et les sanctions qui y étaient appliquées n'étaient pas suffisamment efficaces, même du point de vue de la prévention. Elles n'ont pas atteint l'effet rétenteur des sanctions des peines de caractère éducatif et en même temps d'ordre pénal des sanctions appliquées dans les affaires similaires auparavant par les tribunaux pénaux; c'est-à-dire en pratique, l'effet social direct envisagé et attendu primordialement de l'institution de la déjudiciarisation ne s'est pas réalisé. Dans cette période de l'application des déjudiciarisations, même dans le monde des experts, la question s'est fait prévaloir de plus en plus de savoir si les raisons des résultats en pratique pas suffisamment positifs de la déjudiciarisation ne se trouvent pas dans des raisons autres, de caràctere social et de politique de droit plus lointains et finalement dans des préoccupations de légalité. Il fallait tirer certaines conséquences. L'une était la conviction fortement vive dans la conscience des citoyens sur la vocation "classique" de la justice d'Etat, suivant également des principes fondamentaux de la légalité, selon laquelle c'est uniquement les autorités de l'Etat qui ont la compétence de juger les conflits de caractère criminel parmi les citoyens. C'est exclusivement leur jugement qui a été reconnu rassurant par les parties impliquées directement dans le conflit, mais aussi par la société elle-même.

A part cela, des devoirs ultérieurs, et par conséquent de nouveaux problèmes se sont présentés au cours de l'administration des cas déjudiciarisés. Ainsi, la légalité de jugement des cas déjudiciarisés et divertis à la voie disciplinaire ou aux tribunaux des camarades, et comprenant les éléments de la violation du droit criminel, a été surveillée par les procureurs, ce qui était une solution pareille à la médiation connue dans certains pays. Mais par ce fait, — par la surveillance parallèle des cas administrés par la voie sociale et de la part de l'Etat — une double administration s'est produite, qui a été contraire à l'un des buts envisagés de la déjudiciarisation, notamment la simplification.

IV.

Telles suites de la pratique de déjudiciarisation ont amené à une époque postérieure à la conception juridique de devoir chercher d'autres moyens du jugement différencié des infractions de moindre importance. La diversion a soulevé, hors des résultats pratiques insuffisants déjà mentionnés, aussi des problèmes théoriques. Ainsi la question se posait de savoir quel est le caractère de la procédure de l'autorité disciplinaire ou du tribunal des camarades lors du jugement d'un comportement réalisant un crime ; si ces organes procèdent en compétence pénale ou en qualité remplaçant celle-ci, en considération de ce que l'action était originalement menacée d'une sanction pénale, tandis que la sanction appliquée est effectivement de caractère de droit de travail ou de caractère social. En fin de compte, la question est restée ouverte de savoir si dans les cas jugés de cette manière c'est la prétention pénale qui se fait prévaloir, ou une prétention appartenant à une autre branche du droit, et dans ce contexte quelle est la branche de droit à laquelle la responsabilité appartient, ou éventuellement s'il s'agit d'une responsabilité juridique à caractère mixte.

Une politique juridique prenant en considération les exigences de la pratique ne peut pas considérer ces préoccupations théoriques — qui, d'ailleurs, peuvent être dissipées de manière ou d'autre — comme prédominantes, quand même elles se sont présentées. On s'est demandé si l'énergie, les efforts scientifiques dédiés à l'élaboration de la conception théorique sont en proportion avec l'importance pratique du problème. C'est ainsi qu'on a procédé à la recherche des solutions plus viables, surtout à la différenciation ultérieure de la réglementation pénale elle-même, entre autres justement dans l'intérêt d'un jugement plus juste et plus approprié à la prévention, des infractions de moindre importance. C'est pourquoi au début des années soixante-dix notre système de normes pénales a passé à la dichotomie : à part les crimes graves, aussi les délits moins graves ont été considérés comme des infractions, et à part cela, la possibilité du jugement des contraventions a été perfectionnée, et dans le cas de quelques actions appartenant à la sphère des délits, la possibilité du jugement de contravention a été créée [décriminalisation complémentaire]. Ensuite, au cours des années soixante-dix, les dispositions de loi permettant la diversion du procédé pénal à la voie disciplinaire ou aux tribunaux des camarades ont été mises graduellement hors vigueur. Cette réglementation a eu lieu parallèlement à ce que le nouveau Code Pénal déjà en état de rédaction à l'époque et entré en vigueur le 1er juin 1979 [la Loi No. IV de l'année 1978] a considérablement élargi et différencié le système de sanctions du droit pénal.

L'ample différenciation du système de sanctions garantit le jugement juste des comportements moins graves et moins dangereux à la société, mais épuisant les caractéristiques d'un ensemble de faits criminels. Par conséquent, ce n'est que dans une mesure réduite que le maintien ultérieur de dispositions de loi, permettant de résoudre des conflits criminels avant le [ou au lieu du] jugement pénal, est justifié.

Parmi les peines prévues dans le Code Pénal, surtout parmi les peines secondaires, il y a de nombreuses sanctions de caractère éducatif ou d'effet social direct, qui ne sont pas accompagnées de peines privatives de liberté : travail de correction et d'éducation, amende, interdiction de l'exercise de la profession, retrait du permis de conduire, confiscation des biens. En outre une promotion plus efficace de la retention individuelle est assurée par le fait qu'en cas de l'existence de certaines conditions légales, la majorité des peines secondaires peuvent être infligées indépendamment, sans l'application de

peine principale. En même temps, on a élargi considérablement la sphère des soi-disant mesures pénales, manquant pratiquement des caractéristiques traditionnelles de la sanction pénale et étant d'une importance sociale directe; comme par exemple: la réprimande, la mise à l'épreuve, dans le cas de délinquants malades mentaux le traitement médical forcé, le traitement forcé de délinquants alcooliques, la surveillance protective.

Les sanctions applicables aux auteurs d'infractions moins graves dans une sphère appropriée à une différenciation ont résolu la plupart des problèmes de la pratique et rendu possible d'éliminer en majorité des dispositions de loi permettant auparavant la diversion. L'emploi des sanctions de moindre importance et de caractère social — ainsi que l'élimination de la rigueur existant dans les sanctions pénales traditionnelles et des conséquences préjudiciables — est possible dans le cadre de la procédure criminelle elle-même. Simultanément, les auteurs des infractions moins graves, mais contraires à la loi pénale ne doivent pas nécessairement subir le préjudice de la stigmatisation sociale. Notamment, l'infliction de mesures éducatives prévues dans le Code Pénal n'implique aucune conséquence légale; une telle personne ne peut pas être considérée comme un homme au casier judiciaire chargé.

V.

En vertu du Code Pénal hongrois en vigueur, dans le cas d'une infraction moins grave et d'un danger réduit d'auteur et d'action à la société, c'est surtout la réprimande qui peut être appliquée à large étendue: la réprimande sans aucune sorte de limitation légale et sans aucune condition particulière. La réprimande, comme mesure administrative de caractère éducatif signifie la condamnation morale de l'auteur de l'infraction, sans aucun préjudice légal. Son but est de conduire le délinquant au mode de vie respectueux de la loi. Le contenu de la réprimande est d'une part la réprobation, c'est-à-dire l'expression du fait que l'action du délinquant est préjudiciable, pour laquelle il est tenu de se sentir responsable personnellement, d'autre part un appel au délinquant de s'abstenir dans l'avenir de commettre une infraction. La réprimande est appliquée par le tribunal en résultat d'une audience, mais dans l'intérêt de l'efficacité de la procédure criminelle, la loi pénale en permet une application de la part des autorités chargées de l'enquête et du procureur.

Un moyen particulier du droit pénal est la mise à l'épreuve: le tribunal peut ajourner l'infliction de la peine pour une période d'épreuve dans le cas d'une infraction menacée d'une peine pas plus grave qu'une réclusion de deux ans, si on suppose à raison que ça suffit en soi-même pour réaliser le but de la punition. La période d'épreuve peut s'étendre à trois ans, et dans le cas où le délinquant s'abstient de violer les règles de comportement préscrites pour la durée de la période d'épreuve, et ne commet aucun nouveau délit, sa punissabilité cesse à l'expiration de la période d'épreuve. Contre une personne se trouvant dans l'état de maladie mentale au moment de la perpétration de l'infraction il n'y a pas lieu d'application de peine, mais contre un tel auteur — dans le cas de l'existence de certaines conditions — un traitement par contrainte peut être ordonné. La condition est qu'il soit question d'une infraction violente commise contre des personnes ou dangereuse au public et qu'il y ait un pronostic selon lequel le malade mental va commettre des actions pareilles à l'avenir; finalement une autre condition est telle que la personne en question, dans le cas où elle serait punissable, serait punie d'une peine excédant celle d'une réclusion d'une année. Les conditions du traitement par contrainte comprennent

donc, à part la constatation de la maladie mentale, une position prise à la base d'une évaluation des circonstances susmentionnées.

Le tribunal peut ordonner un traitement par contrainte, si l'infraction commise par le délinquant est en connexion avec sa manière de vivre influencée par l'alcoolisme. Le traitement par contrainte peut être appliqué conjointement avec une peine privative de liberté excédant les six mois et exécutable en tant que mesure complémentaire ; ou bien en tant que mesure indépendante, en remplacement d'une peine privative de liberté n'excédant pas les six mois, ou une peine moins grave que celle-ci. Cette mesure signifie une thérapie de travail dans un établissement approprié et le traitement médical ne peut pas excéder les deux ans.

La surveillance protective est une punition de caractère primordialement social, signifiant que l'auteur d'infraction condamné à un certain type de peine — réclusion suspendue, liberté conditionnelle etc. — est obligé aussi de respecter quelques règles de comportement, en même temps qu'il est en contact régulier avec un protecteur, qui contrôle son comportement. D'autres moyens de grande importance du jugement des infractions moins graves sont le travail correctif-éducatif et l'amende. La personne condamnée au travail correctif-éducatif n'est pas limitée dans sa liberté personnelle, mais est obligé de faire un travail qui lui est prescrit à son lieu de travail, et une part de son salaire [de 5 à 30 pour cent] sera déduite au bénéfice de l'Etat. La durée maximum du travail correctif-éducatif est de deux ans.

Par rapport à l'amende, comme peine principale, un système particulier de son application prévaut dans le nouveau Code Pénal, notamment le système des soi-disant taux journaliers, connu déjà dans d'autres systèmes juridiques. Le tribunal établit le nombre des taux journaliers par rapport à l'importance de l'infraction, [dans le cadre de 10 à 180 taux journaliers, et mesure le montant correspondant à un taux journalier selon le revenu de l'inculpé] dans les limites de 50 à 1000 Forint. L'amende s'établit par la multiplication de ces deux facteurs. Ce système d'infliction d'amende s'est bien avéré dans la pratique juridique domestique, il est largement applicable à la réalisation des exigences de l'individualisation et de la différenciation.

VI.

Le droit hongrois en vigueur ne connaît que dans un nombre limité les moyens de la solution des conflits de caractère criminel [réalisant une infraction] avant le [ou au lieu du] jugement judiciaire. Ces moyens peuvent être interprétés comme des variantes particulières de la déjudiciarisation. Comme exemple, les suivants peuvent être mentionnés :

a. Dans les affaires de soi-disant accusation privée [des affaires de moindre importance où l'accusation est représentée non pas par le procureur mais par la victime en tant qu'accusateur privé], le tribunal convoque le dénonciateur et le dénoncé à un interrogatoire personnel avant l'audience et essaie de les réconcilier. Le succès de la réconciliation est considéré comme révocation de la dénonciation, et dans ce cas-ci le tribunal cesse la procédure. Dans un tel cas le litige entre les parties se règle donc sans un jugement.

b. La réprimande, comme mesure pénale ne signifiant que la désapprobation morale sans conséquences légales, peut être appliquée déjà par l'autorité chargée de l'enquête ou le procureur aux auteurs d'infractions moins graves et moins dangereuses à la société.

Ainsi ces cas s'arrangent aussi en cours de l'enquête sans procéder à une instance judiciaire et un jugement.

c. Si l'infraction est commise par un malade mental [une infraction de violence ou de danger public] et s'il est à craindre que de la part de l'auteur une action similaire ne soit commise dans l'avenir aussi, le tribunal pourra appliquer le traitement médical par contrainte, dans le cas où il s'agit d'une infraction de telle importance, que l'auteur, dans le cas de sa punissabilité, pourrait être puni par une peine plus grave que celle d'un an de réclusion, Mais souvent c'est déjà au cours de l'enquête qu'on peut prévoir la criminalité future, respectivement la probabilité d'infliction d'une peine excédant la réclusion d'une année. Si ces conditions dernières manquent, le procureur doit arrêter l'enquête, c'est-à-dire dans un tel cas aussi, l'affaire d'auteur malade mental s'arrange sans jugement de tribunal.

d. Si les conditions légales du traitement par contrainte applicable contre l'auteur malade mental ou alcoolique manquent, l'autorité s'adresse à l'hôpital de malades mentaux ou à l'autorité sanitaire compétente en demandant le traitement ou le soin du délinquant. Dans ce cas aussi la procédure criminelle finit sans jugement judiciaire et sans application d'une sanction pénale, et d'autres mesures [mesures sanitaires] seront appliquées contre le délinquant ayant commis une action autrement épuisant les caractéristiques de l'infraction. Dans ce cas-ci la base du procédé ultérieur [sanitaire] est la disposition [signalisation] de l'autorité agissant dans l'affaire criminelle.

e. Il n'y a pas d'inculpation dans le cas prévalant dans un cercle limité du principe de l'opportunité. Selon ce principe, si le délinquant est inculpé à côté d'une infraction grave aussi d'une infraction minime d'importance, l'autorité [le tribunal] peut omettre, sous certaines conditions, la poursuite concernant cette dernière.

f. En vertu du droit pénal hongrois en vigueur, les personnes au-dessous de 14 ans [enfants], ne sont pas punissables à cause de comportement réalisant une infraction, une procédure criminelle ne peut être entamée contre elles, ce sont exclusivement des mesures de protection et de prévention de caractère social qui pourront avoir lieu.

VII.

Le Code Pénal hongrois actuellement en vigueur, la loi IV de l'année 1978, ainsi que la loi I de l'année 1973, modifiée en 1979 sur la procédure pénale ne connaît donc la possibilité de la déjudiciarisation, c'est-à-dire celle de permettre aux organes sociaux de juger des comportements criminels, que dans une mesure limitée. L'exigence d'un jugement juste, differencié et à la fois efficace des infractions moins graves est suffisamment réalisable dans le cadre de la réglementation du droit pénal et de procédure pénale, en considération du système dichotomique, voire, dans un certain sens même trichotomique de notre droit pénal.

Les infractions sont les crimes et les délits, mais il y a un nombre considérable de soi-disant violations des règles, réalisant les caractéristiques essentielles de l'infraction et réglées dans une loi séparée [dans certains systèmes elles s'appellent contraventions]. Ainsi, dans le cas de moindre importance objective, de valeur inférieure, ou de dommage inférieur, les actions suivantes sont considérées non pas comme infraction, mais comme violation de règle [contravention] : spéculation, agiotage, mise en danger de l'approvisionnement public, violation de l'économie de devises, fraude d'impôts, abus de régie, contrebande, recel de douane, vol, détournement, appropriation illégale, recel, fraude,

détérioration, indélicatesse, abus à l'arme à feu, vagabondage dangereux, prostitution, ravages, violation de domicile, diffamation.

La situation présente du droit reflète exactement l'article relatif de la Constitution hongroise, selon laquelle dans les affaires criminelles la juridiction est exercée par les tribunaux [en collaboration avec les autorités d'enquête et les procureurs]. Une déviation de ce principe de base ne semble justifiée dans les cas des infractions soi-disant moins graves non plus. Mais cette situation correspond églament aux dispositions du Pacte International des Droits Civiques et Politiques [en particulier avec articles 9 et 14] adopté le 16 décembre 1966 par la session XXI de l'Assemblée Générale des Nations Unies, promulgué en Hongrie par le décret-loi No. 8 de l'année 1976. Cette réglementation juridique est appuyée aussi par des motifs de garantie. Pour le jugement de comportements réalisant une infraction, le procédé des tribunaux n'est nullement moins rassurant que celui de quelque employé d'administration ou de quelque organe social. Et finalement la présente réglementation est en concordance avec le principe de l'officialité prévalant dans la juridiction pénale hongroise. Dans l'esprit de ce principe, en cas d'infraction les autorités compétentes de l'Etat sont obligées d'entamer la procédure en cas de l'existence des conditions légales.

La majorité des institutions de déjudiciarisation est devenue éliminable surtout par le fait que dans le système pénal hongrois, au cours des récentes années, la dépénalisation-décriminalisation s'est largement réalisée, d'autre part l'élargissement et la différenciation considérable de la sphère des sanctions pénales a assuré les conditions d'un jugement juste des infractions moins graves. Les mesures et programmes de contenu social, moral et éducatif — servant primordialement la resocialisation — appliquables dans un arrangement extraprocessuel [influence sociale directe à l'inculpé, sanctions de caractère matériel et de droit de travail, surveillance du comportement, assistance à la solution du conflit etc.] sont réalisables pratiquement aussi dans le cadre de la procédure criminelle. En plus, selon les expériences, les résultats obtenus par la procédure criminelle sont meilleurs, des points de vue précités, que ceux obtenus dans les cas déjudiciarisés. Ainsi par exemple, les bases de la restitution [le dédommagement] sont établies de manière rassurante dans la procédure criminelle, et ensuite la réalisation en aura lieu au cours d'une autre procédure, éventuellement non criminelle.

Une socialisation exagérée et éventuellement précipitée dans la juridiction pénale peut s'avérer inopportune, non seulement par rapport au jugement des infractions graves, mais aussi dans le cas des infractions moins graves. En effet, l'avantage de soulager la surcharge des tribunaux s'équilibre par le désavantage de l'accroissement de la charge des autres organes.

Les sanctions moins graves appliquées dans la procédure criminelle [peines et mesures de caractère éducatif] ne stigmatisent la personne impliquée d'antédédents judiciaires que pour une durée courte ou pas du tout. D'autre part la circonstance de l'application de ces sanctions de la part des organes judiciaires plutôt que de celles des organes sociaux, ne les prive nullement de leur caractère éducatif et de leur contenu social. En même temps les sanctions pénales de caractère éducatif sont considérées plus graves et simultanément plus efficaces par les citoyens, par l'opinion publique, et même par le délinquant lui-même, que les mesures et programmes applicables par les organes sociaux.

La méthode de la réalisation de la différenciation non en dehors de la procédure criminelle, mais dans le cadre de celle-ci assure mieux la légalité, et en même temps rend superflu le procédé double et le contrôle des affaires d'infractions moins graves : on peut

éviter les activités parallèles des organes judiciaires et sociaux. Et finalement dans la présente condition juridique aussi les problèmes théoriques perdent leur actualité, ces efforts tendant à expliquer si dans le cas d'une infraction la société, respectivement les citoyens ou un groupe de ceux-ci, est autorisée — et dans le cas affirmatif, de quelle manière — à faire valoir des prétentions de ce caractère, et conformément à appliquer des sanctions pénales ou autres sanctions remplaçant celles-ci.

B: REPONSES

aux questions rédigées dans les suggestions pour les rapports nationaux:

1. Pratique de la Déjudiciarisation

a. Dans la République Populaire Hongroise un nombre insignifiant d'infractions est absorbé par la société sous forme d'arrangement direct.

b. Comme indiqué dans la partie A du présent rapport, dans la République Populaire Hongroise c'est le principe de la légalité qui est fondamentalement adopté dans la poursuite criminelle et le principe de l'opportunité ne prévaut que dans une sphère très limitée.

c. La déjudiciarisation couverte est inconnue.

d. Comme indiqué au préalable, le jugement du comportement criminel peut avoir lieu dans la phase de la procédure criminelle précédant la sentence judiciaire, lorsque:

—le procureur cesse la procédure en infligeant à l'inculpé une réprimande exprimant la désapprobation morale;

—le procureur cesse la procédure contre l'inculpé malade mental, vu que l'action commise ne justifie pas une peine privative de liberté excédant un an, ou parce que la perpétration d'une infraction similaire dans l'avenir n'est pas prévisible;

—dans le cas d'accusation privée les parties se concilient au cours de la phase préparative de la procédure judiciaire et le tribunal cesse la procédure;

—les conditions légales nécessaires au traitement médical par contrainte du malade mental ou au traitement par contrainte de l'alcoolique ne sont pas présentes dans la procédure criminelle, c'est pourquoi l'autorité pénale s'adresse à l'établissement psychiatrique ou à l'autorité sanitaire compétente en demandant le traitement et les soins de la personne en question.

e. La déjudiciarisation avec médiation est inconnue.

f. Le tribunal des camarades ou cour communautaire [d'usine] ne peut pas juger des conflits criminels, seulement des autres manifestations illégales ou antisociales mais de moindre importance.

g. La resocialisation à travers le travail n'est pas applicable sans la décision du tribunal.

h. Dans les cas d'arrangement avant la sentence judiciaire [point d.] la discrétion y est, la procédure n'est pas publique.

i. Dans les cas indiqués sous point d., étant donné que les mesures finissant la procédure sont prises par des autorités autres que les tribunaux, la vigueur légale ne

se présente pas et en cas de nécessité une reprise de la poursuite pénale peut avoir lieu.

j. La déjudiciarisation, étant appliquée dans la République Populaire Hongroise dans un nombre relativement limité de cas, sert à la simplification et à l'accélération de la procédure.

k. La déjudiciarisation est basée en essence sur des considérations pratiques et non philosophiques.

2. Evaluation de la Déjudiciarisation

a. La déjudiciarisation, permise actuellement dans une sphère restreinte, est généralement évaluée favorablement.

b. Dans certains cas la déjudiciarisation n'est pas assez efficace du point de vue de la prévention et de la retenue.

c. Après la diversion effectuée dans la phase de l'enquête [par le procureur] l'efficacité de la déjudiciarisation est contrôlable par les moyens de la surveillance générale de la légalité pratiquée par le Parquet.

d. Les raisons pour lesquelles les dispositions de la loi ne permettent que dans une mesure limitée la déjudiciarisation, se trouvent surtout dans des considérations constitutionnelles et de garantie, mais sont aussi appuyées par les points de vue pratiques de la prévention et de l'efficacité.

e. L'étendue actuelle de la déjudiciarisation et les possibilités légales de celle-ci sont généralement appropriées selon le jugement de la théorie et de la pratique.

f. La déjudiciarisation pourra se maintenir dans l'avenir en tant que mesure de correction de la justice pénale de l'Etat, par des raisons de simplification et des préoccupations utilitaires.

Philippines
DIVERSION AND MEDIATION

Sixto A. Domondon

I. Introduction

Members of the legal profession, eminent mentors in law, distinguished guests, ladies and gentlemen:

Let me extend to the organizers of the Colloquium the sincere greetings of your counterparts in the Philippines. I have also been asked to convey their grave interest in the subjects we are all set to talk about, recognizing that the problems involved are not only peculiar to one nation but to all member nations of the AIDP.

On my own, may I also thank the organizers in general, and Prof. Kuniji Shibahara in particular, for singling me among my peers to represent my country in this momentous event. Prof. Shibahara spared no effort to bring me here today. Sir, I'm eternally grateful to you.

The panel which drew up the rules for the Colloquium has made it beyond our power to digress from the subject of 'Diversion and Mediation' which will form Question No. III in the forthcoming XIII International Congress of the AIDP. In the following discussion and report, therefore, I must stick as closely as possible to Sec. IV of the Guideline requiring "Suggestions for national reports on the practice of and arguments for diversion in our own countries, within the limited definition of 'deviation' contained in said guideline, which is: any deviation from the ordinary criminal process, before any adjudication of guilt by a court, which results in the suspect's participation in some form of non-penal program where the purpose is not to punish a transgressor, but to rehabilitate him or to resolve the underlying conflict from which the crime itself resulted."

It must be stated at the outset that judging from the programs of our government and the efforts of the Integrated Bar, the Philippines acknowledges the necessity of devising ways on "Diversion and Mediation" as we understand it in this Hall. The incidence of crime in a population that has risen upwards to 42 million from some 27 million after the war, and the inability of the judicial processes to declog our criminal dockets have made us accept the necessity of our participation on this venture.

And so under the Martial Law regime in our country, an innovation of paramount significance in dispensing justice speedily and with the end in view of preserving peace and security among distinct communities or groups of families has become a major concern. This is the introduction of the Barangay System of government in every barrio or district in the various cities and municipalities country-wide. The word "Barangay" is the term applied to a group of families—usually from a tribe, grouped together for their own welfare and protection with a chieftain called a Sultan or Datu at the head. The "Barangay" is therefore some sort of a political unit or cell in the national framework, invested with some functions to help in the national effort for prosperity, for security or for dispensation of justice. In the law creating these political units a Barangay Court is born.

For want of a better name, or just because it assumes what were once the functions of a regular court, this adjudication agency is named a court. And obviously the appellation "Barangay" is given to it because the basic agent who is called upon to initiate the move or who sets the system in motion is no less than the Barangay Chairman himself. Thus, firstly he is called upon to organize at once a group of responsible members of his unit from which a final group of 3 may be drawn to conduct reconciliation, negotiation and arbitration of various conflicts in the unit or barangay. After appointing the standing body of from 5 to 20 persons (called the Lupon members), he:

No. 1. Swears them into office;

No. 2. Posts their names so that the constituents may have opportunity to object to any of his appointees on grounds of lack of integrity, partiality, no independence of mind and lack of fairness and reputation for probity due to age, social standing, educational attainment and other relevant objections.

No. 3. Makes replacements for these who must be stricken from his list for reasons above-mentioned;

No. 4. Receives all written complaints and notes all verbal ones made personally before him. (He does not have the power, however, to receive complaints by or against corporation, partnerships or other judicial entities.)

No. 5. Immediately, upon such receipt, he should issue summons to the respondent, giving complainant notice to appear before him not later than the second working day from date of summons.

To exact compliance of his summons or notice he may apply with the City or Municipal trial court for punishment of recalcitrant party or witness as for indirect contempt of court, and said court is empowered to exact a fine not exceeding p. 100.00 or imprisonment of not more than one month, or both.

No. 6. He is empowered to administer oaths in connection with any matter relating to all disputes brought before him for settlement.

No. 7. Resolves all objections on venue raised during the mediation proceedings and

No. 8. Mediates all disputes within his jurisdiction or arbitrates them upon written agreement of the parties.

Upon successful conclusion of his mediation efforts, or upon agreement of the parties to the disputes which they should embody in writing, the Barangay Captain then reduces to writing in a language or dialect known to the parties the terms or conditions of the settlement, has them sign the same, before adding his attestation to the due execution thereof. On the sixth, but not later than the fifteenth day following the date of arbitration or agreement, he shall certify the results in writing in a language understood by both parties.

Should the Barangay Captain fail to make the parties agree, he shall set a date for the parties to select 3 members (called the Pangkat or arbitrators) from the standing group of 5 to 20 persons previously chosen by the Barangay Chairman. This group of 3, then, sets the date and time for the initial hearing which shall not be later than 3 days from their constitution.

In its actual operation, this group of 3 arbiters or mediators shall choose a chairman who:

No. 1. Shall preside at all hearings conducted by the group;

No. 2. Issues summons for the appearance of the parties before it, with the similar power to apply to the local court to coerce, if not punish recalcitrant parties or witnesses with indirect contempt;

No. 3. Attests to the authenticity and due execution of settlement reached by the parties;

No. 4. Conducts arbitration proceedings where it has failed to negotiate or make the parties voluntarily agree; and

No. 5. Certifies, in case of final failure, the case to a proper court of law as for court action.

All the proceedings before the Barangay Chairman and the panel of three arbiters are recorded by a duly appointed secretary. This secretary keeps all the minutes of all proceedings in writing and issues certifications that any case where the panel has failed to arbitrate may be dealt with in court.

Now, all disputes may be the subject of the foregoing proceedings for amicable settlement where the act committed is, under the law on crimes, punishable by imprisonment not exceeding 30 days or a fine not exceeding p. 200.00. In the Penal Code, such crimes are called light felonies, such as slight physical injuries which do not require medical attendance for over 9 days, slight slander, light threats, unjust vexation, littering, gambling, jaywalking, public scandal, vagrancy and prostitution, and such other classes of disputes which the Prime Minister, upon the recommendation of the Minister of Justice and/or the Minister of Local Government, may determine as proper subjects of mediation or arbitration.

On venue, the place of settlement is subject to the following rules:

> Sec. 3. Venue.—The place of settlement shall be subject to the following rules:
>
> (a) Where the parties reside in the same barangay, the dispute shall be brought for settlement in said barangay;
>
> (b) Where the parties reside in different barangays in the same city or municipality, the dispute shall be settled in the barangay where the respondent or any one of the respondents actually resides, at the choice of the complainant;
>
> (c) Dispute involving real property shall be brought for settlement in the barangay where the real property or any part thereof is situated;
>
> (d) Any objection relating to venue shall be raised before the Barangay Captain during the mediation proceedings before him. Failure to do so shall be deemed waiver of such objection; and
>
> (e) Any legal question relating to venue may be raised to the Minister of Justice whose ruling thereof shall be binding upon the parties involved. The proceedings shall nevertheless continue pending resolution of such question.
>
> Commencement—Proceedings for settlement shall be commenced by verbal or written complaint to the Barangay Captain on any matter not excepted under section 2 and subject to the Rules on Venue provided in the preceding section.
>
> Answer—The respondent shall answer the complaint orally or in writing, by denying specifically the material averments of the complaint and/or alleging any lawful defense. He may also interpose a counterclaim against the complainant, a cross-claim against a co-respondent, or a third-party complaint against one not yet a party to the proceedings.
>
> Personal appearance—In all proceedings for amicable settlement, the

parties must appear in person without the assistance of council or the intervention of any one. Minors and incompetents, however, may be assisted by their next of kin who is not a lawyer.

Failure to appear—The complaint may be dismissed when complainant, after due notice, willfully fails or refuses to appear on the date set for mediation, conciliation or arbitration. Such dismissal, as certified to by the Lupon or Pangkat Secretary as the case may be, shall bar the complainant from seeking judicial recourse for the same cause of action as that dismissed.

Upon a similar failure of the respondent to appear, any counterclaim he has made that arises from or is necessarily connected with complainant's action, may be dismissed. Such dismissal, as certified by the Lupon or Pangkat Secretary, as the case may be, shall bar the respondent from filing such counterclaim in court, and it shall likewise be a sufficient basis for the issuance of a certification for filing complainant's cause of action in court or with the proper government agency or office.

In addition, such willful failure or refusal to appear may subject the recalcitrant party or witness to punishment as for contempt of court, i.e. by a fine not exceeding one hundred pesos or imprisonment of not more than one month or both.

Hearings

(a) The Barangay Captain and the Pangkat shall proceed to hear the matter in dispute in an informal but orderly manner, without regard to technical rules of evidence, and as is best calculated to effect a fair settlement of the dispute and bring about a harmonious relationship of the parties.

(b) Proceedings before the Barangay Captain shall be recorded by the Lupon Secretary while those before the Pangkat shall be noted by the Pangkat Secretary. The record shall note the date and time of hearing, appearance of parties, names of witnesses and substance of their testimonies, objections and resolutions, and such other matters as will be helpful to a full understanding of the case.

(c) All proceedings for settlement shall be open to the general public except that the Barangay Captain or the Pangkat, as the case may be, at the request of a party or upon his or its own initiative, may exclude the public in the interest of privacy, decency or public morals.

(d) Admissions made in the course of any proceedings for settlement may be admissible for any purpose in any other proceedings.

Agreement for arbitration—The parties may, at any stage of the proceedings, agree in writing to have the matter in dispute decided by arbitration by either the Barangay Captain or the Pangkat. In such a case, arbitrational hearing shall follow the formal order of adjudicative trials.

Time limits

(a) The Barangay Captain shall exert all efforts to conciliate the parties within fifteen days from their initial confrontation before him. Failing

in this effort, he shall set a date for the constitution of the Pangkat in accordance with Rule V hereof.

(b) The Pangkat shall convene to conciliate the parties on the date, time and place set by the Barangay Captain but not later than three days, and make all efforts to conciliate the parties within fifteen days from their initial confrontation, extendible in its discretion for another period not to exceed fifteen more days, except in clearly meritorious cases.

(c) Where the parties have agreed to arbitrate, the Barangay Captain or Pangkat, as the case may be, shall after hearing make the award not earlier than the sixth day but not later than the fifteenth day following the date of such agreement.

Form of settlement—All settlements whether by mediation, conciliation or arbitration shall be in writing, in a language or dialect known to the parties. Settlements by mediation or conciliation shall be signed by the parties and attested by the Barangay Captain or Pangkat Chairman, as the case may be, that such settlement was agreed upon by the parties freely and voluntarily, after a full understanding of its terms and an intelligent awareness of the legal consequences thereof.

The arbitration award shall be signed by the Barangay Captain or all the members of the Pangkat, as the case may be.

Repudiation—Any aggrieved party to an agreement for arbitration may, within five days from date thereof, repudiate the same by filing with the Barangay Captain or the Pangkat, as the case may be, a statement sworn to before either of them repudiating the agreement on the ground that his consent thereto was obtained and vitiated by fraud, violence or intimidation.

Similarly, a settlement by conciliation or mediation may be repudiated by an aggrieved party for the same grounds, within ten days from date of such settlement.

Failure to repudiate the settlement or the arbitration agreement within the time limits respectively set, shall be deemed a waiver of the right to challenge on said grounds.

Effect of settlement by arbitration or conciliation—The amicable settlement and arbitration award shall have the force and effect to a final judgment of a court upon the expiration of ten days from date thereof unless repudiation of the settlement has been made or a petition for nullification of the award has been filed before the proper city or municipal court.

Transmittal of settlement and award to court—Immediately upon signing, the Barangay Captain or the Pangkat Chairman, as the case may be, shall furnish copies of the settlement or award to the parties and send such settlement or award to the Lupon Secretary who shall transmit the same to the local or municipal court within five days from date of the award or, in the case of settlement, from the eleventh to the fifteenth day from date of settlement.

Execution—The amicable settlement or arbitration award may be enforced by execution issued by the local city or municipal court within one

year from date of settlement in accordance with the preceding paragraph, and thereafter, the same may be enforced by action in the appropriate city or municipal court.

United States of America
DIVERSION AND MEDIATION

B. J. George, Jr.

I. Introduction

Screening, diversion and informal resolution of criminal matters in the United States are not formalized by law, and experimental programs have been sporadic and at the local level. That this is so is an inevitable product of the federal system of government under the United States Constitution, in which the central government has only specialized functions in criminal law administration, and the states are the governmental entities bearing principal responsibility to define crimes, investigate and prosecute them, and punish offenders. It also should be noted that compilation of comprehensive criminal justice statistics is not mandated by federal law, and those which are in fact collected and compiled are completely inadequate to depict the actuality of screening, diversion and informal criminal dispute resolution in the United States.

II. Exercise of Discretion by Police and Prosecutors

A. Police Discretion

Reports of crime come to the attention of local police employed by municipal police departments or county sheriff's offices. State police powers are limited either to highway traffic and safety enforcement outside municipal boundaries or to policing services in local areas. Federal law enforcement agencies are specialized organizations responsible for enforcement of special federal legislation or provision of police services on restricted federal enclaves within the exclusive control of the federal government. For purposes of this report, therefore, attention must be directed at local police authorities, rather than those at the state and federal level.

Traditional American arrest law assumes that police who encounter criminals, no matter what the gravity of their offenses, must arrest them and produce them in court. In fact, however, police have always had discretion to overlook crimes and to refrain from arrest, production in court and formal charging. For example, police very frequently, perhaps too frequently, refuse to arrest in family disputes, even those in which one spouse has seriously assaulted the other. Indeed, metropolitan police departments today usually provide training in crisis intervention so that police officers know how to conduct themselves when confronting family members in crisis and conflict. This embodies a functional recognition that arrest and prosecution may be the least effective modes of official intervention in such circumstances. There is also official awareness, based on generations of experience, that spouses seldom are eager to cooperate with authorities in pursuing a criminal prosecution which will render the offending spouse a convicted

criminal, whose threatened imprisonment will impair or destroy family unity, nurture of children and family earnings or whose payment of fine and costs will irreparably deplete family financial resources.

Even modern statutory codifications, though, do not reflect this tradition of nonprosecution, actively practiced today, except sometimes in traffic and automotive safety legislation which recognizes that officers who stop erring drivers may reprimand them and let them go, issue a traffic ticket or citation or, if the offense is particularly serious or a driver cannot produce satisfactory identification showing residence in the state, make a full custodial arrest.[1] That exception aside, one may assume that traditions of police arrest and charging discretion will continue, but without formal legislative recognition.

If one seeks a reason for this legislative unwillingness to acknowledge a substantial practical problem of law enforcement, it probably lies in the fact that legislative confirmation of police discretion would necessitate that standards to guide its exercise be provided, which in turn would require external monitoring. That monitoring, granted American traditions, inevitably would be exercised by the courts, which already are excessively overloaded. Hence, economical use of scarce judicial resources militates against formal review of police discretion.

The most authoritative recommendations to date concerning screening of criminal cases are found in the 1973 report of the United States Department of Justice's National Advisory Commission on Criminal Justice Standards and Goals.[2] The term "screening", as used in the *NAC Courts Report*,[3] was directed principally at prosecutorial decisions to stop, before trial or plea, formal criminal proceedings against persons officially charged as defendants. Nevertheless, the report recognized that police authorities, in consultation with prosecuting officials, should develop guidelines, analogous to those discussed below relating to exercise of prosecutorial screening discretion,[4] governing exercise of police discretion to take persons into custody or release them immediately.[5] The Courts Task Force, though, preferred the policy of vesting primary discretion in prosecuting authorities, rather than police, to designate criminal cases which will proceed into and through the court system.

Obviously, however, that approach has no impact on police who decide not to arrest or to file complaints in court. One may assume that putative defendants do not object when the police determine not to carry a case forward, for they stand to lose much more if they become criminal defendants than they possibly can if they are merely subjects of police investigation. Instead, unhappiness will be evidenced by victims and relatives of victims who believe offenders should be prosecuted. Rarely is there any channel or procedure through which they can express their dissatisfaction with a police decision not to charge. Even where police departments have established citizen complaint bureaus,[6] their jurisdiction extends only to police misconduct infringing the constitutional and legal rights of citizens and inflicting harm upon them. They are not constructed to accommodate victim and citizen objections to police inaction.

B. Prosecutor Discretion

Early in its national history, states in the United States as well as the federal jurisdiction rejected the English tradition of private prosecutions (criminal prosecutions begun in the name of the Crown by aggrieved subjects) and vested all authority and control over prosecution decisions in a county prosecuting or district attorney, usually selected

through popular election.[7] That functionary determines whether complaints should be filed in court and proceeded with.[8] Even in a handful of states preserving an option for citizens to file an initial criminal complaint if they post security for costs,[9] a prosecuting attorney thereafter can refuse to carry the case forward. Although institution of a parallel system of private prosecutions has occasionally been advocated as a means to control abuse of prosecutorial powers,[10] there is no practical likelihood that this will occur in the foreseeable future.

Prosecutors can be removed from office for chronic nonfeasance or misfeasance in office, but not on the basis of a refusal to institute or approve prosecution in specific cases.[11] They may be disqualified from proceeding in cases concerning which they may be biased, usually in a defendant's favor, or involved in an evident conflict of interest.[12] Similar grounds for disqualification apply in unusual instances in which a regular prosecutor has been superseded or disqualified and a special attorney is appointed from another governmental agency[13] or the private bar.[14]

An abuse of prosecutorial discretion based on constitutionally impermissible factors like race, nationality or ethnic origin can bring about dismissal of charges,[15] and the United States Supreme Court has recognized at least in principle that certain egregious forms of abuse of prosecutorial discretion might deny due process of law under the fifth and fourteenth amendments to the United States Constitution.[16] However, only those who are prosecuted have any redress under these emerging doctrines. Victims or their relatives who are disappointed by a prosecutor's refusal to commence criminal proceedings, for example, against assailants of the same racial or ethnic group, cannot precipitate a judicial intervention to overturn that refusal.[17]

Consequently, as in the setting of police screening, attention has been devoted chiefly to administrative guidelines governing the exercise of prosecutorial charging discretion. It has been strongly recommended,[18] and the recommendation occasionally has been legislated,[19] that police discretion to file criminal charges be eliminated, and that the chief prosecuting official of the jurisdiction approve all police requests that criminal proceedings be commenced. A decision to prosecute ought not be subject to judicial review, according to the *NAC Courts Report*; neither should a failure to follow guidelines or screening criteria be available to a defendant as a ground to attack a criminal pleading or conviction.[20] However, the report recommended that prosecutorial decisions to screen putative defendants out of the criminal process should be subject to judicial review, at the request of either the police or private complainants, to determine whether the decision to abandon prosecution amounted to an abuse of prosecutorial discretion.[21] If it was, the court should be empowered to order the prosecuting or district attorney to commence formal proceedings. That recommendation, however, has not been enthusiastically greeted by state legislatures concerned, no doubt, about the expense and additional docket crowding which such a remedy for investigating officers and complainants probably would generate.

As noted, prosecution should not be instituted unless the prosecutor is persuaded from the available evidence that there is a reasonable likelihood a potential defendant can be convicted and the conviction sustained on appeal.[22] Even if there is evidence enough to support a conviction, however, an accused person should be screened out of the system if the prosecutor personally entertains a reasonable doubt that the accused actually is guilty of any offense charged.[23] Other factors recommended for consideration in deciding whether or not to screen a case include:

1. The extent of harm actually caused by the offender.[24]
2. Disproportionality between the authorized punishment and the particular offense or offender.[25]
3. Improper motivation on the part of the complainant.[26]
4. Reluctance of a victim to testify.[27]
5. Cooperation on the part of the accused in the apprehension or conviction of others, or activities by the accused which may prevent future commission of crimes by others.[28]
6. The availability and likelihood of a prosecution and conviction of the offender in another jurisdiction.[29]
7. The impact of further proceedings on the accused and those close to him or her, particularly in the form of financial hardship and family life disruption.[30]
8. The value of further proceedings in preventing or deterring the commission of future offenses by persons other than the accused.[31]
9. The effectiveness of prosecution in forestalling future crimes by the defendant personally, based on factors like the offender's commitment to criminal activity as a way of life, the seriousness of his or her past criminal activity which might reasonably be expected to continue, the possibility that further proceedings might tend to create or reinforce a commitment on the part of the accused to criminal activity as a way of life, and the likelihood that programs available upon diversion or sentencing following conviction might reduce the likelihood of future criminal activity on the part of the accused.[32]
10. The value of further proceedings in reinforcing the community's sense of security and confidence in the criminal justice system.[33] In contrast, however, a prosecutor should not be deterred from proceeding because of personal knowledge that juries in the jurisdiction have tended to acquit defendants charged with the same crimes as an accused.[34]
11. The direct costs of proceeding further, in terms of prosecutorial and court time and like factors.[35]
12. Prolonged nonenforcement of the underlying criminal statute in the jurisdiction.[36]
13. Socially beneficial activity by the accused that should be encouraged in others by abandoning a prosecution against the accused.[37]

However, no prosecutor in deciding to screen should consider personal or political advantages or disadvantages which might flow from a determination either to prosecute or not to prosecute, or seek to enhance his or her record of convictions.[38]

The *NAC Courts Report* recommended that each prosecutor's office formulate written guidelines, more detailed than those by which police screening is accomplished, to regulate prosecutorial review of individual cases.[39] A written statement of reasons should be retained concerning each case in which a defendant in custody has been screened from the criminal prosecution channel, and the chief prosecutor should review all case files periodically to see that screening guidelines are being complied with by subordinates.[40]

Screening decisions should be made relatively promptly.[41] Before formal charges are filed, police are under no constitutional duty under the sixth amendment speedy trial provision to move swiftly. The only control is fifth and fourteenth amendment due process, which can be impaired if police delay their decision to charge to the point that

a defendant experiences actual harm, for example, through death or disappearance of an important defense witness.[42] Even that rule is qualified, however, in that if investigating authorities have a valid reason justifying postponement of filing of charges, for example, the need to complete a complicated criminal investigation concerning several defendants, delay does not impair due process even though a defendant experiences harm through the lapse of time between initiation of police investigation and the inception of criminal proceedings.[43] Prosecutors also might defer for a time a charging decision to see whether a prospective defendant conforms his or her conduct to the law. If this delay occurs before charges are filed, only the *Marion-Lovasco* rule controls. However, if criminal proceedings are begun, allowed to sleep for months or years, and then revived because of further defendant criminal misconduct, the sixth amendment right to a speedy trial may have been impaired,[44] barring all further proceedings based on the transaction to which the original criminal charges related.[45] That would not affect, however, charges based on new criminal activity during a time of suspended prosecution.

In the federal jurisdiction and states retaining the grand jury as a charging device,[46] citizen grand jurors are strongly under the influence and control of the prosecutor. Therefore, a prosecutor who for any reason wishes to forestall criminal proceedings against an individual can almost always accomplish that by controlling the evidence which the grand jury is allowed to hear and by recommending that no indictment be returned. Screening accomplished in that way is off the record and should be discouraged if the approach of using guidelines, as recommended by both the *ABA Prosecution Function Standards* and *NAC Courts Report* described above, is to be truly effective.[47]

III. Diversion after Formal Charging

A. Diversion Programs

The term "diversion" in American practice usually means the halting or suspension, before conviction, of formal criminal proceedings against a person, conditioned on some form of counterpart performance on the part of the defendant.[48] It can, however, embrace any program under which criminal defendants are shunted into noncriminal, *e.g.* mental health, channels in lieu of criminal prosecution.[49]

The *NAC Courts Report* advanced several categories of cases as especially appropriate for diversion:

1. Cases of chronic substance abuse, particularly public intoxication.[50] This is appropriate, but a need for diversion can be eliminated by legislative programs allowing protective custody and detoxification treatment for those found under the influence of alcohol or controlled substances in a public place.[51]
2. Spousal assault cases.[52] These cases usually reflect a reciprocal pathology best dealt with under a community social counseling or community mental health program.
3. Mentally-ill minor offenders.[53] Many persons of this sort are geriatric cases or social derelicts without homes and close relatives. Criminal convictions and sanctions seldom are effective to meet the underlying problem, and periods of incarceration based on convictions for crimes like vagrancy or disorderly conduct serve only to provide shelter and food for a brief period.
4. Fraud cases against first offenders when restitution is likely.[54] The principal peril

in programs of this sort lies in the weakened deterrent effect which prosecutions and convictions in general may have on chronic offenders of this type.

5. Mentally-ill serious offenders.[55] Offenders in this category are dangerous to the community, but society often is protected most through preconviction diversion from criminal prosecutions to mental health commitment procedures.
6. Drug abuse cases.[56] Addiction is best addressed through civil detoxification programs. The chief defect inherent in this diversion alternative is the fact that most such programs are voluntary, so that persons cannot be required to participate in them by court order. This constitutes a strong disincentive to prosecuting authorities to divert defendants to such programs, because they possess no sanctions to compel continued cooperation by a diverted defendant.
7. Youthful offenders.[57] Diversion in such instances is not accomplished through a transfer to a juvenile court, because in most states only young persons aged sixteen or under must be proceeded against in juvenile courts. Instead, young adults not within juvenile or family court jurisdiction are diverted into vocational and other educational programs, sometimes residential in character, designed to fit them for productive service as citizens and to eliminate underlying economic causes of criminal activity.
8. Unemployed offenders.[58] Particularly in times of widespread unemployment, diversion into programs which may enhance employability offers a measure of community protection. However, frequent use of such a ground for diversion may garner criticism from labor unions and from unemployed citizens who have not committed crimes because of economic pressures. In times of full employment, programs aimed at vocational rehabilitation of older offenders may be quite acceptable to the community.

The administration of diversion programs must be individualized on the basis of the personal history and characteristics of offenders. Factors favorable to diversion include (1) relative youth, (2) an offender's desire to forestall a criminal conviction, (3) mental abnormality related to the criminal act, if mental health treatment is available, and (4) other personal problems like unemployment or family disruption which can be remedied through intervention authorized under a diversion program.[59] Factors inimical to diversion include (1) a history of physical violence toward others, (2) involvement with organized crime, (3) a history of antisocial conduct suggesting that such conduct has become an ingrained part of a defendant's character, making him or her resistant to change, and (4) a special need to pursue a criminal prosecution to discourage others from committing like offenses.[60]

The *NAC Courts Report*[61] recommended certain procedures for administering diversion programs. One is the establishment and publication of guidelines governing diversion. A diversion determination should be embodied in a written agreement between the defendant and prosecuting officials; if that proves not possible, the prosecution office should prepare and retain a written statement of the fact of and reasons for the decision to divert the case.[62] Prosecutorial determinations not to permit diversion should not be subject to judicial review.[63]

The NAC Courts Task Force, however, was concerned about the basic fairness of prosecutorial diversion agreements embodying a significant deprivation of a defendant's liberty, for example, through compelled participation in an institutional detoxification

program or mental health hospitalization. Therefore, it urged that a court order be required approving such a diversion agreement conditioned on defendant participation in a program.[64] It advanced a number of requisites which should attach to judicially authorized diversion programs:

(1) Offenders should be represented by counsel during diversion negotiations and the procedure to obtain judicial approval for diversion.
(2) Suspension of criminal prosecution should be allowed only for one year or less.
(3) Agreements envisioning a substantial period of institutionalization should not be approved unless a court specifically finds that the defendant is subject to non-voluntary detention in an institution under noncriminal statutory authorization for such institutionalization.[65]
(4) An agreement should state fully the agreed-upon future conduct expected of the defendant and the grounds for diversion.
(5) The criteria for determining the acceptability of the diversion agreement should be the same as those governing acceptance of guilty pleas.[66]
(6) At the expiration of the agreement the court should dismiss the indictment or information with prejudice against later resubmission of charges based on the conduct underlying the original charges.
(7) During the life of the agreement the prosecutor's office should have discretionary authority to determine whether the diverted defendant is performing as agreed and, if not, whether to reinstate the original criminal charges.[67]

During the era of federal funding for experimental criminal justice programs, prosecuting offices in several parts of the country developed diversion programs,[68] supplemented by so-called intervention programs designed to identify defendants in need of special rehabilitative treatment and to make available needed treatment services.[69] However, those programs were not widely replicated; because of the demise in 1981 of the United States Department of Justice Law Enforcement Assistance Administration, the present unavailability of federal monies to support state criminal justice administration, pressing financial difficulties at the state and local level, and the prevailing punishment-oriented attitude of perhaps a majority of citizens, it is most improbable within the decade that they will be instituted widely throughout the nation.[70]

B. Pretrial Release Programs

As mentioned earlier in this report,[71] traditional American criminal procedure law assumes that criminal proceedings begin with custodial arrests and the production of arrestees in court to answer formal criminal charges. Release from custody pending trial is the responsibility of the courts, which have functioned generally on the assumption that the sole purpose of all pretrial release devices is to ensure the appearance of defendants in court when required.[72] The principal contemporary controversy concerning pretrial release revolves about whether persons who are likely to commit additional crimes if allowed at large pending trial and conviction can be held in custody on that basis, even though there is little or no reason to doubt the probability of their appearance in court. To illustrate, a defendant who plans to kill the sole prosecution witness will be only too glad to appear in court for proceedings which must be terminated on the basis of a failure of prosecution proof. Incarceration in such circumstances obviously is for the protection of witnesses and the community.[73] The Supreme Court

has not to date considered the constitutionality of the few statutes embodying the alternative use of conditional pretrial release or its denial as a means of crime prevention, so that the issue remains an open, though highly controversial, one.[74]

A perhaps more important issue, however, lies obscured behind the preventive detention controversy, namely, the legality of using pretrial release, in the form of a release on personal recognizance (promise to appear) conditioned on participation in rehabilitative programs or defendant acceptance of informal preconviction probation supervision. Programs of this sort have been experimented with in a handful of jurisdictions,[75] and the *ABA Pretrial Release Standards* somewhat elliptically contemplate the practice through their provision for conditions on release bearing more on rehabilitation than appearance in court,[76] and their recommendations for use of a pretrial services agency to supervise defendants granted conditional preconviction release.[77] If a sweeping declaration of unconstitutionality of all pretrial release conditioned on other than court appearance can be avoided, and the problem of preventive detention dealt with in isolation, there is promise in the use of preconviction release on personal recognizance, conditioned on participation in therapeutic and rehabilitative programs which can reduce or eliminate a risk of future criminal conduct. If prosecuting authorities concur and suspend active criminal prosecution for a time, court-supervised diversion can be accomplished without a need to invent a special new procedure for judicial approval of diversion agreements as recommended in the *NAC Courts Report*.[78] If such an adaptation of traditional preconviction release procedures cannot be used constitutionally, then the NAC recommendations would have to be implemented if informal preconviction probation is to be accomplished.[79]

C. Plea Negotiations as a Settlement Mechanism

Plea negotiations (bargaining) and reliance on submission of guilty pleas to clear an overwhelming majority of pending criminal cases from judicial dockets are phenomena peculiarly associated with the administration of criminal justice in the United States. Jurists from Roman law-influenced nations usually are highly critical of such practices although, in fairness, the summary or accelerated trial procedures allowed under their criminal procedure laws do not differ materially in function from guilty plea practice in the United States as controlled by federal constitutional requirements. A summary of the salient features of guilty plea practice may be of help.

Defendants have no constitutional right to require the prosecution to plea bargain with them.[80] On the other hand, however, plea negotiations and judicial acceptance of guilty pleas do not offend against fourteenth amendment due process as long as certain prerequisites are met.[81] Those prerequisites include:

(1) Counsel during negotiations and submission of a plea, including assigned counsel for financially unable defendants.[82]

(2) Intelligent and voluntary submission of a guilty or nolo contendere[83] plea, which serves as a waiver of trial-related constitutional rights; this must be placed on the record.[84] A defendant must understand the loss of procedural rights which flow from a guilty or nolo contendere plea,[85] and must comprehend within the limits of lay understanding the nature of the pending criminal charges.[86]

(3) Acknowledgment by the defendant of sufficient facts to support a judicial conclusion that the crime to which a guilty plea is tendered was in fact committed. If a defendant clearly desires to forgo trial by pleading guilty and is aware of the

consequences, but will not acknowledge guilt directly, the court can accept the tendered plea if the prosecution provides suitable data on the basis of which the court can infer the defendant's responsibility for the crime pleaded to.[87]

(4) The defendant must be present and must make the requisite statements personally for the record.[88] Guilty or nolo contendere pleas cannot be submitted by counsel for an absent or silent defendant.

If a plea is accepted in violation of these constitutional norms it is invalid and no judgment of conviction and sentence imposed on the strength of it is constitutional. If a plea is valid, the defendant has a right to expect that the underlying bargain be kept; as part of plea acceptance procedures, an underlying plea agreement must be stated for the record and accepted by the court.[89] If the plea bargain is not implemented exactly as a defendant agreed, the defendant must either be resentenced to conform with the bargain or allowed to withdraw the plea and undergo trial, at the court's election.[90]

There has been strong advocacy for abolition of plea negotiations,[91] and some state legislatures have forbidden guilty pleas to offenses less than the maximum charge set forth in an indictment or information.[92] However, the Supreme Court's stance on the matter is clear: plea bargaining or negotiating is a legitimate process,[93] "a process mutually beneficial to both the defendant and the State".[94] Therefore, an evaluation of functional mediation and settlement of criminal matters in the United States must take account of charge and sentencing bargaining. Bargaining will not often produce a withdrawal of all pending criminal charges, but it can produce a guilty plea to a relatively minor charge, coupled with acceptance by the defendant of probation conditions requiring participation by the defendant in therapeutic, educational or rehabilitative programs or restitution to a victim. The defendant has a criminal conviction, a result avoided in screening and diversion programs, but in actuality the underlying problem has been settled in a way less draconian than conviction and punishment for the most serious offense alleged by prosecuting authorities.

On occasion, a prosecutor's office may negotiate defense acceptance of a reduced plea conditioned on participation in rehabilitative programs or restitution, and not move the case promptly before the court for judicial consideration and acceptance of the plea.[95] If the defendant refrains from criminal misconduct for a suitable period of time, pending criminal charges are dismissed. This does not differ significantly from the diversion programs described earlier, and the latent constitutional problems are the same.[96] Statute or rule provisions requiring prompt disposition of pending criminal charges,[97] however, would render such programs largely ineffective, because the elapsing of a stated period of time would require dismissal of the charges with prejudice, thus removing the chief sanction against defendant noncompliance with the sleeping plea agreement.

D. Withdrawal of Prosecution

Mention has been made of conditional pretrial release and suspended implementation of plea agreements as forms of informal preconviction probation. If defendants fulfill prosecutorial expectations of future law-abiding conduct, pending criminal charges are withdrawn by prosecution motion. Traditionally, this was accomplished through the motion or common-law writ of *nolle prosequi*.[98] It required no statement of reasons, but the recommended modern practice is for the prosecutor to make a record of the reasons for withdrawing charges.[99] Such a procedural requirement inevitably would necessitate

a revelation to the court of the understanding reached with the defendant about the latter's expected future conduct and actions and the fact of compliance with the understanding.

IV. Lay Participation in Criminal Dispute Resolution

A. Precharging or Pretrial Mediation

Persons nurtured in Asian cultures, in particular, properly view American society as litigious and over-lawyered. The United States has no tradition of informal dispute resolution through respected authority figures in the family, community, enterprise or government. The natural response of aggrieved Americans often seems to be a demand for criminal prosecution or institution of civil litigation against those who have harmed them. The consequences have been a massive overload on federal and state judicial systems and inordinate delay in deciding pending cases. The heavy reliance on plea negotiations as a response to this has already been noted.[100] Mediation and arbitration have become increasingly frequent in civil matters, usually on the basis of commercial or labor contract provisions. They have been, however, quite rarely used in the resolution of criminal disputes.[101] Experiments with informal settlement of criminal matters have been reported in Hennepin County, Minnesota,[102] Philadelphia, Pennsylvania,[103] New York City,[104] and a handful of other cities under the auspices of the American Arbitration Association.[105] Courts and legislatures, however, will have to become much more aware of and approving toward these forms of dispute settlement before they achieve significant general recognition. Certainly, contemporary popular attitudes and traditions are not conducive to ready acceptance of prevention or termination of criminal prosecutions through methods of private dispute resolution. Only after such methods have become routine in civil disputes, rendering litigation the exception rather than the rule, will there be much likelihood that arbitration and mediation will be relied on in criminal matters to any significant extent.

B. Citizen Supervision of Diverted Offenders

Certain Asian nations have made significant use of citizen volunteers to supervise convicted criminals and to resolve later-arising criminal problems in ways short of new criminal prosecutions.[106] Only rarely has such a system surfaced in the United States. One example, however, applied a voluntary probation officer concept in the setting of preconviction screening. Genesee County, Michigan, had for a time a Citizens Probation Authority, functioning under the office of prosecuting attorney. The authority screened pending criminal cases to recommend noncriminal responses in the form of an informal preconviction probation in which citizen probation officers counseled and worked with offenders.[107] Although the results were claimed to be positive, the program apparently was not replicated elsewhere, and no statistically adequate basis emerged by which the actual effectiveness of the program could be evaluated.

C. The Jury System

Citizen participation in criminal justice administration in the United States is restricted to witness appearances, grand jury service in jurisdictions retaining the grand jury as a charging entity, and trial jury service. Of the three activities, only grand juries occasionally serve a function of criminal dispute resolution outside the criminal courtroom,

either by concurring in a prosecutor recommendation that no indictment be returned[108] or by ignoring a prosecution recommendation that an indictment be returned. Because grand jury deliberations under traditional criminal procedure must be secret, no prosecuting or district attorney participates in juror deliberations. Hence, grand jurors can decide that community and victim protection may be satisfactorily accomplished without instituting formal criminal charges, and thus in one sense can settle the underlying criminal matter. If a grand jury refuses to indict, the only recourse left to the prosecution is to present the case once more to a different grand jury in the hope that the new citizen jurors will act more favorably towards the prosecution than their predecessors did. If a later grand jury indicts, the defendant cannot object on constitutional grounds, because he or she is not placed in jeopardy until trial commences.[109] Even if grand juries were to serve as "citizens' courts" to a much greater extent than they do, the want of finality in their decisions not to prosecute would impair their effectiveness as a procedural device for screening criminal cases. Hence, the future of screening and diversion in the United States must be viewed as resting with prosecutors, not with citizen grand jurors.

Trial juries can be as arbitrary as they wish in acquitting defendants or in rendering inconsistent verdicts against cocriminals proceeded against in separate criminal proceedings.[110] Such a jury disposition favoring defendants is in one sense a "settlement" of the underlying dispute. However, jury acquittals are *ad hoc* in particular criminal prosecutions, and no body of six, nine or twelve individual citizens ever hears more than a single case.[111] Accordingly, jury trial cannot be considered a medium for systematic dispute resolution, screening and diversion in the United States.

V. Other Modes of Dispute Resolution

One or two other isolated examples of informal resolution of criminal matters may be identified. Occasionally a statute penalizing the negotiation of worthless checks will require dismissal of charges if small amounts are involved and restitution is made.[112] Instances of consumer fraud also may be settled in similar fashion.[113] Statutes might also allow the composition or settlement of a broad array of relatively minor misdemeanors and dismissal of charges on proof that compensation has been provided or restitution made by the defendant.[114] This can prove a quite valid means of encouraging private settlement of disputes underlying pending criminal charges.

A quite ancient device is the so-called peace bond.[115] A citizen can allege that a person has threatened to commit an offense against person or property. If a court finds after a hearing that there is "just reason to fear" the threat will be carried out, it can require the respondent to post a bond for a stated period, conditioned on future law-abiding conduct toward all citizens. If the respondent cannot post bond immediately, he or she is retained in detention until bond is posted. A special statute applying the peace bond device to spouses involved in divorce or separation proceedings also may be in force.[116] For defendants or potential defendants with means, such a judicially-supervised system of deterrence and dispute resolution may prove quite effective. Therefore, more legislative attention perhaps should be paid to reviving and modernizing traditional peace bond practice.

VI. Implementing the Recommendations under American Law

One must conclude that, granted American traditions, culture and constitutional limitations, screening and diversion will remain largely out of the ken of the courts, except as conditional preconviction release and acceptance of negotiated, reduced guilty pleas make courts aware of informal diversion agreements generated through negotiations between prosecutor, defendant and perhaps victim. One may hope for an ever-increasing acceptance of systematic screening and diversion, perhaps participated in by private mediators or arbitrators reporting their results to prosecuting authorities. However, for that to happen, a generation or two of lawyers, prosecutors and judges will have to be educated about the methods and objectives of screening and diversion, and the community at large must be brought to believe that it is adequately protected against crime despite termination of criminal prosecutions before trial and that crime victims are adequately compensated in the process.

It is not a legal prerequisite that formal criminal proceedings have been commenced before screening can occur. As noted earlier,[117] police authorities in the United States can and do weed out cases inappropriate for prosecution before offenders appear in court. Nevertheless, there has been both judicial and lay concern over broad, unregulated police discretion in the setting of criminal investigations, and one may well expect the same concern to be expressed about systems granting police officials broad discretion to screen and settle disputes. Because prosecuting authorities in the United States have no supervisory control over the police, and do not maintain their own corps of criminal investigators, they cannot be expected to function as evaluators of the worth of criminal cases until at least a preliminary charging document is ready to be filed with a court. As a practical matter, therefore, effective screening and diversion in the United States will occur only after formal charges have been instituted.

An offender's consent is constitutionally required for effective plea negotiations and settlements, and probably for conditional pretrial release envisioning defendant participation in therapeutic and rehabilitative programs. Even were that not so legally, effective diversion requires a commitment by defendants if it is to succeed in practice.

A requirement that a victim or complainant consent to a criminal dispute settlement has been urged on occasion in the context of plea negotiations. However, prosecutors and defense attorneys generally resist the idea of a third entity, *i.e.*, the victim or complainant, participating formally in plea negotiations, and adamantly oppose any suggestion that victim or complainant approval must be a condition precedent to judicial acceptance of a lawful guilty plea. Indeed, judicial authority must remain unimpaired to accept or reject an otherwise valid guilty plea tender; that authority would be impermissibly infringed by a requirement that a victim approve a plea bargain. Therefore, revision efforts at the present time focus on administrative procedures to keep victims[118] and investigating officers apprised of developments in a pending prosecution, including advice of the results of plea negotiations.

As noted,[119] a defendant must either acknowledge guilt, or the prosecution must make a record proving guilt, before a guilty plea can be accepted. Care also would have to be taken in establishing preconviction release conditions that defendants not be required to incriminate themselves. If defendants were impelled to acknowledge criminality as a condition to eligibility for conditional preconviction release for therapeutic or rehabilitative purposes, their statements and evidence derivative from them would be unavailable

to the prosecution for any purpose, since a defendant cannot be forced to abandon one statutory or constitutional right in order to effectuate another.[120] An informal indication by suspects or defendants under consideration for screening or diversion that they recognize their amenability to conviction may be important to indicate feelings of guilt or remorse conducive to rehabilitation and performance of restitution commitments. Nevertheless, a legal requirement that offenders specifically acknowledge guilt as a condition to diversion might very well be held unconstitutional.

Statements made in the context of guilty plea negotiations or during plea-taking proceedings are inadmissible in evidence if the plea is rejected, vacated or withdrawn.[121] Privilege against self-incrimination problems arising from compelled acknowledgments of guilty were noted in the preceding paragraph. On the basis of these analogies, one may assume that offender admissions of responsibility made during diversion-related discussions must and will be privileged if there is to be any likelihood that diversion will be practiced widely.

If formal legislative or judicial recognition is given to diversion based on offender commitments to participate in therapeutic or rehabilitative programs or to provide restitution to victims, sanctions must be devised to enforce the expected performance. Because it is doubtful that even deliberate refusals to perform can be made independently criminal,[122] only a revival or pursuit of earlier criminal charges is likely to prove an effective means of enforcing diversion-based commitments on the part of offenders. This does not raise double jeopardy problems, for the defendant has not yet been in jeopardy,[123] but there are problems of due process and speedy trial if such a sanction is invoked, a problem noted earlier.[124]

The right to counsel applies to plea negotiations and the acceptance of guilty and *nolo contendere* pleas. It also applies to pretrial proceedings at which eligibility for and conditions on preconviction release are determined. Counsel would not be required at other stages, but incriminating admissions obtained by any authorities from a counseled defendant in the absence of counsel or a valid waiver of attendance by counsel are constitutionally inadmissible.[125] Therefore, it is extremely imprudent for screening- and diversion-related conversations to be conducted in the absence of counsel, unless perhaps there is at the time near certainty that no criminal charges will be filed.

The right to public proceedings governs hearings to set conditions of preconviction release and to accept guilty and *nolo contendere* pleas in court.[126] Otherwise, however, there is, and should be, no requirement that diversion and plea discussions be conducted in the presence of victims or the public at large.

Issues bearing on the qualifications and status of mediators and arbitrators have not been dealt with in the context of screening and diversion in criminal cases. Since, however, the principles advanced in the preliminary general report are orthodox in the setting of commercial and labor arbitration, there is no reason to believe they would not be adhered to should mediation and arbitration become standard components of American criminal procedure. Sealing records in successful diversion cases has its counterpart in expungement of conviction records after sentences have been served and no recidivism has been manifested for a specified period. This has been advocated,[127] and would be as desirable in the setting of screening and diversion if the rehabilitative goals of those practices are to be realized fully. However, the freedom of information legislation in some states[128] is so sweeping that it would be impossible to privilege even this form of public record.

In sum, screening and diversion exist in the United States, but largely out of sight. If their use is to be expanded it will be through county-based programs, perhaps authorized by state legislation, and not through a national initiative. The present environment of criminal justice administration in the United States, however, is hardly supportive of efforts to reduce through expanded use of screening and diversion the number of pending criminal cases if the public perceives any degree of risk that dangerous persons will be diverted improperly into the community to commit further offenses. Sustained public information programs, coupled with increasing citizen awareness of the heavy burden on taxpayers imposed by ever-expanding prison populations, may in time lay the needed groundwork for increased legal recognition of screening and diversion as devices promoting both system efficiency and community protection, but realization of such hopes is hardly imminent.

Notes

1. American Bar Association Standards for Criminal Justice, Pretrial Release §§ 10-2.1–2.3, 3.1–3.4 (2d ed. 1980) [hereinafter, *ABA Pretrial Release Standards*], recommends a general use of summons in misdemeanor cases and discretionary use in nonviolent felony cases, as a means of limiting the number of cases in which offenders are held in custody for any time and in which pretrial release must be arranged.
2. U.S. Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Courts Report ch. 1 (1973) [hereinafter, *NAC Courts Report*].
3. *Id.* at 17.
4. *See* text accompanying notes 21–36 *infra*.
5. *NAC Courts Report*, note 2 *supra*, § 1. 2, ¶ 1.
6. *See* K. Davis, Police Discretion 16–27 (1975); Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 Am. Crim. L. Rev. 245 (1976); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 J. Urban L. 25 (1974).
7. *See generally* National College of District Attorneys, The Prosecutor in America (J. Douglass, Ed. 1977).
8. *See generally* National College of District Attorneys, Discretionary Authority of the Prosecutor (J. Douglass, Ed. 1977); Grossman, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 Temple L.Q. 35 (1982); Note, *Prosecutorial Misconduct*, 16 Am. Crim. L. Rev. 83, 88–90 (1978).
9. *See, e.g.*, Mich. Comp. Laws Ann. §§ 764.1, 744.4.
10. Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209 (1955).
11. Prosecutors may be prosecuted for criminal dereliction of duty in a number of cases, State *ex rel.* Forsythe v. Coate, 171 Mont. 377, 558 P.2d 647 (1976), and may be removed, depending on jurisdiction law, through the common-law writ of *quo warranto*, State *ex rel.* McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939), supersession by a state attorney-general, State *ex rel.* Wild v. Otis, 257 N.W.2d 316 (Minn. 1977), or action of the state governor. People *ex rel.* Tooley v. District Court, 190 Colo. 486, 549 P.2d 774 (1976); People *ex rel.* Witcher v. District Court, 190 Colo. 483, 549 P.2d 778 (1976); Pitler, *Seperseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 Fordham L. Rev. 517 (1973).
12. People v. Superior Court (Greer), 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977) (victim was son of clerk in district attorney's office); State v. Brandt, 253 N.W.2d 253 (Iowa 1977) (county attorney represented defendants and other members of defendant's family in

civil matters; recusation or disqualification could extend to assistant prosecutors appointed by county attorney); Sharplin v. State, 330 So.2d 591 (Miss. 1976) (prosecutor had represented defendant, charged with murdering estranged wife, in divorce action). An order of disqualification, however, is excessively sweeping if it extends automatically to all members of the current prosecuting staff or all who might be employed in that capacity in the future. Sapienza v. Hayashi, 57 Haw. 289, 554 P.2d 1131 (1976).

See generally American Bar Association Standards for Criminal Justice, Prosecution Function § 3-2.10 and commentary (2d ed. 1980) [hereinafter, *ABA Prosecution Function Standards*].

13. *In re* April 1977 Grand Jury Subpoenas, 573 F.2d 936 (6th Cir. 1978) (special prosecutor for federal grand jury proceeding had been responsible for civil tax investigation in same matter).

14. State *ex rel.* Moran v. Ziegler, 244 S.E.2d 550 (W. Va. 1978) (defendant earlier had approached special prosecutor, before designation, to retain him as defense counsel).

15. United States v. Hayes, 589 F.2d 811, 819 (5th Cir. 1979). Sex discrimination, while not recognized as a form of discrimination under the federal constitution (as opposed to legislation), can invalidate a prosecutorial decision to commence proceedings. People v. Municipal Court (Street), 89 Cal. App. 3d 739, 153 Cal. Rptr. 69 (1979). Dictum by the United States Supreme Court has recognized that prosecutorial discretion exercised impermissibly based on race, religion or other arbitrary classification would deny due process. United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979).

16. In Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978), the Supreme Court noted that "there are undoubtedly constitutional limits upon [the] exercise" of prosecutorial discretion. It set out in Marshall v. Jerrico, Inc., 446 U.S. 238, 249–50 (1980), a further dictum that prosecutorial decisions resting on personal interest embodying extraneous or impermissible factors "in some contexts [will] raise serious constitutional questions." *See also* Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in Bordenkircher v. Hayes*, 6 Hastings Const. L.Q. 269 (1978).

However, in Leeke v. Timmerman, 454 U.S. 83 (1981), the Court held that there had been no infringement of the federal civil rights of certain state convicts based on abuse of official powers. They had sought criminal arrest warrants against prison guards who they claimed had beaten them during a prison riot; thereafter, prison authorities met with the county prosecutor and provided the latter with information which he used to support a request to a magistrate that the arrest warrants not be issued. The Supreme Court noted that issuance of arrest warrants would have been simply a prelude to actual criminal prosecution; because "the decision to prosecute is solely within the discretion of the prosecutor . . . the issuance of the arrest warrant . . . would *not* necessarily lead to a subsequent prosecution." *Id.* at 87 (emphasis in original). The convicts were not prevented from lodging their complaints with a state judge in an effort to set the criminal justice machinery in motion, but neither could they prevent the prosecutor from opposing issuance of the warrants, based on information supplied by state corrections officials. This conclusion, the Court thought, "comports with the smooth functioning of the criminal justice system," *id.* at 87 n.3, as reflected in *ABA Prosecution Standards*, *supra* note 12, § 3-3.4.

In United States v. Goodwin, 102 S. Ct. 2485 (1982), the Court rejected a lower court decision constructing a presumption of vindictiveness whenever, in the course of a criminal investigation and proceeding, a prosecutor substitutes graver charges for less serious ones. It acknowledged the currency of the *Bordenkircher v. Hayes* dictum that direct punishment of a defendant who has exercised a protected statutory or constitutional right, inflicted through increased charges, violates due process of law. However, it would not allow a presumption that increased charges *before* trial were motivated improperly, and left open only "the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's

charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Id.* at 2494. The responsibility to establish that, however, would rest on a defendant unaided by a presumption of prosecutorial vindictiveness.

Overcharging constitutes an abuse of prosecutorial discretion. It can take two forms. One is selecting a more serious charge than the prosecutor actually believes he or she can prove in court, in the hope that a defendant will plead guilty to or be convicted of a lesser offense which actually is the most grave crime the prosecutor can establish, in order to forestall a conviction of an even less serious offense. A second is to charge more separate crimes, in a jurisdiction which allows the sentences for each to be cumulated, than the prosecution in fact can prove, in the expectation that a guilty plea or judgment will embrace all the counts the prosecution actually can prove. On overcharging, *see* People v. Carmichael, 86 Mich. App. 418, 272 N.W.2d 667 (1978); *ABA Prosecution Function Standards, supra* note 12, § 3-3.9(a), (e) (2d ed. 1980); American Bar Association Code of Professional Responsibility DR 7-103(A) (1969).

17. *E.g.*, People v. Holbrook, 373 Mich. 94, 128 N.W.2d 484 (1964). This means that a court cannot ignore a prosecutor's refusal to consider a plea to a lesser charge (a procedure discussed below in text accompanying notes 77–87) and accept a plea to reduced charges. United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Genesee County Prosecutor v. Genesee Circuit Judge, 391 Mich. 115, 215 N.W.2d 145 (1974). *See generally* Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss. L.J. 515 (1982).
18. *ABA Prosecution Function Standards, supra* note 12, § 3–3.4(a)–(c) (2d ed. 1980); *NAC Courts Report, supra* note 2, § 1.2, ¶ 2.
19. *E.g.*, Mich. Comp. L. Ann. §§ 764.1, 774.4. Child abuse and neglect cases also are to be transmitted by personnel of the Michigan Department of Social Services to the prosecuting attorney of the county where control powers over a child victim are centered. *Id.* § 722.628(4).
20. *NAC Courts Report, supra* note 2, § 1.2, ¶ 5.
21. *Id.* ¶ 6.
22. *Id.* § 1.1, ¶ 2; *see also ABA Prosecution Function Standards, supra* note 12, § 3–3.9(a). *See generally* Note, *Pretrial Diversion: Problems of Due Process and Weak Cases*, 59 B.U.L. Rev. 305 (1979).
23. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(b)(i); *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(1).
24. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(b)(ii).
25. *Id.* § 3–3.9(b)(ii).
26. *Id.* § 3–3.9(b)(iv); *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(7).
27. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(b)(v).
28. *Id.* § 3–3.9(b)(vi); *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(10).
29. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(b)(vii); *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(9).
30. *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(2).
31. *Id.* § 1.1, ¶ 3(3).
32. *Id.* § 1.1, ¶ 3(4).
33. *Id.* § 1.1, ¶ 3(5).
34. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(d) (limited to crimes involving a serious threat to the community).
35. *NAC Courts Report, supra* note 2, § 1.1, ¶ 3(6).
36. *Id.* § 1.1, ¶ 3(8).
37. *Id.* § 1.1, ¶ 3(10).
38. *ABA Prosecution Function Standards, supra* note 12, § 3–3.9(c). The latter is important because of the fact, noted earlier, that local prosecutors are elected in almost all American states.
39. *NAC Courts Report, supra* note 2, § 1.2, ¶ 3.

40. *Id.* § 1.2, ¶ 4.
41. *ABA Prosecution Function Standards, supra* note 12, § 3-2.9(b).
42. Dillingham v. United States, 423 U.S. 64 (1975); United States v. Marion, 404 U.S. 307 (1971).
43. United States v. Lovasco, 431 U.S. 783 (1977).
44. Klopfer v. North Carolina, 386 U.S. 213 (1967). However, if criminal charges are dismissed and a renewed criminal investigation later eventuates in the filing of a new indictment or information, only *Marion-Lovasco* due process considerations, and not the sixth amendment right to a speedy trial, govern. United States v. MacDonald, 456 U.S. 1 (1982).
45. Strunk v. United States, 412 U.S. 434 (1973).
46. Fourteenth amendment due process does not require the states to utilize grand juries, mandated in federal prosecutions by the fifth amendment, to charge felonies and serious misdemeanors. Gerstein v. Pugh, 420 U.S. 103 (1975); Hurtado v. California, 110 U.S. 516 (1884).
47. *Cf. ABA Prosecution Function Standards, supra* note 12, § 3-3.5(b): " The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury."
48. *NAC Courts Report, supra* note 2, at 27.
49. *Id. See generally* Andriessen, *A Foreigner's View of American Diversion*, 26 Crime & Delinq. 70 (1980); McSparron, *Community Correction and Diversion*, 26 Crime & Delinq. 226 (1980); Potter, *Pitfalls of Pretrial Diversion*, 7 Corrections Magazine, No. 1, p. 5 (Feb. 1981); Roesch & Corrado, *Policy Implications of Evaluation Research: Some Issues Raised by the Fishman Study of Rehabilitation and Diversion Services*, 70 J. Crim. L. & Criminology 530 (1979).
50. *NAC Courts Report, supra* note 2, at 34.
51. *E.g.*, Michigan Substance Abuse Assistance Act, Mich. Comp. L. Ann. §§ 325.751–.763. Regrettably, funds have never been appropriated in that state to allow full utilization of the statutory procedures.
52. *NAC Courts Report, supra* note 2, at 34–35. *See also* R. Nimmer, Diversion: The Search for Alternative Forms of Prosecution 31–32 (1974) [hereinafter, *R. Nimmer*].
53. *NAC Courts Report, supra* note 2, at 35.
54. *Id.* at 35–36.
55. *Id.* at 36.
56. *Id.* On financial difficulties affecting the related field of addict civil commitment programs, *see* Gettinger, *Keeping Clean in California*, 6 Corrections Magazine, No. 2, p. 44 (April 1980).
57. *NAC Courts Report, supra* note 2, at 36–37. *See also* Lemert, *Diversion in Juvenile Justice: What Hath Been Wrought*, 18 J. Res. in Crime & Delinq. 34 (1981).
58. *NAC Courts Report, supra* note 2, at 37. *Cf.* Krajick, *Work Ethic Approach to Punishment*, 8 Corrections Magazine, No. 5, p. 7 (Oct. 1982).
59. *NAC Courts Report, supra* note 2, § 2.1, ¶ 2.
60. *Id.* § 2.1, ¶ 3.
61. *Id.* § 2.2.
62. This should not be required if members of specified categories routinely are considered for diversion. *Id.* § 2.2, ¶ 3.
63. *Id.* § 2,2, ¶ 6.
64. *Id.* § 2.2, ¶ 4.
65. *See R. Nimmer, supra* note 52, at 35–37.
66. *See* text accompanying notes 80–90 *infra.*
67. The latter determination would be subject to the speedy trial restrictions established in Klopfer v. North Carolina. *See* text accompanying notes 42–45 *supra.*
68. *See generally* J. Mullen, The Dilemma of Diversion: Resource Materials on Adult Pre-Trial Intervention Programs (1975) [hereinafter, *J. Mullen*] (summarizing the results of programs

in Minneapolis, Minnesota, Boston, Massachusetts and Dade County, Florida); *R. Nimmer, supra* note 52, at 43–84.

69. *J. Mullen, supra* note 68, at 6.
70. *See* Blackmore, *Community Corrections*, 6 Corrections Magazine, No. 5, p. 4 (Oct. 1980) (noting impact of the termination of LEAA on community-based correctional programs).
71. *See* Part II(A) *supra*.
72. The Supreme Court has never ruled directly that fourteenth amendment due process embodies a right to bail as well as the eighth amendment claim that bail not be excessive. *See* Stack v. Boyle, 342 U.S. 1 (1951). Certain courts believe that is the case, but not all. *See, e.g.*, Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981); Sistrunk v. Lyons, 646 F.2d 64 (3d Cir. 1981). A majority of state constitutions give a right to bail to all defendants other than those charged with murder (or perhaps a handful of additional extremely serious felonies) when "the proof is evident and the presumption great," *i.e.*, the prosecution's case appears strong. *See, e.g.*, Mich. Const. art. 1, § 15 (1963).
73. The federal Victim and Witness Protection Act of 1982, effective January 1, 1983, established new provisions, 18 U.S.C. §§ 1512–1515, to provide criminal and civil protection for witnesses and victims against harassment, tampering and retaliation. The statute also amended Fed. R. Crim. P. 32(c)(2)(C) to require that federal presentence reports contain a "victim impact statement" "concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense." P.L. 97–291, § 3 (Oct. 12, 1982). The federal statute drew heavily on American Bar Association Criminal Justice Section, Reducing Victim/Witness Intimidation: A Package 6–12 (1981) (containing model statutory provisions); *see also* American Bar Association Criminal Justice Section, Bar Leadership on Victim Witness Assistance: A Criminal Justice Improvement Manual for State and Local Bar Associations (1980); U.S. Dep't of Justice Nat'l Inst. of Law Enforcement & Criminal Justice, Executive Summary, Victims and Witnesses: Their Experiences with Crime and the Criminal Justice System (1977).
74. Contemporary legal literature is gathered in *ABA Pretrial Release Standards, supra* note 1, commentary to § 10-5.9 at 10.106–.109. *See also* N. Bases & W. McDonald, Preventive Detention in the District of Columbia: The First Ten Months (1972); J. Roth & P. Wise, Pretrial Release and Misconduct in the District of Columbia (1980).
75. *See generally J. Mullen, supra* note 68, at 32–33; Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 Geo. L.J. 667 (1972).
76. *ABA Pretrial Release Standards, supra* note 1, § 10-5.2(a)–(c):

    Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous of the following conditions necessary to assure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

    (a) release the defendant to the custody of a pretrial services agency established pursuant to standard 10-5.3;

    (b) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court . . . ;

    (c) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to certain geographical areas or premises; . . .
77. *Id.* § 10-5.3.
78. *See* text accompanying notes 59–66 *supra*.
79. *See R. Nimmer, supra* note 52, at 97–98.
80. Weatherford v. Bursey, 429 U.S. 545, 561 (1977).
81. Blackledge v. Allison, 431 U.S. 63, 71 (1977):

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

82. Moore v. Michigan, 355 U.S. 155 (1957).
83. Defendants who plead nolo contendere do not acknowledge personal guilt, but submit to judgment and sentence. The chief procedural advantage to defendants is that a nolo plea cannot be used as an admission of responsibility in unrelated civil or criminal matters. *See generally* American Bar Association Standards for Criminal Justice, Pleas of Guilty § 14-1.1 and commentary (2d ed. 1980); Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255 (1942); Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 Neb. L. Rev. 428 (1954). In federal practice, a court must consent to submission of a nolo contendere plea in lieu of a guilty plea, and may accept it "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." Fed. R. Crim. P. 11(b).
84. Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).
85. Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976).
86. This means a guilty plea proceeding is inherently defective unless it can be determined that a defendant knew the material elements of the crime pleaded to, and the trial court record of plea-taking reveals an acknowledgment of guilty knowledge or an acceptable procedural substitute for knowledge. The Court suggested several alternative modes of accomplishing this: (a) a finding after trial; (b) a voluntary admission by defendant that intent existed; (c) stipulation by counsel (in defendant's presence, presumably) that criminal intent existed; (d) judicial explanation of the details of the charge to the defendant, followed by an acknowledgment of guilt; (e) a statement on the record by defense counsel "that the nature of the offense has been explained to the accused," *id.* at 647; or (f) in the absence of an express representation of advice, a presumption "that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.*
87. North Carolina v. Alford, 400 U.S. 25 (1970). This might be done through witness testimony or depositions, or use of transcripts of grand jury hearings, preliminary examinations or earlier trials of the same case. A defendant's confession, constitutionally obtained, probably would suffice, but would have to be corroborated in order to provide a sufficient basis for acceptance of a guilty plea. If a defendant is allowed to plead nolo contendere, one or more of these methods must be used to establish the required factual support for acceptance of the plea.
88. Fed. R. Crim. P. 11(c).
89. *Id.* R. 11(e)(2)–(4).
90. Santobello v. New York, 404 U.S. 257 (1971). *See also ABA Prosecution Function Standards, supra* note 12, § 3-4.2(c):

    It is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.
91. *NAC Courts Report, supra* note 2, § 3.1, advocated abolition no later than 1978 of plea negotiations aimed at charge or sentence concessions.
92. For example, a 1982 popular initiative in California adopted a new Penal Code § 1191.7 which prohibits plea bargaining in a lengthy list of serious felonies and the crime of driving

a vehicle under the influence of alcohol or controlled substances, "unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." *Id.* § 1192.7 (a).

93. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).
94. Corbitt v. New Jersey, 439 U.S. 212, 222 (1978).
95. *See J. Mullen, supra* note 68, at 25 (describing a deferred acceptance of guilty plea program in Honolulu, Hawaii).
96. *See* text accompanying notes 42–45, 67 *supra.*
97. *Cf.* Fed. R. Crim. P. 11(e)(5):

    Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

98. On the historical antecedents of the writ of *nolle prosequi* in England, *see* J. Edwards, The Law Officers of the Crown 227–37 (1964). It reflected the phenomenon of private prosecutions and was the device through which Crown authorities could stop prosecutions not viewed to be in the government's interest. Because private prosecutions have not been recognized in the United States, *see* text accompanying notes 9–10 *supra*, the writ had no true home in American criminal procedure, and serves today only as the formal procedure to reflect a prosecutorial decision not to continue a prosecution, for whatever reason. The Supreme Court noted the nonfinal nature of a withdrawal of prosecution, in Bucolo v. Adkins, 424 U.S. 641, 643 (1976), by finding that a *nolle prosequi* did not meet its mandate that judgment be entered in a state criminal defendant's favor; a *nolle prosequi* entered against one who had not yet been placed in jeopardy or who had waived jeopardy through an appeal would not forestall a later reinstitution by the prosecution of the original or related charges. *See also* Note, *Prosecutorial Misconduct*, 16 Am. Crim. L. Rev. 83, 90–91 (1978).
99. *See ABA Prosecution Function Standards, supra* note 12, § 3-4.3.
100. *See* Part III(c) *supra.*
101. *See generally* W. Felstiner & L. Williams, Community Mediation in Dorchester, Massachusetts (1980); Garofalo & Connelly, *Dispute Resolution Centers*, 12 Crim. Just. Abstracts 416, 576 (1980); McCarthy, *Dispute Resolution: Seeking Justice Outside the Courtroom*, 8 Corrections Magazine, No. 4, p. 33 (Aug. 1982); Roesch, *Does Adult Diversion Work?*, 24 Crime & Delinq. 72 (1978); Salas & Schneider, *Evaluating the Dade County Citizen Dispute Settlement Program*, 63 Judicature 174 (1979).
102. *J. Mullen, supra* note 68, at 91.
103. *R. Nimmer, supra* note 52, at 78–84.
104. L. Kos-Rabcewicz-Zubkowski, Diversion and Mediation: Preliminary General Report 14 (1983 mimeo).
105. *Id.*
106. *See, e.g.*, Tanigawa, *Public Participation and the Integrated Approach in Japanese Rehabilitation Services*, in Criminal Justice in Asia: The Quest for an Integrated Approach 329, 330–33 (B. George ed. 1982); Veloo, *The Probation Service in Singapore, id.* at 351, 361–69.
107. *See J. Mullen, supra* note 68, at 16–19.
108. *See* text accompanying notes 46–47 *supra.*
109. Crist v. Bretz, 437 U.S. 28 (1978).
110. *See* Harris v. Rivera, 454 U.S. 339, 346 (1981).
111. A jury is empaneled for and sits in only one civil or criminal case; jurors do not serve for months or years as assessors on the bench with professional judges. The chances of the same body of citizens ever being gathered together to serve on a later case are so statistically remote as not to be a realistic possibility.
112. *E.g.*, N.Y. Penal Law § 190.15(1) (McKinney 1975) (it is an affirmative defense that a de-

fendant or someone acting on his or her behalf made full satisfaction of the amount of the check within ten days after dishonor by the drawee); *see R. Nimmer, supra* note 52, at 26–27.

113. *R. Nimmer, supra* note 52, at 27–30.
114. *See, e.g.*, Mich. Comp. Laws Ann. §§ 766.19–766.21.
115. *See, e.g.*, Mich. Comp. Laws Ann. §§ 721.2–721.14.
116. *See, e.g.*, Mich. Comp. Laws Ann. §§ 722.13a–722.15a; *see generally* Letzmann, *Helping the Abused Spouse*, 57 Mich. St. B.J. 918 (1978).
117. *See* Part II(A) *supra*.
118. *See* American Bar Association Criminal Justice Section, Reducing Victim/Witness Intimidation: A Package 29–30 (1981).
119. *See* text accompanying note 87, *supra*.
120. United States v. Kahan, 415 U.S. 239 (1974) (procedure to establish indigency for purposes of assignment of counsel); Simmons v. United States, 390 U.S. 377 (1968) (testimony at a motion to suppress necessary to establish standing).
121. *See* Fed. R. Evid. 410; Fed. R. Crim. P. 11(e)(6).
122. Nonappearance in court not only violates preconviction release conditions but also is made a new crime. *See, e.g.*, 18 U.S.C. § 3150 (1976). *See also ABA Pretrial Release Standards, supra* note 1, § 10-5.7; Criminality, however, rests on deliberate noncompliance with a judicial order. Such an order would exist if judicial approval of diversion should become required as suggested in the *NAC Courts Report, supra* note 2. *See* text accompanying notes 64–66 *supra*. Informal diversion agreements, in contrast, would lack any authority warranting imposition of criminal penalties for noncompliance with their terms.
123. *See* text accompanying note 109 *supra*.
124. *See* text accompanying notes 42–45, 68 *supra*.
125. *See* Estelle v. Smith, 451 U.S. 454 (1981); United States v. Henry, 447 U.S. 264 (1980).
126. *See generally* Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982).
127. *See* American Bar Association Standards for Criminal Justice, Legal Status of Prisoners § 23-8.2 and commentary (Supp. 1983).
128. *See* Fla Stat. Ann. §§ 119.07, 110.08 (West 1982).

Italie
DÉJUDICIARISATION (DIVERSION) ET MÉDIATION

Vittorio Grevi

I. Introduction

Dans le *commentaire* préparé sur le thème "diversion et médiation" on définit le concept de *diversion* — ou, qui mieux est, de *déjudiciarisation* — en se référant à "tout écart du procès pénal ordinaire, avant le jugement de condamnation rendu par le tribunal, qui aboutit à la participation du suspect à un quelconque programme non pénal". Et, tout de suite après, on précise qu'un programme de ce genre "équivaut simplement à un programme dont le but n'est pas de punir le coupable, mais de l'aider à se resocialiser ou à résoudre le conflit qui l'a amené à l'infraction".

Les motivations politico-législatives évoquées comme fondement d'une telle technique de contrôle social — technique axée sur l'abandon des instruments ordinaires du système pénal — à l'égard de formes de déviance pénalement marquantes, sont facilement déterminables. A la base de cette technique on note, en effet, d'un côté une exigence précise d'économie processuelle, relativement à l'excès des affaires judiciaires pendantes, et de l'autre une exigence tout aussi nette d'une plus grande souplesse de la réponse sanctionnatrice, afin qu'elle soit resocialisatrice plutôt que punitive.

Ici, toutefois, surgissent certains problèmes de "fidélité" à l'égard de la ligne de développement esquissée dans le *commentaire*. Alors qu'un project qui se proposerait, à l'intérieur du système italien, de distinguer du modèle normal du procès pénal toutes les institutions de "déviation" inspirées par le besoin de satisfaire l'une ou l'autre de ces exigences ne soulèverait pas des difficultés particulières, les difficultés naissent en présence des autres limitations provenant du concept de *diversion* proposé comme terme de référence dans la rédaction des rapports nationaux.

Notamment pour l'Italie, la limitation est particulièrement significative, avant tout, en ce qui concerne l'exclusion envisagée du domaine de la *diversion* de ce qu'on appelle les "techniques rattachées au droit administratif" de déflation du système pénal, comme le sont en particulier les techniques de la dépénalisation et de l'imposition de sanctions administratives au lieu de sanctions pénales (*comm.*, I, n° 2,4). Et ce, parce que dans notre système c'est spécialement à ces moyens que l'on s'est jusqu'à présent référé pour satisfaire aux finalités correspondant à celles auxquelles tend la stratégie de la *diversion*.

D'autre part, les mesures décrites dans le *commentaire* comme typiques du concept de *diversion* qui y est admis ressentent nettement l'influence de systèmes qui sont dominés par le principe d'opportunité en fait d'action pénale, et ne sont pas liés par des réserves légales, ni par des réserves juridictionnelles, en matière de dispositions limitatives de la liberté personnelle (*comm.*, II, n° 1). Mais puisqu'en Italie la situation est exactement le contraire, sous le signe d'une rigoureuse application du principe de légalité — au niveau constitutionnel — il est facile de se rendre compte que la plus grande partie de ces mesures ne sont pas compatibles avec une semblable position : et la conséquence

est de réduire à des limites très restreintes, dans le système italien, la sphère d'efficacité potentielle d'un concept de *diversion* ainsi défini.

Etant donné ces prémisses, on tiendra naturellement compte dans le rapport du modèle de diversion tracé dans le *commentaire*, et on s'efforcera d'y ramener toutes les institutions qui peuvent y être comprises, même s'il s'agit parfois d'institutions disséminées de façon fragmentaire entre les plis de la législation, sans aucun fil conducteur pour les unir sur le plan systématique. Mais, outre cela, il semble opportun de faire également quelques brèves allusions de type descriptif à des institutions qui, bien que ne pouvant pas être ramenées dans les limites du modèle de *diversion* ci-dessus mentionné, obéissent toutefois à la même logique sur le plan de la *ratio* politico-législative, et permettent en tout cas de satisfaire des exigences analogues.

De plus, on rendra compte aussi de quelques pratiques répandues dans les organes de police, et parfois dans la magistrature, qui tendent à forcer la rigueur du principe de légalité de l'action pénale afin d'accorder une certaine étendue aux appréciations discrétionnaires en ce qui concerne le déclenchement de la poursuite, surtout quand les situations de conflit découlant de l'infraction peuvent trouver une solution raisonnable en dehors de la justice pénale. Des phénomènes de ce genre ne peuvent évidemment pas être appréciés en termes de légitimité, dans la mesure où ils représentent des comportements contraires aux devoirs de fonction, toutefois il est nécessaire de prendre acte qu'on les constate dans la pratique, à l'arrière-plan des graves problèmes de congestionnement qui affligent notre justice pénale. Du reste, si ces pratiques étaient ignorées, on courrait le risque de présenter une image déformée des dimensions "fondamentales" de la *diversion* dans la réalité du droit en vigueur.

II. Le Principe de Légalité de l'Action Pénale

Comme on y faisait allusion un peu plus haut, un rapport sur la présence et sur l'éventuel degré d'incidence pratique, dans le système processuel pénal italien, d'institutions pouvant être ramenées au schéma de la *diversion*, ne peut pas omettre une brève introduction au sujet des principes dont s'inspire en Italie la réglementation de l'action pénale (*comm.*, II, n° 1).

La première donnée à enregistrer, à ce propos, est fournie par l'article 112 de la Constitution, où il est stipulé que "le ministère public est obligé d'exercer l'action pénale". Il s'agit d'une décision précise du législateur constitutionnel en faveur du principe de légalité de l'action pénale — sans aucune exception, il faut le remarquer — qui tire ses raisons historiques d'un jugement négatif en ce qui concerne l'usage qui, durant le régime fasciste, avait été fait du principe du pouvoir discrétionnaire, par suite également de forts conditionnements de type politique. Conditionnements rendus possibles par la prévision, dans la loi sur l'organisation judiciaire alors en vigueur (art. 69 du décret royal du 30 janvier 1941, n° 12), d'un rapport de subordination du ministère public vis-à-vis du ministre de la justice, sous la "direction" duquel le magistrat titulaire de l'action pénale devait exercer les fonctions d'accusation qui lui sont attribuées par la loi.

Dans ce cadre le code de procédure pénale de 1930, toujours en vigueur avec de larges modifications, tout en établissant dans l'article 1 le principe du caractère officiel de l'action pénale ("l'action pénale est publique et, lorsque la plainte, la requête ou la demande

ne sont pas nécessaires, elle est introduite d'office à la suite d'un rapport, d'un référé*, d'une dénonciation ou de tout autre renseignement sur l'existence de l'infraction"), avait prévu que le ministère public, quand il estimait ne pas devoir engager la poursuite "en raison de l'absence manifeste de fondement" de l'avis d'infraction, pouvait ordonner "la transmission des actes aux archives" (art. 74, al. 3 cod. pr. pén.). Par l'institution du "classement", confiée à l'initiative exclusive de l'organe de l'accusation — et sans aucun contrôle de nature juridictionnelle — on admettait, en somme, que le ministère public pouvait selon sa volonté décider de ne pas donner cours à l'action pénale, sur la base d'une appréciation négative quant à l'importance des faits se référant à l'infraction dont il avait été avisé. Même si ce n'était pas dit en termes formels, on admettait donc le principe du pouvoir discrétionnaire en ce qui concerne l'exercice de l'action pénale.

Ce n'est pas par hasard qu'une des toutes premières réformes introduites dans le système processuel pénal après la chute du régime fasciste (art. 6 du décret législatif du lieutenant du Royaume, du 14 septembre 1944, n° 288) fut destinée à agir sur le texte de l'article 74 du code de procédure pénale, en vue d'établir que le ministère public "au cas où il estime qu'en raison du fait on ne doit pas promouvoir l'action pénale", ne peut pas ordonner lui-même le classement, mais doit "demander au juge d'instruction" de prononcer le décret correspondant. Et la conséquence — aujourd'hui encore expressément prévue par la disposition mentionnée ci-dessus — est que le juge d'instruction " s'il n'estime pas devoir admettre la demande, décide par ordonnance l'instruction formelle" (art. 74, al. 3 cod. pr. pén.), tandis que le préteur, dans des circonstances analogues, pourra procéder personnellement au prononcé de décret, en en informant toutefois le procureur de la République, "lequel peut réclamer les actes et ordonner au contraire que la poursuite soit intentée" (art. 74, al. 4 cod. pr. pén.).

Mises à part les discussions que cette réglementation a suscitées dans la doctrine italienne du fait que s'y manifeste une exception au principe *ne procedat iudex ex officio*, il n'y a pas de doute qu'elle a marqué une nette conversion du système vers le principe de légalité de l'action pénale, car il n'était désormais plus permis au ministère public de décider le classement de l'infraction dont il avait été averti, sans passer au crible du juge d'instruction. Et cette orientation systématique en faveur du principe de légalité aurait trouvé une confirmation indirecte, en moins de deux ans, avec l'article 39 du décret royal du 31 mai 1946, n° 511 (concernant les "garanties de la magistrature"), qui intervint pour modifier l'article 69 susmentionné de la loi sur l'organisation judiciaire, en décidant qu le ministère public devait exercer ses fonctions "sous la surveillance" du ministère de la justice : non plus, par suite, "sous la direction" (comme l'avait prévu le législateur de 1941 en accord avec ses propres prémisses) et donc en dehors de tout rapport hiérarchique entre ministère public et pouvoir exécutif.

Cela signifie que, au moment de l'entrée en vigueur de la Constitution républicaine (1948), le système positif était déjà, au niveau de la législation ordinaire, en accord avec les principes fixés par le texte constitutionnel, pour ce qui importe ici. D'un côté, en effet, la réforme qui était intervenue sur l'article 74 du code de procédure pénale, en

* Le mot "référé" par lequel est traduit le mot "referto" ne doit pas être pris dans le sens habituel qu'il a dans la langue française. Dans le code italien le "referto" correspond à un avis ou à une dénonciation à faire dans un cas particulier.

soustrayant au ministère public toute possibilité de pouvoir discrétionnaire incontrôlé en ce qui concerne le déclenchement de l'action pénale, avait désormais déterminé le cadre normatif nécessaire pour que le principe de légalité correspondant, prévu dans l'article 112 de la Constitution, puisse être appliqué. D'un autre côté, la configuration changée des rapports entre ministre de la justice et ministère public, en mettant ce dernier dans une position d'autonomie également fonctionnelle à l'égard des sommets gouvernementaux — unique position compatible, du reste, avec l'obligation d'exercer l'action pénale — avait dans la réalité devancé les décisions qui allaient être prises au niveau constitutionnel pour protéger l'indépendance des magistrats du ministère public (art. 104–108 de la Constitution).

En définitive, des innovations significatives n'étant survenues depuis lors ni sur le plan des principes, ni sur le plan de la réglementation législative concrète, le principe d'obligation de l'action pénale continue aujourd'hui à dominer l'horizon du procès pénal italien, laissant ainsi des marges très réduites pour l'admission dans le système de mécanismes pouvant être ramenés au domaine de la *diversion*, au moins dans les limites où ces mécanismes supposent l'attribution au ministère public de pouvoirs discrétionnaires en ce qui concerne l'instauration du procès pénal.

III. L'Institution du "Classement"

Etant donné les caractéristiques du système processuel pénal italien relativement à la réglementation de l'action pénale, il semble prévu depuis le début que dans notre système il n'y a pas place de façon formelle pour des cas de *diversion* de type "simple", c'est-à-dire axés sur le plus complet pouvoir discrétionnaire de l'organe d'accusation (sinon, tout simplement, des organes de police) pour décider de ne pas donner cours au procès pénal, même en ayant connaissance d'une infraction. Cela, naturellement, dans le cas d'avis d'infraction qualifiés (c'est-à-dire établis dans une des formes prévues par la loi), tandis que dans le cas d'avis non qualifiés (c'est-à-dire connus occasionnellement par le ministère public) il n'y a aucune possibilité de contrôle sur l'éventuelle inaction de l'organe d'accusation.

Comme il ressort de l'article 74, alinéa 3, du code de procédure pénale, toutes les fois que le ministère public estime ne pas devoir promouvoir l'action pénale en présence d'une *notitia criminis* qualifiée, il devra demander expressément au juge d'instruction de prendre un décret (défini encore aujourd'hui décret de "classement") qui l'autorise à ne pas instaurer le procès, sauf pour le même juge le pouvoir de décider lui-même, par ordonnance, le déclenchement de l'instruction formelle. Il faut noter que cette dernière ordonnance, dont les contenus correspondent essentiellement à ceux de l'action pénale, n'est généralement pas susceptible de recours, l'unique exception étant la réclamation prévue *ex* article 29 de la loi du 22 mai 1975, n° 152 dans le cadre de la procédure "spéciale" pour les délits attribués à des membres des forces de police judiciaire ou de sûreté publique relativement à des "faits accomplis en service et relatifs à l'usage des armes ou d'un autre moyen de contrainte physique".

Il en résulte que le ministère public, à moins qu'il ne contrevienne à ses propres obligations institutionnelles, ne pourra jamais "décider" à son gré du sort d'un avis d'infraction, en le détournant de sa destination normale — c'est-à-dire en le soustrayant à la connaissance du juge d'instruction — même quand l'organe d'accusation n'estime

pas valables les conditions nécessaires à l'action pénale. La seule dérogation parfois tolérée dans la pratique à l'égard de cette réglementation est représentée par la possibilité pour le ministère public d'en venir *tout court* à la "mise au panier" des avis d'infraction qui à première vue sont faux, ou paradoxaux, ou bien le résultat de plaisanteires ou de pures fantaisies. Mais, même en admettant la légitimité (très douteuse) d'une telle pratique, et compte tenu de la pratique analogue d'inscrire dans un "registre des recours" les dénonciations considérées a priori dépourvues d'importance pénale, ce ne sont certainement pas là les voies par lesquelles un mécanisme de *diversion* "simple" pourrait entrer dans le système (*comm.*, II, n° 1).

Des considérations analogues sont faites, d'autre part, en ce qui concerne la situation du préteur. Il est vrai que, dans ce cas, étant donné les modestes limites de compétence de l'organe (pour les délits punis d'une peine privative de liberté ne dépassant pas au maximum trois ans), la loi lui permet de prononcer lui-même le décret de classement, sans demander l'intervention d'un autre organe juridictionnel. Une particularité de ce genre ne suffit pas toutefois pour faire penser qu'au moins devant le préteur il y a des marges pour un cas de *diversion* en forme "simple", du moment que l'information au procureur de la République qui est prévue, et l'éventuelle initiative de ce dernier en vue de déclencher le procès enlèvent au préteur toute possibilité de disposer de l'avis d'infraction aux fins ici considérées.

Une autre question est celle qui découle du fait qu'en Italie, comme il arrive du reste dans presque tous les systèmes dominés par le principe de légalité de l'action pénale, à la rigueur de ce principe ne correspond pas, dans la réalité judiciaire, une application concrète aussi rigoureuse. Soit à cause des difficultés rencontrées par les organes du ministère public pour donner suite, avec les vérifications appropriées, à tous les avis d'infraction qui leur sont parvenus ; soit à cause des difficultés qui surgissent successivement auprès des organes d'instruction dans l'accomplissement des enquêtes nécessaires au déroulement de l'instruction pour tous les faits délictueux à l'égard desquels a été introduite comme il se doit l'action pénale.

Il s'ensuit que, à part les cas pathologiques (d'ailleurs plutôt rares) d'"ensablement" de certains procès, dus à l'inaction des magistrats du ministère public, l'accumulation des affaires judiciaires pendantes provoquée par l'exercice de l'action pénale pour toutes les *notitiae criminis* tend déjà depuis longtemps à atteindre des niveaux tels qu'ils provoquent — même physiologiquement, pour ainsi dire — le phénomène de la paralysie des procès correspondants. C'est pour cela que se réalise sur le plan pratique le même mauvais fonctionnement auquel d'autres systèmes font face en recourant à des formes de *diversion* "simple" (*comm.* III).

On assiste ainsi à l'accumulation des dossiers dans les bureaux des ministères publics et des juges d'instruction sans qu'il y ait la possibilité matérielle (en raison du manque de personnel, ou de structures, ou de toute façon en raison de la disproportion du rapport entre le nombre des procès et le nombre des enquêteurs) d'assurer qu'à chaque action pénale corresponde un développement processuel propre à permettre une décision réfléchie sur le fond. D'où, en l'absence d'une ferme prévision de dénouements processuels atypiques, ou abrégés, ou de toute façon différenciés quant à l'*iter* ordinaire de la procédure, on enregistre toujours plus largement le phénomène de la conclusion du procès sans vérification de fond, parce que survient une cause d'extinction de l'infraction : habituellement en raison de l'écoulement des délais de prescription, mais parfois aussi

pour d'autres motifs, parmi lesquels est assez fréquente la concession d'une amnistie (précisément à cause de cette exigence d'"allégement" des charges judiciaires en Italie les amnisties ont suivi, au cours des trente dernières années, le rythme déprimant d'une tous les trois ou quatre ans).

Cela signifie, en somme, que cette "sélection" des avis d'infraction — ou, par la suite, des poursuites déjà engagées — qui est empêchée sur le plan formel par le principe de légalité de l'action pénale, finit en fait par se réaliser également, en raison des difficultés pratiques qui découlent de l'excès des affaires processuelles pendantes. Et la conséquence est, entre autres, qu'en réalité les critères sur la base desquels se détermine l'accélération, ou bien le ralentissement, ou même la paralysie de l'une ou de l'autre des poursuites, sont en définitive confiés tantôt au hasard, tantôt aux décisions personnelles — assez souvent arbitraires aussi — de l'organe compétent pour la phase d'instruction. Mais, comme les statistiques judiciaires des dernières années se chargent de le démontrer, ce n'est certainement pas cette formule qui est la meilleure pour enrayer l'accroissement progressif du "chiffre noir" représenté par la différence entre le nombre des délits pour lesquels une dénonciation a été faite (dont la conséquence est l'exercice de l'action pénale) et le nombre des délits à l'égard desquels le procès instauré s'est conclu par une sentence sur le fond.

IV. Dépénalisation, Conciliation Administrative et «Oblation Volontaire»

Pour chercher à remédier, au moins en partie, à de tels inconvénients, qui en dernière analyse finissent par transférer l'incidence des décisions discrétionnaires du ministère public du moment de l'exercice de l'action pénale au moment du développement successif du procès, dans le système italien on s'est efforcé plusieurs fois d'alléger le travail des organes judiciaires au moyen de la dépénalisation — ou plus exactement, du point de vue sémantique, de la décriminalisation — entendue dans le sens de la dégradation en illicite administratif d'infractions antérieurement qualifiées de délits. C'est ce qui s'est produit dernièrement avec la loi du 24 novembre 1981, n° 689, qui a assujetti à la "sanction administrative du paiement d'une somme d'argent" une vaste série de comportements jusque là considérés pénalement illicites (articles 32–39); toutefois il semble évident qu'une telle stratégie législative ne peut pas se ramener au domaine de la *diversion*, dans le sens ici examiné (*comm.*, I, n° 2).

Entre autres, avec les lois de dépénalisation on a beaucoup restreint le champ d'action de l'institution de la "conciliation administrative", qui permettait au contrevenant — dans le cas d'infractions nuisibles à des intérêts typiques de l'administration publique — d'éviter la transmission du rapport à l'autorité judiciaire au moyen du paiement à l'autorité administrative d'une somme d'argent, de toute façon inférieure au montant de la peine pécuniaire prévue par la règle pénale. Une conséquence troublante des interventions de dépénalisations est représentée par le fait que, aujourd'hui, les rares cas de conciliation administrative qui ont été maintenus concernent les secteurs de protection pénale exclus de la dépénalisation.

Pour le sujet traité ici, plus intéressante se révèle, y compris pour son caractère d'actualité, l'institution de l'«oblation volontaire», en vertu de laquelle — comme il ressort de la réglementation traditionnelle de l'article 162 du code pénal — dans le cas de contraventions punies de la seule peine de l'amende de police, le contrevenant est autorisé à payer, avant l'ouverture des débats, ou encore avant le décret de condamnation, une somme égale au tiers du maximum de la peine pécuniaire fixée par

la loi. Ici on suppose qu'une poursuite pénale a déjà été engagée, mais puisque ce paiement a pour effet d'éteindre l'infraction, on se rend compte de l'importance pratique considérable d'un semblable mécanisme, qui en somme confie à l'initiative (exclusive) du prévenu la dégradation de l'illicite pénal contraventionnel en illicite administratif.

Précisément en raison de son aptitude à influer en termes réducteurs sur l'énorme quantité de procès concernant des infractions "mineures", en en déviant le cours vers un dénouement anticipé, l'institution de l'oblation a été souvent au centre de propositions tendant à élargir son champ d'action au-delà des limites étroites décrétées par l'article 162 du code pénal. Suivant cette direction on a récemment élaboré l'article 162-*bis* du code pénal (inséré dans le code pénal *ex* article 126 de la loi du 24 novembre 1981, n° 689), qui prévoit la possibilité d'un règlement transactionnel également dans le cas de contraventions punies de la peine alternative de l'arrestation ou de l'amende de police fixée par la loi.

A part cette dernière différence par rapport à la réglementation précédente, d'ailleurs restée en vigueur, la nouvelle discipline se caractérise par le fait qu'elle attribue quand même au juge le pouvoir discrétionnaire de rejeter la demande d'oblation, compte tenu de la "gravité du fait", même dans les cas où cette demande est admissible. Et puisque parmi les causes d'inadmissibilité, à côté de celles qui sont axées sur des cas particuliers de récidive ou de périculosité du sujet, on range aussi la permanence de "conséquences dommageables ou dangereuses de l'infraction qui peuvent être éliminées par le contrevenant", on se rend compte que cette nouvelle forme d'oblation suppose, de la part de celui qui veut en bénéficier, l'adoption préalable de mesures propres à neutraliser (pour autant que cela lui soit possible en pratique) les effets préjudiciables du fait. Ici, en d'autres termes, à la nécessité d'alléger les charges processuelles s'ajoute également, avec un caractère prioritaire, une motivation différente, liée à un but de "resocialisation" du sujet, auquel on demande d'avoir des comportements contraires à celui se rapportant au fait délictueux qui lui est imputé : comportements qui, au fond, se présentent comme *conditio sine qua non* pour pouvoir être autorisé à l'oblation, c'est-à-dire pour éviter le jugement pénal.

V. Accomplissement des Obligations Civiles Découlant de l'Infraction et Poursuite sur Plainte

Abstraction faite du cas que l'on vient d'examiner, en outre très particulier, dans le système processuel pénal italien — contrairement à ce qui a lieu dans d'autres systèmes — l'accomplissement des obligations civiles découlant de l'infraction et l'éventuelle *restitutio in integrum* ne confèrent à l'autorité judiciaire (ni, encore moins, à l'autorité de police) aucun pouvoir de "médiation" ou de "conciliation", en vue d'éviter l'instauration du procès, ou au moins d'en favoriser une issue qui rende inutile le jugement au fond (*comm.*, III, n° 3, *b*).

Il s'agit, comme c'est évident, d'une conséquence directe du principe de légalité de l'action pénale, mais précisément pour cette raison la situation peut présenter quelques aspects différents dans le cas des infractions passibles de poursuite sur plainte, à l'égard desquelles on enregistre une atténuation incontestable du régime d'obligation. Dans ces cas, en effet, l'obligation du ministère public d'exercer l'action pénale étant maintenue, cette obligation est subordonnée à la présentation de la plainte par la personne lésée par l'infraction (art. 120 du code pénal), à laquelle revient également le pouvoir de retirer la plainte après l'avoir présentée, provoquant ainsi la conclusion anticipée de la procé-

dure — par extinction de l'infraction — à condition que l'individu poursuivi ne refuse pas d'accepter le retrait (articles 152–155 du code pénal).

Dans ce cadre, caractérisé par l'incidence sur le procès d'une condition de poursuite laissée à la volonté de la personne lésée par l'infraction, la perspective que les obligations civiles *ex delicto* vont être accomplies finit également par prendre une importance qui ne peut pas avoir d'équivalent dans les cas d'infractions passibles de poursuite d'office. Sur le plan formel il est déjà prévu, par exemple, que la plainte ne peut plus être présentée non seulement quand la personne lésée par l'infraction a introduit devant le juge civil l'action en vue des restitutions ou de la réparation du dommage, mais aussi quand elle a transigé sur le dommage (art. 12 cod. pr. pén.). Ce qui signifie, à notre point de vue, que dans des situations de ce genre l'auteur de l'infraction (ou celui qui le remplace) a la possibilité d'éviter la poursuite pénale simplement en vertu de l'accord transactionnel sur le dommage conclu avec la personne lésée, titulaire du droit de plainte, sans qu'il soit besoin d'aucune intervention de l'autorité judiciaire : laquelle, d'ailleurs, une fois la transaction conclue, se trouvera empêchée d'exercer l'action pénale.

Quand, au contraire, la plainte a déjà été présentée, rien n'exclut que l'accord éventuel intervenu entre le plaignant et la personne visée par la plainte sur les restitutions et sur la réparation du dommage puisse avoir une influence pour favoriser le retrait de la plainte. Bien que la loi interdise que la déclaration de retrait soit soumise à des conditions, en revanche il est significatif que l'on ait prévu que dans le même acte "on peut renoncer au droit aux restitutions et à la réparation du dommage" (art. 152, dernier alinéa, cod. pén.), avec une allusion évidente à des stipulations réparatrices intervenues en autre lieu entre la personne visée par la plainte et celle qui retire la plainte.

Du reste on déduit de la pratique judiciaire courante que l'acte de retrait de la plainte est normalement précédé d'accords séparés tendant à satisfaire les exigences du plaignant sur le plan du droit civil (parmi ces accords l'article 14, dernier alinéa, du code de procédure pénale ne permet d'insérer dans l'acte de retrait que le pacte qui met les frais de procédure à la charge de la personne objet de la plainte).

Mais il y a plus puisque, restant toujours sur le terrain de la pratique, il est une éventualité on ne peut plus fréquente, c'est que ce soit la même autorité judiciaire saisie de la procédure à intervenir entre le plaignant et la personne visée par la plainte — en prenant parfois directement l'initiative des premiers contacts — afin de rendre propice le retrait de la plainte, avec la prise en charge, par la personne visée par la plainte, d'obligations propres à faire office de dédommagement ou de réparation à l'égard du plaignant. Bien qu'il s'agisse d'initiatives étrangères au rôle institutionnel de l'autorité judiciaire en matière pénale, et qui précisément pour cette raison sont reléguées exclusivement sur le plan des comportements de fait, il n'y a pas de doute qu'elles appartiennent au champ des comportements licites — quelles qu'en soient les motivations réelles, que l'on peut ramener le plus souvent à un besoin d'allégement du travail judiciaire — et comme telles doivent être enregistrées au niveau d'une expérience concrète du tribunal. Au fond, nous sommes en présence d'une sorte d'appropriation, de la part de l'autorité judiciaire, d'un rôle de "médiation" qui ne relève pas formellement de sa compétence dans les procès de ce genre, même si on peut le faire remonter à une fonction plus générale de conciliation des conflits certainement pas étrangère aux tâches de la magistrature, au moins quand il s'agit d'intérêts "disponibles" (comme dans le cas des délits passibles de poursuite sur plainte, dont le domaine a été récemment élargi en vertu des articles 86–99 de la loi du 24 novembre 1981, n° 689).

Sur cette dernière question on peut rappeler, en raison d'une connexité de sujet, que l'article 1 du décret royal du 18 juin 1931, n° 773 (texte unique des lois de sûreté publique) attribue à l'autorité de sûreté publique le pouvoir-devoir d'agir afin de pourvoir au "règlement amiable des dissensions privées". Plus exactement, comme il résulte des articles 5 et 6 du règlement d'exécution correspondant (décret royal du 6 mai 1940, n° 635), l'autorité de sûreté publique pourra dans ce but inviter les parties à comparaître devant elle pour une "tentative de conciliation", au cours de laquelle cette même autorité devra leur expliquer "la question de fait et les principes de droit qui lui sont applicables, sans imposer son avis".

Bien que cette institution ait été représentée comme ayant en vue des questions sans importance sur le terrain pénal, il n'y a pas de doute qu'elle puisse se prêter aussi à la solution de "dissensions privées" provenant d'infractions passibles de poursuite sur plainte car, en exerçant ses pouvoirs, l'autorité de sûreté publique pourra s'efforcer d'obtenir un règlement des rapports entre les "parties", en évitant la présentation de la plainte (au besoin directement sous la forme de la renonciation, que l'article 13 du code de procédure pénale prévoit aussi "devant un officier de police judiciaire"), ou en rendant opportun son retrait. Dans ces limites, en conséquence, on finit par reconnaître également à l'autorité de sûreté publique un rôle de "médiation" qui n'est pas sans influence sur le déclenchement et sur les éventuels développements des procédures engagées pour des infractions passibles de poursuite sur plainte (*comm.*, II, n° 3, *a*).

En revanche, on ne peut reconnaître un rôle analogue à la même autorité en ce qui concerne les infractions passibles de poursuite d'office (même si le phénomène de la dénonciation d'abord présentée puis "mise au panier" à la demande du dénonciateur lui-même n'est pas complètement ignoré de la pratique) puisque, une fois qu'elle a eu connaissance d'une infraction de ce genre, l'autorité de police est obligée d'en faire rapport "sans retard" à l'autorité judiciaire (art. 2 cod. pr. pén.) à laquelle elle est également obligée de transmettre "sans retard" les dénonciations et les autres renseignements concernant des infractions qui lui sont parvenus (art. 8, dernier alinéa, cod. pr. pén.). Il est ainsi confirmé que, en ne tenant pas compte du domaine des infractions passibles de poursuite sur plainte, le système italien ne prévoit aucune possibilité de *diversion*, pas même au niveau des organes de police: ce qui correspond, du reste, au principe de légalité de l'action pénale, qui postule l'acquisition par le ministère public de toutes les *notitiae criminis* présentées aux organes de police, ou acquis par eux.

VI. Les Délits d'Injure et de Diffamation: Jury d'Honneur et Preuve Libératoire

Restant toujours dans le domaine de la poursuite sur plainte, on doit consacrer une attention particulière aux délits d'injure et de diffamation, qui du reste appartiennent au domaine des infractions pour lesquelles sont normalement prévus des mécanismes procéduraux assimilables à la *diversion* (*comm.*, II, n° 4, *c*).

A cet égard, la particularité la plus significative est représentée, dans le système italien, par la prévision du renvoi à un jury d'honneur du jugement sur la vérité du fait attribué par le prévenu à la personne offensée. Etant donné que, en règle générale, dans les procès concernant les délits d'injure ou de diffamation le prévenu "n'est pas admis à prouver, à sa décharge, la vérité ou la notoriété du fait attribué à la personne offensée", l'article 596, alinéa 2, du code pénal stipule, en effet, que lorsque l'offense "consiste en l'attribu-

tion d'un fait déterminé" la personne offensée et l'offenseur peuvent, en accord — avant que soit prononcée une sentence irrévocable, mais aussi avant la présentation même de la plainte — déférer à un jury d'honneur le jugement sur la vérité dudit fait. Et puisque dans ce cas la plainte "est considérée comme tacitement abandonnée ou remise" (art. 597, al. 2 cod. pén.), il semble évident que la solution du jury d'honneur concrétise un cas exceptionnel de déviation du cours ordinaire de la justice vers une vérification de type non juridictionnel (tandis que le procès pénal se conclura par une sentence déclarative de l'extinction du délit), quand tout simplement elle n'arrête pas le déclenchement du procès pénal, comme cela se produit dans le cas où le renvoi à un jury a lieu avant même la présentation de la plainte.

Il s'agit, en somme, d'un cas typique de substitution à la justice ordinaire d'une forme particulière de "justice privée", sur la base d'une décision soumise à l'accord des sujets intéressés, lesquels au moyen d'une telle option — qui se rapporte à une matière traditionnellement "disponible", comme l'est celle des délits contre l'honneur — montrent qu'ils ont intérêt moins à la vérification de la responsabilité pénale, souvent lente et complexe quant à la forme, qu'à une plus rapide et plus souple vérification "de la vérité du fait", destinée à avoir une valeur entre "gentilshommes". En effet, cela seulement fait l'objet du jugement déféré au jury d'honneur, qui devra prononcer son verdict dans le délai de trois mois à partir de l'acceptation de sa nomination (nomination qui, à la demande de l'offensé et de l'offenseur, pourra être effectuée par le président du tribunal, ou bien par des associations reconnues légalement), à moins d'une éventuelle prorogation de trois autres mois par le même président du tribunal. A ce dernier, en définitive, n'incombe rien de plus qu'une sorte de contrôle formel sur la régularité de la constitution du jury et sur la durée de ses travaux, qui doivent se dérouler en séances non publiques, et sous le sceau du secret (articles 9–12 du décret royal du 28 mai 1931, n° 602).

A côté de l'institution du jury d'honneur, certainement intéressante sur le plan théorique, mais dont l'application est très limitée sur le plan pratique — probablement parce qu'elle évoque une morale sociale d'élite, comme telle destinée à rester démodée — la réglementation adoptée par le code pénal en matière d'injure et de diffamation présente une autre institution qui mérite d'être mise en vedette du point de vue qui nous intéresse ici.

On se réfère encore une fois à la règle déjà rappelée d'exclusion de la preuve libératoire en ce qui concerne la "vérité ou la notoriété du fait" (art. 596, al. 1er cod. pén.), et l'on remarque qu'il y a dérogation à cette règle non seulement en présence de situations rattachées à des conditions de type objectif (cas où un fonctionnaire public est offensé, et que le fait se rapporte à l'exercice de ses fonctions ; cas où en raison du fait attribué à la personne offensée une poursuite pénale a été engagée), mais aussi à la suite d'une simple initiative du plaignant. Pour être plus précis, quand l'offense consiste en l'attribution d'un fait déterminé, si le plaignant "demande formellement que le jugement s'étende à la vérification de la vérité ou de la fausseté du fait qui lui est attribué", dans ce cas comme dans les autres la preuve de la vérité est "toujours admise au procès pénal" (art. 596, al. 3, n° 3 du code pénal) : la conséquence est que "si la vérité du fait est prouvée" l'accusé n'est pas punissable.

Il s'ensuit, en réalité, qu'au moyen de la demande mentionnée ci-dessus le plaignant a le pouvoir d'influer sur l'objet même du jugement, en l'élargissant jusqu'à y englober la vérification de la vérité du fait qui lui est attribué. Et même, on peut dire que cette vérification, en prenant, dans le cas d'une issue positive, la physionomie précise de preuve

libératoire pour l'accusé, finit par constituer l'objet principal du jugement pénal, et a pour résultat d'influer de façon sensible sur le cours du procès et sur le comportement des parties. Si, d'un côté, l'accusé a tout intérêt à faire son possible pour prouver la vérité du fait qu'il attribue au plaignant, le ministère public, pour sa part, pourra facilement être contraint de modifier la position accusatoire qu'il aurait prise si l'*exceptio veritatis* n'avait pas été admise, et ce même juge ne pourra naturellement pas ne pas tenir compte de la nouvelle règle de jugement qui lui est imposée à la suite du choix opéré par le plaignant.

Bien que, comme on l'a expliqué, l'initiative du plaignant d'accorder la "faculté de preuve" à l'accusé ne serve pas en soi à éviter le prononcé d'une décision de fond par l'organe juridictionnel, elle ne semble pas toutefois complètement étrangère à la thématique examinée ici. Il faut souligner, en particulier, que par suite de cette initiative, et donc exclusivement en vertu de sa déclaration de volonté, la loi reconnaît au plaignant le pouvoir de modifier le critère de fond de la décision judiciaire, pour mettre au centre du jugement, avec effet libératoire, la preuve de la vérité du fait, autrement refusée à l'accusé. Et puisque cela signifie que, une fois cette preuve fournie, elle conduit directement à l'acquittement de l'accusé lui-même du fait qu'il est "non punissable" — en rendant ainsi inutile toute autre vérification relativement à l'imputation d'offense à l'honneur ou à la réputation — il n'y a pas de doute que dans ces limites également le mécanisme normatif qui vient d'être décrit puisse figurer parmi ceux qui sont aptes à dévier le procès pénal vers une conclusion atypique par rapport à l'itinéraire normal de développement.

VII. Application de Sanctions de Remplacement à la Demande de l'Accusé

Une institution absolument nouvelle dans le système processuel pénal italien, élaborée selon le modèle auquel ne sont étrangères aucunes suggestions du *plea bargaining* de tradition nord-américaine, est celle qui est réglementée par l'article 17 de la loi du 24 novembre 1981, n° 689, concernant l'"application de sanctions de remplacement à la demande de l'accusé".

Etant donné que l'article 53 de la même loi attribue au juge, lorsqu'il prononce la sentence de condamnation, le pouvoir d'appliquer *ex officio* les sanctions de la semi-liberté, de la liberté surveillée et de la peine pécuniaire en "remplacement" de la peine privative de liberté — quand cette dernière ne dépasserait pas, respectivement, les durées de six mois, trois mois et un mois — la nouveauté introduite par le susdit article 77 consiste avant tout à prévoir le fonctionnement d'un dispositif normatif semblable, même à la demande de l'accusé. Dans ce cas, toutefois, avec quelques particularités destinées à modifier sensiblement la physionomie de ce dispositif, jusqu'à le présenter comme une institution tout à fait particulière également par rapport aux exigences de l'économie processuelle.

Plus exactement, l'article 77 stipule qu'au cours de la phase d'instruction, et tant que les formalités d'ouverture des débats ne sont pas accomplies pour la première fois, le juge — à la demande de l'accusé et avec l'avis favorable du ministère public — peut rendre une sentence par laquelle il décide l'application des sanctions de remplacement de la liberté surveillée, ou de la peine pécuniaire, en déclarant avec la même sentence que l'infraction est éteinte en vertu de l'application réalisée de la sanction de remplacement. La condition d'une telle décision est que le juge estime, d'après l'examen des

actes processuels et des contrôles éventuellement décidés, qu'"il existe bien des éléments pour appliquer à l'infraction pour laquelle la poursuite est engagée" l'une ou l'autre des sanctions en question.

Au-delà des nombreux problèmes soulevés par une réglementation de ce genre, soit en ce qui concerne son interprétation concrète, soit au niveau de questions de légalité constitutionnelle, il est certain que — offrant de façon concrète un domaine à une possibilité de conclusion anticipée des procédures relatives à des infractions de faible importance — elle atteint l'objectif de rendre inutile la poursuite de ces procédures jusqu'à l'éventuelle sentence de condamnation. Le tout est basé sur l'assujettissement volontaire de l'accusé à une sanction qui ne semble pas susceptible d'être classée comme sanction pénale tout court, ne serait-ce que par suite de la déclaration d'extinction de l'infraction. C'est si vrai que, contrairement à ce qui se produit dans le cas de sanctions de remplacement infligées d'office par le juge aux termes de l'article 53, dans le cas examiné l'éventuelle inobservation des obligations inhérentes à la sanction appliquée *ex* article 77 n'aboutit pas à ce que "la partie restante de la peine se convertisse en la peine de remplacement privative de liberté" (art. 66), mais elle se présente comme un cas d'infraction autonome (art. 83).

A ce sujet on pourra discuter longuement sur le sens du rapport qui existe entre la "demande" du prévenu et l'"avis favorable" du ministère public, de même que sur le sens de l'appréciation confiée au juge au sujet de l'existence d'"éléments" propres à "faire appliquer la sanction substitutive pour l'infraction pour laquelle est engagée la poursuite", toutefois une donnée semble indéniable. C'est-à-dire que, lorsque le juge conclut cette appréciation en termes positifs, le contenu de la sentence qui fait suite est celui d'une déclaration de non-lieu en raison de l'extinction de l'infraction, en sorte que l'application concomitante de la sanction de remplacement ne peut en aucune façon se manifester comme la conséquence d'une décision de condamnation. D'autre part, il serait assez difficile d'imaginer un jugement de responsabilité à l'encontre du prévenu pendant la phase d'instruction (celle-ci constituant la dimension chronologique, typique de l'institution, à part l'extension à "tout état et phase de la procédure" autorisée par l'article 79), et donc sur la seule base d'un "examen des actes" et d'éventuelles "vérifications" qui, en raison de leur nature ne sont pas aptes à donner un fondement à un jugement de ce genre.

La vérité est que, sur la prémisse de l'initiative prise par le prévenu et du consentement exprimé par le ministère public (pas nécessairement, mais probablement à la suite de contacts interlocutoires entre les deux parties, déjà définis dans le jargon du tribunal "négociations"), le législateur de 1981 a attribué au juge, dans les cas particuliers indiqués par l'article 77, le pouvoir de terminer le procès pénal dès la phase d'instruction. Et ce au moyen d'une sentence d'extinction de l'infraction, logiquement consécutive à l'application d'une sanction de remplacement correspondant à celle qui, dans les mêmes cas, aurait été applicable à la suite du contrôle judiciaire de la responsabilité pénale du prévenu.

En d'autres termes, la possibilité accordée à l'accusé de renoncer aux débats et d'accepter l'éventuelle application d'une sanction de remplacement, en se combinant avec le nécessaire avis favorable de l'organe titulaire de l'action pénale, finit par influer sur le rite même du procès, parce qu'il met le juge (lorsqu'il ne doit pas acquitter sur le fond) dans les conditions requises pour appliquer une mesure sanctionnatrice sans passer par le jugement, ni encore moins par une déclaration formelle de responsabilité de l'accusé.

Et en effet, la sentence prononcée aux termes de l'article 77 est une sentence de non-lieu par extinction de l'infraction, sentence qui sera inscrite au casier judiciaire à seule fin d'empêcher que l'accusé puisse profiter une seconde fois de la même procédure (art. 81).

En définitive, grâce au mécanisme réglementé par l'article 77 de la loi du 24 novembre 1981, n° 689, les procès pénaux concernant les infractions qui y sont prévues pourront trouver leur conclusion sous une forme atypique et anticipée, par l'acquittement de l'accusé et sa soumission à une sanction comme conséquence non pas d'une condamnation, mais de la "demande" de cet accusé lui-même, partagée par le ministère public, et ensuite soumise à l'examen minutieux du juge, dans les limites permises par la nature des contrôles d'instruction. De cette façon, à l'avantage pour l'accusé d'éviter la publicité négative des débats et, surtout, le prononcé d'une sentence de condamnation, ainsi que l'éventuelle expérience carcérale, correspond — dans les situations de ce genre — l'avantage découlant pour le système entier de la diminution des affaires judiciaires pendantes relatives à des infractions de peu d'importance, avec comme conséquence l'éloignement du danger d'augmentation de la population pénitentiaire due à l'exécution de peines privatives de liberté de durée très faible.

VIII. Justice des Mineurs et Pardon Judiciaire

Parmi les secteurs dans lesquels, dans d'autres systèmes, l'institution de la *diversion* a trouvé plus traditionnellement application, il y a celui de la justice des mineurs (*comm.*, II, n° 4, *d*).

En Italie, d'ailleurs, ce secteur étant aussi dominé par le principe de légalité, il n'est pas prévu d'institutions propres à éviter que le mineur de 18 ans, accusé d'avoir commis une infraction, soit soumis à une poursuite pénale. Sur le plan du fait, toutefois, une "soupape de sûreté" peut être représentée par la règle de la loi sur les mineurs (art. 25 du décret royal du 20 juillet 1934, n° 1404) qui autorise le tribunal pour enfants à appliquer aux mineurs "irréguliers" une mesure administrative de soutien rééducatif: telles sont les mesures prévoyant l'envoi du mineur dans un service social pour mineurs, ou bien son placement dans une maison de rééducation ou dans un établissement médico-psycho-pédagogique.

La condition pour l'application de ces mesures se concrétise dans la manifestation, de la part du mineur, de "preuves d'irrégularité de sa conduite ou de son caractère" — donc à l'exclusion évidente de tout comportement entrant dans le domaine de l'illicite pénal — toutefois il n'est pas rare que les organes du service social pour mineurs, et le procureur de la République près le tribunal pour enfants lui-même, en présence d'infraction de faible importance (spécialement dans le cas d'infractions passibles de poursuite sur plainte), préfèrent demander que le mineur soit assujetti à une des mesures mentionnées ci-dessus, plutôt que de provoquer le déclenchement d'une poursuite pénale à son égard (*comm.*, II, n° 3, *c*). L'application de ces mesures administratives est prévue, d'autre part, comme normale dans les cas où le mineur a été acquitté pour incapacité de comprendre et de vouloir, sans qu'une mesure de sûreté privative de liberté lui ait été appliquée.

Quand, au contraire, le mineur est rituellement soumis à un procès pénal, et n'est pas reconnu incapable de comprendre et de vouloir, il y a toujours la possibilité d'éviter son implication dans le procès pénal jusqu'au prononcé d'une sentence de condamnation, en faisant levier sur le moyen du pardon judiciaire. En vertu de cette institution

le tribunal pour enfants a la faculté d'acquitter le mineur, en lui appliquant le pardon — si les conditions objectives et subjectives indiquées par les articles 169 du code pénal et 19 de la loi sur les mineurs sont remplies — non seulement dans la phase des débats, mais aussi dans la phase de l'instruction. Alors que dans le cas de pardon judiciaire accordé à la fin des débats la sentence correspondante représente une sorte d'abstention de condamner de la part de l'Etat, même si "les résultats du jugement seraient de nature à légitimer la condamnation du prévenu" (art. 478 cod. pr. pén.), la sentence de pardon judiciaire rendue au moment de l'instruction suppose que "les résultats de l'instruction seraient tels qu'ils autoriseraient le renvoi en jugement du prévenu" (art. 379 cod. pr. pén.). Cette sentence prend donc la signification d'un renoncement de l'Etat à la continuation du procès, malgré l'existence de toutes les conditions de fait et de droit requises pour la vérification successive par des débats.

C'est là l'aspect de l'institution qui nous intéresse ici de plus près. A l'arrière-plan il y a, évidemment, une exigence politico-législative prépondérante de préserver le prévenu mineur de la publicité nuisible des débats, soutenue par un pronostic "favorable" en ce qui concerne sa conduite future, par rapport aussi au peu de gravité de l'imputation. D'ailleurs, au-delà de ces motivations, il y a la réalité d'un mécanisme normatif qui dévie le procès de son cours ordinaire, en l'amenant à une conclusion anticipée pour des motifs entièrement étrangers à la logique du contrôle juridictionnel mais qui peuvent être rattachés exclusivement à un souci de préserver le mineur d'une expérience "stigmatisante" et de le récupérer par les moyens prévus de son envoi dans un service social pour mineurs ou de son placement dans une institution spéciale de rééducation (art. 26, al. 2 de la loi sur les mineurs). De ce point de vue l'institution du pardon judiciaire, surtout dans sa version "d'instruction", se montre certainement digne d'attention dans la typologie variée de mesures pouvant être ramenées au domaine de la *diversion* (*comm.*, II, n° 1), également parce qu'elle concrétise dans notre système une des rares exceptions "autorisées" par la loi quant au principe de légalité de l'action pénale, compris en se référant non seulement à l'introduction, mais aussi à la continuation de l'initiative accusatoire.

IX. Quelques Exemples de Diversion Enregistrés dans la Pratique (en matière de vols dans les grands magasins et de détention de stupéfiants)

Quant aux autres secteurs auxquels on se réfère habituellement (*comm.*, II, n° 4), sur la foi d'expériences étrangères, comme aux domaines les plus indiqués pour l'expérimentation de mécanismes de *diversion*, le système italien ne présente pas d'institutions qui méritent d'être soulignées particulièrement, abstraction faite de ce qui a été dit à propos des délits contre l'honneur.

En ce qui concerne les infractions de faible gravité, à part l'ample répercussion qu'a la volonté de la personne offensée sur le déroulement du procès pénal dans les cas de poursuite sur plainte, un régime particulier est prévu par exemple pour les délits contre le patrimoine commis au préjudice des membres de la famille les plus proches sans violence sur les personnes, mais la particularité se réduit à la prévision d'une cause de non-punissabilité (art. 649 du code pénal), sans autres conséquences sur le plan du contrôle social.

Il y a d'autre part des situations de délinquance "mineure" à l'égard desquelles ont été instaurées — même dans certaines zones du pays seulement, à propos d'infractions

nuisibles à des intérêts typiques de catégories, ou bien par suite de décisions avec "réactions molles" prises d'un commun accord par les différents destinataires potentiels de l'offense — quelques pratiques tendant à éviter que les avis d'infractions déterminées parviennent à l'autorité judiciaire afin de résoudre par un arrangement privé le conflit d'intérêts correspondant. Même en l'absence de documents statistiques officiels, le phénomène semble particulièrement significatif en ce qui concerne la délinquance portant sur les vols commis dans les grands magasins (*comm.*, II, n° 4, *b*), comme l'ont du reste attesté de récentes recherches menées "par échantillon" dans le domaine des organismes de distribution *self-service*. On en conclut que c'est seulement selon un pourcentage très bas que les "victimes" de cette sorte d'infractions sont habituées à s'adresser à l'autorité judiciaire pour dénoncer les vols subis, également parce que, lorsque cela arrive, assez souvent cette même autorité manifeste clairement une tendance à éviter la condamnation, sinon tout simplement le jugement, au moyen de procédés de détournement qui ne sont pas différents des techniques de la *diversion*, caractérisés par une *intervention* "couverte". Ce fait explique la propension des propriétaires des supermarchés et des magasins assimilés à résoudre de tels cas par une voie qui ne revêt pas les formes normales, non seulement en exigeant la restitution de la marchandise dérobée ou le paiement du prix, mais parfois en imposant aussi au responsable quelques sanctions de type privé, comme pourrait l'être la réparation du dommage (*comm.*, II, n° 2, *a*).

En restant toujours sur le terrain des infractions pour lesquelles on suggère parfois l'usage des moyens de *diversion*, de ce point de vue, en Italie, la situation des personnes qui ont commis des délits en état d'incapacité de comprendre et de vouloir par suite d'infirmité mentale ne revêt aucune importance (*comm.*, II, n° 4, *e*). Dans les cas de ce genre il est prévu, en effet, que ces personnes doivent toujours être soumises à une poursuite pénale, même en vue seulement de contrôler leur non-imputabilité, et que ce n'est qu'après ce contrôle — à moins qu'il ne s'agisse de faits de peu de gravité — qu'elles sont soumises à la mesure de sûreté consistant en l'internement dans un hôpital psychiatrique judiciaire pour une durée proportionnée à la gravité de fait commis (art. 222 cod. pén.). Et il en est de même dans le cas de délits commis en état d'intoxication chronique par l'alcool ou par les stupéfiants.

En ce qui concerne le secteur des infractions qui portent sur la détention et l'usage de stupéfiants (*comm.*, II, n° 4, *f*), bien que la législation italienne ne prévoie pas — toujours conformément au principe de légalité de l'action pénale — la possibilité de soumettre les personnes responsables de telles infractions à des mesures de type curatif et de réhabilitation au lieu de les soumettre au procès et à la sanction qui en est la conséquence, il faut toutefois signaler une particularité digne d'attention. Pour être plus précis, la prémisse normative est fournie par l'article 80 de la loi sur les stupéfiants (loi du 22 décembre 1975, n° 685), où il est prévu que la détention pour usage personnel même non thérapeutique de substances stupéfiantes, à condition qu'il s'agisse de "quantités modiques", n'est pas punissable : appréciation, cette dernière, qui est toujours confiée au juge après l'instauration normale d'une poursuite pénale à l'encontre du détenteur.

En présence de cette cause spéciale de non-punissabilité, il faut rappeler que les articles 99 et 100 de la même loi attribuent à l'autorité judiciaire le pouvoir de décider que les personnes adonnées à l'usage de stupéfiants (y compris le cas de la "quantité modique") seront obligatoirement soumises à une hospitalisation ou à des soins donnés dans un dispensaire, si elles refusent de se soumettre volontairement au traitement néces-

saire. Précisément à l'intérieur d'un tel contexte normatif, qui attribue à l'autorité judiciaire une sphère de pouvoir discrétionnaire assez large pour apprécier les conditions de la punissabilité prévue par l'article 80, on constate parfois dans la pratique un phénomène qui n'est pas sans intérêt pour ce dont on s'occupe ici. A savoir qu'il arrive que le magistrat saisi de la procédure (généralement le préteur) puisse être amené à exprimer avec une plus grande souplesse son jugement personnel sur la quantité "modique" de stupéfiants détenue par le pharmacodépendant, de façon à en exclure la punissabilité, quand ce dernier se déclare prêt à se soumettre selon son choix à des interventions sanitaires thérapeutiques ou de réhabilitation.

Dans des cas de ce genre, qui certainement peuvent faire naître des hésitations relativement au principe de légalité, soit sur le plan substantiel, soit sur le plan processuel — mais qui correspondent à un besoin d'adhérence à la réalité du monde de la drogue très ressenti au niveau de pratique judiciaire et d'assistance sociale — se dessinent du côté de l'autorité judiciaire des schémas de comportement assez voisins de ceux de la *diversion* dans la forme "couverte" (*comm.*, II, n° 3, *e*). Et il en est de même, à plus forte raison, dans les cas qui ne sont pas rares où les organes de police eux-mêmes, après avoir arrêté des pharmacodépendants, surtout mineurs, trouvés en possession de modestes quantités de drogues "légères", prennent la décision de les relâcher (sans les dénoncer à l'autorité judiciaire), en négligeant même aussi le "signalement" prévu aux centres médicaux et d'assistance spéciaux.

X. Mécanismes Normatifs de Type "Promotionnel" et "Régularisation" de Comportements Pénalement Illicites

Quelques indications intéressantes se rapportant à la thématique de la *diversion* peuvent être données, enfin, par certains mécanismes normatifs prévus dans les nombreuses lois spéciales contenant aussi des dispositions de nature pénale. D'autant plus quand on pense que, sur le plan pratique, ces mécanismes finissent parfois par être utilisés aussi au-delà des limites expressément fixées par les règles qui les prévoient.

C'est par exemple le cas de l'institution de la "sommation", prévue en matière de travail et de sécurité sociale par l'article 9 du décret du Président de la République du 19 mars 1955, n° 520, où il est stipulé que dans le cas d'inobservance de règles de loi — même pénales — dont l'application est confiée à la surveillance des inspecteurs du travail, ces derniers ont la faculté, "après avoir apprécié les circonstances du cas, de faire une sommation à l'employeur avec une prescription spéciale, en fixant un délai pour la régularisation". On a beaucoup discuté sur le sens de ce pouvoir de sommation, qui traditionnellement a été interprété, surtout dans la pratique des bureaux du travail, comme alternatif avec le devoir qui pèse sur les inspecteurs du travail, en tant qu'officiers de police judiciaire, de faire un rapport à l'autorité judiciaire à propos de toutes les infractions dont ils ont eu connaissance à cause ou dans l'exercice de leurs fonctions. En d'autres termes, en s'en tenant à cette interprétation, l'article 9 cité attribuerait aux inspecteurs du travail, lorsqu'ils constatent une infraction dans le domaine de leur compétence, la possibilité de choisir entre la transmission du rapport à la magistrature, ou bien l'envoi d'une sommation à l'employeur responsable de l'inobservance, avec l'ordre d'observer dans un certain délai les prescriptions qui lui sont imposées. Ce n'est qu'après l'expiration de ce délai, sans résultat utile, que se déclencherait pour l'inspecteur du

travail l'obligation du rapport, tandis qu'au cas où la régularisation de la situation aurait eu lieu aucun avis d'infraction ne serait transmis à l'autorité judiciaire.

A vrai dire cette interprétation a été récemment critiquée dans la doctrine et rejetée par la jurisprudence, sur la base de la remarque évidente que l'article 9 ci-dessus mentionné ne prévoit aucune dérogation à l'obligation du rapport qui pèse sur les inspecteurs du travail ; de sorte qu'obligation de rapport et pouvoir de sommation ne peuvent être estimés alternatifs entre eux mais doivent être considérés concurrents, du fait qu'ils concernent différents niveaux d'intervention confiés aux mêmes inspecteurs, en vue d'assurer l'observance des dispositions comprises dans la sphère de leur surveillance. Il faut dire, toutefois, que sur le terrain opérationnel une pratique continue de rester très répandue, c'est celle qu'ont les inspecteurs du travail de subordonner à l'exécution de la sommation — donc, après l'échéance du délai assigné au transgresseur — la transmission du rapport correspondant à l'autorité judiciaire, avec pour conséquence l'appropriation fondamentale de la part de ces organes d'un pouvoir de "sélection" des avis d'infraction. Ce qui fait d'autant plus naître, en l'absence de règles expressément prévues, une perplexité qui n'est pas légère, surtout au point de vue du principe de légalité de l'action pénale.

Ceci dit il ne semble pas douteux que, dans les limites où l'on suit effectivement cette interprétation discutable, le fait d'avoir fait entrer la sommation dans la compétence des inspecteurs du travail se présente comme un cas de *diversion* avec intervention (*comm.*, II, n° 1), parce que l'on fait dépendre d'un comportement du transgresseur, postérieur à la constatation de l'infraction et dont le contenu est réparateur quant à la disposition violée — par l'observance des "prescriptions prévues à cet effet" — la transmission de l'avis d'infraction à l'autorité judiciaire, en empêchant ainsi jusqu'au déclenchement de la poursuite pénale. Et le même propos est valable aussi eu égard à l'identique pouvoir de sommation attribué par l'article 21, alinéa 4 de la loi du 23 décembre 1978, n° 833 aux employés des unités sanitaires locales auxquelles sont confiées des fonctions d'inspection et de contrôle pour la protection de la santé des travailleurs et la sauvegarde du milieu.

Sur un plan différent, mais dans le cadre d'une même perspective d'incitation à des conduites jugées dignes d'encouragement, se placent aussi quelques dispositions de lois spéciales qui en arrivent à décréter la non-punissabilité de l'auteur de faits délictueux déjà commis, si celui-ci manifeste des comportements volontairement contraires à la conduite pénalement illicite.

Même en ne tenant pas compte de la thématique du "désistement volontaire" et du "repentir actif" (art. 56, alinéas 2 et 3 du code pénal), ainsi que de la thématique connexe de la "dissociation" prévue par la législation antiterroriste (concernant les délits indiqués à l'article 1 de la loi du 29 mai 1982, n° 304), le schéma n'est pas complètement nouveau puisqu'il rappelle d'autres cas semblables d'exclusion de la punissabilité qui peuvent être ramenés au comportement de l'agent après l'infraction : telle est, par exemple, la prévision de l'article 641, alinéa 2 du code pénal, où il est stipulé — à propos du délit d'insolvabilité frauduleuse — que "l'accomplissement de l'obligation réalisée avant la condamnation éteint l'infraction". Dans notre cas, toutefois, il y a une autre particularité, pour la raison qu'il s'agit spécifiquement de lois qui, en introduisant un nouveau et plus rigoureux régime sanctionnateur à l'égard de cas précis jusqu'alors réglementés avec une plus grande "indulgence", ont également prévu la possibilité d'une sorte de

"régularisation" des faits délictueux commis relativement à la précédente législation, à condition que le responsable adopte des comportements spéciaux d'adaptation à la nouvelle normative, dans un délai déterminé par son entrée en vigueur.

Plus précisément, en matière de détention illégitime d'armes, de munitions et d'explosifs, il est prévu que ceux qui, dans le délai fixé par la loi, pourvoient selon les cas à la dénonciation, ou bien à la remise à l'autorité de sûreté publique des armes et des autres objets illégitimement détenus ne sont pas punissables (art. 13 du décret-loi du 6 juillet 1974, n° 258, converti en loi du 14 août 1974, n° 393 ; art. 36 de la loi du 18 avril 1975, n° 110). De la même façon on a exclu la punissabilité pour les responsables d'infractions en matière de devises, lesquels, après avoir fait dans le délai prévu, puis plusieurs fois prorogé, la déclaration correspondante, font rentrer dans le territoire national les capitaux illicitement exportés ou constitués à l'étranger (art. 2 de la loi du 30 avril 1970, n° 159, et modifications successives). Et, dans un même ordre d'idées, dans le domaine de la législation pour la protection des eaux contre la pollution, on prévoit la non-punissabilité pour les faits de pollution déjà prévus comme infraction, lorsque les responsables adoptent les mesures nécessaires pour éviter une augmentation même temporaire de la pollution, et se conforment donc aux "limites d'acceptabilité" fixées dans les tableaux annexés à la loi (art. 25 de la loi du 10 mai 1976, n° 319).

En somme, dans des hypothèses de ce genre il semble hors de discussion qu'un jugement pénal aurait lieu, et qu'une sentence de condamnation serait prononcée, dans le cas de culpabilité dûment constatée, si les auteurs de l'infraction, dans les limites de temps édictées par les différentes lois, n'adoptaient pas les comportements auxquels les dispositions ci-dessus rappelées attribuent une efficacité de "régularisation". Sous cet aspect de tels mécanismes normatifs, dans la mesure où ils permettent un dénouement anticipé de l'événement judiciaire, ou tout simplement "rendent inutile" le déroulement du procès selon l'itinéraire traditionnel, semblent certainement dignes d'intérêt même du point de vue du phénomène de la *diversion* (*comm.*, II, n° 1). D'autant plus que les lignes de tendance du système italien vont nettement dans le sens d'une extension, au moins dans le cadre de la législation pénale spéciale, de l'emploi de moyens "promotionnels" analogues, soit afin d'obtenir dans un bref délai des résultats concrets pour la défense des biens juridiques protégés, soit afin d'éviter de nouvelles accumulations des affaires judiciaires pendantes.

XI. Conclusions

En définitive, si l'on veut faire un rapide bilan, il faut reconnaître qu'en Italie la thématique de la *diversion* n'a pas eu jusqu'à présent un développement adéquat. En particulier, il a manqué une intention politico-législative précise en vue de concevoir organiquement des institutions pouvant être ramenées au schéma en question : c'est-à-dire au schéma de la déviation du procès de son cours naturel vers des dénouements non judiciaires, ou de toute manière étrangers à la logique du jugement, et donc de la sentence de fond.

Les quelques institutions et les rares règles qui peuvent d'une façon ou d'une autre être ramenées au domaine de la *diversion* semblent donc être le fruit de décisions législatives non coordonnées entre elles, souvent occasionnelles, et qui en tout cas présentent une évidente saveur de caractère exceptionnel par rapport au système processuel pénal ordinaire. Et ce parce que, ce système étant inspiré du principe de légalité du procès et

de l'obligation de l'action pénale, toutes les institutions qui s'écartent de ces canons prennent en conséquence un caractère d'exception, sinon véritablement d'inconstitutionnalité.

La perspective d'un développement des mesures de *diversion* dans le système italien passe donc, nécessairement, par une atténuation (à tout le moins) du principe de légalité de l'action pénale. Mais puisque ce principe est fixé par la Constitution (art. 112), et que sa révision requiert des procédures parlementaires astreignantes, il semble aujourd'hui difficile de penser que l'on puisse atteindre dans un bref délai un résultat de ce genre. Même s'il faut dire que de plus en plus souvent, parmi les spécialistes, et dans le milieu judiciaire lui-même, s'élèvent les voix favorables à une introduction au moins partielle du principe d'opportunité, à propos de certaines catégories d'infractions peu graves et qui alarment faiblement sur le plan social.

Tant que l'on ne suivra pas cette voie, l'emploi de solutions analogues à celles de la *diversion* ne pourra avoir lieu qu'au niveau de la pratique. Mais la limite de cette situation est naturellement représentée par le fait que, lorsque des pratiques semblables sont entreprises par les organes de police ou par l'autorité judiciaire, elles se présentent comme des comportements illégitimes, puisqu'elles supposent l'inobservance de devoirs précis en relation avec la transmission des avis d'infraction ou, respectivement, avec l'exercice de l'action pénale. Et il s'agit d'une limite assez grave.

Il convient d'ajouter que, au cours des dernières années, les travaux préparatoires en vue de la promulgation d'un nouveau code de procédure pénale se sont orientés toujours plus résolument vers la prévision de modèles processuels différenciés, de façon à offrir à l'autorité judiciaire un large éventail de solutions possibles dans le choix du rite, même relativement à la position prise par l'accusé dans le procès. Par cette voie, tout en maintenant sans changement le principe de légalité de l'action pénale, on pourra obtenir au moins le résultat d'alléger le travail des services des magistrats du siège, car l'on prévoit que le modèle processuel ordinaire, fortement garanti et inspiré par le schéma accusatoire, sera employé seulement en ce qui concerne les infractions les plus graves, ou dont la vérification est plus complexe. Dans les autres cas, à la demande du prévenu (qui pourra en tirer des avantages sur le plan substantiel), ou même d'office, sera prévue l'adoption de modèles processuels abrégés, ou de toute façon moins appesantis par des garanties procédurales, et certains d'entre eux pourront permettre que le procès se termine au cours d'une audience préliminaire spéciale, avant même le passage à la phase des débats.

Cette dernière caractéristique sera l'une des plus significatives du futur code de procédure pénale. Une sorte de *diversion* au niveau processuel, axée sur la déviation du procès du type ordinaire vers un type abrégé, est l'unique issue possible, étant donné l'exigence d'éviter la paralysie de l'administration de la justice — dans un système qui, jusqu'à présent ne permet pas de formes de *diversion* dans le sens classique, car ces formes impliqueraient des marges de pouvoir discrétionnaire aujourd'hui inadmissibles dans l'exercice de l'action pénale.

Sweden
DIVERSION AND MEDIATION

Uno Hagelberg

A Report on Diversion and Mediation in Criminal Cases in Sweden

The rules concerning diversion in a system of criminal justice must be regarded in relation to the more fundamental principles of the system, particularly as pertaining to the prosecution of criminal offences in general. Before going into the subject of diversion in Sweden criminal law it is therefore necessary to give a brief outline of some of the basic aspects of the Swedish system of criminal justice.

The enforcement of criminal law in Sweden is characterized by a division of functions based on the separation and independence, from each other as well as from the executive, of the general courts and the public prosecutors. The judicial power in criminal cases is vested in the general courts. (Some exceptions from this general rule have been made through provisions for summary procedures in cases concerning petty offences, whereby the police or the public prosecutors may impose a fine, subject to the approval of the suspect.)

The procedure in criminal cases is based on what is usually referred to as the principle of accusation, i.e. the court may not consider an issue of criminal liability or impose a penalty unless charges have been instituted by a prosecutor. In the court trial the prosecutor and the defendant appear in the case as equal parties.

The rules of procedure are set out in great detail in the Code of Judicial Procedure of 1942. The code is available in an English translation as Number 15 of the American Series of Foreign Penal Codes (revised edition, Sweet & Maxwell, London 1979). Criminal investigation is the responsibility of the police and the public prosecutors. The investigation takes the form of a "preliminary investigation", following rules given in the Code of Judicial Procedure. A preliminary investigation must be initiated as soon as there is cause to presume — due to an accusation or otherwise—that an offence that is subject to public prosecution has been committed. All criminal offences (with some exceptions in cases of insult and slander) are subject to public prosecution. The investigation may be started by the police or the public prosecutor. As soon as a reasonable suspicion against someone has been formed the investigation must be led by a public prosecutor, unless the investigation concerns a matter that is of a simple nature, in which case the police may continue to lead the investigation. The object of the preliminary investigation is to ascertain whether there are sufficient grounds for prosecution and to prepare the matter so that, if prosecution is instituted, the evidence may be presented to the court in a coherent way. There is an explicit rule requiring that the preliminary investigation be conducted in an objective manner. As the investigation is concluded a decision must be made whether to prosecute or not. Only the public prosecutor has the authority to decide on that question. (In cases where the public prosecutor has decided not to prosecute the law gives the injured party the right — very rarely used in practice — to bring the case to court by private prosecution.)

Concerning the public prosecutor's obligation to prosecute the Swedish law adheres in general to the legalistic, as opposed to the opportunistic, principle, i.e. the prosecutor generally has an absolute obligation to prosecute. The general rule of prosecution in the Code of Judicial Procedure thus states that the prosecutor must institute action for an offence that is subject to public prosecution unless otherwise prescribed. The application of this general rule naturally presupposes that the strength of the evidence etc. against the suspect is such that the prosecutor has sufficient cause to prosecute. In practice this has been taken to mean that the prosecutor has a duty to prosecute whenever he has objective reason to expect that the court will find the defendant guilty. If on the other hand the prosecutor institutes action without probable cause he makes himself guilty of unjustified prosecution according to the Penal Code. In conclusion it can be said that it is only to the extent that the law expressly prescribes it that prosecution is facultative and the public prosecutor is given any room for considerations of a discretionary nature concerning the suitability of prosecution. Such exceptions however, are fairly common and the prosecutor is in fact given a considerable scope for diversion. There are even situations where prosecution is the exception rather than the rule.

There are a few special rules of prosecution in the Penal Code and in other penal statutes that stipulate as an absolute prerequisite for prosecution that the consent to prosecute has been granted by the Cabinet or that charges have been made by various government agencies. The consent of the Cabinet is required, for example, for the prosecution of some extraterritorial offences and some crimes against the security of the State. An example of a rule of prosecution prescribing the consent of a government agency is found in the Currency Act, criminal offences against which may not be prosecuted unless an accusation has been made by the National Bank. In cases of the type exemplified here the question of consent is tried in a discretionary way. The exercise of discretion does not involve the prosecutor. When he has received the consent to prosecute it is up to him to decide whether to prosecute or not in accordance with the ordinary rules regarding prosecution.

The bulk of exceptions from the main rule of prosecution mentioned above, however, consist of special rules of prosecution and rules concerning waiver of prosecution that give the public prosecutors a considerable scope for taking into account the suitability of prosecution.

Special rules of prosecution are usually contained in the Penal Code and other penal statutes in connection to the particular offences to which they apply. Typically they set up special requirements that must be fulfilled if prosecution is to be instituted.

One type of requirement that is encountered in a number of cases is that the wish of the victim is to be taken into account by the prosecutor. This applies, for example, in some cases of sexual assault, economic crimes against members of the family, breach of domiciliary peace and unlawful intrusion. It is expressed in the law by the formal rule that prosecution may be instituted only if an accusation has been made by the injured party. However, with few exceptions, the victim is never given an unqualified right to block prosecution. It is obvious that the wish of the victim to avoid court action may sometimes conflict with the public interest that action be taken against an offender. At times the victim may refrain from making an accusation because of fear or undue pressure by the offender. Rules of prosecution calling for an accusation by the victim are therefore generally combined with the provision that, even if an accusation has not been made, prosecution may be instituted if the public interest requires it. Thus the

prosecutor is here given leeway for a discretionary decision. In practice it is relatively rare that action is taken against the wish of the injured party in these cases.

Some criminal offences may be prosecuted only if the public interest requires it. This applies for instance to some crimes of carelessness in connection with debts and to petty fraud. A few offences are combined with the even more stringent condition that prosecution may be instituted only if it is required for particular reasons by the public interest. Examples of this are offences concerning unlawful disposal of goods that have been bought on instalment and infliction of minor damage to private property.

By rules of the nature just mentioned, obliging the prosecutor to decide on the suitability of prosecution, a considerable field has been created where prosecution is facultative. The guidelines within which the prosecutor may exercise discretion in these cases follow from the interpretation of what lies in the public interest. The practice established here has become quite stable, usually leaving little room for uncertainty in individual cases. In effect rules of facultative prosecution of the nature discussed here have considerably limited the scope of the penal statutes to which they apply. Prosecution has become the exception, leaving unpunished the majority of offences against the statutes in question.

There is another type of exception from the general rule of obligatory prosecution, namely rules concerning waiver of prosecution. These are found in the Code of Judicial Procedure and, in reference to offences by juveniles, in a special law. The rules concerning waiver of prosecution differ from the special rules of prosecution discussed above in that they are in principle applicable to all types of offences. Another difference of a principal nature is that waiver of prosecution presupposes that a criminal offence has actually been committed by the suspect. In other words the prosecutor may not waive prosecution unless it has been established during the preliminary investigation that the suspect is guilty. In practice a decision to waive prosecution is generally possible only if the suspect has confessed to the crime and his confession is borne out by the circumstances. If a court action is deemed necessary to establish whether the suspect is guilty a waiver of prosecution is excluded.

The Code of Judicial Procedure allows for *waiver of prosecution* in the following four situations (chapter 20, section 7):

1. If it may be presumed that in the event of prosecution a sanction more severe than a fine would not be imposed, and the public interest does not require prosecution.

This rule makes it possible for the prosecutor to abstain from prosecution in cases concerning minor offences. It is used mainly in the case of first-time offenders, where the offence is of a less serious nature than the typical offence against the penal statute in question. For example, prosecution is often waived by this rule in cases of shoplifting where the value of the goods taken is small. On the other hand, prosecution is seldom waived by this rule in the case of for instance traffic offences, where a fine is usually called for by the public interest.

2. If the offence was committed before the suspect was sentenced for another offence committed by him or had completely fulfilled the sentence or other sanction for that other offence, and it is evident that the instant offence, compared with the other offence, is, with regard to the sanction, without appreciable importance.

This rule makes it possible to abstain from prosecution that would not serve any practical purpose with regard to the penalty imposed upon the offender. It is often used to drop cases of minor offences that are investigated coincident with serious crimes, or to limit the number of offences that have to be investigated when the offender has committed a series of similar crimes, e.g. systematic fraud or theft.

3. If for special reasons it is evident that no sanction is required to prevent the suspect from further criminal activity, and in view of the circumstances no other considerations warrant prosecution.

This rule is used in a small number of cases where for particular reasons prosecution seems meaningless or even offensive. Examples from practice are situations where the suspect has become seriously injured or ill, or where he is responsible for causing the death of a close relative by negligence for instance in road traffic.

4. If it is evident that the offence was committed under the influence of the kind of mental abnormality described in chapter 32, section 2, of the Penal Code, that confinement for psychiatric treatment or treatment in a nursing home or special hospital for the mentally retarded will occur without proceedings, and that no special considerations require prosecution.

By this rule it is possible to avoid prosecution for example in cases where the outcome would only be that the court surrenders the offender to the health authorities for psychiatric treatment.

As can be inferred from the four rules that have been discussed here the legislation concerning waiver of prosecution serves several purposes, the principal of which are based on considerations relating to the efficiency of the legal system and to criminal policy. Considerations in the nature of criminal policy become even more apparent in the legislation concerning waiver of prosecution in cases involving juveniles. These rules are contained in a law with special provisions regarding young offenders, i.e. persons under 18 years of age (persons under the age of 15 are not punishable).

In the case of young offenders prosecution may be waived, in addition to the rules in the Code of Judicial Procedure, in two situations :

1. If the offence was obviously committed out of mischief or impulse.

2. If the offender has been taken into care by the social welfare authorities or has received their help and support, and it can be presumed that these measures are the most appropriate for his rehabilitation.

In both the instances mentioned prosecution must be instituted if it is required by the public interest.

In practice the effect of the rules mentioned here is that young offenders are usually not prosecuted and punished under the penal statutes. The responsibility for their readjustment is instead diverted to the social welfare authorities. The exceptions, where legal action is taken on account of the public interest, are mainly limited to the most severe crimes, some crimes of violence, and at the other extreme minor offences like

possession of small amounts of narcotics, negligence in road traffic or other points of order where a fine is considered appropriate.

Recently some changes in the Code of Judicial Procedure went into effect that allow the prosecutor to discontinue a preliminary investigation and thus close a case if it can be presumed that the investigation, if carried on, will not result in prosecution on account of some rule of facultative prosecution or waiver of prosecution. A preliminary investigation may also be closed if the offence investigated would render no more than a fine and the costs of continued investigation are not reasonable in view of the importance of the matter. If the prerequisites for discontinuing an investigation are at hand from the beginning, the prosecutor may decide not to initiate a preliminary investigation.

These rules of limiting investigations do not apply if an investigation is required by public interest. Nor do they apply if the foreseen decision to waive prosecution is based on the special rules about young offenders that have been mentioned above.

The objective of this new legislation is mainly to increase the efficiency in the use of the resources that are available to the police and the public prosecutors.

Before ending this report some remarks should be made about the position taken by the Swedish law in relation to plea-bargaining and the use of Crown witnesses. No provisions have been made in the law for the use of either of these methods. On the contrary, it is one of the consequences of the principal adherence to the legalistic view of prosecution and the formal regulation of exceptions from it, that the prosecutor cannot enter into agreements with a suspect concerning the charges against him in return for a confession or information. Thus there is no room for either plea-bargaining or the use of crown witnesses.

Federal Republic of Germany
DIVERSION AND MEDIATION

Joachim Herrmann*

I. Introduction

Diversion was developed in the United States towards the end of the sixties, as a novel program of criminal policy. This program seeks to lift the criminal from the ordinary course of criminal procedure before he is convicted, and to submit him to treatment, often unconnected with criminal justice, which is better suited to rehabilitate him. From its beginnings, diversion in the United States was closely linked with another reform program, viz. "community treatment". Originally, "community treatment" was taken to refer only to the rehabilitation, through treatment programs on community level other than imprisonment, of persons already convicted. In the course of time, however, the idea of diversion led to the application of these treatment programs to criminals who had not yet been convicted.

The concept of diversion has found general recognition in the United States since. This is indicated by the innumerable diversion programs of most different character that have been created throughout the United States.

Mediation, as it appears in the title of this report and as it is practised in the United States, is to be regarded as a special form of diversion. It is used in some American communities to deal with offenses concerning the private sphere, by replacing the criminal trial with a settlement of the differences between the parties through arbitration.

Although the idea of diversion, generally accepted in the United States, has been noted in German criminal law and criminology, it did not engender a comprehensive program of criminal policy there. The reasons are to be sought in the framework of principles that govern German criminal justice. The most important of these principles will be set forth in chapter II.

Notwithstanding the absence of a comprehensive diversion program in Germany, there are a substantial number of special modifications of the ordinary criminal process which to a larger or a lesser degree originate in the idea of diversion. They were developed at different times and with different considerations. Even though they will be discussed in detail in chapter III, they are briefly listed here for the sake of better understanding.

1. The police are under a legal duty to investigate every offense that has come to their notice. In practice, however, this requirement is not always complied with and in various respects the police in fact fulfil a selective function.

2. In the case of trivial offenses committed by adults, the prosecutor or the court may choose to discontinue proceedings. They may simply drop a case or they may do so after certain conditions have been met by the accused.

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3. In proceedings against drug addicts diversion for therapy reasons may be ordered by the prosecutor or the court.

4. Diversion and mediation may be practised in cases concerning offenses which are subject to private charge by the victim.

5. Wide diversion powers are exercised by the prosecutor and the court in proceedings against juveniles and adolescents.

II. The Framework of the German Criminal Justice System

1. The Principle of Guilt

The principle of guilt plays a far more important role in the criminal justice system of the Federal Republic of Germany than in that of the United States. Until recently, punishment in the United States was generally not determined according to the degree of the offender's guilt, but mainly with reference to rehabilitative considerations. In order not to impede rehabilitation a high degree of discretion was awarded to the judge when determining sentence, and to the parole boards when supervising the execution of sentence. During the seventies, American criminal policy has begun to diverge from the one-sided adherence to rehabilitative sentences and to search for new approaches to criminal policy. One of these new approaches was diversion which is intended to lead to the successful rehabilitation that could not be attained by punitive measures. The strong advancement of diversion was made possible because, from a German point of view, the principle of guilt in the United States is of comparatively little importance even after the reform of its criminal policy.

In the Federal Republic of Germany, on the other hand, the principle of guilt exercises a braking function on the endeavours for diversion. As the strict application of this principle requires that the degree of guilt be a decisive factor in determining sentence, diversion can only become relevant where the principle of guilt does not preclude it. As will be explained in more detail below, this is the position in the case of trivial offenses, for considerations of retaliation may be disregarded here due to the offender's small degree of guilt. Also in the fields of juvenile offenses and violations of narcotic law, considerations of education and rehabilitation are superimposed on the principle of guilt. In these areas, therefore, German criminal law is sufficiently flexible to allow for diversion.

2. Sanctioning Practice

While in the United States the sanctions of primary importance are imprisonment and probation, in the Federal Republic of Germany by far the most common sentence is that of a fine. During the past few years, fines were imposed in an average of 83 percent of the cases where adults were convicted. Sentences of imprisonment unconditionally imposed amounted to about six percent, while approximately eleven percent of the cases led to a suspended prison sentence. The strong leaning towards fines is a consequence of the reform of 1969 which was aimed at reducing short-term imprisonment because it is detrimental to rehabilitation.

In view of this sanctioning practice, the need for the introduction of far-reaching diversion programs in the Federal Republic of Germany is incomparably smaller than in the United States. There the idea of diversion was to a considerable extent based on the

realization that the frequently imposed prison sentences were much less suitable for rehabilitation than had been assumed for a long time.

The fine is not primarily intended to lead to rehabilitation, and it is hardly conceivable in what way it could possibly help to integrate a criminal into society. The fine merely fosters rehabilitation in an indirect way since it replaces the short-term imprisonment so detrimental to rehabilitation. Apart from the special treatment of trivial offenses referred to above, however, there have been no attempts in the Federal Republic of Germany to replace fines with other measures, in particular measures of diversion, that have a more direct effect on rehabilitation.

3. The Rule of Compulsory Prosecution and Prosecutorial Discretion

The question to what extent police and public prosecutors may direct diversion measures in the course of the pre-trial proceedings is dependant upon their discretionary powers. In this respect, too, there are fundamental differences between the American and the West German criminal justice systems.

In the United States the public prosecutor is vested with unrestricted discretionary powers. It is true that in practice he will bring a charge whenever there is sufficient evidence against the accused, not least because this is expected of him by the citizens who elected him into office. Legally, however, he is under no obligation to do so. Where an accused is suspected of having committed several offenses the prosecutor is also free to choose the charge he wishes to file. The police have equally wide and legally unlimited powers of discretion. Consequently, neither the public prosecutor's office nor the police are subject to legal restrictions when directing diversion measures—their actions may be determined by mere considerations of expediency.

In the Federal Republic of Germany the public prosecutor's office was initially strictly bound by the rule of compulsory prosecution. The legal duty to investigate and prosecute was intended to warrant equality of prosecution. In the course of time, however, the rule of compulsory prosecution has frequently been qualified in favor of prosecutorial discretion. With an eye to diversion, the qualifications of importance are those intended for the prosecution of adults in trivial cases and drug cases as well as those for the prosecution of juveniles.

In these cases the discretionary powers of the prosecutor are limited by statutory standards. For example, the prosecutor may choose not to prosecute an adult where the guilt of the accused is minor and public interest does not demand prosecution. In the case of juvenile offenders, the prosecutor may decide against prosecution if an educational measure has already been imposed upon the accused and a conviction, therefore, is deemed dispensable.

The activities of the police in criminal proceedings are governed solely by the principle of compulsory prosecution. It will be set forth below, however, that when the police decide on the question of starting investigations and instituting preliminary proceedings, the principle of compulsory prosecution is not always strictly observed. In this sense it may therefore be said that the police practise informal diversion by refusing to take action.

As soon as preliminary proceedings have been instituted, though, the rule of compulsory prosecution is rigidly applied, for the police cannot terminate their activities in any other way than by transmitting the dossier of the case to the prosecutor's office.

This excludes the possibility of diversion by the police once preliminary proceedings have taken their course.

The police usually conduct their investigations independently and on their own responsibility. Diversion by the prosecutor, therefore, becomes relevant only once investigations by the police have been brought to a close, which is rather late in most cases. This must be regarded as unfavorable to diversion, for the accused is not removed from criminal proceeding at the earliest possible stage. Also, the police are not relieved from part of their case load. On the other hand this approach ensures that the accused is not subjected to diversion measures too early, i.e. before his guilt has satisfactorily been determined.

4. The Solution of the Crime Problem as the State's Responsibility

In the United States a substantial number of diversion programs are implemented not by the criminal justice system itself but by other institutions. These institutions are usually organized on the community level, and they may be either state-controlled, semi-state-controlled, or of private character.

Decentralization and the participation of citizens are typical characteristics of the American system of criminal justice. They originated in the colonial period, where settlers had no choice but to organize matters of security within the local communities independently.

Even today the prevention of crime in the United States is not regarded as the sole responsibility of the various American states and the Federal Government, but as a problem that is to be solved also on community level. The public prosecutor's offices and the police are organized on community and county level. Since they are independent and not responsible to any higher authority, they are free to develop their own strategies for the prevention of crime. It is for this reason that they are also in a position to establish diversion programs that are above all based on local needs.

The idea of giving citizens joint responsibility for the prevention of crime is clearly illustrated by the American jury system. It is further indicated by the fact that judges and public prosecutors frequently receive their office by popular vote. The participation of citizens in establishing and implementing diversion programs is therefore by no means as unusual as might sometimes appear to the outsider.

Quite contrary to the American approach but in line with the continental European way of legal thinking, the prevention of crime in the Federal Republic of Germany is regarded as the sole responsibility of the state. In exercising this function the state employs the hierarchically structured and well organized branches of both the public prosecutor's office and the police in the various federal states. In their fight against crime prosecutors and police can therefore not let themselves be guided merely by local needs. They are under considerable pressure to heed uniformity in enforcing criminal law. It is obvious that this will impede the establishment of a diversity of diversion programs solely based on local requirements.

In the centralized and bureaucratically organized system of German criminal justice there is little room for the participation of citizens. Where lay judges participate in German criminal trials, they decide questions of guilt and punishment together with professional judges. In practice, lay judges fulfil only a subordinate function since they are dominated by the professional judges. Because of these restrictions it seems obvious that the citizens of the Federal Republic of Germany do not feel themselves directly

responsible for the solution of the crime problem. As a consequence citizens have only rarely taken an active part in a diversion program.

5. Checking Stigmatizing Effects

Diversion is also being called for with an eye to protecting the offender from the stigmatizing effects that are brought about by his subjection to criminal proceedings, by his conviction, and in particular by his seclusion in a penal institution. One should not neglect, however, that stigmatizing of the offender cannot be avoided by merely replacing criminal proceedings and criminal sanctions with programs of social education and other diversion measures. Any form of separation and special treatment based on negative selection criteria will harm the social image of the person concerned. Repressive measures which will not be labeled as being negative by society are hardly conceivable.

Bearing this in mind, it will not suffice to merely substitute diversion for the measures of criminal law. Rather, the crucial point is that diversion has to be shaped in such a fashion as will reduce the stigmatizing effect on the person concerned to an absolute minimum.

Independent of this, however, an effort should also be made to check the stigmatizing effect of the offender's subjection to criminal proceedings, of his conviction and of the sentence imposed upon him. In the Federal Republic of Germany there are indeed several methods that pursue this aim.

In criminal cases involving adults, the public trial and the negative publicity resulting from it will be avoided when the prosecutor, instead of bringing a charge, applies to the judge for a penal order. The prosecutor prepares a draft of the proposed penal order. The judge decides whether to issue the order solely on the basis of the prosecutor's draft and the dossier of the case. Penal orders, which may be compared to the guilty plea in Anglo-American procedure, are issued in approximately one third of all criminal cases.

In trials involving juveniles, that is persons between 14 and 18 years of age, the public is excluded, inter alia to avoid the young person's exposure. Trials involving adolescents, that is persons between 18 and 21 years of age, may be conducted to the exclusion of the public. In practice this is in fact frequently done.

The media are by law required to respect the interests of the accused when reporting on crimes and criminal proceedings. The freedom of the press is restricted by the accused's right to privacy and by the presumption of innocence. The media are therefore prohibited from publishing the name or picture of the accused unless serious crimes of general interest are concerned.

Due to the separation involved, imprisonment is particularly easily noted by fellow-citizens. As has been explained above, imprisonment has been cut back in favor of less stigmatizing forms of punishment. The former differentiation between imprisonment and penal servitude which was so harmful to a person's reputation has been replaced by uniform imprisonment.

Most of the petty violations of the law which were formerly treated as a separate category of criminal offenses ("Uebertretungen"), were excluded from the body of criminal law and turned into non-criminal infractions to be dealt with by administrative authorities by means of a summons. The totality of minor traffic offenses has, for example, been relabeled in this way. The exact difference between criminal offenses and

non-criminal infractions has by no means been established. There is general agreement, though, that a summons issued by an administrative authority is to be considered less reproachful than a fine imposed by a court. On the other hand it should not be overlooked that to the person concerned it will scarcely matter whether the demand for payment imposed upon him is defined as an administrative or a criminal fine.

The reform of the law regarding the criminal record was another factor that served to limit stigmatizing. The Federal Central Register Act which came into operation in 1972 provides that convictions which have been placed on the criminal record are to be expunged considerably earlier than what had been done until then. The Act also provides that only limited information on convictions listed in the criminal record shall be given. Where a private person requests that information contained in the Federal Central Register be given to him in the form of a "certificate of character", a sentence of not more than ninety day fines or of imprisonment of not more than three months will not be disclosed provided there are no further entries in the criminal record. Should a person apply for employment after any of these sentences have been imposed on him, he may therefore submit a clean "certificate of character" and may state that he has no previous convictions. The high practical significance of this rule becomes apparent when one considers that in some 83 percent of all convictions a fine is imposed and that approximately 98.5 percent of the fines will not exceed ninety day fines.

The Federal Central Register Act also takes into account that stigmatizing is particularly serious when young persons are involved. Juvenile courts may impose three types of sanctions: educational measures, disciplinary measures and penalties. When educational or disciplinary measures are listed in the criminal record they may not be communicated either to any private person or to the police. These measures are imposed in approximately 86 percent of the cases involving juveniles. Penalties imposed upon juveniles are included in a "certificate of character" only in serious cases; they are also more easily effaced from the criminal record than convictions of adults.

Unnecessary stigmatizing is also prohibited by sec. 40 of the Execution of Prison Sentences Act. This section provides that certificates attesting the successful participation in an educational or vocational training course shall not indicate in any form that they were issued to a person serving his prison sentence.

III. The Various Forms of Diversion

1. Diversion by the Police

According to the Code of Criminal Procedure (CCP) the police are not entitled to make use of diversion. Sec. 163 (I) of the Code provides that the police have to investigate every crime that comes to their notice, i.e. the police are subject to the rule of compulsory prosecution without exception. This legal obligation is complied with as soon as the police have started investigative proceedings and have recorded initial findings in a dossier. The police then have no choice but to refer the case to the prosecutor after they completed their investigations.

Yet, as long as the police have not started investigative proceedings, and as long as nothing has been recorded in writing, the police are in a much more flexible position. It is a well-known fact that the police by no means investigate all incidents giving rise to suspicion with equal thoroughness. The police may refrain from initiating investiga-

tions and thus employ a form of simple diversion. This does, however, not mean that the police will always remain completely inactive. In appropriate cases the police regard it as their duty to mediate disputes, to fulfil a conciliatory function, to calm and caution disturbers and to draw the attention of injured parties to damage claims.

Although there is no doubt that diversion by the police is in conflict with the law, it is nevertheless generally accepted. As a rule it remains restricted to trivial offenses, and therefore also those injured by these offenses obviously consent to it.

Diversion by the police is usually justified by referring to the shortage of personnel and limited financial means. A further reason for diversion is, however, that it would be intolerable if criminal proceedings were to be instituted for every, albeit how petty, violation of criminal law.

Since the police are forced to make use of diversion, the question arises by what criteria they are guided. There is no doubt that the police develop their own strategies and that their approach is determined by widely diverging factors, for example, by internal instructions, by the daily routine, or by the norms of professional subculture. To date, however, little information on the details of these strategies and factors is available.

It has been ascertained by empirical research, for example, that the police are rather reluctant to start investigations when an offense against a person is reported, but that they readily institute proceedings when informed of a property offense. Even if one takes into account that the reported crimes against a person were largely of trivial character, this practice indicates that the police are evidently more prepared to make use of diversion when violations of immaterial interests are concerned than when material interests are at stake.

A further example of diversion by the police is to be found in connection with drug offenses. Empirical research has shown that the police sometimes deliberately decline to take action against offenders in petty matters and dealers operating on small scale, and restrict themselves to observing them in order to find trails that lead to more dangerous dealers with a larger turnover. The police are in a position to develop investigation strategies of this nature because they become active of their own accord here and do not have to wait for a report to be made by a victim.

2. Diversion by Prosecutors and Courts in Trivial Cases Involving Adults

a) The most important diversion measure in proceedings against adults is the dropping of cases concerning trivial matters by either the prosecutor or the court. In both instances the law requires that a misdemeanor be involved, that the offender's guilt be minor and that there be no public interest in a conviction. The accused is removed from the ordinary course of proceedings either by "simple diversion", i.e. by simply discontinuing proceedings (sec. 153 CCP), or by "intervening diversion" (sec. 153a CCP). In the case of intervening diversion the prosecutor, with the consent of the court, provisionally declines to bring a charge and imposes certain measures upon the accused. After the accused has complied with these measures proceedings against him are finally terminated.

Sec. 153 was included in the Code of Criminal Procedure as long ago as 1924, in order to unburden the criminal justice system and to serve as a balance for the rapid expansion of substantive criminal law during those years. Apart from this form of simple diversion, various forms of intervening diversion were already practised by the prosecutor to a

limited extent. In 1975, intervening diversion received a legal basis through the introduction of sec. 153a CCP. Initially this provision was applied only reluctantly, but its application has been increasing over the past few years.

b) During 1980, approximately 102,000 proceedings were terminated by the prosecutor in accordance with sec. 153a CCP. If one takes into account that the prosecutor preferred charges in approximately 728,000 cases during that year, this means that for virtually every seven charges there was one disposal by means of intervening diversion. Almost another 50,000 cases were dropped in accordance with sec. 153a CCP by the courts after charges had been preferred.

Statistics further show that a considerable number of cases are also terminated by simple diversion through sec. 153 CCP. In regard to prosecutors the ratio of diversion by intervention to simple diversion is about four to three.

c) The legal requirements of minor guilt and absence of public interest, i.e. the criteria that have to be considered by the prosecutor and the court in their decision, are so vague that they can scarcely serve as effective guidelines. As far as the prosecutor is concerned, this gap was closed by directions issued by the ministers of justice or by the heads of the prosecutor's offices. These directions usually indicate the types of offenses and the maximum damages for which diversion may be considered. There are two groups of offenses for which diversion, especially intervening diversion, will typically be allowed: less serious offenses against property, in particular shoplifting, riding on public transport without paying, and petty traffic offenses. The maximum damages may be between 100 DM and 800 DM.

When deciding on the discontinuation of the proceedings, the prosecutor has to rely on relatively little evidence, for he has only the dossier that was compiled by the police. When mass criminality of petty character is involved the dossier will almost without exception contain only sparse information which the police gather by way of routine and by largely making use of standard forms. Usually the dossiers will merely indicate the kind of the offense, the extent of damage, the occupational position of the accused and his previous convictions.

The prosecutor will generally decline to drop a case when the standard maximum damage has been exceeded or when the accused has a criminal record, in particular if his previous convictions are similar in kind to the alleged offense. Individual aspects of a case cannot be considered as the police will usually not include them in the dossier.

Thus, diversion in these cases is evidently not a process specifically directed at the rehabilitation of the accused. Rather, it serves the purpose of relieving the criminal justice system of heavy case loads. In addition, it protects the accused by disposing of the case against him quickly and without unnecessary stigmatizing.

Stigmatizing is further avoided by the fact that no entry is made in the Federal Central Register if a case is dropped in accordance with secs. 153, 153a CCP. Prosecutors, however, undermine this decision of the legislature since they keep special registers on a local basis in which they list cases that have been dropped. This is done to prevent recidivists from benefiting from diversion.

The unimportant role the idea of rehabilitation plays in these cases, becomes apparent also if one looks at the measures that may be imposed by way of intervening diversion. Sec. 153a CCP provides for four intervention measures: 1) compensating the victim, 2) payment of a sum of money to a charitable organization or to the state, 3) performance of some other charitable work and 4) undertaking support obligations in

favor of a dependent. In practice, however, the prosecutor will almost without exception direct that the accused pay a sum of money to a charitable organization. During 1980 this measure was imposed in more than 96 percent of the cases of diversion with intervention.

The sum of the money to be paid as intervention measure is often determined in relation to the fine that would have been imposed by the court. Usually the prosecutor will fix the amount in the form of round sums, for example, at 100 DM or 200 DM. Thus, this intervention measure is determined mainly with reference to the offense rather than the individual offender. It is obviously governed by the desire to dispose of similar cases in a uniform manner.

d) Only little is known about the diversion practice of the courts. One may assume, however, that the courts will normally be in a position to base their decision as to diversion and intervention measures on a broader evidentiary basis. At the trial, they have an opportunity of acquainting themselves with the particulars of the offense and the offender. These particulars may be relevant for the question of whether or not diversion should be directed. As far as the selection of intervention measures is concerned, however, the particulars scarcely seem to be of any significance, for payment of a sum of money to a charitable organization is the condition most frequently imposed by judges.

e) The prosecutor's power of intervening diversion as established by sec. 153a CCP has been sharply criticized by scholars of criminal law. It is maintained that the imposition of intervention measures without first proving the offender's guilt before a court is not compatible with the presumption of innocence and that there is danger of sanctioning someone who is in fact innocent. Furthermore, it is emphasized that the accused is not actually free to withhold the consent required of him for intervening diversion. He will feel compelled to comply with the intervention measures since he knows very well that otherwise he has to face the continuation of proceedings and possible conviction. It is also argued that in determining the intervention measures the prosecutor exercises functions which should be reserved for the judge. With regard to the payment of a sum of money to a charitable organization, critics have spoken of ransom proceedings, a millionaires' provision and the commercializing of criminal justice.

As far as this criticism is aimed at the practice of intervening diversion it is evidently unfounded. Neither have persons affected by intervention measures voiced any complaints, nor has empirical research revealed irregularities.

On the other hand a few spectacular cases have become known in which proceedings were discontinued by a court after considerable amounts of money had been paid to a charitable organization although it was doubtful whether the guilt of the offender could be regarded as minor or whether guilt could have been proved at all. It seems questionable, however, whether single cases of this nature should lead to the total rejection of a process that has evidently been applied to the general satisfaction in about 150,000 cases per year.

In response to the argument that intervention measures should not be imposed without the necessary proof of guilt, it may be pointed out that sec. 153a CCP explicitly requires that the guilt be established prior to diversion. As is well known, the prosecutor bases his decision in favor of diversion on the dossier that was compiled by the police. When investigating an offense, however, the police do not distinguish between those cases where a charge is preferred or a penal order is applied for, and those that involve diversion. There is no way in which the police could anticipate what steps the prosecutor

will later take. On the other hand, there have been no indications to date that the prosecutor resorts to intervening diversion even though there is not sufficient evidence to prove the offense.

The fact that an accused has to choose between two evils, i.e. either punishment or a diversion measure, does not appear to be unfair to him. If he is really innocent or if he is of the opinion that his guilt cannot be proved, he may withhold his consent to diversion and consequently face criminal proceedings in the same manner as any accused who is not offered the possibility of diversion. If the accused is guilty, he is not unjustly burdened by an intervention measure as long as the measure is not of a more stringent character than what the expected punishment would have been. There is nothing to suggest, however, that in practice payments to charitable organizations will involve higher sums than the fines that were imposed in comparable cases.

The establishment of the prosecutor's office, i.e. the separation of investigative and the judicial functions, was an important step in overcoming the old inquisitorial proceedings. Remembering this, the objection that the prosecutor performs a judicial function when directing diversion measures does at first glance appear to be a serious one. It could be argued, of course, that unless property offenses involving trivial damage are concerned, the court has to consent to intervening diversion and therefore has to take joint responsibility. In practice, however, the prosecutor often seems to consider the damage in property offenses so minimal as not to require judicial consent. In other cases where judicial consent is necessary it will regularly be given as a matter of routine so that efficient control of the prosecutor's decision is scarcely possible.

The argument that the prosecutor illegally exercises judicial sanctioning power is nevertheless not convincing. The sanctions provided for in sec. 153a CCP can hardly be regarded as punishment since they were introduced with the specific purpose of replacing punishment with diversion. Also, unlike punishment, diversion measures are neither enforced by coercion nor are they entered into the Federal Central Register.

It is also not true that in cases where diversion measures may be directed the prosecutor exercises an investigating as well as a decision-making function. As was pointed out above, investigations in these cases are conducted by the police rather than by the prosecutor. Ordinarily, the prosecutor readily endorses the findings of the police. He will conduct his own investigations or direct the police to supplement their findings in exceptional cases only. Thus, in practice, the investigating function is exercised by the police while the prosecutor is restricted to the decision-making function.

It could be argued that the decision as to diversion measures should be left to an independent judge rather than to the prosecutor who is subject to directions by his superiors. One cannot overlook, however, that the prosecutor also exercises considerable sanctioning power when, instead of bringing a charge, he applies to the judge for a penal order. From a legal point of view the prosecutor can only file an application, while the judge has to make the actual decision. In practice, however, judges comply with the request of the prosecutor almost without exception. Since this practice is generally accepted without criticism, it does not appear consistent to reject the much less extensive sanctioning power the prosecutor exercises in directing diversion measures.

3. Diversion for Therapy Purposes in Proceedings Involving Drug Addicts

A special form of intervening diversion was developed only recently for offenders addicted to drugs. The new Drug Act which became effective in 1982 provides that with

the court's consent the prosecutor may provisionally decline to prefer a charge in cases where a drug addict who committed an offense has already been undergoing treatment for at least three months and his rehabilitation is to be expected. The prosecutor may proceed with a provisionally terminated case only under certain legally defined circumstances, in particular if the accused fails to provide evidence from time to time that he is still receiving treatment, or if he breaks off treatment. Where a charge has already been preferred, the court may terminate proceedings under the same conditions if the prosecutor consents.

Diversion for therapy purposes has been modelled on sec. 153a CCP, but may be practised in a much wider context. While sec. 153a CCP applies only where the offender's guilt is minor, diversion in drug cases may be directed as soon as not more than two years of imprisonment are to be expected. Whenever a prison sentence of this length is involved an offense can no longer be defined as trivial, as sec. 153a CCP would require. If one considers the sanctioning practice of the courts it appears that the Drug Act opens the possibility of diversion for the majority of offenders addicted to drugs.

For obvious reasons, diversion for therapy purposes may be directed in cases involving offenders of any age group.

The Drug Act admits all kinds of treatment as diversion measures. It may be provided in an institution or in an ambulatory way; it may be given by a medical doctor, psychologist, educationalist, or any other qualified specialist. Treatment involving Methadon, Polamidon or other drug substitutes is excluded, however, as it does not pursue any therapeutical aims.

Intervening diversion as created by the Drug Act is widely regarded as an important milestone in the realization of the principle "therapy in lieu of punishment". On closer examination, however, it becomes apparent that the Drug Act does not fully justify this claim. There are but a few drug addicts who will undergo treatment of their own accord before investigating proceedings are instituted, or who will be moved to do so thereafter on account of impending punishment.

Practical experience and empirical research have revealed that drug addiction is by no means an isolated problem. In the Federal Republic of today it is found mainly in the lower classes, and it is usually interwoven with juvenile instability, social demoralization and all kinds of criminality. These factors, as well as drug dependence itself, will often impede the offender's willingness to undergo therapy. Diversion as envisaged by the Drug Act can therefore only cater for the small group of offenders who have aptly been called the "elite patients" willing to undergo treatment.

In view of this, it would have been incumbent on the legislature not only to introduce diversion, but in addition, to provide for detailed drug counselling. Through counselling it could have been attempted to influence those not willing to undergo therapy and thus to motivate some of them to participate in a treatment program. Taking into consideration that to date prosecutors have only rarely intervened in investigations and that they have generally refrained from interrogating drug addicts, it seems unlikely that they will take the initiative to arrange for drug counselling without being legally obliged to do so.

If it should be possible to overcome the unwillingness of drug addicts to undergo treatment, a further obstacle to diversion would present itself. Experts on drug problems are agreed that in this event there would be a serious shortage of institutions for treatment and facilities for ambulatory therapy.

4. Diversion and Mediation in Connection with Offenses which are Subject to Private Charge by the Victim

The German Code of Criminal Procedure provides for a combination of diversion and mediation in the case of offenses which are subject to private charge by the victim. These are certain less serious misdemeanors designed to protect private interests, for example, insult, less serious forms of causing bodily harm, damage to property and breach of domestic peace. The prosecutor will not file a public charge in cases subject to private prosecution unless it is in the public interest. In practice the public interest is regarded as being at stake only in exceptional cases, in particular when one of the just mentioned offenses has affected not only the victim but a larger group of persons. The prosecutor's general practice not to prosecute where offenses subject to private charge by the victim are involved, may be regarded as a simple form of diversion. Yet, diversion in this case does not always terminate proceedings in a final way.

If the prosecutor refrains from prosecution the victim is entitled to prefer a private charge. The victim assumes the role of a prosecutor in his own case and brings the offender to trial. Experience has shown, however, that victims will do so only in rare cases as they evidently do not attach sufficient importance to offenses against their person. There are also a number of other factors which prevent the victim from preferring a private charge. As the victim will usually lack the skill of drawing up a charge sheet and presenting the charge at the trial he has to assign counsel and pay his fees. Furthermore, the victim is required to make advance payment for court costs and to provide surety for the accused's costs. Should he lose the case he will forfeit what he has paid. In practice the risk that the victim will fail to win is particularly high. Empirical research has shown that only three to eight percent of private charges will result in conviction.

In view of these impediments and financial risks it is not surprising that private prosecution is today "on its deathbed". It has therefore been suggested that this form of proceedings should either be thoroughly reformed or that it should be abolished altogether. The demand for the abolition of private prosecutions seems to be justified. It should, however, not entail doing away with conciliatory proceedings.

Whenever a victim decides to prefer a private charge, the first thing required of him in the majority of cases is that he has to take part in a conciliation hearing. In other words, there has to be a mediation procedure before private charge proceedings can begin. The conciliatory proceedings do not primarily concern the clearing up of the alleged offense, but rather attempt to settle the dispute underlying it. They therefore fulfil a pacifying function extending beyond the particular case in question. Apart from this they relieve the courts of cases that would have to be regarded as trivial. A statistical inquiry has established that in practice conciliatory proceedings dispose of a considerable percentage of cases. Of the cases examined, approximately 50 percent were successfully settled, while a private charge was only preferred in some 50 percent of those cases in which a settlement had not been reached.

In Baden-Württemberg and Bavaria, conciliatory proceedings take place before the mayor or an official of the community; in other federal states they are regularly conducted by an elected arbitrator. Mediators will hold the hearing without formalities and in a private atmosphere, often even at their own homes. Although they are entitled to hear witnesses and experts, they cannot compel them to appear or to give evidence. In

practice, evidence will be heard only rarely, since conciliatory proceedings do not so much aim at fact-finding as rather to reconcile the parties.

The parties have to attend the conciliation hearing in person, but may appear with counsel. Successful proceedings will end with a settlement. A typical settlement entails that the injured party waives his right to prefer a private charge, while his opponent, for example, apologizes, makes a "declaration of honor", or promises to compensate the injured party for damage or to pay a sum of money to a charitable organization.

Conciliatory proceedings are evidently conducted to the general satisfaction of the parties. They are even employed in matters for which they are legally not envisaged. With regard to civil jurisdiction it is even being considered to follow American models by making more use of informal mediation proceedings.

In spite of the essentially positive assessment, conciliatory proceedings have been disregarded in the context of recent diversion efforts. Most likely they have been overshadowed by the criticism that has been levelled against private charge proceedings. This seems regrettable. A desirable solution would be to retain conciliatory proceedings and to even extend their application, regardless of whether or not private prosecutions are abolished.

5. Diversion in Proceedings against Juveniles and Adolescents

a) In proceedings against juveniles and adolescents the prosecutor and the court have a much wider scope of diversion possibilities than in proceedings involving adults. Due to the fact that the young person's education is the predominant consideration in these cases, intervening diversion is the general rule here, but simple diversion is also possible.

b) In accordance with sec. 45 (II) 1 of the Juvenile Court Act (JCA) the prosecutor may decline to prosecute if an educational measure which makes proceedings before a juvenile court dispensable has already been imposed. This form of diversion which does not require the judge's consent may be ordered in the case of misdemeanors and theoretically also in felony cases. The fixing of the educational measure depends largely on the pedagogical skill of the individual public prosecutor. Sometimes educational steps by the parents, the master or the school are considered appropriate; in other cases counselling by a probation officer for juveniles, a judge, or the prosecutor himself may be regarded as sufficient. In more serious matters, voluntary performance of charitable work, correctional education or a period of pre-trial custody that has already been suffered should be taken into account.

c) Likewise, in accordance with sec. 45 (II) 2 JCA the prosecutor may decline to prosecute without the judge's consent where the requirements of sec. 153 CCP have been met, i.e. when guilt is minor and public interest does not demand conviction. The prosecutor is expected to make use of this kind of diversion only in exceptional cases, as the absence of any intervention measure might lead to unfavorable results from an educational point of view. It may be argued, however, that the mere instituting of investigative proceedings and the confrontation with the police may sometimes be enough to impress a young person. Before choosing between intervening and simple diversion, the prosecutor should therefore make himself familiar with the personality of the accused. A report on the practice of the Hamburg prosecutorial office indicates, however, that prosecutors will mainly orient themselves by the seriousness of the crime and by

previous convictions. Proceedings are terminated without imposing educational measures in theft cases involving damage of less than 10 DM provided it was the offender's first offense, as well as in cases of using public transport without paying.

d) A form of intervening diversion which in practice is applied in somewhat more serious cases requires the prosecutor and the judge to cooperate (sec. 45 (I) JCA). Where the prosecutor considers a conviction to be dispensable, but thinks the participation of a judge advisable for educational reasons, he may suggest that the judge give the accused a warning or that he order him to make restitution for the damage, to apologize to the injured person, to pay a sum of money to a charitable organization, to perform charitable work or to participate in traffic instruction by the police. After the judge has put the prosecutor's suggestion into practice, the latter will terminate the proceedings.

As a rule, judges will follow the suggestions of prosecutors. They then conduct a so-called "informal educational trial", which takes place without the prosecutor and without the hearing of evidence and is often held in the judge's chambers.

A legal prerequisite for this form of proceedings is the confession by the accused. Its purpose is to prevent any of the measures mentioned from being directed before the question of guilt has been resolved. It is open to doubt, however, whether confessions actually serve as such a safeguard, especially when one considers that juveniles and adolescents are evidently extremely willing to confess.

According to the report on the practice in Hamburg, informal educational trials are held only if the accused is a juvenile and his crime was one of the following : first offenses involving damage between 10 DM and 25 DM, using public transport without paying in no more than two instances, or typical petty juvenile crimes, for example, offenses against the Weapons Act, tampering with emergency telephones, simulating an offense, and false accusation. As far as traffic offenses are concerned, it is mainly driving an uninsured vehicle, driving without a driver's license and petty instances of negligently causing bodily harm that come into question.

It would appear that also in these cases the prosecutor does not base his decision on the personality of the accused, but rather on the number of his previous convictions, the seriousness of the offense and the extent of the damage that was caused. The wording of sec. 45 JCA, however, does not require that these should be the sole criteria for diversion, nor even that diversion should be limited to positively petty crimes. Neither do these criteria appear useful from an educational point of view. One could argue, of course, that the prosecutor would not be able to cope with the work load if he had to inquire extensively into the personality, family situation, and conditions at school and work in the case of every accused. A report by the prosecutorial office in Lübeck states, however, that a certain degree of clarity on these aspects may be reached quickly and without much effort by making use of a prosecutorial hearing.

e) Sec. 45 JCA provides that the prosecutor will terminate proceedings finally as soon as an educational measure has been directed. It is nevertheless generally regarded permissible to suspend proceedings only provisionally. By the provisional suspension of proceedings on probation the accused is indirectly compelled to comply with the educational measures imposed on him. Should he fail to do so within the specified period of time, the prosecutor may continue proceedings.

f) Once the charge has been preferred, the judge may terminate a case provided the conditions which entitle the prosecutor to decline prosecution during pre-trial proceed-

ings prevail (sec. 47 JCA). Here, too, it has become the general practice that initially proceedings are merely suspended, while they are terminated finally only after the educational measures have been complied with.

g) Termination of proceedings by the judge or by the prosecutor is of great practical significance. During 1981 37,831 cases were terminated through sec. 45 (I) JCA, and 52,259 through sec. 47 JCA. Terminations of cases through sec. 45 (I) JCA which may be executed by the prosecutor without the judge's consent are estimated to have amounted to at least 25,000 cases. Thus in 1981 a total of 115,090 cases were dropped while there were 141,517 convictions according to juvenile criminal law. This means that about 45 percent of the cases were disposed of by means of diversion.

These figures indicate the fact that the practice of diversion is not uniform in the different parts of the Federal Republic. There seems to be a growing tendency, however, to make use of the various forms of diversion. To what extent this is in fact done, will depend mainly on the educational intervention measures available in a particular case.

h) In an attempt to improve these intervention measures, new steps have recently been taken. The Juvenile Court Act provides that juveniles and adolescents may be directed to perform charitable work, i.e. some form of social service. There is general consensus that for educational reasons social service is better suited for criminals who committed offenses no longer to be regarded as trivial than a fine or juvenile detention which would also be available in such cases. Usually, however, social service cannot be directed due to the shortage of suitable opportunities for its performance.

In order to alleviate this shortage, so-called "Brücke"-Projects have been established in Munich and Cologne as well as in several other cities. These projects find suitable opportunities for the performance of social services, arrange for juveniles and adolescents to work there, and at the same time fulfil counselling functions. The "Brücke"-Projects organize the performance of social services not only where a youthful offender has been sentenced to it but also where it is directed as a diversion measure. In fact, by organizing the social service the "Brücke"-Projects actually try to replace judicial sentences with diversion as far as is possible.

The "Brücke"-Projects were established on private initiative; they are financed with private and public funds. The great practical significance they have reached within a short time is illustrated by the fact that annually about 2,500 juveniles and adolescents are found places for the performance of social services in Munich, while in Cologne the figure is approximately 1,500. The social services are performed by aiding aged and handicapped persons or by working in hospitals, in children's and juveniles' homes as well as in other social institutions. It lasts for an average of 25 to 30 hours, but in exceptional cases it may even exceed 60 hours.

From a legal point of view, the liberal expansion of the social service is somewhat problematical, for according to a decision of the High Federal Court of Appeals the performance of work may be directed only where the juvenile's attitude towards work is intended to be influenced and where such influence is in fact possible. Judges and prosecutors who cooperate with "Brücke"-Projects evidently ignore this restriction, for when directing the performance of social work they will, as a rule, not ask the juvenile or adolescent about his attitude towards work. This does not necessarily mean, however, that the imposition of social work is alienated from its legal purpose, i.e. that it is turned from an educational measure into a retributive sanction. Social service may have an indirect educating effect since it is suited to open a person's eyes for the problems of

his fellow-citizens, to strengthen his sense of responsibility as well as to let him experience success and the feeling of being part of a community. The Court's restriction of the idea of education therefore seems unjustified.

The activities of the "Brücke"-Projects are not limited to the organization of social service. In Munich and Cologne, for example, the Projects also offer individual counselling and group therapy. In Kiel the Project attempts to activate restitution of damages as a diversion measure.

There are experiments with new diversion measures elsewhere, too. In Wuppertal, for example, social training courses are held in order to replace juvenile detention. In Mönchen-Gladbach there are attempts to substitute criminal prosecution with mediation proceedings in cases of shoplifting.

On the one hand, these projects indicate the willingness to allow for greater individualization in juvenile criminal justice. On the other hand, it is to be observed that in the field of juvenile law criminal sanctions and social policy measures overlap to an increasing extent.

Yugoslavia
DIVERSION AND MEDIATION

Željko Horvatić

I. Introductory Remarks

It is with pleasure that I accept the task of elaborating a national report for Congress Topic III, entrusted to me by the Presidency of the Union of Yugoslav Associations of Criminal Law and Criminology and have read with greatest attention the paper sent to me containing the specifications for elaborating such national reports. Having constantly in mind the difficulties of compiling an overall report encompassing the data given in explanations of the situation and ideas in the national reports, I endeavoured, as far as possible, to adhere to the guidelines which were given. My attempt, however, did not always prove successful in every respect. First of all, I divided the report into two parts. In the first part, I review the general problems concerning particular cases of diversion from prosecution and mediation in criminal matters, and in the second, I try to give as full as possible demonstration of the state of these subjects in positive Yugoslav law. I did not respond to the questions given in the instructions according to their order, neither did I do so all in one, but I took account in my presentation not to omit any one of the answers to those questions.

In the title of the report, I attempted, with the expression "particular cases", to clarify that this did not concern all cases of diversion from prosecution which exist in positive law, or which are possible in the procedure against an individual who is suspected of having committed a crime. The subject we are dealing with, namely, does not include those cases of diversion where, at any stage of the procedure, it is established, for example, that the matter does not concern a criminal offence, that it is subject to the statute of limitations and has expired, that the offence was amnestied or pardoned, that circumstances exist which exclude prosecution, when there is no evidence that accused has committed a criminal offence and so forth. With regard to mediation I felt the need to clarify that the aforementioned concerns such procedure only in "criminal matters", that it does not involve any kind of mediation in order to eliminate a situation of conflict other than one which has ensued (or is suspected to have ensued) out of a criminal act, neither does it concern mediation in the course of criminal proceedings, as this mediation may be attempted and realized before the moment when, according to the positive law of a country, criminal proceedings, in the formal sense, begin.

II. The General Problems of Particular Cases of Diversion from Prosecution and Mediation in Criminal Matters

Of the number of issues which could be discussed from different angles of approach to the given subject, in my opinion, several merit particular attention. Thus, for example, firstly, it is necessary to specify which differences and peculiarities exist when diverting criminal offences from prosecutions undertaken on the grounds of an official charge or

a private plaint. A point which is closely related to the aforesaid concerns the position of the person who is the victim of the criminal offence, for whose part prosecution is officially carried out, in the case of diversion. Two very important points belong to this category of problems, one of which regards the position of the offender whose prosecution has been diverted, and the other concerns the criminal policy purpose of this diversion from prosecution. I shall briefly discuss both of these points with the intention of appraising them and rendering an opinion on them.

a) Prosecution on the Grounds of an Official Charge and of a Private Plaint

In the catalogue of incriminations in modern criminal law, there are criminal offences for which prosecution is undertaken on the basis of an official charge or a private plaint. This is from the viewpoint of establishing who is authorized prosecutor, the basic but not sole division of criminal acts. There are criminal offences which do not belong to any one of those categories, and for which prosecution is undertaken at the instigation of the victim of the criminal offence. (A case of prosecution is submitted to the public prosecutor and he undertakes the entire procedure just the same as in a case concerning a criminal offence prosecuted on the grounds of an official charge. However, the victim can, at any time, withdraw his suit, and then the public prosecutor is in duty bound to renounce prosecution.[1]) The difference between criminal offences prosecuted on the grounds of a private plaint or on an official charge is not important so it need not be analysed. Moreover, we can disregard this difference, so when we speak of situations arising out of prosecution on the grounds of a private plaint, we also refer to those concerning prosecution on an official charge. As to diversion from prosecution, when this concerns criminal offences prosecuted on an official charge, it is important to note whether the public prosecutor undertakes prosecution according to the principle of legality or of opportunity. In the first case, specific possibilities for diversion from prosecution must be explicitly foreseen by law. Whilst in the second case, as a rule, the public prosecutor is authorized to divert from prosecution by the very discretional judgement contained in the principle of opportunity in prosecution. Diversion in such a system is, undoubtedly, simpler and the possibility for this in everyday practice is greater. If legality of prosecution exists in the system and if the possibility of diversion from prosecution for certain cases is not foreseen in the law, such diversion is out of the question. There is, of course, a probability that in the system in which the principle of legality of prosecution is prescribed, the public prosecutor in some cases, diverting from prosecution, acts as though he were authorized, although the legal propositions are not fulfilled and he then conceals this under one of the forms permitted. However, these situations are not in accordance with legal solutions, and if we were to discuss them, this would lead to unsafe ground for making conclusions.

Concerning criminal offences where prosecution is undertaken on an official basis, the situation regarding diversion from prosecution is therefore different depending on whether the principle of legality or of opportunity for prosecution is prescribed. With regard to criminal offences where prosecution is undertaken on the basis of a private plaint (or alternatively at the instigation of the victim), "discretional judgement" as to whether diversion will ensue is not subject to any legal limitations whatsoever. Therefore, in discussion on the general problems of diversion from prosecution, we should

1. Such prosecution according to a suit for some criminal acts was prescribed in Yugoslav criminal law before the new laws enacted in 1977.

not omit the number of criminal offences in the catalogue of incrimination in any country where prosecution is undertaken on an official charge or a private plaint, or an analysis of this relation. The more there are of the latter, the greater the possibility of diversion from prosecution in the system. Thus, for example, if the legality principle for prosecution is prescribed and there are a relatively small number of criminal offences for which prosecution is undertaken on the basis of a private plaint, legal possibilities for particular cases of diversion are far fewer in comparison to the system in which the principle of opportunity of prosecution is prescribed, and the number of incriminations prosecuted on the grounds of a private plaint is all the more important.

After these remarks and conclusions, it would be expedient to question whether, in any respect, in cases where a private plaint does not give rise to proceedings or where at some stage of the proceedings prosecution is stopped, this concerns the diversion from prosecution which we are discussing. Namely, it seems (and one would so conclude from instructions for the elaboration of the national report) that particular cases of diversion are to be considered only when they concern criminal offences for which prosecution is undertaken on the basis of an official lawsuit, and that situations when a private plaintiff either does not sue or withdraws his suit later are sufficiently clear and are not a part of the discussion on the given topic. If we add to this the possible standpoint that interventions connected with diversion are undertaken only at the initiative of state or state administrative organs, the conditions for misapprehension are fulfilled. I say a misapprehension, because I consider that in a discussion on the general problems of particular cases of diversion and mediation in criminal matters, the situations dealing with criminal offences, prosecuted on the basis of a private plaint, must be included. This should be when we limit the discussion only to those cases of diversion with intervention. I think, namely, that by the nature of things, it is indisputable that in the notion of simple diversion, all cases should be included when the victim of the criminal offence decides on this solution of his own accord. A private plaintiff may, however, initiate proceedings or persist in his suit, depending on circumstances on which the suspect or accused can decide, and can inform him informally or in the presence of an official body and even before the court.[2] Thus, for example, the person who is authorized to submit a private plaint can, either before or after submitting a suit to the court, inform the person who he intends to accuse, or has already accused, that he will withdraw his suit if compensation is made, or an apology is given and so forth. Is this not a proper example of diversion from prosecution with intervention, by which, instead of applying criminal sanctions, the conflict is settled in another fashion? This is a possible way of mediation in criminal cases when dealing with prosecution on the basis of a private plaint.

b) The Position of the Victim in the Case of Diversion from Prosecution for a Criminal Offence Prosecuted on the Basis of an Official Charge

In the discussion on the general problems of diversion from prosecution and mediation in criminal matters, we must direct our attention to the position of the victim, concerning criminal offences for which prosecution is undertaken on the basis of an official

2. We speak of a suspect or the accused. The accused, at this point and further on in the text, I consider to be a person under investigation or who has already been accused, if only on the basis of a private plaint. In the preliminary phases of procedure, we talk of the suspect. To simplify matters, in future, I will use only one term—accused— when I refer to the suspect or the accused.

charge, because by the decision of the public prosecutor, the procedure need not be definitely or conditionally ended. Systems exist, namely, in which a victim whose personal or property rights are impaired or jeopardized has the right and possibility to continue prosecution in the case where the public prosecutor diverts from prosecution of a criminal offence on an official charge. This can be taken into consideration in the system which foresees prosecution both according to the principle of legality and of opportunity. It would be expected that possibilities for continuing prosecution in the system of opportunity of prosecution are greater. However, in both cases, it is necessary to legally solve those questions which are of import in diversion and mediation. The basic question in this context regards the position of the victim who has right to persist in prosecution. Diversion in particular cases, especially with intervention, can, because of the victim's right to continue prosecution, depend on his will and decision. This again means that, for particular cases of diversion, it would be necessary first to obtain the statement of the victim that he agrees to this and will not continue prosecution. At this moment we must differentiate two points: with respect to simple diversion, I consider that such a statement is unnecessary and that there is no reason not to expect the continuation of prosecution. This is, ultimately, one of the ways to check the rectitude of the public prosecutor's decision and the realization of the victim's legal position. Concerning diversion from prosecution with intervention, there are two possibilities: primarily, to seek the consent, or in case this is not necessary, the victim has no legal right to continue prosecution. Which of these two possibilities is more acceptable depends on the development and organization of intervention. If the forms of intervention in the system are verified and well organized, if they can effectively replace criminal sanctions, then, in the general public interest, it would not be justified to permit the persistence of the victim in continuing and completing procedure in order to apply criminal sanctions. This, however, is of no use in a case where intervention consists of mediation. For mediation between parties, it is absolutely necessary to have the intention or at least the consent of the accused and of the victim. I consider that it would be mistaken to force the victim to mediation by prescribing that he will not have the right to continue prosecution if he does not consent to mediation and the public prosecutor diverts the case from prosecution. The purpose of mediation is to remove the conflict and not to reduce the number of cases in criminal justice.

c) The Position of the Accused who is Subject to Diversion from Prosecution

The position of the accused in the situation we are discussing can be viewed from different aspects. We shall focus our attention only on some questions. First of all, we should ascertain that the position of the accused is fundamentally different depending on whether this concerns diversion without or with intervention. With simple diversion, the accused is not, as a rule, bound to any obligation and is not obliged to any activity, nor is he forced to submit to anything passively. His position, therefore, after diversion, does not differ from that of a citizen who has not been accused of committing a criminal offence. This position is clearly regulated by positive regulations, and in theory it is sufficiently explicit. This situation is, after all, not of central interest to us, considering that the subject of our discussion is diversion with intervention. Because of this, we shall review the legal and factual position of the accused in such a case. There will be further discussion of the legal position and only mention of the factual position if this is in necessary connection with the legal position. At this point, I shall remind you

of the well-known and obvious fact that in practice, the legal and factual positions of the accused are not identical. The legal position which is defined by positive regulations in a system differs from the factual position, not only when the organs which participate in the procedure do not apply these regulations, apply them inaccurately or abuse their authority and so forth, but also when these regulations are strictly applied in a concrete situation. This concerns the case when the reality of life causes or imposes solutions which diverge from those foreseen in the normative content.[3]

As far as the legal position of the accused is concerned, it is obvious that in modern legal systems, there are norms which serve the same purpose, though they more or less differ from one another : the guarantee of respecting and safeguarding the general human rights of the accused in criminal proceedings and the attempt to reduce, as much as possible, the difference between the position of the accused and that of a citizen who has not been charged with a criminal offence. A detailed analysis of those and other norms in a system can give us a true picture of the real legal position of the accused. However, we shall not enter into such an analysis. We shall limit ourselves to one element that is important for judging the legal position of the accused, which is, at the same time, of the greatest importance for the general problems of diversion from prosecution with intervention. This regards the guarantee which is considered to be the assumption of innocence of the accused. In modern law, this guarantee is most frequently formulated as in Article 9 of the Declaration of Human and Civil Rights, from 1789, which is repeated in contemporary documents of an international legal nature and significance, with some minor divergences. Thus, for example, the formulation that every man is considered innocent until declared guilty, is found in Article 11, paragraph 1 of the General Declaration on Human Rights of the OUN from 1948, in Article 6, paragraph 2 of the European Convention on the Protection of Man and His Fundamental Rights from 1950, in Article 14, paragraph 2 of the International Regulations on Civil and Political Rights from 1966, and so forth. The same idea in a slightly different version is found in Article 184, paragraph 4 of the Constitution of the SFRY and in Article 3 of the Yugoslav Law on Criminal Procedure in force since 1 July 1977 : "No one can be considered guilty of a criminal offence until it has been established by a judicial verdict". The matter which arises, in connection with this guarantee, when we discuss the general problems regarding particular cases of diversion from prosecution and which should be settled, could be formulated like this : is diversion from prosecution with intervention contrary to the above-mentioned guarantee? Namely, it seems that the diversion from prosecution we are concerned with here, presumes exactly the opposite, i.e. that the accused is guilty, but that for specific reason the procedure undertaken to establish this is not conducted, but before the completion of this procedure, intervention is undertaken instead of criminal sanctions. Before I try to deal with this issue, here an occasion arises to briefly mention viewpoints of several Yugoslav legal experts on the constitutional and legal regulations which we are discussing. According to Prof. Dr.

3. The difference between the legal and factual position of the accused can be illustrated in our discussion by an interesting example concerning one meaning of the assumption of the innocence of the accused, which consists of his not being obliged to defend himself or to prove his innocence. This is his legal position. However, if the court is not familiar with certain facts because of which the accused is likely to be convicted, he is factually forced to present his defence and this is his factual position in the procedure./V. Bayer, Yugoslav Criminal Procedural Law, Zagreb, 1980, p. 27.

Tihomir Vasiljević, the regulation as it is formulated in Article 3 of the Law on Criminal Procedure is not an assumption but the ascertainment of something that is of itself clear and which is a logical consequence of the suit. If such a regulation which contains an evident fact has a purpose, the purpose is not in establishing an assumption and least of all an assumption of innocence, but to remind the organs participating in the procedure and who are sometimes apt to forget, that the person they are dealing with is still not guilty and that they must treat him as such. This interpretation is not far from the opinion of Prof. Dr. Vlado Vodinelić, who believes that the assumption of innocence is not at all an assumption but that the regulation in law concerning this is to be considered an instruction for procedure given to the organs of criminal procedure who must deal with the accused as though he were innocent until the contrary is established. The third prominent Yugoslav expert in this field, Prof. Dr. Vladimir Bayer, considers that the Yugoslav federal legislator intended, undoubtedly, to pose the assumption of the innocence of the accused in the constitution and intended to carry out his purpose in regulation of Article 181, paragraph 4 which was later literally transferred into Article 3 of the Law on Criminal Procedure, but that this regulation does not contain the abovementioned assumption. On the contrary, this assumption is contained in other regulations of the Law on Criminal Procedure and it therefore exists in our criminal procedural law. The same theoretician explains that the assumption of the innocence of the accused in Yugoslav law has two meanings. The first meaning, in principle, is that the accused is not legally obliged to state his defence or to prove it, and that the obligation or weight of giving evidence therefore lies with the prosecutor and subsidiarily with the court. The other meaning is that the court must bring in an acquittal not only when it is fully convinced of the innocence of the accused, but also when it is not entirely convinced of his guilt, nor of his innocence.[4] Understanding entirely the reasons for these differences in the interpretation of the existence and content of assumption of the innocence of the accused, in Yugoslav law, I hold that in spite of these differences, it can indisputably be concluded that the legislator had the intention of prescribing such an assumption. So, it does exist in the Yugoslav legal system, as it does in many other contemporary legal systems. However, the viewpoint according to which the regulation of Article 3 of the Law on Criminal Procedure is only an ascertainment or instruction for the organs of criminal procedure is not contrary to the proposition that, in essence, the legal and factual positions of the accused do not differ in procedure by accepting either one or another concept on the nature of the regulation we are analysing within the scope of the same normative system. And this is what I am asserting. Whether it concerns assumption or not, the existence of these norms completely eliminates an assumption to the contrary, or treatment by which the accused could, at any stage of the procedure, be considered guilty before bringing in a verdict.

If we take account of everything which has plainly been asserted a moment ago, I consider that because of the guarantee described, and the position of the accused which is defined by this guarantee, with regard to diversion from prosecution with intervention, it is justified to uphold the following viewpoint: diversion from prosecution with intervention is possible only with the consent of the accused, and only in specific

4. V. Bayer, op. cit. in note 3, p. 30, then T. Vasiljević, System of Criminal Procedural Law SFRY, Belgrade, 1981, p. 228 and V. Vodinelić, On the Legal Nature of the Assumption of Innocence, Coll. of Reports, Faculty of Law, Split 1968.

cases, and again, only when this concerns minor criminal offences. The consent of the accused is not required for diversion itself but for the intervention which must be undertaken, and, as one does not go without the other (or it turns into simple diversion), it should be considered that this consent is necessary for diversion from prosecution with intervention. If such a diversion could be applied without the consent of the accused, his position would inadmissibly differ from the position guaranteed to him by the assumption of innocence, in one of the meanings we discussed earlier. Intervention undertaken even against the will of the accused in the course of procedure is of different nature and has another purpose. The accused has his rights but also some obligations in the proceedings. His general obligation is to participate in proceedings, i.e. to allow proceedings against him. He can be, in these proceedings, required to fulfill particular obligations, such as, for example, to go for a checkup, to be arrested and so forth, which does not signify a contradiction to the concept of an assumption of innocence. It concerns the fact that there are the interests of society, the state and the individual. Therefore, the individual who is suspected is faced with the common interest of society and the state, in the legal and regular accomplishment of criminal justice which, ultimately, is in his own interest.[5]

All these are inevitable circumstances (the fewer, the better), on the path of which the final goal is that "no one who is innocent shall be convicted and that the offender shall be sentenced to criminal sanction" [Article 1, paragraph 1 of the Yugoslav Law on Criminal Procedure]. In the case of diversion from prosecution at any stage of the procedure, this process is interrupted, and any kind of intervention for achieving the purpose which is mentioned in the law is unnecessary. For this reason, such an intervention does not belong to the category of those which the accused is obliged to undergo. Perhaps some of these obligations can, without greater trouble, be applied to any citizen who is not charged with an offence [within the scope of welfare or health measures and so forth], but I consider that because of the particular position of the accused in relation to the organs of state authority, such measures cannot be undertaken within the scope of criminal procedure or in direct connection with it. The position of the accused is legally regulated, and the guarantee we have discussed belongs to this category of regulation. When the accused considers that his guarantee is unnecessary, he can, in certain cases defined in the law, voluntarily give his consent to being treated as though he had committed a criminal offence and is criminally responsible. His consent is a kind of admission to his guilt and so it is necessary to take into consideration that according to Yugoslav law for example, the admission of the accused to guilt, however complete it may be, does not free the court of its duty to examine other evidence. This leads us to conclusion of due caution when accepting consent. Both consent and admission can be result of psychological pressure, the fear of an innocent party of the risk of further proceedings, an attempt to conceal the true culprit and so forth. The organ which undertakes diversion from prosecution with intervention with the consent of the accused must take account of this. One of the most important reasons why I am of the opinion that diversion from prosecution with intervention can be applied only to minor criminal offences is actually the possibility the innocent party will agree to this. With respect to such criminal offences, fear of a possible penalty is certainly less than for heavier categories, and penal measures are prescribed according to the weight of the crime, so it is prob-

5. Dragoljub V. Dimitrijević, Criminal Procedural Law, Belgrade, 1981, p. 122.

able that an innocent party will not renounce voluntarily a position which guarantees him the right not to give his consent to intervention, in spite of risk that the case will be settled unfavourably for him. The other important reason for the claim that this is only for minor criminal offences is the result of the belief (however limited) in the general preventive action or effect of criminal sanctions by their prescription and pronouncement. By applying diversion from prosecution for more serious criminal offences, such a minimum effect of deterrence could be even smaller and less tangible.

d) The Aim of Diversion from Prosecution with Intervention

The aims of diversion from prosecution with intervention can be extremely diverse, however, so that such a procedure has a purpose and is justified; the realization of one, at least, must be expected in every case. Considering that this relates to particular cases of diversion from prosecution, when it is assumed that a crime has been committed and it was perpetrated by the accused who is criminally responsible (or if he is not, that conditions exist for applying obligatory psychiatric treatment), then the intervention applied together with diversion must accomplish at least the same purpose which in such a case can be expected from criminal sanctions. This general purpose in Yugoslav criminal law is defined in Article 5 of the Criminal Law of SFRY (in force since 1 July 1977) and consists of "suppressing socially dangerous activities which harm or jeopardize the social values protected by the criminal legislation". It is undoubted that the general purpose of criminal sanctions in every system in modern criminal law is to suppress crime. Within the general purpose of criminal sanctions, the purpose of punishment, i.e. the application of criminal sanction, consists of special and general preventive aims. The purpose of diversion from prosecution with intervention, which should not be omitted, must at least in the fundamental outline coincide with the general purpose of criminal sanctions and, in the majority of cases, with the aims of punishment. Diversion from prosecution that we are discussing can be applied if it may justifiably be expected that nearly the same result which could be expected from the application of criminal sanctions can be achieved. If, owing to the specific circumstances of a particular case of diversion from prosecution with intervention, such procedure can be expected to give a better result than the application of criminal sanctions, then this is one reason more to discontinue the regular course of procedure and to "divert". Apart from the expectation of achieving this purpose, other reasons may exist for applying diversion from prosecution with intervention, such as those which are most frequently mentioned: reducing the burden on the organs of justice, reducing the costs of state administration, avoiding the negative effects of short-term sentences of imprisonment, removing the stigma of having been convicted, removing conflicts as the main cause of criminal behaviour and so forth. These reasons justify the existence of the possibility for diversion from prosecution with intervention in the system, and in particular cases, but they cannot be sufficient if we lack the belief that by such procedure, the aim which is expected from application of criminal sanctions can be achieved. This belief is truly an indispensable condition for allowing the application of true diversion from prosecution with diversion. To conclude: discussing the general problems of diversion from prosecution with intervention (one of which is mediation), we have only dealt with four questions which I thought were of primary importance. If all the conditions are fulfilled for diversion from prosecution with intervention we mentioned, if all the remarks we made are taken account of, and if we apply the necessary caution, I am

convinced that such procedure can be a most acceptable and effective way to realize criminal policy aims in our modern society.

III. Particular Cases of Diversion from Prosecution and Mediation in Criminal Procedure According to Positive Yugoslav Law[6]

To follow in this part the order of the questions from the instructions for elaborating a national report, and to answer them, would oblige us in several instances to speak of the same thing and therefore to repeat ourselves. At the same time, because of that, and because of possible incoherence and the inappropriate system, this report might not be sufficiently informative and clear. Therefore, if we leave out the unnecessary details, we shall point out the elements illustrating the situation in Yugoslav law on the problem we are dealing with, according to the logical sequence, but in an endeavour to give complete answers to the most important questions from the instructions. We shall also take account of the issues which we discussed in the previous section, when we dealt with the general problems of diversion and mediation. For this reason, in describing the situation in Yugoslav law, we shall attempt to bring this explanation into connection with the above-mentioned regarding the general problems of diversion and mediation in criminal procedure.

III. 1.

In order to get a clear picture of the possibilities for diversion from prosecution in a system, it is necessary, first of all, to establish what the position of criminal procedure is for which prosecution is undertaken on the grounds of an official charge and of a private plaint. Yugoslav criminal procedural law has accepted the principle of officiality of criminal prosecution for the majority of criminal offences. It is the principle by which prosecution of the offender is undertaken exclusively or mainly in the interests of the community "on the basis of an official charge", regardless of whether a person whose personal or property rights have been harmed or jeopardized by the crime should so desire or not. The authorized prosecutor for such offences in our system is the public prosecutor, an independent state organ who carries out his duty on the basis of the constitution and the law. For a minor number of criminal offences from the catalogue of incriminations in positive Yugoslav criminal law the principle of officiality of prosecution is not valid. This concerns the exceptions to this principle, when the law leaves it entirely up to the victim to decide whether he will prosecute or not, whether he will persist until the verdict or, alternatively, whether or when he will abandon prosecution. It is specified in criminal law that these exceptions are prosecuted on the basis of a private plaint. Such exceptions are few in number in comparison to the total number of incriminations. In the Criminal Law of the SFRY which is enforced on the whole of the territory of Yugoslavia, a separate section contains a catalogue with a total of 289

6. The main sources of positive Yugoslav law which I am presenting and commenting on consist of the Constitution of the SFRY and the Constitutions of the federal units from 1974, the Laws on Courts and the Laws on Conciliation Councils which were enacted on the basis of these constitutions, the Criminal Law of the SFRY and the Criminal Laws of all six republics and two autonomous provinces and the Yugoslav Law on Criminal Procedure. (The federal Criminal Law and Law on Criminal Procedure and the Criminal Laws of federal units have been in effect since 1 July 1977.)

incriminations. Prosecution is undertaken on an official charge for all these criminal offences. The catalogue of incriminations of the criminal law of the federal units consists, in the main, of approximately the same number of criminal offences. In order to point out the proportion of the number of offences which are prosecuted both on an official charge and on the basis of a private plaint, as a whole, we should take, as an example, the number of incriminations from the federal law and the law of one federal unit. Thus, for instance, the Criminal Law of the SFRY and the Criminal Law of the Socialist Republic of Croatia together envisage 634 incriminations (289+400=689 minus 55 incriminations which are to be found in both laws). Of these incriminations, 41 are prosecuted on the basis of a private plaint. Therefore, of all the criminal offences from the Criminal Law of the Socialist Republic of Croatia, 10.25% are prosecuted on the basis of a private plaint, and of the total number of incriminations in an integral criminal law which is applied on the territory of this republic, criminal offences which are prosecuted on the basis of a private plaint amount to 6.46%. The situation is similar in the other federal units. However, this data is not sufficient for getting a real picture. First of all, prosecution on the basis of a private plaint cannot be undertaken for the aforementioned criminal offences if the offender is a minor (under 18 yrs. of age). For criminal offences committed by minors, the authorized prosecutor is always the public prosecutor. Furthermore, according to the court statistics, for instance, for 1980, in all first degree courts on the territory of Yugoslavia a total of 159,333 criminal cases were submitted, of which 53,993 (33.9%) consisted of proceedings on the basis of private plaints. It can be concluded that criminal offences prosecuted on the basis of private plaints make up a relatively small percentage in comparison to the total number of incriminations in Yugoslav criminal law, but their number in court proceedings is five times greater. Practically every third criminal case on the court is conducted on the basis of a private plaint.

III. 2.

For criminal offences prosecuted on the basis of a private plaint, the victim can, of his own accord, at any stage of the proceedings, withdraw prosecution. In the widest sense, diversion from prosecution by such an action can also be considered to occur when a person authorized to submit such a plaint, instead, withdraws from prosecution before the commencement of criminal proceedings. There is no statistical data on such decisions, no is there any "dark number" on crime, but it can be justifiably assumed that the number of such diversions is very great every day. However, when it concerns criminal offences which are prosecuted on an official basis, in order to discuss the possibilities of diversion from prosecution in every system, it is of the utmost importance whether the principle of legality or of opportunity of prosecution is applied. In Yugoslav criminal procedural law, the action of the public prosecutor is prescribed according to the principle of legality. In Article 18 of the Law on Criminal Procedure, it is defined that the public prosecutor "is obliged to undertake criminal prosecution if evidence exists that a criminal offence has been committed for which prosecution is undertaken on the basis of an official charge". It ensues from other regulations of this law, that the public prosecutor is not only bound to undertake prosecution, that is, not only to initiate criminal proceedings, but to persist in the prosecution until a judicial verdict has been brought in, unless any of the legal conditions for criminal prosecution are eliminated in the course of proceedings, such as the existence of the offence, criminal responsibility,

conditions for employing safety measures when the offender is not criminally responsible, amnesty, pardon, lack of evidence and so forth. When establishing this principle, the Yugoslav legislator obviously preferred the reasons which are customarily cited in favour of this principle, and he did not consider the reasons which speak in favour of opportunity of prosecution to be sufficient. With the consequent application of the principle of legality of prosecution, the equality of citizens in the eyes of the law can undoubtedly be realized, as well as trust in the function of the public prosecutor and the belief that such procedure contributed to the greater efficacity of the general preventive function of criminal law, but in some cases, this can cause certain undesirable effects of criminal legislation. This, however, can be avoided to a greater or lesser extent by prescribing exceptions to the application of the principle of legality of prosecution. These exceptions exist in Yugoslav law too. The most important exception proceeds from the regulation of material criminal law which concerns the existence of the criminal offence. It regards the "covert" exception, as the principle of legality is applied only when a criminal offence exists, while prosecution is out of the question when there is no criminal offence. And the regulation from Article 8, paragraph 2 of the Criminal Law of the SFRY excludes the existence of a criminal offence too, in the case when though all the characteristics of a criminal offence which are defined by law exist, the act presents only a slight danger to the community because it is of little importance and because of the slightness or absence of harmful consequences. As criminal offences which are prosecuted on the grounds of an official charge can be estimated by the public prosecutor as to whether in a concrete case this concerns an act of only slight danger to the community, the decision is left to him whether or not to prosecute this offence. Judging that the offence is of little importance and the harmful consequences only slight, the public prosecutor has the legal and factual possibility of decision in which there are elements of the opportunity of prosecution. The court likewise has such a possibility and can bring about an acquittal, by which the same result is achieved: the omission of criminal legal repression, in spite of fact that the criminal offence, in its formal sense, has been committed. Anyway, this situation in Yugoslav law should be taken into consideration when discussing particular cases of diversion from prosecution. If this is not clearly pointed out, they could easily be foreseen and classified in regular cases of diversion, where they belong according to legal determination. Only a more profound analysis contributes to the accurate conclusion that this regards the manner in which, in spite of the principle of legality of prosecution in our criminal system, those aims are achieved, for which in other legal systems the principle of opportunity serves.[7]

Apart from this, there are also other exceptions which are regulated by the norms of criminal procedural law. These norms in specific cases give the public prosecutor, the authorization to act according to the principle of opportunity. The most important of those exceptions for this report is the one which concerns juvenile criminal offenders. Apart from other particularities which are foreseen in the Yugoslav Law on Criminal Procedure for proceedings against juvenile offenders, there is one which is prescribed in Article 468 of this Law. According to this norm the Public Prosecutor may decide not to demand the undertaking of criminal procedure for criminal offences for which a sentence of imprisonment of up to three years or a fine are prescribed, although there

7. Prof. Bayer estimates it in this manner in the part which is quoted in note 3, p. 160 and the first edition from 1960, p. 135.

is evidence that the minor has committed a criminal offence, if he considers that conducting proceedings would not be expedient, considering the nature of the criminal offence and the circumstances under which it was perpetrated, the previous life of the juvenile delinquent and his personality. Before this decision, in order to examine his personality, the young offender may be sent to a community centre or establishment, for examination or training, for a period of up to one month. The public prosecutor may also decide not to demand the undertaking of proceedings against a juvenile offender even when sentence or any other pedagogical measures are underway, if he estimates that taking criminal sanctions for another criminal offence would not fulfill their purpose. Although the cases described refer to simple diversion from prosecution, it is not unnecessary or incorrect to caution on the part of the stated regulation which regards sending the juvenile offender to a community centre or institution for examination or education. This refers to procedure which in certain cases can be considered as a kind of intervention which precedes diversion from prosecution. Although the purpose of sending the juvenile offender is to examine his personality, his contact with experts can, at the same time, be a kind of treatment. The final results of examination can consist of an assessment of his behaviour in the course of examination and a forecast of his future behaviour. Such a conclusion can be of decisive value for the decision of the public prosecutor on prosecution. If he diverts from prosecution, owing to the fact that contact with the juvenile offender in the course of examination has, according to his judgement, been successful and that there is no further need to apply criminal sanction, there is justifiable reason to stress such a case in our discussion.

III. 3.

The legal and factual possibilities for diversion from prosecution for criminal offences which are prosecuted on the basis of an official charge in Yugoslav criminal law are defined as we have described under III. 2. by the principle of legality of prosecution and exceptions to this principle. Those possibilities, however, are even fewer when we take into consideration the legal right of the victim to a subsidiary charge. Among the regulations of Yugoslav criminal procedural law, we find one which gives the victim the right, in the case when the public prosecutor does not find any grounds for undertaking or continuing criminal procedure, to take his place [General Regulations, Basic Principles of the Law on Criminal Procedure, Article 17, paragraph 3]. A detailed description of the legal conditions for realizing the rights of the victim to appear and act as an authorized prosecutor in the proceedings for a criminal offence, the prosecution of which is undertaken on the basis of an official charge, is not necessary in this review. However, I would like to mention one limitation, which, like many others of which we have spoken, refers to juvenile offenders. Namely, when a minor is the perpetrator of a criminal offence, the victim cannot continue prosecution if this was not done by the public prosecutor, but can only demand of the Council for Juvenile Cases of the first degree court that they assess the justification of the decision of the public prosecutor on diversion from prosecution. If the court confirms the decision of the public prosecutor to divert from prosecution, this diversion is definite, owing to the fact that the victim has no right to appeal against the decision of the court.

Therefore, other than when minors are perpetrators of criminal offences, diversion from prosecution, on the part of the public prosecutor in Yugoslav criminal law, does not imply final diversion from prosecution of the accused. An approximate idea concern-

ing whether and to what extent a victim can take the place of the public prosecutor in criminal proceedings can be given from statistical data: of all the criminal cases accepted on first degree courts in Yugoslavia in a period of five years [1976–1980], victims have appeared as subsidiary prosecutors in 2.8% of the cases.

III. 4.

With respect to criminal offences which are prosecuted on the basis of a private charge, apart from simple diversion from prosecution, diversion from prosecution in Yugoslav law exists as a result of mediation between the parties. Mediation in criminal cases according to positive Yugoslav law can be classified as:

a) Mediation before a regular criminal court and mediation before a self-management court, and

b) Mediation on the initiative of the victim who is authorized to bring a private charge and mediation on the initiative of a regular criminal court before which a private charge has been brought.

Ad a) According to the regulations of the federal constitution and the constitutions of the federal units, the court function, in the uniform system of government and self-management of the working class and of all working people, is carried out by regular courts as organs of state power, and self-management courts which are established as courts of associated labour, arbitration courts, mediation councils, appointed courts, as well as other forms of self-management courts [Articles 217 and 225 of the Constitution of the SFRY and the pertinent articles of the constitutions of the socialist republics and autonomous provinces]. Regarding self-management courts, according to the current situation, mediation councils should be given the most consideration. Therefore, we shall endeavour to define their function and organization in greater detail.[8]

Mediation councils are self-management courts to whom working people and citizens in local communities, organizations of associated labour, other self-management organizations and communities can entrust intermediation in disputes concerning their rights. The members of mediation councils are appointed and relieved of such duties by the working people and citizens, every four years. An adult citizen who has a good social reputation in the community where he resides or works can be elected as a member of a mediation council. A mediation council, when mediating in disputes, consists of three members, one of whom is the president of the council. A dispute before a mediation council is oral, direct and public. [The public may be excluded in order to protect morals or for some other justified reasons, and must be excluded when at least one party should so demand.] Mediation before a mediation council is entirely voluntary for the parties concerned. If one or both parties do not respond to the summons of a mediation council, or relatively refuse mediation, the mediation council states in written form that mediation was not successful. Mediation councils act without the advice or help of legally trained persons, are independent in their work, do not apply laws and do not bring sanctions. They are not organized according to hierarchy and mediation for

8. Each federal unit brings about its own law on mediation councils. These laws differ, but concerning those issues we are dealing with, not essentially. Here I quote the content of one such law as an example.

purpose of conciliation in criminal cases, does not come under the control of state courts.[9] This has to do with a function and orgnization which has deep roots in the history of the Yugoslav nations; modern mediation councils, at the same time, embody one of the forms of transferring judicial authorization and functions from state to social organs in the present stage of development of a socialist self-management society.

Parties can be reconciled before mediation councils or before a criminal court, and in both cases the result is the same : the victim diverts from prosecution which he intended to undertake or has undertaken already. In the course of reconciliation, the parties can conclude an arrangement on the rights which they freely dispose; most frequently, they agree on compensation for damages. If such an agreement is reached before a mediation council, the arrangement is formally concluded, which signifies that on recommendation of one party, this can be legally executed by organs of a regular court, as if the arrangement were concluded in proceedings before court.

Ad b) The initiative for mediation according to the very nature of things may be given by both parties or any well-meaning person who is familiar with the conflict. Reconciliation may ensue directly after the behaviour causing all elements of the criminal offence which is prosecuted on the basis of a private plaint.[10] In such a case, diversion from prosecution can come about even before any proceedings. To be exact, the victim does not decide to undertake prosecution, or forgoes this decision even before he carries it out. The victim and the offender can apply to a conciliation council for the purpose of mediation or to some other arbitrator. All these and similar cases can be considered, undoubtedly, as mediation in criminal matters. However, in the Yugoslav Law on Criminal Procedure, we find regulations which concern only those cases when the initiative for mediation comes from the victim. This is understandable because only the victim is an authorized plaintiff for criminal offences which are prosecuted on the grounds of a private plaint, and it depends on him only whether he shall divert from prosecution or not. Thus is prescribed that a private plaint shall be submitted to a regular court within the term of three months from the day when the person authorized to submit this plaint knew of the criminal offence and of the perpetrator. However, within the same term, the victim can apply to a mediation council, or to another self-management court authorized to mediate, and then the term for submitting the plaint is prolonged. Namely, this term commences from the day when the case is unsuccessfully ended before a self-management court, and if it is not completed within three months after the expiry of this term [Article 52 of the Law on Criminal Procedure]. The regulation by which the appeal of the victim to a mediation council on his own initiative considerably prolongs the term for submitting a private plaint regularly to a state court can be considered clearly as an effort on the part of the legislator to stimulate mediation on the initiative of the victim, before criminal proceedings, and this is the way to divert the procedure from the path of criminal justice. Namely, the victim, when resorting to a

9. Mediation councils, according to these characteristics, differ essentially from "comrade courts" which exist in the USSR and in some other socialist countries, as Dr. Davor Krapac rightly pointed out in his report at the X. International Congress of Social Defence [Thessaloniki, Greece, 1981].

10. Such reconciliation can come about if it concerns a criminal offence prosecuted on the basis of an official charge and, if no one else reports the offence, it can happen that the public prosecutor does not have any knowledge of the offence and due to this fact does not prosecute. However, we are not dealing with such matters.

mediation council, does not stand to lose anything in the real sense of the word, least of all time to submit a private charge; instead he only gains time, if he needs it. If the impression is correct that the legislator had the intention of stimulating mediation, then we can conclude that he desires this to achieve diversion from prosecution, with all positive effects which result from this. If the above-mentioned conclusion of the intention of the law is correct, it is even more obviously and clearly confirmed in the regulations which envisage mediation on the intiative of a regular court to which a private charge has been submitted. Such an initiative can be optional or obligatory for the court. An optional initiative for mediation is prescribed in Article 444 of the Law on Criminal Procedure. According to this precept, the judge of the court hearing of a private charge for a criminal offence, for which a sentence of up to one year of imprisonment or a fine is prescribed, before scheduling, can summon only the private plaintiff and the accused, in order "to clarify the matter, if he deems it expedient for a speedier completion of the proceedings." The true reason for such a summons can clearly be seen from the following paragraph of this article which begins with the formulation: "If the reconciliation of the parties and the withdrawal of the case do not ensue . . . etc." From such a legal expression it is very clear that the previous clarification is a direct encouragement to mediate in the reconciliation of the parties. Thus, ultimately, if mediation succeeds, the aim which the law forsees as the initiative of the court shall be attained: "a speedier completion of proceedings". In the course of mediation before the court, as well as before a mediation council, the parties can conclude an agreement as to compensation of damage, the accomplishment of other obligations, the costs of criminal proceedings and other costs; declarations of regret and apology can be entered in the court record, a promise made concerning the future behaviour of the accused towards the victim and in general, and so forth. The majority of such proceedings can be considered as a kind of intervention stipulated by diversion from prosecution.

The initiation of mediation is obligatory for a court when a private charge is submitted for a criminal offence against honour and reputation (except if this is committed by the press, radio or television), and for criminal offences involving lighter bodily injuries. In any of such cases, the court must refer the case to a mediation council in order to attempt to reconcile the parties. If within the term of three months the court does not receive from mediation council a report that the parties have been reconciled, a court hearing will be arranged and regular proceedings will continue. It will do likewise if it receives a report within this term that mediation did not succeed. If, however, it receives a report that the parties were reconciled and the victim has declared that he withdraws his suit, the proceedings are completed before a regular court by rejection of the private plaint [Article 445 of the Law on Criminal Procedure].

III. 5.

In the endeavour to establish and to give at least as close and as rough a picture as possible of diversion from prosecution in everyday practice, we used statistical data. Apart from this, I spoke to a particular number of judges who described to me their experience and impressions which concerned mediation in criminal cases.

From the general statistical data over a ten-year period on the number of cases of criminal proceedings received in regular courts and on who was the authorized prosecutor and proceedings which were for various reasons discontinued, throughout the entire territory of Yugoslavia, it can be concluded that diversion from prosecution for criminal

cases submitted on the basis of a private plaint came before regular courts in about 55–65% of all cases. According to data from court records and from what I heard from judges who have been working on such matters for many years, in the majority of cases diversion from prosecution ensues after the reconciliation of the parties on the initiative of the court, prior to a court hearing or in the course of a court hearing before a verdict is brought in. Likewise, in the main, reconciliation ensued after the accused expressed his regret at having committed a criminal offence and apologized to the victim and after an arrangement had been made before the court concerning compensation for damages and costs of court proceedings, or an agreement had been reached on the issues which caused the conflict resulting in the criminal behaviour. It was not possible to establish even a rough approximation, for the entire territory of Yugoslavia, of the total number of successful mediations carried out in the manner envisaged in Articles 444 and 445 of the Law on Criminal Procedure. On the basis of some indicators, it was nevertheless possible to conclude indirectly that an optional initiative to reconcile the parties according to Article 444 of the Law on Criminal Procedure is always given when the judge justifiably expects mediation, on the basis of the data from the private plaint and his experience, to succeed. In regular city courts, this is undertaken in 20–25% of the cases, and in the courts whose jurisdiction mainly covers rural districts, in up to 60%. In almost all the remaining cases, where the judge does not summon the parties to clarify the matter first, that is, in order to mediate, he does attempt to reconcile the parties before the court hearing commences. Such diversion from prosecution after reconciliation in the course of the preliminary clarification of the case, or after reconciliation before the beginning of the court hearing, cannot be determined statistically, which is not necessary anyway, because both situations do not differ essentially. With regard to mediation in criminal cases before a mediation council on the obligatory initiative of the regular court, we do not dispose of any statistical data for whole Yugoslavia. According to some research, it can be concluded that generally, mediation for the purpose of reconciliation before mediation councils in criminal matters is successful in 24% of the cases in urban centres and in 32% of the cases in rural districts. These indicators include cases of reconciliation after submitting a private plaint to a regular court, as well as all other cases based on other initiatives. According to the informations I obtained from several courts, it can be concluded that within the term of three months, reports are sent by mediation councils for one third of the private plaints submitted, of which about 60% mention that mediation was successful. Therefore, two thirds of the private plaints submitted, after the expiry of three months, and, according to the norm in Article 445 of the Law on Criminal Procedure, are continued in proceedings before a regular court, although even then, in a certain number of cases, reconciliation is achieved and diversion from prosecution has been realized. A relatively small number of reconciliations before mediation councils can be explained as particular problems of organization in the work of these councils, which are as yet "finding their bearings" in a function which is new to them and which results from cooperation with regular courts.

IV. Conclusion

The legal and factual situation with respect to particular cases of diversion from prosecution and mediation in criminal matters in Yugoslavia is only a part of the general situation in society. In this situation distinct tendencies of the affirmation of the principle

of legality of criminal sanctions are apparent, and of the principle of legality of prosecution as a part of the general legal security of citizens. The legal security constitutes a guarantee relevant to the legal and factual position of the accused in criminal proceedings, but also the socialization of the organs of criminal justice and their functions. In this situation we can also survey efforts to realize results of the criminological observation in criminal law, particularly limiting repression and replacing penal sanctions in the reaction of society towards prohibited behaviour by other measures by which success can be achieved in preventing and suppressing delinquency. These and other tendencies in connection with this cannot be successfully developed, nor can criminal policy aims be attained by insisting on one or other detail, but only by their complex action in all the domains of social life, and particularly in the domain of criminal law. Special cases of diversion from prosecution and mediation in criminal cases in this complex action have their role and function; both are very important and deserve full attention. As I have pointed out, the theory of criminological and sociological disciplines takes account of this in Yugoslav legislation, and the necessary research is done to establish the result achieved so far and proposals of further legislative measures and practical action. However, the same consequences which are expected of such action can be achieved in another way, for example, by the decriminalization of certain behaviour entirely or partially, the limitation of applying criminal sanctions of a punitive nature, a greater resort to the treatment of offenders in order to remove the dangerous states and circumstances which cause criminal behaviour. A realistic picture of the present stage and prospects of further development in this domain, in any country, as well as in Yugoslavia, can be formed when everything that is done to improve living conditions is taken into consideration, of which an important element is the struggle against criminal behaviour. However, we had to leave out such an extensive approach in this report, although it was necessary because of the understandable and acceptable limitations which arise out of the heading and the requests of the organizers regarding the length of the text. From the description of the particular cases of diversion from prosecution and mediation in criminal matters, in Yugoslav law and practice, isolated in this way from the complexity of the entire situation, the idea can nevertheless be conveyed that these cases exist, and that procedure in mediation is particularly developed in the scope of the process of transferring the function from the state to the self-management courts. For the further affirmation of self-management judicial procedure, the prospects are undoubtedly very good, which means that we can reliably expect growing success in its action also with regard to mediation in criminal matters. This mediation will probably extend to other cases but will certainly retain the fundamental characteristics of the present state of the legal system: above all, the principle of legality of prosecution, voluntary mediation and diversion from prosecution for criminal offences prosecuted on the grounds of a private plaint, and the possibilities to apply intervention on the behalf of the accused, before he is declared guilty by the court of law, only under the conditions which are based on the present principles of procedure and on those which I argued in favour of, in the section dealing with the general problems of diversion from prosecution.

Finland
DIVERSION AND MEDIATION

Matti Joutsen

I. Questions of Definition

The background paper for this colloquium has tentatively defined diversion as "any deviation from the ordinary criminal process . . . which results in the suspect's participation in some form of non-penal program".

On the basis of such a definition, the Finnish national report can be both thorough and brief. Finnish criminal policy does not accept diversion *with* intervention at any stage in the criminal justice system. In order to deal with the assumptions and principles on which this position is founded, it is suggested that a wider definition of diversion be taken as the starting point. This paper will examine diversion as *any* deviation from the ordinary criminal justice progression of police–prosecutor–court–sentence, *without* imposing the additional requirement that this deviation lead to a program.

II. General Observations Regarding the Finnish Criminal Justice System

The Finnish legal heritage can be traced through the centuries of Swedish rule to the influence of Germanic law.[1] A consequence is the fundamental importance assigned to the principle of legality: the law must be adhered to. The rigidity of this principle, however, has been modified by certain informal and flexible features of the system in operation. In criminal law, this can be seen in the discretion granted to the police, the prosecutors and the courts; in the central role of the complainant (in practice, the victim) in raising charges and having the matter dealt with in court; and in the scope that the court has in taking the totality of the circumstances into consideration.

In the following, the different stages of the criminal justice system will be examined in respect of the amount of discretion provided, and consequently in respect of the scope for diversion. This will be followed by an analysis of the concept of diversion and its place in the Finnish criminal justice system.

III. Diversion Prior to Entry into the Criminal Justice System

Each year, some 500,000 offences are recorded by the police, ranging from minor traffic offences to major offences. Studies of hidden crime, however, indicate that the true number of offences in society, as defined by the criminal law, is several times higher than the reported figure in many categories. Obviously, a considerable number of potential criminal cases are being "diverted".

The reason why an offence remains hidden may be pure ignorance of the fact that an

1. The development of the Finnish criminal justice system, especially during the past century, is dealt with in *Raimo Lahti*, Criminal Sanctions in Finland: A System in Transition, Scandinavian Studies in Law, 1977, pp. 119–157.

offence has been committed, a lack of confidence in the police or the courts, a fear that one's own criminal conduct may come to light, a total lack of information on the offender, and so on. One reason in particular should be emphasized here: in many cases, the victim does not report the offence because he has reached an accord with the offender. A wife may refrain from reporting an assault by her husband because "he promises not to do it again"; an apartment building supervisor may decide not to report damage caused by a child because the child or his parents agree to pay for the damages; a teacher does not report a theft or assault at school because the matter has already been dealt with at the school; a company does not report fraud or embezzlement because the employee in question agrees to settle the matter quietly through other means; a store does not report a shoplifter because the person in question agrees to pay the price of the goods several times over, and so on.

In all of the above cases it is clearly a question of an offence, and equally clearly there is an element of diversion and even mediation. However, there are no "programs" involved in any of the cases. All of the cases are dealt with on an individual level by the parties immediately involved. This is *diversion with informal intervention.*

Similar informal intervention takes place on the fringes of the criminal justice system when the policeman investigating an alleged offence decides not to report the matter after having discussed it with the suspect and a possible victim. Section 14, subsection 1 is the basic legalistic provision regarding the police: if a policeman becomes aware that an offence has been committed, he must report it to his superior officer for possible consequent measures. This is immediately modified by subsection 2, which allows the individual policeman the right to refrain from reporting a petty offence if it was due to understandable carelessness, thoughtlessness or ignorance, the complainant does not wish to press charges, and the public interest does not demand that the matter be dealt with formally.[2] There are no hard-and-fast rules on how this provision should be applied in practice. It is thus possible that some policemen in certain situations attempt to mediate actively. It is probable that in this regard there is more active mediation in rural areas than in urban areas. It is even possible that some policemen exercise what the background paper calls covert intervention, where the suspect understands that if he does not participate in the informal resolution of the matter, the policeman will report the offence. Given the legalistic approach of the criminal justice system in Finland, however, as well as the total lack of any indications that covert intervention is actually used, this form of intervention could have only incidental significance. It is another matter to what extent the *victims* threaten to report offences unless compensation is paid for any damages.

The background paper presents the suggestion that diversion prior to the involvement of the police usually involves a "conversation between the offender and the victim . . . presumably in most cases with the assistance of a social agency". There are no social agencies specifically assigned with such a role in Finland. Many bodies (schools, shelters for battered women, hospitals, social welfare offices and so on) come into contact with offences and suspected offences, and as part of their normal operations they may be instrumental in arranging a reconciliation or mutually agreeable arrangement. It may

2. On the waiving of measures in general in Finland, see *Raimo Lahti*, Diversion from Criminal Justice—Some Experiences from Finland, in Selected Papers on Penal Problems (Raimo Lahti-Lauri Lehtimaja), Institute of Public Law, University of Turku 1978.

be surmised, however, that the practical significance of such arrangements is small. Most diversion prior to entry into the criminal justice system takes place outside of the framework of any structured mediation, a point that will be returned to later on.

IV. Diversion during the Police Investigation Stage

As already noted, the police are legally entitled to refrain from instituting or proceeding with measures in certain petty cases. Many cases where the law is broken are so trivial that, in keeping with the principle of proportionality, an informal caution by a policeman would seem the appropriate response.

Also quite serious cases may remain outside of the criminal justice system. Germanic and Scandinavian law has defined certain offences as "complainant offences", where the prosecutor may not press charges unless the complainant (the victim) himself demands that the offender be punished. The reason for setting these offences totally outside of the scope for prosecution by the State may be the view that prosecution itself may violate other interests of the victim (as in the cases of sexual offences), the possibility that only the complainant can judge whether or not an offence has actually taken place (as in the case of trespassing or some forms of damage to property), or a combination of these two reasons together with the need for the corroborating testimony of the complainant in court (as in the case of assault or petty assault in nonpublic places). Although in theory the fact that an offence is a complainant offence does not prevent the police from investigating it, in practice the police will not allocate their resources to the investigation of offences that presumably will never come to court.

With due consideration to what is known of hidden crime, it is believed that many of the cases where complainant offences do not come to court are cases where the offender and the complainant have reached some agreement on the matter. The role of the police in this is an unknown factor. At least in the case of domestic violence, it is not at all uncommon that the police responding to a home disturbance call merely exhort the parties to resolve their differences in a more peaceable manner.

V. Diversion during the Prosecutorial Investigation Stage

By the time the case has been passed on to the prosecutor, it has been dealt with relatively thoroughly. It can be said on a very general level that if a case falls out at all for any reason—legal bars to prosecution (e.g. the technical irresponsibility of the suspect, the statute of limitations), the pettiness of the offence, the obvious lack of guilt of the suspect, the lack of evidence, and so on—this will take place already during the police investigation. The cases that come to the prosecutor have usually been dealt with to the extent that they are almost ready for the trial stage.

Just as section 14, subsection 2 of the Police Act relieves the legality principle manifested in subsection 1 of the same provision for policemen, section 15, subsection 1 of the Enforcement of the Penal Code Decree obliges the prosecutor to proceed with prosecution whenever there are reasonable grounds for suspecting someone of an offence, and then subsection 2 goes on to provide him with discretion similar to that of the policeman.

The prosecutor, of course, is also bound by the limitations on complainant offences. The only exception is when prosecution is called for by a "prevailing public interest".

Section 11 of chapter 20 of the Penal Code allows the prosecutor to prosecute for certain sexual offences when this condition is met. A recent study, however, indicated that prosecutors rarely avail themselves of this opportunity.[3] Another example of a complainant offence where prosecution is possible despite the reluctance of the complainant to press charges is found in section 8 of chapter 27 of the Penal Code, where prosecution can be instituted for the complainant offences of defamation, slander, or invasion of privacy through the means of the mass media. The prosecutor may prosecute if the offence involves the use of the mass media and a prevailing ("very important") public interest demands this. An unusual feature here, however, is that the decision to prosecute on the basis of this section can only be made by the Ministry of Justice.

In all besides the specifically identified complainant offences, charges can be brought by either the complainant or the prosecutor. This decision can be made by either on an independent basis. Thus, the complainant himself can take care of all matters relating to the prosecution, including appearing in court in the role of the "prosecutor", presenting claims based on the offence, calling for punishment, summoning witnesses, presenting evidence and so on. It is considerably more usual, however, that the prosecutor joins in, and thereupon takes over these matters. This is, of course, in the interests of the complainant, as the prosecutor is better equipped for dealing with these matters than is a layman.

The fact that both the prosecutor and the complainant have an individual and independent right to consider the raising of charges brings up the question of the possibility of state prosecution when the complainant has otherwise reached an agreement with the offender, and is willing to drop charges. Section 16, subsection 2 of the Enforcement of the Penal Code Decree specifically states that an agreement between the complainant and the offender does *not* prevent public prosecution. No figures are available on the number of such cases in practice.

Statistics show that prosecutors rarely use their right of waiving prosecution, thus diverting the case. During 1980, measures were dropped in only some 8,000 cases that had reached the prosecutor. In roughly 1,300 cases, this was due to the fact that the prosecutor concluded that no offence had taken place, and in a further 400 cases the statute of limitations prevented the continuing of the case. In almost 3,200 cases, the prosecutor decided that there was not sufficient evidence for prosecution. In only some 2,800 cases did the prosecutor base his decision on what can properly be called discretion, for example, on the above-mentioned section 15, subsection 2 of the Enforcement of the Penal Code Decree.

VI. Diversion during the Court Trial Stage

Once charges are presented in court, the legality principle requires that the case be dealt with and a decision announced. The prosecutor cannot withdraw charges. The complainant, however, may withdraw his charges at any time before the actual decision is reached (section 17 of the Enforcement of the Penal Code Decree). In these cases, of which there are only some 200–400 each year, the prosecution is said to have lapsed.

In all other cases, then, the court must decide on the question of guilt and on the

3. *Inkeri Anttila:* Asianomistajarikokset ja "erittäin tärkeä yleinen etu" (Antragsdelikte und ein besonders wichtiges öffentliches Interesse), Lakimies 1977/3, pp. 211–222.

appropriate sanction if it finds that the accused is guilty of an offence. The very nature of the court and of the trial process underline the importance of the legality principle. The decision must have a firm foundation in law. Thus, although the court may waive sentence on the basis of section 5, subsection 3 of chapter 3 of the Penal Code (under conditions similar to those allowing policemen the right to refrain from reporting an offence, and prosecutors the right to refrain from prosecution) or go below the legally defined minimum sentence for the offence in question for special and specifically mentioned reasons, when this is not contrary to the public interest (subsection 2 of the same provision), the court cannot decide on forms of intervention not outlined in law. On this point there is an immense difference between the possibilities open to a Finnish court and those open to, for example, an American judge. If the offender is found guilty, the only options possible are imprisonment, fines or the waiving of punishment either because of the pettiness of the offence or because the offence was due to, for example, self-defence, coercion or an accident.

The above serves to show that covert intervention by a court is not possible in Finland, nor may the court suspend a sentence on the condition that the offender participate in a treatment program. (Conditional sentences are possible—and widely used—on the basis of the Conditional Sentences Act, but they can be ordered enforced only if the conditionally sentenced offender commits a new offence for which he is given a sentence of imprisonment.)

The court may also deal with civil claims in connection with a criminal case. Consequently, the court may combine any of the possible findings with an order that the offender pay damages. This is, indeed, the normal procedure.

VII. A Need for Diversion?

The background paper points out that diversion serves two quite separate functions. The first is related to case management. By diverting certain cases away from the normal system, overcrowded court dockets are avoided, leading to reduced administrative costs and more rapid adjudication. The second function refers to the outcome of the matter. Diversion may provide a more flexible and human method of resolving criminal cases. This second point assumes that there are cases where punishment would be an ineffective method of dealing with a conflict.

As to the first point, there are scarcely any legal systems that would not benefit from a lower volume of cases. This, however, should be balanced against the need for due process. It would appear that a fairly flexible criminal justice system, one that does not adhere too rigidly to the legality principle and yet which provides a reasonable opportunity for having one's case heard, would be the best alternative.

The Finnish system, in comparison with that operating in a number of other countries, can be called flexible and even, to an extent, informal.[4] For example, the complainant has a considerable role in the raising of charges and in the trial process. Although in court the complainant's role bears considerable parallels to that of a witness, this should not cause us to ignore the importance of his role. It was mentioned that the complainant

4. This is, of course, a generalization. In practice, the degree of informality experienced in court will depend on the judge: an authoritarian judge or a judge who is unsure of himself will tend to "stick to the letter of the law" more than others. Another term which can be used to describe Finnish court procedure is "prosaic".

has the right to sue for damages in connection with the criminal case. This leads to a concentration of litigation in the same case.

Even so, the very fact that a case must be brought up in court means that there will be a delay before the court decision is given. Of the some 80,000 full-scale court trials in criminal matters each year, the median length of time between the commission of the offence and the decision of the court of first instance is 4–5 months.

The trial itself is relatively informal, with little of the strict adherence to procedural rules that is typical of, for example, Anglo-Saxon countries. One point is that there is no obligation to be represented by a lawyer. Anyone can, and frequently does, speak on his own behalf in court. The courts also have full discretion over the presentation of evidence, and so uneducated attempts by a layman to present evidence will generally not be barred on legal technicalities.

It is the second function of diversion that is of ideological importance. This function is connected with a questioning of the appropriateness of punishment in general. Doubters of the effectiveness of the criminal justice system assume that there are identifiable groups of offenders who can be dealt with more effectively through unofficial, community-based or treatment-oriented means. The argument has also been advanced that for at least some groups of offenders, punishment, in particular incarceration, will lead to even more undesirable results.

It should be noted that diversion may be directed at two different categories of offenders. One is the petty offender, who would generally only be fined in court. The rationale here is that such cases are so petty that they can be dealt with readily through informal means. The emphasis in the Finnish provisions on discretion at the different stages means that it is this group which is in fact generally diverted in Finland. The second group includes the serious offender, who would generally be sentenced to conditional or unconditional imprisonment. It is this group which is the target of those who suggest that prison be replaced by, for example, treatment programs.

VIII. Diversion from Official Punishment?

As background to the current discussion on diversion in Scandinavia, Scandinavian criminal policy should be set out. The five countries of northern Europe—Sweden, Denmark, Norway, Finland and Iceland—have generally had the reputation of progressive thinking in societal planning. During the first decades of this century, some Scandinavian countries, especially Sweden, made far-reaching efforts to put into practice what is known as the therapeutical model of criminal justice. This golden age of treatment optimism, as it is known today, embodied the belief that an offender can be rehabilitated by the application of an individually-tailored program of treatment. In Finland, symptoms of this approach were seen in the adoption of indeterminate incarceration for those guilty of repeated offences, and the institution of juvenile prison.[5]

Large-scale efforts in Scandinavia and elsewhere to match the offender with a suitable rehabilitation program, however, have not met with success. No treatment program has been found which would generally and repeatedly lower the risk of recidivism for any

5. See, for example, *Inkeri Anttila*, Conservative and Radical Criminal Policy, in Scandinavian Studies in Criminology, 1971, p. 11 ff. A compendium of articles on various facets of Scandinavian criminal policy is *Norman Bishop* (ed.), Crime and Crime Control in Scandinavia, published by the Scandinavian Research Council for Criminology, 1980.

offender group. The recidivism risk, which is generally used as the measuring stick of the success of rehabilitation, is generally highest for those guilty of relatively petty offences (especially property offences) while it is considerably lower for those guilty of such serious offences as homicide. Consequently, the use of treatment which would take the recidivism risk into account would be in conflict with the principle of proportionality. Also, it is difficult to evaluate when a treatment program has succeeded : some offenders might be kept in the program for extended lengths of time despite the fact that, had they been released, they would not have committed new offences (the problem of false positives). Fourthly, it has been noted that severe sentences appear to be correlated with a higher rate of recidivism, even when these severe sentences have a therapeutic goal. Fifthly, as many of these programs in fact depended on coercive treatment, there was the problem of human rights. Finally, criminologists became aware during the 1960's of two facts which had not received sufficient attention : first, the commission of an offence is not necessarily a sign of a deviant personality, but may only be associated with a certain stage of development or with certain surrounding circumstances ; second, the operation of the criminal justice system itself, from the determination of what acts shall be considered offences, down to the day-to-day operation of the police, has a marked effect on who is singled out as an offender.

As a reaction to this amassing of evidence about the fallacy of the assumption behind the treatment model, all of the Scandinavian countries have turned to what is called "new criminal policy".[6] This bears certain features which can also be seen in the neoclassicist revival in parts of the United States : an emphasis on the guilt manifested through the offence, the raising of the importance of general deterrence as opposed to special deterrence, a realization of the role of the expression of social disapproval in the act of sentencing, and the importance of the principles of equality and proportionality.

Professor Nils Christie of the University of Oslo in Norway, who was instrumental in demolishing the myth of the effectiveness of coercive treatment, has now questioned the importance that the "new criminal policy" assigns to the role of official punishment. His ideas, together with parallel views expressed by e.g. Professor Louk Hulsman of Erasmus University in the Netherlands, have met with a favorable response in certain circles in Scandinavia, and have forced renewed discussion on the principles lying behind the criminal justice system.

Professor Christie begins by pointing out that punishment is the intentional infliction of pain.[7] He suggests that modern criminal justice systems concentrate almost solely on the alleged offender, while ignoring the possible social causes of the conflict between the offender and the victim. The mechanism by which the offence is dealt with takes it away from the hands of the offender and the victim—the two parties with a strong personal interest in the resolution of the entire conflict—and places it in the hands of lawyers and judges who perforce take a very narrow and legally determined view of the matter.

6. This new criminal policy is evident in official reports published almost simultaneously in Finland, Sweden, Denmark and Norway at the end of the 1970's. The Finnish report dealt with the basis for a completely re-drafted penal code (Rikosoikeuskomitean mietintö 1976 : 72, Helsinki 1977). These official reports are commented upon in Straff och rättfärdighet — ny nordisk debatt, Stockholm 1980.

7. *Nils Christie*, Limits to Pain, Oslo 1981.

Christie's principle argument is that punishment is an inappropriate response. The most mutually satisfactory and lasting resolution of the matter can only be achieved by having the two immediate parties meet personally to find a means of settling the entire conflict.

This, then, is diversion on a grand scale. The background paper has dealt with the same matter in speaking of the community control of behavior. It is specifically *community* control, because the friends and acquaintances of both the offender and the victim, all of whom may have a personal interest in the continuing harmonious contacts in the community, help the two to come to a resolution of their difficulties. Christie, however, would take issue with the background paper's assumption that the community control of behavior is limited to developing countries. Christie would argue that it is also possible to realize it in developed countries, and even in urban areas.

IX. The Illusion of Community Control

Social norms are most effectively controlled by the immediate community. If the criminal justice system was to rely solely on the State enforcement of norms, it is possible that these norms will be followed only in the relatively rare cases where the person in question runs the risk of detection and apprehension by a State agent. If, on the other hand, the society can rely on the pressure, influence and guidance of the local community, there is a considerably greater chance that the norms will be followed in practice. This community control will eventually lead to the internalization of norms by the members of the community, and so after a while even the need for community control will be lessened. The need for community control will never disappear, however, given the constant technological development and demographic changes in present-day societies, to mention only two factors; also norms will undergo change, and so there will be new norms to internalize. Also, community control will be necessary to check offences committed when the internalized norms are overridden by, for example, sudden temptation or stress.

Some scholars also in Finland have hypothesized that community control could take over the function of the criminal justice system entirely, thus removing the need for policemen, prosecutors, judges and jailers. These scholars generally begin with the observation that it is the political forces in a society that determine what behavior is criminalized and what is not. If group solidarity, a comprehensive approach to the education of citizens and the support and guidance provided by all of the members of the society lead to a situation where the incidence of certain offences is reduced, it may be that the remaining offences are so petty and rare that mass decriminalization can be instituted, ultimately leading to a utopian society "free of crime".[8]

While such a crime-free society is highly desirable, it would still seem to remain on the utopian level. It is not yet time to dismantle the criminal justice system.

One reason for this is that deviant behavior is always a relative matter. If the more blatant forms of deviancy (such as homicides) are virtually eliminated, it is quite probable that lesser forms of deviancy will be "upgraded" and lead to a comparable amount

8. See, for example, *P. O. Träskman*, Samhällets produktionssätt och brottsligheten, in Oikeus 1974/4, pp. 17–24.

of social disapproval. Also, as mentioned, the development of society will generally lead to a need for attempting to lessen the incidence of new forms of deviancy.[9]

The second reason has to do with the practical implications of community control. By relying on the community for the resolution of differences, one is relying on the fairness of members in dealing with inter-personal matters. Many petty conflicts can and should be dealt with in this relatively flexible manner. However, it may even be unjust to leave matters in the hands of the immediate parties. In some cases, the social power of either the offender or the victim may be so strong that he is unwilling to deal impartially or objectively with the underlying conflict. It is also possible that such very human emotions as anger or revenge may make it impossible for him to be impartial or objective. In such cases, the other members of the community may take over—but is there any way of making sure that they are any more capable of dealing with the conflict?

A third reason is that much of what we call "criminality" is not based on inter-personal conflicts. Examples are traffic offences, tax fraud, offences of negligence or carelessness, offences directed against the state, forgery, and alcohol offences. Such offences in fact count for the great majority of acts that modern societies have chosen to criminalize.

X. Finnish Criminal Policy and Diversion

The survey at the beginning of this paper pointed out that there are a considerable number of cases where diversion with informal intervention takes place. It would be fair to say that in these cases the community control of crime is a factor leading to the resolution of conflicts.

But it would not be proper to say that in all of these cases the community control of crime has led to the best resolution possible. The two examples mentioned by the background paper, that of minor incidents of violence in the context of close family or neighborhood relationships, and that of shoplifting, are typical cases where informal intervention takes place. But to continue with these examples: studies of hidden violence show that the man who assaults his wife is very likely to repeat his offence, and yet the wife might not always be in a position to escape the conflict. It may be that only court intervention—criminal proceedings, or civil proceedings for divorce—may be the way out of this circle of violence. As for shoplifting, it may be that the stores utilize forms of mediation almost akin to extortion, for example by requiring that the shoplifter pay the price of the goods many times over.

It would thus apparently not be a solution to establish as a hard-and-fast rule that certain cases remain outside of the criminal justice system. It would, on the contrary, be better to continue and improve the present situation, where the complainant and even the suspect (in certain cases) can elect to have the matter dealt with either informally or by the court. From the Finnish point of view, it might be a solution to expand the sphere of offences considered complainant offences. Official proposals along these lines have been made. These proposals have usually also included an "escape clause", according to which the prosecutor would be able to bring the matter to court despite the ab-

9. This and the following analysis is largely based on the thoughts expressed by *Patrik Törnudd*, for example in Syntyykö rikoksetonta yhteiskuntaa?, in Pykälän Uutiset 1974/3, pp. 8–10.

sence of the complainant's request whenever a prevailing public interest would call for this.

The preceding outline of the two positions, that taken by the official criminal policy of Scandinavia, with its emphasis on equitable and proportional punishment as well as on general prevention on the one hand, and that taken by the advocates of community control on the other, may seem to stand in irrevocable conflict. On closer inspection, however, this does not prove to be the case. The dividing line between the proper scope of each is imperceptible.

During the 1960's and the 1970's, Scandinavian criminal policy accepted the view that criminal policy is only one segment of societal policy, and that punishment is not the only or even the most effective way of deterring crime. The operation of the criminal justice system as a whole has a general deterrent effect, but more fundamental social measures can prove even more successful in preventing crime.

Many demographic changes during this century have lessened the impact of unofficial social control, turning over more and more of the responsibility for dealing with crimes to the official crime control organs. A result has been that the enforcement of norms has to a large extent moved from the community level to the higher, more official levels, resulting in decreased effectiveness.

One goal of Scandinavian criminal policy has been to reinforce unofficial social control. The difficulty here is that "official" intervention and diversion, through its very officiousness, may prove ineffective. If the police or prosecutors were given instructions to turn over all cases fulfilling certain criteria to, for example, "peer courts" or local mediation boards, the police and the prosecutors would have to have some way of assuring themselves that the result of this diversion would be equitable. Otherwise, the opportunity will not be used. A logical conclusion would be that these diversion organs would have to follow due process, albeit possibly on a more "down-to-earth" level. This due process presumably would even include the right of appeal to an ordinary court. Also, if the decision of the informal organ was to have any validity, there must be some way of enforcing it. This, in turn, might necessitate the back-up support of the official apparatus. The factual difference between the present courts and the suggested mediation boards would remain slim. The latter organs would furthermore suffer from the fact that they are unfamiliar to the members of society; the consequent effects on the sense of justice and legal safeguards would be difficult to assess.

On the other hand, the present phenomenon of diversion with informal intervention is primarily limited to petty cases, where on the whole the result of this informal intervention is more lenient than a court-ordered sentence. This is in harmony with the principles behind present criminal policy. The strengthening of social control will possibly lead to an increase in the number of cases dealt with through this mechanism, and there would not seem to be any weighty criminal policy arguments against such a development—as long as the possibility of turning to the criminal justice system remains open.

Use of diversion for serious offenders, however, would not appear to have any chance of acceptance in Scandinavia. This is due not only to the need for expressing social disapproval of such offences, but also to the fact that such intervention would presumably involve coercive treatment, something that Scandinavian criminal policy has experimented with and emphatically rejected.

Singapore
DIVERSION AND MEDIATION

John T. L. Koh

The term "Diversion" will refer to any deviation from the ordinary criminal process whereby an accused person participates in some form of non-penal programme instead of facing a prosecution in court. Such programmes refer specifically to those whose purpose is either to rehabilitate or to resolve any underlying criminal propensity.

Investigation and Prosecution of Offences in Singapore

In Singapore, the criminal process can be divided into the following stages:

(1) complaint/report
(2) arrest
(3) investigations
(4) indictment/charge
(5) prosecution
(6) conviction/acquittal
(7) sentencing.

In describing the system of prosecution in Singapore, it will become apparent that diversion takes place after either investigations or indictment but before actual prosecution.

Investigations commence when a report is lodged with the Police and the other law enforcement agencies such as the Corrupt Practices Investigation Bureau and the Central Narcotics Bureau. They may also commence with the arrest of persons suspected to have committed crimes. The police are empowered to arrest without a warrant under section 31 of the Criminal Procedure Code. This power is normally confined to seizable cases. In Singapore offences are categorized as either seizable or non-seizable cases.

Non-Seizable Cases

In these cases, the prosecution is initiated by way of summons. A complaint is filed and if the magistrate is satisfied that an offence is disclosed, he will issue a summons which is then served on the person accused. He is then required to appear in court to answer the charges.

These cases, commonly referred to as "summons cases", constitute the bulk of the cases tried in the courts. Most of these cases relate to minor offences, such as traffic offences.

Seizable Cases

These are cases where an accused person can be arrested without a warrant. Where

a person is arrested by law enforcement officers, the usual practice is to release the person on bail pending completion of the investigations. Sometimes, however, it is not possible to release him on bail because of the seriousness of the crime. However, Article 9(4) of the Constitution requires a person who is arrested and not released to be produced before a magistrate within 24 hours and stipulates that he shall not be further detained in custody without the magistrate's authority. (Investigations will continue in such cases after the person is charged in court.)

Once investigations are completed, the police will refer the investigation papers to the prosecutor's office for a decision to be made to either institute a prosecution or discontinue investigations by having any charges withdrawn.

Section 335 of the Criminal Procedure Code states that the Attorney-General, who is also the Public Prosecutor, "shall have the control and direction of criminal prosecutions". Article 35(8) of the Constitution states that the Attorney-General "shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence". In the exercise of these powers, the Attorney-General appoints Deputy Public Prosecutors (DPPs) to perform the functions and duties of the Public Prosecutor. There are at present 13 DPPs.

Control of prosecutions is exercised in three ways:

(1) When the Police and the other law enforcement agencies are uncertain whether to proceed against an accused person they will refer their investigation papers to the DPP for a decision. Furthermore, the prosecution of certain offences requires either the sanction (e.g. false declaration) or consent (e.g. corruption) of the Public Prosecutor. In these cases, an accused person can be charged (indicted) in court only when there is enclosed with the charge the relevant consent or sanction of the Public Prosecutor. Any trial without such a sanction or consent of the Public Prosecutor would be a nullity.

(2) For all cases tried at the Subordinate Courts (consisting of Magistrate and District Courts) the DPP will review *all* the cases which are fixed for trial and decide whether prosecutions should be proceeded with. (These are the daily cases handled by some 20 police prosecutors.) He will also deal with representations from counsel before the hearing. Occasionally, counsel and the police prosecutor are directed by the magistrate to consult the Deputy Public Prosecutor before continuing with the hearing.

(3) Finally there are the prosecutions handled by DPPs themselves. These are usually the more complex cases in the Subordinate Courts and *all* High Court cases. Before every High Court trial, a Preliminary Inquiry has to be held to determine if there are sufficient grounds to commit an accused to stand trial. These inquiries are conducted by the DPP. In all these cases the DPP in charge will take the final decision whether there should be prosecution.

Although DPPs decide on all prosecutions, it is not practically possible to have actual control of all charging decisions. Offenders are often charged in Court 26 under the 24-hour rule by the Police. Many petty offenders like shoplifters, when charged, knowing that they have done something wrong, will plead guilty. When he pleads guilty, the plea

is taken and he is sentenced. As the decision to charge is essentially a part of the prosecutorial process, the DPP has the responsibility of ensuring that the Police do not charge someone for trivial matters.

At any time before the hearing of cases, counsel can also write to the DPP to make representations for the withdrawal of cases against their clients. These are, in effect, requests for the matter to be resolved alternatively, such as by diversionary measures.

The availability of diversion is clearly an important element in the exercise of prosecutorial discretion. In Singapore, the "opportunity" principle forms the basis of the prosecutorial decision. However, the exercise of discretion tends to vary with the type of offence. For serious offences, the decision to prosecute would more likely depend on the availability of evidence than on the possibility of diversion.

Types of Diversion

In view of the wide powers vested in him, and since all prosecutions are under his control, the decision to divert would be made by the DPP although great weight is placed on the recommendations of the law enforcement agency. The DPP would consider whether diversionary alternatives are suitable before deciding on prosecution. Since there are only 13 DPPs, it is easier to control and coordinate the guidelines for diversion.

Types of Diversion in Singapore

Simple diversion: This normally occurs when the DPP, after examining the Investigation Papers, instructs the Police not to proceed against the accused even though there is sufficient evidence to justify a prosecution. Instead the accused is summoned to the office of a senior police officer of the Division (precinct) who would then administer a warning to him, stressing that he is being given a second chance to keep the peace and improve himself. Where youths are involved, the parents would also be present.

The offences resolved in this manner are often those relating to petty theft such as shoplifting. In cases involving school children, the actual arrest may be a sufficient deterrent. Offences involving minor violence especially if they are not committed in a public place are also settled in this manner. Young girls between 14 and 16 are also protected by provisions in the Women's Charter that deal with the offence of "carnal connection", that is, consensual sexual intercourse. Reports are often lodged at the instigation of irate parents, but where the consent is between young lovers, the case is almost invariably diverted.

Covert diversion: This rarely occurs in Singapore as it could in many cases lead to criticisms that the prosecutor is abusing his office to enforce a civil settlement on the parties. Alternatively it may be cynically viewed as a means of buying oneself out of a quandary. It is most common in cases where the gist of the offence is an omission to comply with a statutory requirement. A "wait and see" attitude may be taken to give the accused a chance to perform his obligation. In certain restricted situations involving property offences, a decision may be delayed to allow for restitution and compensation of stolen funds. However, this *alone* is rarely sufficient to justify diversion.

For example, the Enlistment Act places certain obligations on citizens to register for National Service. A would-be "draft dodger" may be given another chance to enlist and if he does so, prosecution will be discontinued. Other offences may involve those re-

quiring persons to apply for various licenses. Where employees steal from the employer, the prosecutor may delay making a decision until restitution is paid. However, in such cases, other factors such as age, amount stolen, the views of the employer and whether the accused is remorseful and cooperative during investigations must also be present if the case is to be diverted. In many embezzlement cases, employers may also give the employee who dips into the till a chance and the matter may go unreported to the Police. However, if the intention of the employer is to benefit himself rather than to "rehabilitate", the employer could be prosecuted for the offence of taking a gift to screen an offender from punishment under section 213 of the Penal Code.

Diversion with intervention: Under the Misuse of Drugs Act, 1973, five Drug Rehabilitation Centres were established for the treatment of addicts. The rehabilitation programme varies from 6 months to 3 years. A Review Committee is appointed to review the case of every inmate to determine whether the addict has been rehabilitated and should therefore be discharged.

The rehabilitation programme is mainly meant for those involved in the consumption and possession of drugs. These offenders are usually not charged in court unless they are persistent offenders. If they agree, they will instead spend a stint at the drug rehabilitation centres. In 1981, of the 4,590 drug offenders who were arrested, 2,263 were sent to the DRC and another 1,660 prosecuted. For 1982 (Jan. to June), 2,134 were arrested, 1,050 were sent to the DRC and 652 prosecuted. (The figures for arrest and prosecusion include offences of trafficking for which diversion is rarely recommended.)

In 1982, the Police have, with the help of community leaders, established two Boys' Clubs to deal with young offenders. After charges are withdrawn against them, young offenders are encouraged to join and participate in the activities of the Boys' Club. The purpose is to give them something meaningful to do since boredom is regarded to be a cause of their criminal activities. It is also to give them an alternative to what could otherwise be a criminal environment. The Club is run by a police sergeant aided by 4 police constables, and it is open for 12 hours a day. So far, only ten percent of the membership of the Clubs are young offenders and the Police hope that this percentage will substantially increase. School children may also be referred by the police to the counselling section of the Ministry of Education for guidance.

Mentally ill offenders are also diverted from the criminal process. Based on a psychiatric report which confirms the mental illness of the offender, a court can either release the person if sufficient security is provided to ensure that he will be properly taken care of and prevented from causing injury to himself and others, or report the matter to the Minister for Law who is empowered to make an order for the offender to be treated at a mental hospital.

When a person is confined for mental treatment, his case will be reviewed by a Board of Visitors who will decide if he is ready to be discharged. Their report will then be sent to the Minister. Discharge may also be granted if relatives of the offender are prepared to take care of and provide security for him.

These procedures are set out in Chapter XXXI of the Criminal Procedure Code. Before the Minister for Law makes any orders under these provisions, the case will also be sent to the DPP's office for comments.

Mediation: There are several minor offences which can be compounded by either the Police or the victim. In the former, composition is offered as a matter of course, as is the case with traffic summonses. In other instances, the DPP may decide to reduce the

charge to one which can be compounded. This would be done after looking through the investigation papers and representations, if any. Victims are generally advised by the police or, if a summons action is taken, by the magistrate that the matter can be settled by composition instead of resorting to what could often be an acrimonious trial.

Most traffic offences can be compounded. Others include tax offences and licensing offences. These are compounded by the police or the relevant authority. Another category of offences is compounded by the victims. These are offences where minimal violence is used or those where nuisance or insult is an element. Dangerous driving can be reduced to speeding and assault cases can also be dealt with as minor violence if the circumstances warrant it, for example a fight between friends which goes too far.

Civil Remedies

Many property offences overlap with civil remedies, the availability of which is a factor especially if there are evidential problems. For example, witnesses may be untraced and out of Singapore, not uncommon in cases involving documentary credits. The DPP would then advise the Police to inform the parties to settle the proceedings in the civil courts as it could be difficult to prove the necessary mens rea. However, it is important that the criminal process is not abused as a means of enforcing civil settlements.

Considerations in the Decision to Divert

The factors that are usually considered in the decision to divert are:

1. the seriousness of the offence;
2. the individual characteristics of the offender;
3. whether the accused is a first-time offender;
4. whether there is a probability that the accused will co-operate with and benefit from alternative treatment;
5. whether there are available programmes appropriate to the needs of the offender;
6. whether the public interest will be better served by diverting the case;
7. recommendations of the relevant law enforcement agency;
8. whether provisions have been made for restitution and compensation to the victim of the crime;
9. any other favourable circumstances.

Naturally, in a community where more alternatives are available, more cases can be appropriately dealt with by diversion. However, these need not all be in the form of institutionalized programmes.

Arguments for Diversion

Arguments for diversion cannot be separated from the objectives of any system of criminal justice. The criminal law seeks to promote social order and deter anti-social behaviour. When these laws are breached, one has to consider what is the best way of dealing with the offender. As society becomes more complex, requiring greater regulation, it is essential that there are means available to soften the rigours of the normal criminal

process. Diversionary alternatives allow the prosecutor the possibility of *individuating* the treatment of each offender.

Every criminal justice system has as one of its objectives the rehabilitation of the offender and the deterrence of potential offenders. Diversion in its various forms may achieve the same objectives without having to resort to criminal punishment which, though successful in that it does rehabilitate and deter, invariably stigmatizes. Punishment is not always necessarily the only effective deterrent: the process of investigation might be sufficiently traumatic to deter any potential offenders, especially if they are young offenders. Since the point has been made, there is no need for overkill by seeking a criminal conviction. In the course of investigation, the lessons that have to be learnt could also have been learnt. Diversion allows for all these facts to be considered.

Apart from the presumed individual benefits, the practical benefit of diversion is that it reduces the case load for the courts. Diversion would also mean that police officers do not have to spend time in court, releasing limited manpower resources for law enforcement. The prisons system will not be overloaded and the operation costs will be kept low.

Evaluation

Naturally there are complaints against diversion. Victims often feel that the accused should be punished and not be given a second chance. Department stores would want to prosecute each and every shoplifter, unhappy parents would choose to defend the honour of their daughters by prosecuting their young lovers and so on. But in a civilized society where the conflict between two individuals involves the interests of rehabilitation and retribution, the former must prevail.

Unfortunately, there are no reliable statistics to establish whether diversion is truly effective. Will the young shoplifter learn from his brush with the law or will he carry on with greater impudence? One often has to guess. Sometimes participation in a non-penal programme might be even more vigorous than punishment. The idea of rehabilitation before conviction is a somewhat uneasy one because unless there are adequate safeguards, participation in a non-penal programme could become merely a euphemism for wrongful detention.

Although diversion may be recommended by the law enforcement agency, it is finally the decision of the DPP. Since the decision is neither made publicly nor subject to judicial review, there may be accusations of unfair treatment if there appear to be inconsistencies in the cases that are diverted. Since the decision to divert is one that is highly individuated, it is not always easy to appear consistent.

Nevertheless, there are policy guidelines worked out between the DPP's office and the various law enforcement agencies. Within the DPP's office, a high degree of consistency can be achieved since all decisions are filtered through and reviewed by a senior DPP.

In any case, those who feel strongly enough about a decision can personally or through counsel request for a decision to be reviewed. This further ensures that each decision is a reasonable balance of conflicting interests.

In principle, diversionary alternatives are a valuable aspect in the administration of a system of criminal justice. However, as most available programmes are still experimental in nature, a cautious approach has to be taken. This is especially so since statistics are

often unavailable and the efficacy of diversion is open to dispute. Nevertheless there are indications, the establishment of the Boys' Club on an experimental basis being a case in point, that more resources will be allocated to diversionary alternatives if they prove to be effective. In Singapore, there will certainly be a willingness to examine any available practical alternatives which will help fulfill the objectives of its system of criminal justice.

Japan
DIVERSION AND MEDIATION

Kōya Matsuo

I. Introduction

The most notable feature of the criminal justice administration in Japan is a high clearance rate. It is 55 per cent for theft and 97 per cent for murder (1981). Formal prosecution is, however, initiated very discreetly against those who have been placed under investigation and whose guilt has been sufficiently established. Public prosecutors make a careful selection to divert those offenders from formal prosecution who are unlikely to repeat the commission of a crime, unless the seriousness of the offence committed requires actual punishment in terms of general prevention or social justice. The Code of Criminal Procedure expressly recognizes the discretionary power of the public prosecutor not to take an action. (§ 248 CCP: "If, after considering the character, age and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and the conditions subsequent to the commission of the offense, prosecution is deemed unnecessary, prosecution may not be instituted.") Although the prosecution rate is very high regarding violations of traffic regulations as well as negligent homicides caused by driving cars, the above-mentioned discretionary power is fully exercised for all other types of offenses.

When selecting defendants for formal action, public prosecutors try to exclude those whose guilt appears not to have been proved beyond a reasonable doubt. Since they are successful in this regard, only a few defendants enjoy a judgment of acquittal. The number of defendants who were found not guilty on all the counts charged was 186 in 1980. The conviction rate is well above 99%.

Trial judges also exercise their discretion when they decide whether to send the convicted to prison or not. They often release eligible defendants after conviction, either unconditionally or under probation. Of the 76,223 defendants sentenced to imprisonment in 1980, 49,991, or 60.3% were not sent to prison but were released by the decision of the court. The number of inmates serving prison terms is 42,580, which means that 36 persons per 100,000 are currently in prison as convicts.

In addition, more than two million people are sentenced each year to pay a fine for violations of traffic regulations, reckless driving and other minor or regulatory offences, but almost all of these cases are processed by summary procedure (§ 461 CCP). The defendants are not required to appear in court if they do not object to the fine imposed by summary order. Here again public prosecutors make discretionary decisions concerning whether the defendant shall undergo the ordinary trial in the court or shall be excused from that proceeding on the condition that he pays a fine pursuant to court order.

It seems safe to say that the pivotal figure in the administration of criminal justice in Japan is the public prosecutor because he exercises a wide discretion at the stage of prosecution. Each prosecutor, however, always tries to follow the subtle, unwritten

guidelines which the day-by-day practice of his highly centralized office has produced.

Granting a simple diversion in a large number of cases, usually after minute investigation, is an important part of the prosecutor's practice. Covert diversion is also an indispensable part of his work, although it is not formally provided by law. The only exception which must be mentioned is juvenile cases, in which public prosecutors are not allowed to exercise their discretion. It is family court judges who are primarily responsible for handling juvenile delinquents.

In contrast to the frequent use of simple diversion as well as covert diversion, diversion with formal intervention or diversion accompanied by institutionalized non-penal projects is rather undeveloped in Japan. This is partly because criminal matters are considered to be of an official nature and it is difficult for the private sector to intervene without an official disposition. It is also the result of the increasingly dominant due process idea which is against taking adverse measures regarding criminal matters without formal decisions by the judiciary.

II. Answers to the Questionnaire

Following the "suggestions for national reports" which appear at the end of the commentary, I would briefly answer the questions in order to clarify the specific situation in Japan.

1) Practice of Diversion

a) By "offenses absorbed in the community," we understand those offenses which became known to the community but did not give rise to an investigation on the part of law enforcement agencies. We can point to two groups within the community that may exercise this function of crime absorption. The first group consists of schools, firms, factories, banks, and other public or private associations. They will not quickly report to the police minor crimes—embezzlement, assault, slander and so on—committed by their pupils, employees, or members within their organizations, but will take action such as a warning, discipline, or disqualification. The second group is department stores, supermarkets and other retail shops. They are vulnerable to shoplifters, but it is highly probable that they do not report to the police when the offenders surrender and the stolen goods are recovered.

Statistics are not available as to either category of community absorption.

b) As I described in Part I, the principle of opportunity is basic to the criminal justice system in Japan. The Code of Criminal Procedure expressly provided for the discretionary power of public prosecutors in 1923, but the practice dates back to earlier days.

Police officials are also allowed to drop minor cases. The scope of offenses is, however, narrowly limited. Besides, they must report the total number of such cases to the public prosecutor's office. Therefore, the discretionary power of police officials is of secondary significance.

c) The diversion stated in b) is most frequently a simple diversion. Public prosecutors as well as police officials may suggest to an offender that he compensate the victims, that he find jobs and work regularly, or they may just wait and see what the offender will do. In some cases, public prosecutors put off their decisions for months or even a year in an attempt to achieve the aim of this covert diversion.

d) In case a police officer drops a minor case instead of transferring the case to a

public prosecutor, the police give a severe warning to the suspect; his parents and other supervisors such as his employer are requested to submit written promises that they will in the future effectively supervise him, in accordance with the rules of the National Public Safety Commission.

There exist no such specific rules in case a public prosector drops a prosecution without filing an information; however, similar measures may be, and are in fact taken by the prosecutor. Although paying damages and apologizing to the victims are not legal prerequisites for the public prosecutor's decision of non-prosecution, they are important factors for the prosecutor to consider in making such a decision.

In the case of juvenile offenders, in comparison with the case of adult offenders, stronger intervention is made. The Family Court can decide, prior to its final decision, to place a juvenile offender under the supervision of a Family Court Probation Officer for a certain period. In this case, the Court can fix the conditions to be observed by the juvenile, or can entrust suitable institutions or individuals with the care of the juvenile. (Art. 25 of the Juvenile Law). As a result, if it is recognized that the juvenile concerned has been rehabilitated and that there is no need for further intervention, the Court can terminate the proceedings without ordering any educative measures.

In addition to the above-mentioned measures ordered by the Court, more informal intervention to the juvenile is made in the course of the inquiry by the Probation Officer and the hearing by the Family Court judge: reprimand, warning, consultation, advice and persuasion. If, in response to such intervention, the juvenile recovers his or her sound life voluntarily, then the Court can discontinue the procedures.

e) In Japan, mediation, or rather reconciliation between the offender and the victim, is considered to be a matter of civil law. It frequently occurs that a public prosecutor makes a decision of non-prosecution, taking into account the successful results of such reconciliation. However, the success or failure of reconciliation has only an indirect influence on the prosecutor's decision-making.

f) In Japan there exist no "comrades' courts". However, in some fields administrative commissions, such as the Fair Trade Commission regarding violations of the Antitrust Laws, are empowered to lodge an accusation for certain offenses. Without such accusations, a public prosecutor can not file an information. In such cases criminal prosecution is hindered by the decision of the commission not to lodge an accusation.

g) There exist no such procedures in Japan.

h) The most important decision for diversion in Japan is that of the public prosecutor not to file an information. (See d) above.) In the Code of Criminal Procedure of Japan, the criteria to be followed by the prosecutor are stipulated in a very abstract manner (Art. 248. See Part I). There exist neither rules nor regulations which contain more detailed explanations regarding these criteria. However, in practice, unwritten guidelines to be learned by all the prosecutors through their long experience can work. As long as prosecutors follow these unwritten criteria, they are confident in the impartial exercise of their power of prosecution. Also, because a prosecutor is under the supervision of his superior officer who is also a prosecutor, these superior prosecutors can control the decisions of their subordinates, which contributes to the unification of the criteria regarding the decision to prosecute.

As an organ to control the impartiality of prosecution, there exists "the Prosecution Investigation Committee", consisting of eleven lay people chosen among citizens, which gives an advisory opinion when the decision of non-prosecution by the prosecutor is

considered unreasonable. In the case of public officers' abuse of authority, if a prosecutor decides not to file an information, certain individuals such as victims are entitled to proceed in the criminal court with the prosecution (Art. 262ff).

In case a prosecutor makes a decision to prosecute a case which is, according to the above-mentioned established criteria, not important enough to be prosecuted, theoretically the Court can discontinue the case, although the Court actually makes this decision in very few cases.

i) The decision for prosecution or non-prosecution by a public prosecutor is usually made only after taking into full consideration all of the circumstances, and he enjoys a a rather high success rate. But in case the measures taken for intervention prove to be unsuccessful after the decision was made, he will reconsider the case and make another decision including a formal charge.

j) The reasons why diversion has been widely practised in Japan are:

(i) From the viewpoint of criminal policy, measures to avoid the stigmatizing of offenders and to make their resocialization easier are considered important.

(ii) Diversion is also necessary to reduce the burden of the criminal justice system.

k) In an oriental civilization, there seems to exist the idea that it is desirable to avoid recourse to penalties as much as possible. An ancient Chinese thinker mentioned that the purpose of punishment is to achieve a society which does not need a penal system. This idea forms the basis of the practice of diversion in Japan.

l) The conciliation agreement constitutes only a civil agreement.

2) Evaluation of Diversion

a) The types of diversion currently used are evaluated favourably.

b) In the case of adult offenders, since the screening for prosecution and non-prosecution is conducted precisely by the public prosecutors, more than 99% of the accused are found guility. There is a criticism that it is the public prosecutors who practically decide guilt or innocence, and that the trial before the court has become of little importance.

In the case of juvenile offenders, it has been pointed out that strong intervention through informal proceedings causes an infringement of the fundamental rights of juveniles. It is currently insisted that due process must be guaranteed also in the field of juvenile proceedings.

c) For the public prosecutors' decision of non-prosecution, more effective control of the prosecutors' practice by the public, such as an extension of the power of the Prosecution Investigation Committee, is recommended. Regarding the provisional supervision of juvenile offenders by the Family Court Probation Officer mentioned above (see 1)-d)), it is stated that more detailed legal provisions should be enacted with a view to providing more effective legal control of these measures. However, there is no consensus on these problems.

d) No answer to this item.

e) It seems probable that, generally speaking, diversion will not be restricted in the future. However, diversion will be restricted for some specific offenses, if punishment is considered a more effective measure to cope with such.

f) The two functions stated in 1)-j) should continue to be the function of diversion in the future.

Venda
DIVERSION AND MEDIATION

Murunwa Peter Nthabalala
Michael Malisa Tshishonga

I. Practice of Diversion

Since the Republic of Venda is one of the developing countries, the practice of diversion is mainly informal.

Naturally, simple diversions and diversion with intervention are practiced in the Republic, and the reason for its practice is that where possible the cause and not the symptoms of the disease (crime) should be treated.

A. Community Absorption

A number of minor offences such as the following are absorbed by the Community:

(i) Minor violent crimes

When a husband assaults a wife, the wife goes to the parents of the husband; if he has no parents, to elderly relatives or neighbours. The husband is then called upon and the matter is discussed with a view to bringing about reconciliation.

The husband is reprimanded and the matter is settled.

The matter is settled outside court and by the community itself.

(ii) Property offences

If A kills B's goat and A during the discussion concerning this matter agrees to having killed the goat and further agrees to compensate the owner in kind or cash, the matter becomes settled.

(iii) Libel

Where an offence was committed due to an emotional dispute between an offender and a victim, it is seldom taken to Court.

The matter is settled locally.

(iv) Juvenile offences such as stealing

The youths are directly under the control of the parents and it is the duty of each parent to educate his children in good behaviour.

If a child steals somebody's article, the parent will insist that he return it.

B. Opportunity Principle is Followed (as such simple diversion is practiced to a large extent)

The prosecuting authority in Venda is vested with the Attorney General.

If the A/G declines to prosecute a private person having an interest in the matter he may institute a private prosecution.

The A/G has a discretion either to prosecute or not in all offences which are brought to him for a decision and the prosecutions in the Supreme Court are instituted by his office.

In the lower Courts, it is done by prosecutors acting on his behalf under the A/G's control.

In practice prosecutors have a wide discretion. While they are normally supposed to prosecute in cases where there is sufficient evidence, they are allowed to apply simple diversion in appropriate cases; where the prosecutor is in doubt, he refers the case to the A/G for a decision.

The following are the cases where simple diversion manifests itself in practice:

(i) Minor violent crimes, especially in the family context or where the parties have been reconciled.

Crimen Inuria: parties are usually left to their civil remedies or attempts are made to reconcile them.

(ii) Juvenile offences are often left to be dealt with by parents or other persons in authority.

(iii) Mentally ill persons: in respect of less serious crimes the A/G declines to prosecute if such a person voluntarily submits himself for treatment.

(iv) Drug addicted offenders are more or less treated like mentally deranged persons. Where the crime is not very serious the prosecution may drop the case if the person submits himself for treatment.

(v) Any other minor offences:

Where some or other reasons or circumstances do exist which make the prosecution unnecessary or undesirable simple diversion is practiced.

Simple diversion is also used to a greater extent by members of the police force when they act as mediators, especially in family disputes.

Traffic officers in many instances caution traffic offenders.

C. Covert Diversion

This type of diversion is sometimes used in cases where compensation comes into the picture. It is effected by the prosecutor who usually gives the accused an indication that if the complainant is compensated, a prosecution will not be instituted.

D. Types of Diversion with Intervention Adopted

(i) Mediation

(ii) Conciliation

Mediation and conciliation are effected by the police and prosecutors in an informal manner only. Police action in this regard only occurs at pre-arrest stage. After a case has been registered the matter is in the hands of the prosecutor. The police are not allowed to interfere after the opening of a case docket.

Intervention by the prosecutor takes place at pre-prosecution stage.

The offences which are subject to simple diversion are also subject to diversion with intervention. Arbitration does not feature in criminal law in our legal system.

E. Diversion with Mediation

Mediation takes place especially in respect of minor offences where relatives are involved as parties. The offender goes to a trusted elderly person with a request that the offended should be called upon with a view to settling the matter.

The elderly person acts as a mediator with a view to bringing about a reconciliation.

Where A's child has committed any minor offence, the parents of such a child approach an elderly person who goes to the offended to bring about a reconciliation.

F. Comrades Courts

(Community Courts)

(In my country comrades courts serve the function of diversion).

G. Rehabilitation through Labour

This type of rehabilitation is non-existent in my country.

H. Control of Exercising of Discretion in Diversion Decisions

Vide B Supra.

I. Alternative Measures where Diversion Fails

As it has been indicated above, there is no formal programme for diversion; consequently there are no formal measures.

The only alternative is the re-institution of prosecution.

J. Purpose of Diversion

Simple diversion is practiced to a greater extent than diversion with intervention. Both diversions serve the same purposes:

1. to avoid as far as possible labelling persons as criminals for minor offences;
2. to encourage people to solve their disputes without harming good relationships;
3. to avoid unnecessary cases in criminal courts and the wasting of the court's time;
4. to encourage humane methods of settling disputes rather than punishing the offender;
5. to try and treat the cause of crime rather than the symptoms of crime.

K. Philosophy Underlying Diversion

It has been realized that criminals are also persons, and that there seem to be other methods which can be used and which are more humane than punishment as we know it which is mainly imprisonment.

It does not take much to upset the equilibrium of people of unstable character and faulty education and upbringing and make them forsake the straight and narrow path.

Desire for instance for social status in a material civilization like ours, where it is not what a man is that counts but what he has, desire for recognition of some sort, the breathless chase to keep up with the haves, may well lead the socially ambitious man or woman to criminality.

In dealing with a potential criminal, sociological, historical and criminological aspects should not be lost sight of lest we promote criminality.

II. Evaluation of Diversion

(a) Diversion in my country is evaluated favourably.

(b) There are no criticisms levelled against diversion.

(c) It is very difficult to exercise control over discretion.
The decision-maker is developed through training and experience.
Prosecutors are required to have legal qualifications.
The private person who feels that the practice of diversion in a particular case

does not satisfy him is at liberty to approach the Attorney General or even to institute a Private Prosecution where the A/G has declined to prosecute.

(d) N/A

(e) Diversion is likely to be expanded in my country.

(f) The function of diversion in criminal justice administration.

Diversion serves to rehabilitate and educate offenders in order to make them responsible and good citizens.

It must, however, be limited to those cases where it is not necessary to protect society against the criminal. It will rarely be practiced in respect of serious crimes in the interest of the community and the offender himself.

Proper control by a not too junior legal officer should be required for diversion with intervention.

Legal studies should include subjects in the social, psychological and criminological fields.

Roumanie
DÉJUDICIALISATION (DIVERSION) ET MÉDIATION

Iulian Poenaru

Les problèmes concernant la "déjudiciarisation" dans le domaine pénal, dans le but d'éviter la poursuite et aussi le jugement et la punition de l'infracteur, conformément à la loi pénale, en vue de sa resocialisation par un programme non pénal, nécessitent certaines considérations préalables.

Une première considération se rapporte à la constatation que les diverses modalités par lesquelles s'assure la réalisation du but énoncé présentent, en plusieurs cas, des particularités propres à la législation nationale, de sorte qu'une généralisation devrait tenir compte plus de la nature juridique et de leur fonctionnalité socio-juridique que de leur configuration dans les dispositions normatives strictement formelles de la loi.

De même il faut souligner le fait que du point de vue de la législation roumaine, l'appel ou le non-appel à toute forme de déjudiciarisation ne peut pas dépendre de la volonté ou de la position subjective d'un organe judiciaire (organe de poursuite pénale, procureur, instance de jugement) ou non judiciaire qui s'assumerait "discrètement" et plus ou moins discrétionnairement la solution dans une certaine manière du cas pénal. Au contraire, tant l'intervention des organes judiciaires et non judiciaires que leurs solutions doivent être motivées conformément aux principes de base et aux dispositions de droit pénal substantiel et de droit de procédure pénale et aussi les réglementations spécifiques à chaque forme d'intervention socio-juridique.

Il faut souligner aussi que du point de vue de la terminologie a une signification réduite le fait si les dispositions de la loi roumaine réglementent "la déjudiciarisation" et la "médiation" comme telles ou des institutions juridiques propres, mais dont la fonction et la finalité sont similaires, sinon identiques.

Dans les limites et dans l'esprit de ces considérations préalables nous essaierons de formuler les réponses aux questions suscitées par ce thème qui fait l'objet de ce rapport.

I. La Pratique de la Déjudiciarisation

a) Entre les nouvelles réalités, qualitativement supérieures qui caractérisent la société roumaine contemporaine, s'inscrit aussi l'orientation actuelle de la politique pénale de l'Etat concrétisée dans la constatation que sont accomplies, dans cette étape, les conditions pour que la correction des personnes qui commettent des infractions puisse avoir lieu aussi en d'autres formes que celle qui est, partout et de manière prépondérante, privative de liberté. La restriction de la sphère de la répression, par la diminution substantielle du poids des punitions privatives de liberté, aussi dans la sphère de la légifération que dans la sphère de la pratique juridique, a été et continue à être une préoccupation majeure de ceux qui élaborent la politique générale du parti et de l'Etat de développement multiforme de la société, politique appuyée sur l'unité indestructible et sur la force morale de la nation, sur les mutations profondes de la sphère des relations de production

qui favorisent l'élévation continue du niveau de vie matériel et spirituel du peuple, sur le développement impétueux des forces de production, sur l'élévation générale du degré de civilisation de la société et de la conscience socialiste des masses, sur l'approfondissement sans cesse de la démocratie socialiste. Dans ce contexte s'observe une attitude consciente des citoyens de respecter les lois du pays, de contribuer à la consolidation de la discipline sociale et de l'ordre de droit. Dans ces conditions cela va de soi que la société roumaine est dépourvue des phénomènes antisociaux graves, comme par exemple la criminalité organisée et professionnalisée, l'assassinat politique, la discrimination raciale, les attaques à arme à feu ou autres fléaux sociaux comme le chômage, le trafic et la consommation de drogues, les enlèvements de personnes et autres.

De même il faut dire que se généralise un comportement civique conformément aux principes de l'humanisme révolutionnaire, aux règles de vie et de travail appuyées sur les normes de l'éthique et de l'équité socialiste, dans la lumière desquelles personne ne peut rester indifférent envers un comportement individuel qui viole les règles de cohabitation sociale. Il existe, donc, un intérêt général de la société de prévenir les faits antisociaux et de rééduquer, corriger et réintégrer dans la société les personnes qui commettent de pareils faits.

A partir de ces réalités la société "absorbe" en vue de leur solution, un grand nombre de cas concernant les infractions ou les comportements déviants, intervenant pour les prévenir et proposant des moyens ou voies pénaux ou non pénaux pour rétablir la légalité et les rapports normaux entre les sujets du conflit pénal. Sont multiples les matières dans lesquelles la société, par sa démarche, anticipe l'action des organes judiciaires pénaux ou intervient en exclusivité pour solutionner certains rapports conflictuels entre les individus.

L'intervention sociale a lieu, dans tous les cas, d'une manière organisée, par des formes et des organes sociaux institutionnalisés, par des moyens et méthodes légiférés, assurant, dans leur ensemble, un système d'organisation et de fonctionnement dont l'action constitue une démarche efficiente avec des résultats positifs pour la société dans un domaine ou autre de l'activité et des relations sociales.

b) Du point de vue de la loi du procès pénal roumain il faut préciser, premièrement, que l'Etat est le titulaire de l'action pénale et que le déroulement du procès pénale a à la base deux principes fondamentaux: *le principe de la légalité*, qui impose le respect des dispositions de la loi de procédure pénale, pendant le déroulement du procès pénal, dans toutes ses phases (l'art. 2 al. 1 C.pr.p.) et *le principe de l'officialisation* qui implique l'obligation des organes judiciaires d'accomplir d'office, les actes nécessaires au déroulement du procès pénal (l'art. 2 al. 2 C.pr.p.).

Du principe de la légalité découle *le principe de l'indisponibilité* du procès, conformément auquel les sujets du procès pénal ne peuvent pas, à l'amiable ou sur la voie de la transaction, s'abattre des normes de déroulement du procès pénal. Seulement l'Etat, comme unique titulaire de l'action pénale peut disposer cela, par une volonté antérieure à l'infraction (amnistie, abrogation de l'incrimination) ou par l'effacement, par anticipation, de la responsabilité pénale, dans le cas où sont accomplies certaines conditions (la prescription, la non-introduction à terme de la plainte préalable ou sa retraite, la conciliation dans les cas prévus par la loi).

Du principe de l'officialisation découle *le principe de l'inévitabilité* du procès pénal qui doit commencer et doit se dérouler obligatoirement, *sauf dans le cas où la loi dispose autrement* et *le principe de l'irrévocabilité* du procès, conformément auquel le procès

pénal commencé ne peut pas être arrêté et on ne peut pas revenir sur les actes effectués, *sauf les situations où la loi dispose autrement.* De ces quelques mentions il résulte le principe du procès d'office, bien que la règle de base du procès pénal ait, toutefois, un caractère *relatif*, à cause des dérogations qui existent dans la loi.[1]

Sur le terrain de cette relativité s'inscrit dans la législation aussi la pratique pénale roumaine, l'un des moyens les plus efficients de déjudiciarisation simple, par laquelle les organes judiciaires pénaux peuvent ne pas donner cours aux dispositions formelles concernant la mise en justice et l'application d'une punition à l'auteur d'une infraction : *l'appréciation du péril social concret de l'infraction.*

L'article 18 (1) introduit dans le Code pénal le 29. III. 73 prévoit que n'est pas une infraction le fait prévu par la loi pénale si par la violation minime d'une des valeurs protégées par la loi et par son contenu concret, étant dépourvu manifestement d'importance ne présente pas le degré de péril social d'une infraction.[2] L'appréciation, en concret, du degré de péril social, conformément aux critères établis par la loi, revient au procureur dans la phase de la poursuite pénale et à l'instance dans la phase du jugement du fait. Les critères déterminants d'une pareille appréciation se rapportent à la manière et aux moyens de réalisation du fait, au but poursuivi par l'infracteur, aux circonstances dans lesquelles a été commis le fait, à la poursuite produite ou qui aurait pu se produire et aussi à la personne et à la conduite de l'infracteur.

La recherche scientifique du concept de péril social du fait, dans le contenu de la loi pénale et dans l'activité juridique présente une importance particulière, à cause du fait que le degré de péril social des certains faits peut être différent en temps, adéquat au processus de développement de la société et les mutations sur le plan des relations sociales attirent, implicitement, les corrélations adéquates de traitement juridique dans le plan du droit pénal substantiel et du procès pénal.

Par l'entremise d'une pareille appréciation, le coupable ne se trouve plus sous la poursuite pénale par le procureur, solution qui exclut la procédure judiciaire devant l'instance.

La justification d'une pareille solution ne réside pas dans la position subjective de l'organe judiciaire, fondée sur le soi-disant principe de l'opportunité. Dans la conception du droit pénal roumain, les notions de péril social, culpabilité et incrimination légale constituent des catégories juridiques qui définissent les traits essentiels de l'infraction, en général, à la différence des éléments constitutifs de l'infraction qui définissent l'infraction à proprement parler dans sa particularité.

Dans de pareils cas le fait ne constitue pas une infraction à cause de l'absence objective de l'un de ses traits essentiels, que l'organe judiciaire seulement constate.

Bien que le texte invoqué prévoie que, dans de pareils cas, l'organe judiciaire appliquera toutefois une sanction ayant un caractère administratif,[3] il faut relever que dans les deux solutions (du procureur et de l'instance) a été réalisée la déjudiciarisation du

1. V. Dongoroz, en Explications théoriques du Code de procédure pénale roumain, Editeur de l'Académie, 1975, vol. I, pp. 41–44, 64.
2. Un pareil texte mais dans une formule plus étroite a existé dans la loi pénale roumaine et pendant les années 1960–1969.
3. La remontrance, la remontrance avec avertissement ou l'amende de 100 à 1000 lei (l'art. 92 du Code pénal). Il faut préciser que les sanctions avec caractère administratif ayant une autre nature et fonction que les peines ne produisent pas les conséquences de ces dernières (antécédent pénal, récidive, déchéances, procédure de la réhabilitation et autres).

traitement pénal, en évitant, soit la finalité de la procédure de poursuite pénale et le jugement du cas par l'instance pénale, soit l'application de la punition prévue par la loi pénale. En ce qui concerne l'application de la sanction à caractère administratif, dans la littérature de spécialité s'est relevé que si, concrètement, le fait était dépourvu non seulement de l'importance ou de sa signification pénale, mais aussi de toute importance, il pourrait ne pas présenter non seulement le degré de péril social nécessaire à une infraction, mais *aucun* degré de péril social.

Conformément à cette opinion, dans un pareil cas ne se justifierait, bien entendu, ni même l'application d'une sanction à caractère administratif.

c) Les principes du procès pénal roumain ne permettent à aucun organe ou partie, dans le procès pénal, de finir un conflit pénal par sa propre volonté, négociant, dans une forme quelconque, sur l'action pénale. Ni même le procureur, comme représentant de l'Etat — titulaire de l'action pénale dans le procès — ne peut faire, dans ce sens, une intervention "couverte" même très discrète, renonçant à la poursuite pénale de l'infraction, sans avoir dans ce but un motif du droit, prévu comme tel par la loi.

Conformément aux dispositions du Code de procédure pénale roumain, le procureur dispose la réalisation des principaux actes du procès pénal — y compris la solution du cas pénal — par une résolution écrite ou par une ordonnance, motivées, les unes soumises même à la confirmation du procureur hiérarchiquement supérieur et les actes de poursuite pénale, en totalité, sont toujours soumis — à l'intérieur du délai concernant la prescription de la responsabilité pénale — au contrôle des organes hiérarchiquement supérieurs du parquet.

d) En échange, conformément à certaines dispositions spéciales, dans le cas de certaines infractions, en général avec un degré de péril social plus réduit et dans certains cas même plus prononcé, a lieu une déjudiciarisation par l'intervention de certains facteurs sociaux, par l'entremise desquels la société assume la charge de solutionner le conflit pénal en dehors du mécanisme des structures juridiques et pénales, évitant ainsi le jugement du fait par l'instance judiciaire pénale et en conséquence l'application d'une punition prévue par la loi pénale.

Sont visées de la possibilité d'une déjudiciarisation, par l'intervention de certains facteurs en dehors du procès pénal, à proprement parler, surtout les infractions par lesquelles, conformément à l'art. 131 du Code pénal, la mise en fonction de l'action pénale est conditionnée par l'introduction d'une *plainte préalable* par la personne lésée. Ces infractions se rapportent à certaines actions de violence (le coup ou autres violences, la lésion corporelle simple, la lésion corporelle par faute, la menace), aux faits commis contre la propriété (le vol entre les parents, l'abus de confiance, le trouble de possession), faits contre la dignité de la personne (l'insulte, la calomnie) ou contre certaines règles de cohabitation sociale (l'abandon de famille, le non-respect des mesures concernant le fait de confier le mineur, le trouble de l'usage de logement) et autres.

Dnas le cas de ces infractions, l'absence de la plainte préalable ou la retraite de la plainte par la personne lésée, éloigne la responsabilité pénale.

Dans le cas où une pareille plainte a été déposée à l'organe compétent, la déjudiciarisation peut intervenir par l'action *des commissions de jugement*, oragens *extrajudiciaires*, expression de la démocratie socialiste, de l'augmentation du rôle de l'opinion publique dans la vie sociale, que la loi[4] définit comme étant des organes civiques d'influence et

4. La loi no. 59 du 27. XII. 1968 concernant les commissions de jugement.

juridiction, choisis dans les assemblées générales des travailleurs ou dans les sessions des conseils populaires, par lesquelles se réalise la participation des masses larges à la réalisation de la légalité et de l'éducation socialiste des citoyens dans l'esprit de la promotion d'une attitude correcte envers le travail, à la consolidation et au développement de l'avoir public et aussi à l'assurance d'une bonne conduite dans la société.

Les commissions de jugement se constituent dans les entreprises, organisations économiques, institutions et autres organisations socialistes d'état, organisations coopératistes et autres organisations civiques, auprès de leurs organes de conduite et aussi auprès des comités exécutifs des conseils populaires des villes, des arrondissements de Bucarest et des communes. Elles comprennent 5 membres qui sont choisis pour une période de deux années parmi le personnel travailleur des unités, parmi les membres coopérateurs ou les membres des autres organisations civiques, ou parmi les personnes domiciliées dans les localités respectives, des personnes majeures qui ont une formation adéquate et une bonne réputation. Les personnes qui font partie de la direction des organisations socialistes ne peuvent pas être membres dans les commissions de jugement.

La commission de jugement exerce ses attributions par 3 membres présidés par le président ou par son suppléant, désignés dans ces fonctions par les membres de la commission.

Les membres de la commission qui ne justifient pas la confiance accordée peuvent être révoqués par ceux qui les ont élus.

En principe, l'intervention de la commission de jugement a lieu *avant* toute poursuite pénale. Si ont été faits des actes de poursuite pénale et se constate ultérieurement que pour le fait respectif doivent être appliquées les dispositions légales adéquates, étant nécessaire une plainte préalable, l'organe de poursuite est obligé d'appeler la partie lésée et lui demander si elle désire faire une plainte. Dans le cas affirmatif, l'organe de poursuite pénale envoie le dossier à la commission de jugement compétente et dans le cas contraire transmet les actes au procureur en vue de cesser le procès pénal. Si le changement des dispositions légales adéquates intervient dans la phase du jugement du fait, l'instance appelle la partie lésée et en fonction de sa réponse envoie le dossier à la commission de jugement compétente ou dispose la cessation du procès pénal.[5]

Les commissions de jugement ayant des fonctions complexes peuvent assurer la déjudiciarisation de plusieurs manières réglementées par l'application d'une forme d'influence civique dans le cas d'une responsabilité pénale, par l'essai de concilier les parties, par le jugement de certains faits prévus par la loi pénale et pour lesquels s'appliquent les mesures d'influence civique.

Dans les cas des autres infractions, d'une certaine gravité, qui ne sont pas de la compétence des commissions de jugement, la société assume la responsabilité de la déjudiciarisation, intervenant par d'autres moyens ou voies prévus par la loi.

Ainsi :

— Le code roumain, entré en vigueur le 1. I. 1969 a introduit l'institution du *remplacement de la responsabilité pénale* pour certaines infractions (prévues par la loi avec une punition jusqu'au 6 mois) avec la responsabilité qui attire soit l'application d'une forme d'influence civique, soit une sanction avec caractère administratif. Conformément à la disposition, le procès de l'influence se réalise en plusieurs modalités :

i) par la solution directe par les commissions de jugement des unités socialistes des

5. L'article 286 C.pr.p.

causes concernant les infractions faites à la plainte préalable de la personne lésée si on n'est pas arrivé à la conciliation des parties et si la personne lésée a demandé de prendre envers le coupable une mesure d'influence civique;[6]

ii) par la prise d'une mesure d'influence civique dans les causes envoyées par les instances judiciaires, dans le cas des infractions pour lesquelles la procédure préalable à la conciliation n'est pas obligatoire, mais de l'attitude de l'infracteur, après l'infraction commise, il résulte qu'il regrette le fait et qu'il se donne de la peine pour réparer le préjudice causé par l'infraction;

iii) par le fait de confier, par l'instance, le coupable avec la garantie d'une organisation socialiste en vue de sa rééducation, à la requête de celle-ci et en vertu de la décision prise par les travailleurs de cette organisation, si le fait présente un degré de péril social réduit, n'a pas produit de graves conséquences et si du comportement passé et présent du coupable il résulte assez de motifs pour que celui-ci soit corrigé sans l'application d'une punition; le coupable confié par garantie doit avoir une bonne conduite, prouver de la diligence au lieu de travail et respecter les mesures que l'organisation a prises pour sa correction.

— Dans certains cas la déjudiciarisation peut intervenir en vertu de la loi, en évitant soit le déroulement de la poursuite pénale soit le jugement et l'application de la punition pour des motifs qui, par principe, assurent à la victime le maintien du prestige et une satisfaction morale plus grande que même le procès pénal et la condamnation de l'infracteur. C'est le cas de l'infraction de viol (l'art. 197 al. 1 C.P.) commise dans la forme simple et pour laquelle l'action pénale se met en mouvement à la plainte préalable de la personne lésée. La disposition en vigueur a gardé la cause de non-punition existante aussi dans la législation pénale antérieure, conformément à laquelle le fait n'est pas puni si avant que la décision soit restée définitive, est intervenu *le mariage entre l'auteur et la victime.*[7]

La cause de non-punition est inefficace dans le cas où le fait a été commis par deux ou plusieurs personnes ensemble. A l'exception de ce dernier cas (viol en groupe) la cause de non-punition de l'auteur produit les mêmes effets et envers les éventuels participants.

Une disposition similaire est prévue dans le Code pénal aussi dans le cas de l'infraction de l'art. 198 concernant le rapport sexuel avec une mineure.

— Une activité importante dans la déjudiciarisation de certaines causes concernant les mineurs est déroulée par *les commissions pour la protection des mineurs* auprès des comités exécutifs des conseils populaires des districts et de la ville de Bucarest, institutionnalisés par la Loi no. 3 du 28. III. 1970 concernant le régime de la protection de certaines catégories de mineurs.

Une des catégories de mineurs à laquelle se rapporte la loi est celle des mineurs qui ont commis des faits prévus par la loi pénale, mais qui ne répondent pas du point de vue pénal ou sont exposés à commettre de pareils faits ou dont la conduite contribue à

6. La remontrance avec avertissement qui consiste dans la remontrance de celui qui a commis le délit en lui mettant en vue que s'il ne se corrige pas, à l'avenir envers lui sera pris une mesure plus sévère; l'amende de 100 à 300 lei.

7. Evidemment, pour opérer la cause de non-punition, il est nécessaire d'accomplir les conditions de fond et de forme prévues par la loi civile pour le mariage.

la propagation de vices et d'autres habitudes immorales parmi les mineurs.[8] Envers les mineurs dans une pareille situation, la commission peut prendre des mesures éducatives : la surveillance particulière (le mineur peut rester dans le soin des parents ou du tuteur, en leur communiquant qu'ils ont le devoir de le surveiller de près dans le but de le corriger, au moins une année mais pas après 18 ans) ou le placer dans une école spéciale de rééducation qui fonctionne sous l'ordre du Ministère du Travail, dans le cas où on considère que la surveillance particulière n'est pas efficace ou n'a pas donné de résultats.

Bien que la mesure de confier le mineur ne soit pas déterminée dans le temps, elle peut être remplacée, à la requête de l'école, par une surveillance particulière, avant que le mineur soit devenu majeur.

En vue d'obtenir une qualification professionnelle, à la requête de l'école et avec le consentement de l'élève et l'approbation de la commission dans le département territorial où se trouve l'école, le placement peut être prolongé jusqu'à 20 ans par celui en cause.

Les commissions pour la protection des mineurs ont dans leurs attributions celles de prendre les mesures de protection adéquates et de suivre le développement des mineurs envers lesquels ont été prises de pareilles mesures et aussi d'examiner leurs plaintes et requêtes, saisissant, au besoin, les institutions de protection ou les organes qui les subordonnent.

L'activité de protection des mineurs est dirigée et coordonnée par une commission centrale qui fonctionne au Ministère du Travail. La commission centrale peut approuver l'organisation des commissions pour la protection des mineurs dans les districts, arrondissements de la capitale, villes, communes auprès des comités et bureaux exécutifs des conseils populaires de ceux-ci.

— L'une parmi les causes de déjudiciarisation constitue, conformément à la loi pénale roumaine, *l'état de l'infracteur malade mental ou toxicomane.* Conformément à l'art. 114 du Code pénal, quand l'infracteur est malade mental ou toxicomane et il se trouve dans un état qui présente un péril pour la société, on peut prendre des mesures pour son hospitalisation dans un institut médical de santé jusqu'à la guérison.

L'hospitalisation de l'infracteur malade mental ou toxicomane, comme mesure de sûreté, est disposée pendant le procès pénal, provisoirement, par le procureur dans la phase de la poursuite pénale et par l'instance, dans la phase du jugement. Le procureur et l'instance sont obligés de prendre des mesures pour accomplir l'hospitalisation provisoire et de saisir la commission médicale compétente d'aviser l'hospitalisation. La mesure provisoire dure jusqu'à la confirmation par l'instance de jugement, confirmation qui doit avoir à la base l'avis de la commission médicale.

e) Conformément à la législation roumaine, la déjudiciarisation du traitement pénal, dans le cas de certaines infractions, a lieu, dans la plupart des cas, par *la conciliation.* Le siège de la matière se trouve dans l'art. 132 du Code pénal, conformément auquel la conciliation des parties dans les cas prévus par la loi éloigne la responsabilité pénale et éteint aussi l'action civile. La conciliation est personnelle et produit ses effets seulement

8. Les autres catégories de mineurs protégés par la loi sont : ceux dont les parents sont décédés, inconnus ou dans une autre situation qui mène à l'institution de la tutelle, s'ils n'ont pas de biens ou d'autres moyens matériels propres et il n'existe pas d'autres personnes qui ont été obligées ou qui peuvent être obligées de les entretenir ; les déficients qui ont besoin d'une surveillance spéciale qui ne peut pas être assurée en famille et ceux dont le développement physique, moral ou intellectuel ou la santé est en péril en famille.

si elle intervient jusqu'au moment où la décision reste définitive; pour les personnes sans une capacité d'exercice, la conciliation est faite seulement par ses représentants légaux et ceux avec une capacité d'exercice restreinte peuvent se concilier avec l'approbation des personnes prévues par la loi. La conciliation produit des effets même dans le cas où l'action pénale a été mise en mouvement d'office.[9]

Généralement les parties peuvent se concilier dans le cas des infractions pour lesquelles la mise en mouvement de l'action pénale se fait à la plainte préalable de la personne lésée,[10] et l'essai de conciliation pour la majorité de ces infractions est de la compétence des commissions de jugement, saisies selon le cas, par la personne lésée, par l'instance de jugement, le procureur ou les organes de recherche pénale. Le délai de réclamation est de 2 mois depuis le jour où la personne lésée ou, selon le cas, le représentant légal de celle-ci, a su qui est le coupable.[11]

La commission de jugement essaie la conciliation en terme de tout au plus 30 jours depuis la réclamation, dans les séances qui sont publiques. La commission insiste que les parties se concilient; si les parties se sont conciliées la commission constate cela par un procès-verbal. Quand l'une des parties a assumé des obligations en ce qui concerne la réparation du dommage, celles-ci seront consignées, de même, dans un procès-verbal qui sera signé aussi par les parties. En principe, il n'est pas nécessaire d'inculper le coupable pour procéder à la conciliation. En échange, pour que la procédure de la conciliation puisse se finaliser positivement, il est nécessaire que la conciliation se fonde sur le consentement du coupable et de la partie lésée. Cela ne signifie pas que le coupable doit reconnaître sa culpabilité et assumer la responsabilité de son action illicite. Mais psychologiquement, une pareille attitude de la part du coupable est de nature à assurer dans une mesure plus grande le succès de la procédure de conciliation. De même, tenant compte des susceptibilités des parties et aussi de la "pression" psychologique que la présence des membres de famille, des parents, des amis ou d'autres personnes peut exercer sur eux, nous croyons que les chances de la conciliation dépendent aussi de la mesure où la publicité de la procédure est plus restreinte.

Dans le cas où l'essai de conciliation n'a pas réussi et aussi on n'a pas sollicité le jugement de la cause par la commission ou si aux deux termes consécutifs se présente seulement la personne lésée, la commission dresse un procès-verbal qui sert comme preuve nécessaire pour saisir le tribunal. L'absence non justifiée de la personne lésée aux deux termes consécutifs est considérée comme retrait de la plainte. Si la procédure de la conciliation n'a pas été faite en 30 jours, la partie lésée peut s'adresser à l'instance de jugement à laquelle elle doit présenter la preuve délivrée par la commission, d'où il résulte que la procédure de conciliation n'a pas été effectuée à terme.

f) Les commissions de jugement exercent aussi dans une autre forme — à l'exception des formes de ci-dessus — une déjudiciarisation dans le cas de certains faits prévus par la loi pénale et qui en principe ne font pas l'objet d'une poursuite pénale et d'un

9. Dans le cas des infractions pour lesquelles la mise en mouvement de l'action pénale est faite à la plainte préalable de la personne lésée, la mise en mouvement de l'action pénale est faite toutefois d'office si celui lésé est une personne sans avoir la capacité d'exercice ou avec une capacité réduite d'exercice.

10. voir la lettre d) Supra.

11. Jusqu'à l'institution des actuelles commissions de jugement par la Loi no. 59 1968, ont fonctionné, pour de pareilles causes, des commissions de conciliation, conf. au d. 320 du 26. III. 57 avec la tâche exclusive d'essayer la conciliation des parties.

débat devant l'instance pénale de jugement et par conséquent, ils ne sont pas réalisés par le prononcé de certaines décisions pénales.

Ainsi, les commissions de jugement des entreprises, organisations économiques, institutions et autres organisations d'état et aussi celles des organisations des coopératives et autres organisations civiques, résolvent les cas concernant certains faits commis par le personnel ouvrier au lieu de travail, comme par exemple: le heurt ou autres violences qui n'ont pas causé une lésion de l'intégrité corporelle ou de la santé et aussi l'insulte, le vol et l'abus de confiance entre les membres du même collectif si la valeur du dommage ne dépasse pas un certain quantum, les détournements sous toute forme de l'avoir public et l'abus en service, si dans tous ces cas la valeur du dommage ne dépasse pas un certain quantum[12] et la négligence en service, si la valeur du dommage ne dépasse pas un certain quantum.[13]

De même ces commissions résolvent les cas concernant les détériorations provoquées aux logements et aussi aux installations communes des immeubles, propriété d'état, se trouvant dans l'administration directe des organisations socialistes avec lesquelles le coupable se trouve en rapports de travail ou à ceux se trouvant dans la propriété des organisations des coopératives et des autres organisations civiques, détériorations commises avec intention et par lesquelles on a apporté à l'avoir public un dommage d'une certaine valeur.

Les cas concernant les faits de heurt ou autres violences qui n'ont pas causé une lésion à l'intégrité corporelle ou à la santé, la menace, l'insulte, l'abus de confiance entre les personnes physiques si la valeur du dommage ne dépasse pas un certain quantum et aussi les détériorations provoquées aux logements et aux installations communes, commises avec intention, par lesquelles on a apporté à l'avoir public un dommage d'une certaine valeur, détériorations commises par les citoyens dans leurs relations en dehors du lieu de travail, sont de la compétence de solution des commissions de jugement auprès des comités exécutifs des conseils populaires.

De même les commissions de jugement résolvent les causes concernant l'instigation, la complicité, le recel et la favorisation de l'un des faits mentionnés.

Dans le cas de ces faits prévus par la loi pénale, la déjudiciarisation n'interviendra toutefois, les faits étant poursuivis du point de vue pénal et jugés par les instances, si le coupable a été condamné antérieurement[14] ou si envers le coupable ont été prises les 3 dernières années, au plus deux fois, des mesures d'influence civique ou si lui ont été appliquées des sanctions à caractère administratif, prévues par la loi pénale.

En 1976, par une modification de la loi pénale concernant les commissions de jugement,[15] la déjudiciarisation a été élargie aux soustractions de toute forme commises en

12. A l'exception des cas où le fait a mis ou aurait pu mettre en péril des machines, installations, dépôts, ou autres biens ou valeurs importants, ou aurait pu provoquer de graves troubles pendant le processus du travail.

13. A l'exception des cas de ci-dessus et aussi de ceux où le fait a créé un état de péril pour la sûreté de la circulation des trains ou a eu comme suite un trouble dans l'activité de transport sur la voie ferrée.

14. La condamnation antérieure est considérée inexistante si le fait n'est plus prévu comme infraction par la loi pénale, si l'infraction a été commise pendant l'âge de la minorité, si a été accompli le terme de réhabilitation ou celui de la prescription de l'exécution de la punition, ou si l'infraction a été amnistiée.

15. Le décret no. 364 du 2. XI. 1976.

dehors du lieu de travail quand elles n'ont pas été facilitées ou couvertes par faux et la valeur du dommage ne dépasse pas un certain quantum.[16] La solution des cas revient à la commission de l'unité socialiste où est intégré le coupable ou à celle auprès du comité exécutif du conseil populaire du département où il habite, dans le cas où il n'est pas engagé dans le travail.

Dans tous ces cas, les commissions n'appliquent pas les punitions prévues par la loi pénale, mais une des mesures d'influence civique, si elles établissent la culpabilité du coupable. Conformément à la loi, de pareilles mesures seront appliquées aux mineurs entre 14–16 ans seulement si ceux-ci ont commis le fait avec discernement. Il faut mentionner, de même, que si par le fait commis a été causé à la partie lésée un dommage, la commission oblige celui qui l'a produit à le réparer.

g) Conformément à la législation roumaine, *la resocialisation par le travail* d'une personne qui a commis une infraction peut avoir lieu seulement dans le cas où lui a été appliquée une punition par l'instance de jugement.

h) Dans toutes les formes de déjudiciarisation énoncées ne se dresse pas le problème d'un *contrôle* "de la manière discrète" de formation de la décision. Au contraire, dans certains cas les décisions sont soumises au contrôle des organes hiérarchiquement supérieurs et en certains cas la décision même est le résultat de la coopération de certains organes ou organisations d'état ou civiques ou même de l'opinion publique qui, en fait, exerce aussi le contrôle de la formation des décisions concernant la déjudiciarisation et de leur respect.

i) Dans certains cas où les interventions de déjudiciarisation ne donnent pas de résultats positifs, la loi prévoit certaines procédures par lesquelles on peut revenir sur les décisions.

Il n'est pas le cas d'un pareil retour, par exemple, en ce qui concerne la solution donnée par le procureur, conformément à l'art. 18 (1) du code pénal, quand l'appréciation que le fait commis ne présente pas le degré de péril social d'une infraction ne peut pas être influencée par l'attitude ultérieure du coupable. L'appréciation même, en ce qui concerne la légalité et son fondement, est soumise au contrôle des organes du parquet hiérarchiquement supérieurs.

En échange, la mesure d'influence civique de confier le coupable sous garantie à une unité socialiste est révoquée, conformément à l'art. 97 du code pénal, si pendant la garantie, l'unité socialiste, constatant que le coupable ne donne aucune preuve de correction, renonce à la prise sous garantie. Le fait de confier le coupable sous garantie peut être révoqué aussi dans le cas où pendant la garantie le coupable est condamné pour une autre infraction.

Même dans le cas d'une déjudiciarisation intervenue par la conciliation des parties,

16. Dans le cas de ces faits, la déjudiciarisation n'interviendra toutefois, les faits étant suivis du point de vue pénal et jugés par l'instance, si le dommage n'a pas été réparé en totalité jusqu'au prononcé de la décision par la commission de jugement ou s'il a été commis par une personne qui se soustrait du travail utile ou n'a pas un domicile fixe, menant une vie parasitaire, par une personne qui a été antérieurement condamnée (avec des exceptions montrées à la page 17) ou envers laquelle ont été appliquées les 3 dernières années, deux fois, des mesures d'influence civique ou des sanctions à caractère administratif prévues par la loi ou ont été commis des faits par pénétration sans droit dans une unité socialiste (d'état, de coopération ou civique) ou dans le logement d'une personne ou par la prise d'un bien se trouvant sur une personne ou par violence.

la plainte préalable est adressée, conf. à l'art. 282 c.pr.p., à l'instance qui jugera l'infraction, si le coupable n'a pas respecté les obligations prises devant la commission de jugement concernant la réparation du dommage commis par l'infraction. Dans un pareil cas, nous considérons que le coupable ne s'expose pas aux deux procédures répressives ("double jeopardy") parce que la procédure de la conciliation ne représente pas par elle-même une procédure répressive, mais surtout pour le motif que le coupable s'expose à une nouvelle prodédure, cette fois judiciaire, grâce à sa propre conduite, de non-respect de la condition sous laquelle, antérieurement, il a été procédé à la déjudiciarisation par conciliation.

j) L'introduction dans la législation roumaine des formes de déjudiciarisation est motivée, premièrement, par la politique pénale de l'état où l'une des préoccupations majeures se rapporte *à la restriction continue de la sphère de répression*, par la diminution du poids des punitions privatives de liberté et par l'assurance de certaines formes de rééducation des coupables en *milieu ouvert*, en évitant dans le cas de certaines infractions avec un certain degré de péril social, la rééducation de ceux-ci dans le milieu fermé du pénitencier. De même, ces formes tendent à réaliser en concret les directions concernant *l'accentuation de l'humanisme révolutionnaire socialiste et l'approfondissement du démocratisme* des structures socio-juridiques dans le processus de réalisation de la justice. D'autre part on ne peut pas nier le fait que dans cette manière se réalise — ipso facto — *un dégagement* des instances de jugement qui, délivrées de la charge de solutionner certaines causes pénales concernant des infractions avec un degré de péril social pas si élevé, peuvent se concentrer avec priorité sur la solution des causes pénales concernant des infractions avec un péril social plus prononcé.

k) Par principe, la recherche, l'institution et le perfectionnement de certaines formes de déjudiciarisation, par la solution de certaines causes pénales par les facteurs sociaux qui interviennent du dehors des structures pénales s'inscrivent entre les coordonnées de la politique générale du parti et de l'Etat concernant *le passage graduel de certaines attributions de l'Etat à la charge de certaines organisations n'appartenant pas à l'Etat*, à caractère civique, comme partie intégrante de l'activité de perfectionnement continu des mécanismes économiques et sociaux et de leurs principes de fonctionnement.

La restriction continue de la sphère d'action des moyens de contrainte pénale et l'implication plus grande des facteurs socio-éducatifs dans la rééducation des personnes qui ont commis des infractions, comme des orientations majeures dans la politique pénale de l'Etat, ont été avec clarté exprimées par le président de la république qui, en se rapportant à ceux qui commettent des actes antisociaux, disait: "Nous désirons qu'ils se corrigent dans les fabriques, champs, institutions, par l'influence positive des collectifs. Dans cela consiste et doit consister la force de la société, de la collectivité : elle doit veiller à ce que tous qui vivent dans ce collectif respectent les normes et les lois du pays".

II. Evaluation des formes de déjudiciarisation

a) En général, les formes de déjudiciarisation ont été et sont appréciées *favorablement* comme il résulte aussi de ci-dessus. Il existe, de même, une préoccupation constante pour le perfectionnement de leur cadre législatif et de l'action concrète concernant leur réalisation par divers facteurs sociaux impliqués.

b) Il existe aussi certaines *objections* en ce qui concerne certaines formes de déjudiciarisation ou certains aspects de la manière de leur fonctionnement. Par exemple, long-

temps on a considéré que la possibilité du procureur d'apprécier le péril social concret d'une infraction et de décider, conformément à cela, la non-poursuite et le non-envoi en justice, léserait le principe de la légalité, dans l'interprétation stricte de celui-ci. Sous ce prétexte, la réglementation de cet instrument juridique, relevé comme nécessaire par les praticiens du droit pénal, n'a pas figuré dans la loi pénale entre 1969–1973.

En ce qui concerne l'institution du remplacement de la responsabilité pénale a été relevé le fait que son efficacité pratique a été restreinte, étant donné le cadre juridique restreint de la réglementation, dans le code pénal existant peu d'infractions dont le maximum de punitions soit tout au plus 6 mois de prison.

En ce qui concerne la cause de non-punition, en cas de viol, consistant dans le mariage de l'auteur avec la victime, beaucoup de voix ont signé qu'un pareil mariage ne peut pas avoir à la base les commandements demandés par le Code de la famille, qu'en beaucoup de cas un pareil mariage peut cacher une transaction onéreuse ou qu'en fait, un pareil mariage n'a pas la chance de devenir viable.

Enfin, dans les formes de déjudiciarisation utilisées par les commissions de jugement, moins dans la procédure de conciliation et plus dans le jugement de certains faits prévus par la loi pénale, il existe une retenue en ce qui concerne le passage de certaines infractions plus graves dans leur compétence de solution, ayant en vue qu'elles ne sont pas des organes spécialisés dans les problèmes juridiques, parfois complexes, qu'implique une pareille activité.

c) En général, les prévisions existantes dans le cas où les mesures de déjudiciarisation n'ont pas donné de résultats, exposées au point 1, lettre i, constituent, en même temps, *des formes de contrôle* sur la fonction des instruments juridiques de déjudiciarisation.

d) On peut apprécier que les formes de déjudiciarisation fonctionnent dans les conditions prévues par la loi qui doivent être appliquées avec sévérité. L'utilisation de ces formes nécessitent une orientation correcte, en chaque cas concret et aussi en rapport avec le phénomène d'ensemble de la criminalité, pour que leur utilisation sur une échelle trop large ne produise pas, par conséquent, une diminution de la légalité par l'encouragement des attitudes antisociales.

e) Les orientations générales du développement de la politique pénale de l'Etat, avec toutes les objections apportées aux formes de déjudiciarisation, indiquent toutefois la possibilité d'*une extension* des moyens non pénaux, non répressifs, de réalisation des cas concernant certaines infractions. Une pareille tendance résulte du fait qu'en général, la compétence des commissions de jugement s'est étendue continuellement, que conformément à la nouvelle législation pénale, en cours d'élaboration, ces commissions solutionneront plusieurs infractions et dans le système de punitions deviendront prépondérantes les punitions avec la mise de l'infracteur sous la surveillance des collectifs des travailleurs ou de certains organes d'Etat et que, bien que punitions, elles seront exécutées par travail, *sans privation de liberté.*[17]

f) Nous croyons que la fonction des diverses formes de déjudiciarisation dans l'administration de la justice pénale, pourrait mettre un accent particulier sur l'aspect *éducatif-formatif.* Généralement les infracteurs primaires sont susceptibles d'être réédu-

17. Encore depuis 1973 par la modification du Code pénal roumain a été introduite l'institution du travail correctionnel conformément auquel certaines punitions avec prison, appliquées aux infracteurs pour certaines infractions, s'exécutent par travail, sans les priver de liberté, tout le processus de rééducation se déroulant dans un collectif de travail.

qués, dans le cas de certaines infractions pas très graves, par de pareilles formes dont l'action peut être plus indiquée pour l'œuvre de resocialisation que l'exécution d'une punition dans les rigueurs du règlement d'un pénitencier.

Mais il s'impose que l'utilisation des formes de déjudiciarisation se fasse avec esprit de responsabilité, par un traitement individuel des cas, en assurant dans chaque cas en partie le traitement pénal ou non-pénal adéquat. En tout cas, les formes de déjudiciarisation doivent jouer un rôle de *consolidation de l'état de légalité* et par leur démarche, mises sous le signe des *moyens de pédagogie sociale*, doivent contribuer à la création d'un climat qualitatif supérieur d'ordre et de discipline sociale, d'un climat social qui assure de plus en plus l'élimination des attitudes antisociales par lesquelles sont lésées les valeurs sociales protégées par les normes de droit pénal.

Canada
DÉJUDICIARISATION (DIVERSION) ET MÉDIATION

Célyne Riopel

Introduction: Le Droit Pénal Canadien

Le droit pénal canadien est fondé en très grande partie sur le droit pénal d'Angleterre. Selon la Loi constitutionnelle de 1982 le Parlement fédéral du Canada a le pouvoir exclusif de légiférer en matière de droit criminel "sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle".

Aux termes de l'article 92 de ladite Loi constitutionnelle chaque province a le droit de légiférer sur "l'administration de la justice dans la province, y compris la constitution, le coût et l'organisation des tribunaux provinciaux de juridiction tant civile que criminelle . . .". Suite à une évolution disparate des lois pénales, le nouveau code criminel a été adopté par le parlement fédéral en 1954 pour entrer en vigueur en avril 1955. Les infractions peuvent être classées sous deux rubriques générales soit les actes criminels et les infractions punissables sur déclaration sommaire de culpabilité.

Au Canada toute personne a le droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi. Cette présomption est enchâssée dans les dispositions générales du code criminel et dans la loi constitutionnelle de 1982.

Le système pénal canadien prévoit que "toute personne" peut intenter une poursuite. L'article 2 du Code Criminel canadien stipule que le "poursuivant" désigne le procureur général ou, lorsque celui-ci n'intervient pas, la "personne qui intente les procédures visées par la présente loi [code criminel canadien]", "et comprend un avocat agissant pour le compte de l'un ou de l'autre". Le procureur général bénéficie donc de toute discrétion pour intenter ou non des poursuites et permet aussi à toute personne de les intenter si le procurer décide de ne pas les entamer. L'article 455 du même Code relate les situations où "toute personne" peut faire une dénonciation par écrit et sous serment, si elle croit pour des motifs probables et raisonnables qu'un individu a commis un acte criminel. Par contre, si la poursuite ou la dénonciation résultent en une mise en accusation, cette dernière revient alors au Procureur.

Utilisation et Evaluation de la Déjudiciarisation

A l'origine les programmes canadiens de déjudiciarisation opéraient informellement et surtout par l'entremise de la communauté et des corps policiers. Les systèmes communautaires de déjudiciarisation avaient tendance à opérer comme systèmes privés. A titre d'exemple, nous évoquons les comités de discipline des universités ou encore les agences de sécurité d'importantes compagnies où plusieurs cas de fraude ou de dommages (vandalisme, vols) étaient résolus sans que la cause ne soit nécessairement produite devant les tribunaux. Cette utilisation du système de déjudiciarisation ne s'effectue pas indépendamment du système de justice criminelle mais bien parallèlement.

La police de son côté, a toujours dû exercer un pouvoir discrétionnaire face à la mise en accusation ou le retour du jeune dans son milieu. Une situation analogue peut survenir lorsqu'il s'agit de problèmes de boisson ou de drogues, ou encore d'un comportement anormal permettant de supposer des problèmes psychologiques ou de santé mentale. Les policiers ont eu et ont encore à utiliser leur discrétion en ayant recours à la réprimande, au conseil, à la médiation, au renvoi du cas à des organismes de santé ou de bien-être social et ce, sans qu'aucune poursuite supplémentaire ne soit entamée.

Puis, les efforts concertés en vue de l'utilisation de plus en plus fréquente des ressources communautaires comme palliatif à l'appareil de justice criminelle se sont aussi accentués. L'utilisation par les corps policiers et autres organismes impliqués, des centres de désintoxication (drogues et alcool), des bureaux d'aide à la jeunesse, des cliniques de santé mentale, des centres de familles en détresse n'a fait qu'augmenter à cause des soins, de l'information, du counselling et des services de références qu'ils prodiguent.

Au cours de la dernière décennie, plusieurs recherches, séminaires et documents de travail canadiens ont traité de la déjudiciarisation, notamment les travaux de la Commission canadienne de réforme du droit et ceux du Centre de consultation du Ministère du Solliciteur général du Canada. Plusieurs recommandations furent formulées par les différents intervenants (agences gouvernementales, corps policiers, organismes bénévoles et communautaires, services de probation, etc.)

La plupart des recommandations visaient

1) non pas l'utilisation de la discrétion dans les programmes de déjudiciarisation mais bien sa conformité à l'idéal de justice égale pour tous. L'approche employée sur ce point par la Commission canadienne de la réforme du droit (document de travail *7 — Déjudiciarisation, p. 2) mérite d'être soulignée: ". . . la décision d'inculper dans un cas et de classer l'affaire dans l'autre doit s'appuyer sur des motifs valables et raisonnables dont le bien-fondé doit pouvoir être vérifié. Les politiques sur lesquelles s'appuient les décisions doivent être affirmées publiquement et suivies dans les cas individuels."
2) l'application du principe de mesure au niveau de la poursuite, ainsi que la création et la publication de lignes directrices concernant la déjudiciarisation.

   La notion de mesure en vertu de la loi criminelle fut jugée nécessaire en vue de maximiser la liberté et la dignité humaine dans la société. Le principe de mesure vise, par souci d'équité et de justice, à ne pas punir le contrevenant plus qu'il n'est requis. En ce sens, la déjudiciarisation est nécessaire dans la mesure où elle maximise la liberté et la dignité humaine et qu'elle vise la réconciliation du contrevenant avec la victime et la société.
3) la reconnaissance par les différents intervenants du fait que l'exercice discrétionnaire effectué par les organismes impliqués (police, procureurs, etc.) devrait être accru, moyennant le développement de politiques expresses le régissant. "Cette démarche peut s'avérer frustrante dans bien des cas mais elle ne peut être outrepassée si nous voulons que l'administration de la justice demeure visible, juste et imputable"* La déjudiciarisation a donc dû se formaliser afin que l'équité procédurière soit atteinte dans toute prise de décision de déjudiciarisation et que finalement ces décisions aient une certaine visibilité et imputabilité.

Suite à la revue de la littérature canadienne sur le sujet qui nous préoccupe aujourd'hui, nous avons analysé plusieurs programmes canadiens de déjudiciarisation afin de voir si

leur mise en application tenait compte des modèles énoncés et des recommandations formulées.

Nous avons pu constater que la très grande majorité des programmes canadiens de déjudiciarisation, du moins ceux subventionnés par le Ministère du Solliciteur général du Canada, ont adopté les recommandations proposées tant pour les programmes impliquant les jeunes contrevenants que les adultes.

Les programmes existants sont opérés ou utilisés soit directement par la communauté, les corps policiers ou par le procureur de la Couronne après l'inculpation mais avant le procès. Très peu des programmes révisés visaient une alternative à l'imposition de la sentence.

La déjudiciarisation est surtout utilisée dans des situations impliquant entre autres :

— des incidents avec des juvéniles ou des personnes âgées
— des disputes familiales
— l'usage abusif des boissons alcooliques et des drogues
— des incidents impliquant la maladie mentale ou un handicap physique
— des situations touchant l'ordre public
— des délits n'impliquant aucune violence
— l'exécution d'un premier délit par le contrevenant

et les principaux critères utilisés pour recourir à ces programmes sont :

— la gravité de l'infraction n'est pas de nature à ce que l'intérêt public exige la tenue d'un procès.
— les ressources communautaires pour le traitement de la situation existent déjà.
— les solutions de rechange utilisées sont de nature à prévenir efficacement la répétition du même délit et ce compte tenu des antécédents du contrevenant et des autres éléments de preuve à la disposition de la police.
— l'impact de l'arrestation ou de la poursuite serait excessif pour l'accusé ou sa famille compte tenu du dommage causé.
— la victime et le contrevenant se connaissaient avant la perpétration du délit et les deux parties sont d'accord pour la conclusion d'une entente à l'amiable.

En plus des interventions exercées par les policiers dans le processus de déjudiciarisation, la Couronne semble de plus en plus faire usage de son pouvoir traditionnel dans l'appréciation des cas devant être soumis aux tribunaux. Il appert, selon les ouvrages consultés, que les ententes avant-procès doivent être faites sous le contrôle du Procureur général via le Procureur de la Couronne afin que certaines poursuites puissent faire l'objet d'un règlement formel à l'étape de l'instruction préparatoire avant le procès. Le règlement peut s'effectuer en recourant à la clémence de la Cour, ou au retrait de l'inculpation spécialement lorsque le contrevenant accepte le principe de restitution ou de compensation du préjudice subi. Cette démarche est facilitée lorsque la victime est favorable à une telle solution.

Lorsqu'une décision est rendue de déjudiciariser un cas, ce dernier est généralement référé à une agence ou à un service communautaire. La responsabilité incombe à ces services de travailler avec la victime et le contrevenant et d'en arriver à une entente satisfaisante. L'entente prend, de préférence, la forme d'une entente écrite ou d'un contrat stipulant clairement les termes et conditions que le contrevenant s'engage à respecter. La durée du programme varie généralement entre 60 jours et 6 mois. L'agence ou l'organisme s'assure que le contrat soit respecté et fait rapport au procureur du progrès du cas. S'il y a manquement à l'entente, le procureur, une fois convaincu d'une

déviation volontaire, peut décider de poursuivre les procédures entamées contre le contrevenant; si le contrat est respecté, le procureur retire habituellement les accusations.

Les objectifs à long et à court terme sont l'implication des communautés locales et des citoyens dans la mise en application et la gestion de ces programmes, et la réconciliation entre la victime, le contrevenant et la communauté.

Le processus spécifique utilisé dans l'atteinte de ces objectifs est la médiation. Cette dernière est définie comme une intervention visant à promouvoir la réconciliation, l'entente ou le compromis.

Les programmes de déjudiciarisation actuels facilitent deux types d'ententes volontaires suite à la médiation. Il s'agit d'une part, des ententes de services communautaires, soit l'accomplissement volontaire d'un travail non rémunéré pour la communauté. Cette entente prévaut surtout pour les crimes sans victime ou lorsque la victime préfère cet aspect à une compensation directe. Elle est basée sur le principe que l'on doit assumer la responsabilité des conséquences de ses actes. Ce principe requiert du contrevenant qu'il négocie un plan de compensation pour la communauté et qu'il consacre temps et énergie à travailler pour cette dernière.

Nous retrouvons d'autre part, suite à la médiation, des ententes de compensation de la victime. Ce dédommagement peut s'effectuer par le biais du paiement d'une somme d'argent gagnée par le contrevenant, et remise à la victime ou encore du travail volontaire pour la victime. Ce genre d'entente est aussi basé sur le principe de responsabilité des actes commis.

Un service supplémentaire souvent offert par les projets de déjudiciarisation est celui du "renvoi". Au cours d'établissement d'entente lors de la médiation les contrevenants et leurs familles peuvent identifier certains problèmes spécifiques personnels ou sociaux. C'est à ce moment que les participants aux programmes peuvent référer aux agences ou organismes spécialisés en la matière.

Les programmes doivent être les plus objectifs possible et ils correspondent habituellement à l'établissement d'une échelle de pointage utilisée dans l'évaluation des candidats à divers programmes. On y recherche l'objectivité, la maximisation de la consistance et de l'uniformité à l'échelle d'une province, la diminution maximale des biais et préjugés toujours possibles de ceux qui doivent rendre les décisions.

Les critères établis pour les divers programmes sont aussi sujets à révision périodique. Ces normes sont jugées essentielles afin d'assurer la crédibilité et la cohésion des programmes.

Les travailleurs professionnels ou non professionnels œuvrant dans ces divers programmes doivent être sujets à un code d'éthique qui établit exactement les prérequis, qualités personnelles, assurance du respect de la confidentialité, non-utilisation de méthodes ou techniques coercitives, connaissance adéquate des ressources disponibles, etc.

Les programmes sont aussi sujets à des critères concernant leur mise sur pied et leur fonctionnement aux points de vue de l'administration, des finances, de la gestion et de la formation des ressources en personnel. Les programmes font aussi l'objet de mécanismes de contrôles et d'évaluation par le Ministère du Solliciteur général du Canada.

Les projets de développement accordent priorité à l'implication des éléments-clés du système de justice criminelle (juges, police, procureurs, services de probation) et la participation de la communauté et des citoyens.

Somme toute, les projets existants rencontrent les recommandations initiales énoncées ainsi que la philosophie sous-jacente à la déjudiciarisation. Par contre, nous constatons,

en nous basant sur la littérature de justice criminelle, la pénurie de recherches canadiennes traitant de l'évaluation tant de l'application du principe que des programmes de déjudiciarisation.

Les quelques statistiques disponibles ne traitent que d'évaluations de projets individuels, et aucune donnée analysant ou évaluant l'ensemble des projets canadiens ainsi que leur impact direct et indirect ne fut encore compilée. Ce genre de recherche constituerait, par contre, l'une des priorités à court terme au sein du Ministère du Solliciteur général du Canada.

Les recommandations émises ainsi que les programmes analysés suggèrent d'envisager d'autres éléments reliés à la déjudiciarisation. Leurs conclusions sont à l'effet qu'une accusation devrait être portée pour donner plus de poids à l'entente établie. Si cette entente n'est pas respectée, il est plus facile de continuer les poursuites. La mise en accusation empêche aussi la prescription de s'écouler et permet aussi un consentement informé de la victime, du procureur et du contrevenant. L'accent est donc mis sur le fait que pour servir les intérêts de la justice, le contrevenant doit aussi avoir le choix d'invoquer son innocence et de subir un procès et, la victime, en tant que citoyen, doit pouvoir maintenir sa plainte ou sa poursuite si elle le désire.

En ce qui a trait à l'admission de responsabilité, les programmes essaient d'entrevoir un juste équilibre entre l'admission de responsabilité et la possibilité de refuser de s'incriminer. Il peut être alors difficile de réagir à la situation où le contrevenant reconnaissant sa culpabilité peut voir ses énoncés admissibles en cour à un stade ultérieur. Une reconnaissance des faits allégués plutôt qu'une admission de culpabilité est donc envisagée. Il est aussi à souligner qu'un aveu de culpabilité pourrait faire oublier que la médiation et la recherche d'une entente et non l'adjudication sont visées dans plusieurs cas et qu'ils constituent la raison même de leur utilisation dans les ententes avant-procès.

De plus, depuis la mise en application de la loi constitutionnelle de 1982 le contrevenant doit être avisé de ses droits en cas d'arrestation, de détention ou d'accusation.

Un autre point à considérer est de savoir si l'existence d'une entente pré-procès engendrera la création d'un casier judiciaire. Sur ce point, les opinions sont partagées et établissent une distinction entre le fait que la police compile une liste des condamnations et celui où un employeur ou une autre personne demande à l'individu s'il possède un casier judiciaire. Certains maintiennent la nécessité pour les corps policiers d'établir une telle liste et la possibilité que cette dernière puisse être utilisée lors du prononcé de sentence ; l'autre tenant entrevoit des possibilités de discrimination face à l'emploi par exemple, advenant l'existence d'une telle liste. Tous s'entendent par contre, à l'effet que les lois traitant du casier judiciaire devraient être révisées et devraient prendre en considération le cas de personnes qui bien qu'ayant été mises en accusation, furent l'objet d'une entente avant-procès ou dirigées vers un programme de déjudiciarisation.

Reconnaissant le principe en droit canadien de la publicité des procès, la Commission de réforme du droit estime que "la décision autorisant le renvoi d'une affaire en conciliation doit être prise au grand jour, de manière claire et justifiable, mais que la procédure elle-même et les tractations qui s'y déroulent puissent bénéficier d'un certain caractère privé" (p. 05).

Somme toute, les études, recherches effectuées et programmes établis s'entendent à l'effet que la déjudiciarisation repose sur une affaire de mesure et que ce principe amène à placer le fardeau de la preuve sur les pouvoirs publics qui doivent justifier la nécessité de la poursuite de leur action. De plus la déjudiciarisation est considérée comme un

privilège, une ressource ou une disposition supplémentaire plutôt qu'un droit en soi. La déjudiciarisation constitue une alternative à l'incarcération et est basée sur des politiques et des lignes directrices claires, étoffées et publiques. Les décisions prises à cet effet doivent aussi pouvoir faire l'objet de révision tout comme les décisions touchant la libération conditionnelle et l'administration correctionnelle.

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Public Participation in Crime Combating in the USSR

Soviet criminal justice is characterized by two main features traditionally inherent to it as two forms of reaction to criminal acts on the part of the state and law. The first form is the constitutional principle of adjudging a person guilty of a crime and subjecting him to criminal punishment only by the sentence of the court. In such a case ordinary criminal prosecution will be initiated and performed subsequently by the agencies of investigation, the procurator's office and the court. Every stage of this procedure is thoroughly regulated by the Law of Criminal Procedure of the USSR and by that of the Union Republics.

The second form of reaction embraces cases when there was committed an action with some features of a crime by a first-time offender. If agencies of justice estimate the act as one of relatively small social danger, they relieve a person from criminal responsibility and replace criminal punishment with measures of an administrative nature or with measures of social influence (treatment). According to the law in force such acts are punishable either with administrative measures, with transferring a person under the supervision of a labour collective or social organization or with bringing his case to a comrades' court or to a juvenile commission (if the act was committed by a person who has reached the age of criminal responsibility but is still under eighteen).

In order to apply the measures which substitute criminal punishment, there have been elaborated particular procedural actions lying beyond the frames of criminal justice. All the questions concerning application of criminal punishment are regulated by special criminal procedure under which every criminal case as a rule goes through two stages of law enforcement, i.e. preliminary investigation and trial proceedings.[1]

When dwelling on the procedures replacing criminal proceedings, some general positions of Soviet law doctrine should be mentioned, as they are crucial for regulations of these procedures.

First of all, Art. 9 of the USSR Constitution should be mentioned. This article formulates the position according to which the principal direction in the development of Soviet society is the extension of socialist democracy, ever broader participation of citizens in managing the affairs of society and state, heightening of the activity of public organizations. Corresponding legislative acts regulating participation of the public and

1. There are certain exceptions to this general rule. They deal with cases of private accusation of insults, of intentional causing of light bodily injuries as the result of beating and of defamation causing no serious consequences. Such types of cases are initiated by the court itself in response to victims' complaints. Generally speaking there is no preliminary investigation of such cases.

of public organizations in the activities of agencies of criminal justice were adopted proceeding from these constitutional principles. This is the basis for wide participation of citizens and of the public; and such procedure as transferring cases to comrades' courts and juvenile commissions, as well as application of measures of social influence are based on this principle.

Mobilizing of the public and of public organizations to participation in crime combating is tightly linked with heightening of the role of Soviet people in the solution of tasks of communism construction in our country.

One more point that should be emphasized here lies in the fact that concrete forms of public participation in crime combating are strictly regulated by the law. Legal regulations in the sphere of actions replacing activities of agencies of justice in crime combating attribute stable legal character to these actions, secure observance of socialist legality and safeguard rights and interests of both the victim of the crime and the author of it.

Certain dispositions of criminal law constitute the foundation for the application of measures replacing ordinary criminal prosecution on criminal offences. These dispositions are incorporated into the Fundamentals of Criminal Legislation of the USSR and the Union Republics and into the Penal Code of the Russian Soviet Federative Socialist Republic[2] which provides for the rule that in case of the commitment of an action which does not present a great social danger, the author of it may be relieved from criminal responsibility if there are good reasons to think that his correction and re-education may be achieved without criminal punishment. In such a situation criminal prosecution is terminated, and the matter may be handled in one of the following ways: measures of an administrative nature may be applied to the author of an act with features of the criminal violation of the law; or the case may be brought to a comrades' court, or to a juvenile commission; or the person may be transferred to the supervision of a labour collective or social organization.

Which of the ways will be taken by the agency of justice depends on the character of the act committed, on the personality of the offender and on his behaviour before the agencies of justice.

For example, according to Art. 50 of the PC of the RSFSR a replacement of criminal punishment with measures of an administrative nature is possible regarding only the crimes punishable by a maximum penalty of one year or less of deprivation of liberty or by some other milder penalty. Art. 51 of the PC of the RSFSR gives the list of crimes which may be brought to a comrades' court for consideration. Art. 10 of the PC of the RSFSR sets the rule saying that relief from criminal responsibility resulting in a transfer of a case to a juvenile commission is possible if the crime has been committed by a person under the age of 18 and if agencies of justice (agencies of investigation, procurator's office of the court) have good reasons to admit that the offence is of no great social danger, and the person may be corrected without criminal punishment. According to Art. 52 of the PC of the RSFSR relief from punishment resulting in social supervision becomes possible when the crime committed presents no great social danger, the guilty person admits his guilt and shows sincere repentance, and a social organization or a labour collective petitions to take this person under its supervision.

2. When mentioning articles of the Penal Code of RSFSR here and further in the text we mean that there are analogous articles in the Penal Codes of all the other Union Republics. Hereafter Penal Code is referred to as PC.

Law on criminal procedure (in particular, Art. 6-1, 6-2, 7, 8, 9, 10 of the Code of Criminal Procedure of the RSFSR)[3] provides for rules of termination of criminal prosecution because of application of measures of social influence to a person for a less dangerous crime committed. It also regulates the rules according to which such decisions may be appealed.

Besides norms of criminal law and the law of criminal procedure regulating the most general points of application to offenders of measures of social influence and re-education, legislations of Union Republics thoroughly regulate the procedure of consideration of such matters in comrades' courts and in juvenile commissions.

It is quite evident that the legislator clearly sets the limits within which procedures of social influence, re-education and measures of an administrative nature may be applied to those who have committed a crime.

Due process of public organizations' activities in the sphere of crime combating is secured by the fact that they are under control and supervision.

According to the USSR Constitution, local Soviets of People's Deputies and agencies of trade unions exercise guidance and control over the activities of public organizations. It is formulated as their duty to supervise that public organizations themselves strictly observed legality and treated as inconceivable any infringement of rights and lawful interests of Soviet citizens. Art. 146 of the USSR Constitution establishes that local Soviets of People's Deputies . . . ensure observance of the laws, maintenance of law and order, and protection of citizens' rights.

Art. 164 of the USSR Constitution and Art. 1 of the Law on the Procurator's Office of the USSR vest supreme power of supervision over the strict and uniform observance of laws by public organizations in the Soviet Procurator's Office. Procurators' supervision over the law activities of public organizations is exercised by way of checking whether or not legal acts issued by these organizations correspond to the law, by way of consideration of claims against their decisions and actions, by way of bringing protests against illegal acts.

Mobilizing of the public and labour collectives to participation in consideration of acts and violations with features of crime is extremely important in the sense of prevention. Widely speaking, the scope of activities of public organizations and labour collectives aimed at re-education and, particularly, at re-education of offenders, ensures the efficiency of the whole system of preventive measures; it leads to removal of causes and conditions giving birth to crime.

Such are the most general approaches of Soviet law to the problem of participation of public organizations and labour collectives in crime combating, approaches that in many criminal cases alter the way of criminal proceedings.

Now we may shift to more detailed examination of participation in crime combating of some public organizations.

Let us start with activities of comrades' courts.

Comrades' courts are one of the forms of public participation in combating breaches of law and rules of socialist community. The significance of these courts does not lie in the punitive sanctions, but in collective censure of violators, in comradely criticism and moral disapproval. Comrades' courts came into existence in our country soon after the victory of the Great October Revolution of 1917. At that time these courts' main task

3. Codes of Criminal Procedure of other Union Republics contain similar provisions.

was to combat breaches of labour discipline and immoral behaviour of members of labour collectives.

Soon after the Great Patriotic War of 1941–1945 Comrades' Courts started to function mainly as agencies, supporting labour discipline. Gradually, however, they began to focus their attention on negative factors of everyday life, of moral character, and on certain offences. New frames of Comrades' Courts activities were reflected in Statutes on comrades' courts adopted by all republics in 1961–1962.

The Statute on Comrades' Courts of the RSFSR now in force was approved by the Ordinance of the Presidium of its Supreme Soviet on March 11, 1977.[4] Similar statutes were adopted in other Union Republics. According to statistical data there are more than 300 thousand comrades' courts functioning in the country.[5]

The nature of Comrades' Courts. Art. 1 of the Statute on Comrades' Courts of the RSFSR clearly states that Comrades' Courts "are elective public bodies, set up to promote actively the education of citizens in the spirit of communist attitude to labour, of solicitous attitude to socialist property, of respect to the rules on socialist community life; the courts are aimed to develop relations of collectivism and comradely assistance and respect for the dignity and honour of the Soviet people. The main aim of Comrades' courts is to prevent violations of the law, to educate people by way of persuasion and social influence, by way of creation of the atmosphere of intolerance towards any anti-social behaviour. Comrades' courts enjoy confidence of labour collectives, they express the will of these collectives and are responsible and accountable to them."

Such a definition of the tasks of comrades' courts makes it possible to draw a conclusion on the social nature of these bodies. They may be defined as *agencies of public social activity* tightly connected with the labour collectives which elected them. They are called "courts" because in their activities they use not only moral norms, but also norms of the law; they solve disputes, establish facts, follow and fulfil certain procedural norms, pass their decisions; i.e. comrades' courts fulfil to a certain extent jurisdictional functions. Besides, the word "court" by itself makes these bodies of social activity of people more authoritative and prestigious.

But these are purely external signs of similarity of comrades' and people's courts. In their essence, comrades' courts are quite peculiar social bodies. Not to the smallest degree can they be equated to the people's courts. Citizens elected to comrades' courts are not paid for their activities; they fulfil their duties free of charge at the expense of their free time. Comrades' courts don't use state law enforcement measures. Their decisions don't entail criminal consequences or records. Comrades' courts are the bodies of public social activity, functioning out of the frames of the state court system established by the Constitution of the USSR. These courts can't be considered as bodies of social or public justice, since administration of justice is exclusively function of the state. In other words, comrades' courts stand out of the frames of justice.[6]

Comrades' courts independently fulfil all the tasks they are entrusted with. They do not serve as subordinate agencies: they themselves make decisions as for initiation of procedures concerned; they themselves apply measures of influence or send cases to

4. Gazette of the Supreme Soviet of the RSFSR, No. 12, item 253 (1977).

5. Beredin S. "Utchastie obuschestvennosti v preduprezhdenii pravonarushenij", Sovetskaja Justitsija, 1978, No. 10, p. 14.

6. See: "Constitutzionnie osnovi pravosudija v SSSR; V. M. Savitski ed., Moscow, 1981, pp. 9–12.

other state bodies; the decisions they take do not need to be confirmed by any public or state agencies. In this respect comrades' courts are independent and autonomous, though they are accountable in their work to the labour collectives that elected them.

Some of the sanctions that are imposed by comrades' courts stay in need of state insurance, for example, fulfilment of a comrades' court decision on the imposition of a fine. Other decisions entail the necessity for state organs to take into account measures chosen by comrades' courts when behaviour of the labour collective member is in question. Thus, for example, the decision of the comrades' court may serve as a reason when the administration of an enterprise initiates dissolution of the labour agreement between this enterprise and a worker, because he systematically violates the rules and neglects his obligations. In such a case a decision of the comrades' court acquires juridical character.

However, this does not mean that comrades' court should be treated as an initial level of the USSR Constitution's State court system, as an institution purposed to unload people's courts from insignificant, minor cases. The very origin and the ways of development of comrades' courts should not be correlated with the way appropriate state agencies fulfil their work. Transition from a socialist state system to public self-government under communism naturally and inevitably presupposes gradual transferring under the jurisdiction of the public of some functions of the state, including the function of protection of public order. Therefore, active participation of comrades' courts in implementation of the function of public order protection is not stipulated by some occasional and temporal factors. On the contrary, it is predetermined by objective regularities inherent to the system of socialism.

It is to be supposed that along with development of our society as well as along with the process of strengthening of legality, there will take place the process of rapprochement of state and public court in particular by way of gradual redistribution of powers between them. Evidently, the range of cases comrades' courts take for consideration will become still wider; the arsenal of measures of social influence applied by comrades' courts will also be extended. Nowadays, however, there are not yet necessary objective preconditions to replace state enforcement (criminal punishment) by measures of social influence. That is why it is quite natural and necessary that at the present period of development of the socialist state system there exist parallelly two types of agencies protecting law and order, i.e. state and public courts.

How comrades' courts are organized. Nowadays comrades' courts are formed following two lines: they are organized on territorial principles, as well as at the places where people work, i.e. they are functioning at plants and factories, enterprises, institutions and educational establishments. These courts are formed by decision of general meetings of workers, employees or students.

Following territorial principle comrades' courts operate in rural localities, in country settlements, collective farms and villages. Comrades' courts of this type are formed by decision of general meetings of collective farm members, of inhabitants of many-storied dwelling houses or villagers after they have got an approval of the executive committee of local Soviet of People's Deputies. When a comrades' court is set up in a labour collective the number of people working there should not be less than fifty.

Candidates to comrades' courts are proposed by local organizations of trade unions, Communist Party, Young Communist League; by other public organizations, as well as by ordinary citizens. Lists of candidates are open for general discussion.

Members of comrades' courts are elected for a term of two years by simple show of hands at general meetings of co-workers or at meetings of people living in one community. Meetings are organized by trade-unions' committees or by Executive Committees of local Soviets.

The day of elections is announced in advance. People participating in elections may, if there are reasons, challenge any candidate; they may also propose names of new candidates. The challenge may be accepted or rejected by the majority of votes of those present at the general meeting.

Those candidates who won the majority of votes in comparison with other candidates and more than one half of the votes of people participating in the meeting are considered to be elected into the court. The size of the court's bench is decided by the meeting, but the number can't be less than five. Members of the court from among themselves elect the chairman, his deputies and secretary by open vote.

At least once a year these courts report on their activity to the general meetings of people who elected them. Those who failed to justify the trust of the electorate may be recalled before the term of their service in comrades' court expires. As a rule this question is discussed in the presence of those who are supposed to be recalled.

Competence of Comrades' Courts. Article 7 of the Statute refers to the competence of comrades' courts, the following type of cases: 1. violations of work discipline; 2. administrative offences; 3. offences of no great social danger; 4. property and other civil law disputes; 5. amoral acts and violations of the rules of the socialist community.

Comrades' courts examine also cases of the following crimes: intended slight body injuries and battering which do not cause health damage (part 2 art. 112 PC), slander (part 1, art. 130 PC), insult (art. 131 PC), theft of articles of the habitual use of no great values which are in personal possession of people, if both the guilty person and the victim are members of the same collective (part 1, art. 144 PC). Besides part 2, art. 51 PC stipulates the possibility to remit to a comrades' court cases of other minor offences committed for the first time, if the nature of the offence is suitable and the personality can be re-educated by application of the community control measures.

The Statute specifies the cases of administrative offences which can be examined by comrades' courts: petty hooliganism, first time petty speculations, appearance in public places in the state of alcoholic intoxication, insulting the community morals and other violations of public order.

Comrades' courts have the right to consider cases of work discipline violations, particularly shirking, being late for the work hours, leaving the working place before the specified time, unscrupulous execution of work duties, ignoring of work safety regulations etc.

Among civil law disputes subjected to comrades' courts the Statute specifies ones concerning the damage caused to administrative and residential premises, violations of the rules of anti-fire measures, disputes among the residents concerning the use of subsidiary premises, maintenance fees, property disputes between husband and wife, etc.

And finally, cases of amoral conduct. The Statute does not enumerate such cases but gives examples: parents' neglect of their duty in bringing up children, children's neglect of their duties to parents, improper attitude towards a woman.

To complete the issue of the comrades' courts' competence, one should mention the fact that the majority of the cases can be examined by the corresponding people's court,

militia, administrative commissions under the Executive Committee of the local Soviets of People's deputies etc.; i.e., comrades' courts do not possess an exceptional original competence.

The decision is taken depending on the wish of the parties (in civil law disputes), the victim's wishes (in insignificant criminal offences), or by the initiative by the comrades' court itself or by a state body. Comrades' courts cannot revise cases which already have court sentences pronounced, court decisions taken, administrative or disciplinary sanctions applied, or a comrades' court decision pronounced.

Procedure of the case examination. Rules of case hearing in comrades' courts are stipulated by arts. 11–15 of the Statute. They are direct and easy, although they have certain similarities to the people's courts procedure. These similarities are: a collegial examination of cases, proceedings opened to the public, a direct oral trial, a comprehensive, thorough and objective scrutiny of the circumstances of the case, a guarantee of the rights and interest protection to the accused, the victims, and the parties in civil law disputes.

When hearing a case the comrades' court may accomplish a checkup of materials received in case of necessity. Directors; chiefs of enterprises, offices, and organizations; and other officials and private persons are to submit the necessary documents required by the comrades' court.

The Chairman of the court or his Deputy presents to the accused, the victim, and the parties of the civil law dispute the materials available, and if the ground is sufficient, decides who are to be summoned for the court hearing as witnesses.

When a comrades' court examines a case at the place of the accused person's residence, it takes the necessary steps to provide for the accused person's working collective representatives to take part in the court hearing.

Comrades' court sessions and other duties by the court members connected with the case examination are scheduled for the time free from work time.

Court hearings are collegial, not less than three members; the court composition may be enlarged, but the number of members should always be odd.

A person summoned to the comrades' court, the victim or the parties in the civil law dispute may challenge the Chairman or members of the comrades' court if there are circumstances bringing about the above-mentioned persons' personal involvement in the case.

The challenge is considered by the complete composition of the comrades' court examining the case.

When a case is examined by the comrades' court the accused, the victim, and the parties of the civil law dispute enjoy equal rights.

The court examines the available materials, hears the victim, the parties in the civil law dispute, the witnesses. All present at the hearing may aks questions and speak on the subject matter. The comrades' court keeps a record, which is signed by the chairman and the secretary of the session.

When considering cases and taking decisions the comrades' court is directed by the legislation in operation, the Statute of it and the social duty consciousness. A comrades' court decision is adopted by majority of votes of the court members participating in the case examination, excluding any alien influence. The decision contains the indicia of time and place where the case was heard, the name and composition of the court, data concerning the accused, the essence of the offence or of the civil law dispute, the motives of the decision taken and evidence the court refers to, the measure of community

impact or acquittal, the results of the civil law dispute, as well as the terms and order for an appellation.

The comrades' court decision is signed by the Chairman and court members; it is pronounced publicly and the collective is notified about it.

Measures of the community impact. Based on art. 16 of the Statute the comrades' court may apply to the guilty person one of the following measures:

1. to require public apology to the victim or to the collective;
2. to pronounce comrades warning;
3. to pronounce a public admonition with/without publishing in the press;[7]
4. to pronounce public censure;
5. to impose a fine: up to 10 roubles if the offence is not connected with a work discipline violation; in the cases of minor thefts of state or public property, a fine up to 30 roubles; if the theft is repeated, up to 50 roubles;
6. to recommend to the director of the enterprise, office or organization to transfer the person guilty of the work discipline violations to a job with a lower salary, or to a lower position in accordance with the legislation in operation;
7. to recommend to the director of the enterprise, office or organization to dismiss the person executing educational functions or directly involved in monetary or other values services, in accordance with the legislation in operation, if the court decides it impossible to entrust him with the work in future, considering the nature of the offences committed.

In addition to the above-mentioned measures applied to the guilty person in cases provided for by the law the comrades' court may contact the administration of the enterprise, office, organization and the trade union committee to recommend them to withdraw a part or the whole of the yearly bonus or to recommend a partially free stay in a rest home or convalescent home for the guilty person.

In addition the comrades' court may oblige the guilty person to reimburse the damage caused by his unlawful actions to the sum up to 50 roubles if there are no other legal provisions.

In cases of petty thefts of state or public property, the court in all cases should oblige the guilty person to reimburse the material damage caused by his actions, to define the terms of the decision execution; in cases of petty speculations the court decides to transmit the articles used for such actions to the state.

In accordance with art. 17 of the Statute comrades' court may limit its actions to the mere public case hearing and not apply the measures specified in art. 16 if the guilty person, sincerely repentant, makes public apology to the collective and the victim, and voluntarily reimburses the damage caused. In the absence of the grounds for a conviction comrades' court acquits the accused person. When considering property and other civil law disputes, comrades' court may satisfy the plaintiff completely, partially, or fail to satisfy.

In case of the reconciliation of the parties in a civil law dispute, and in the cases of insulting, slander, battering or slight body injury of the reconciliation of the offender with the victim, comrades' court shall dismiss the action.

If the comrades' court examining a case comes to the conclusion that the accused is

7. The above measures, based on moral impact, comprise more than 60 per cent of all the measures applied by the comrades' courts.

to be subjected to the criminal or administrative responsibility it takes the decision to remit the materials of the case to the relevant agencies.

If the offender is an alcoholic, the comrades' court in addition to the measures of community control may raise the question of his compulsory medical treatment in accordance with the order stipulated by the law.

If the comrades' court examining a property or another civil law dispute comes to the conclusion of the impossibility of solving the dispute because of its complicated nature, the court may remit the case to the district (city) people's court.

The decision of a comrades' court can be appealed by the convicted person, the victim or the parties in a civil law dispute within the term of 7 days from the day the decision was adopted to the corresponding trade union committee or the Executive Committee of the local Soviet of People's Deputies. The mentioned bodies, having established that the comrades' court decision contradicts the legislation in operation or the case circumstances, vacate the decision and remit the case materials to the same comrades' court for a new examination or dismiss the case. A complaint suspends the decision execution.

The comrades' court decision on the damage caused, reimbursement, fine, or other material sanction is to be executed within the time specified in the decision.

In case the comrades' court decision is not legal the people's judge refuses to issue a writ of execution by a motivated ordinance and informs the comrades' court and the corresponding trade union committee or the Executive Committee of the local Soviet of People's Deputies about it in order to vacate the comrades' court decision.

Fines paid by the convicted persons are due to the state budget in accordance with the procedure specified by the law.

The decision to impose a fine pronounced by comrades' court, which has not been executed with a three-months term since its adoption, becomes void, and shall not be executed.

Juvenile Commissions. The role of the public is especially important in the whole complex of measures which are effected in the course of activity to combat juvenile delinquency. Social organizations and workers' collectives are called upon to constantly pay attention to improve educative work, to rise the responsibility of parents and school for the education of adolescents, to purposefully have preventive measures taken at the homes of juveniles and the places they study or work at.

It is the activity of agencies dealing with the prevention of juvenile delinquency and of juveniles' neglect, which had been formed in all the union Republics, that does reflect the constantly growing role of the public in combating juvenile delinquency. A leading role among these agencies belongs to juvenile commissions attached to the executive committees of local Soviets of working people's deputies as well as to the Councils of Ministers of Union and autonomous republics.

Juvenile commissions are state agencies though they resemble social organizations both in their membership and in the procedure of hearing materials on offences committed by juveniles.

The above conclusion is based first of all on the fact that members of the committee include on a voluntary basis both representatives of state agencies (executive committee of the Soviet of working people's deputies, institutions of public education, public health, the militia (police) etc.) and representatives of working people's collectives and their social organizations (trade union, Young Communist League, etc.).

The social voluntary basis in the activity of a committee on the problems of juveniles is seen also in the fact that its task does not consist in taking repressive measures—though it can administer measures of that kind to adolescent offenders—but in conducting corrective education activity. It should be stressed that the work of the commission takes place in conditions of wide publicity, deputies of local Soviets, foremost people in industry, veterans of the Great Patriotic War and other citizens most respected in our society being invited to participate in the hearing of cases of juvenile delinquents.

Supervision over the activity of state agencies in the field of ensuring the rights of adolescents to education work, health protection, as well as conducting mass cultural and health protection measures, plays an important part in the activity of juvenile commissions.

However, parallel with the aforementioned, juvenile commissions are entrusted with the hearing of cases of juvenile delinquents and with administering measures of pressure. This activity of commissions in respect of adolescents who had committed acts containing characteristics of crime takes the place of ordinary criminal trial procedure as criminal cases are dismissed by investigating agencies or the court, and materials on the offence committed are sent to the juvenile commissions.

In accordance with the law, Art. 17 of the Statute on juvenile commissions,[8] the jurisdiction of the commissions includes:

a) all the cases of socially dangerous acts of juveniles who have not reached the age of criminal responsibility;

b) all the cases of not very socially dangerous offences committed by juveniles when there is cause to believe that the perpetrator may be corrected without the administration of measures of criminal punishment;

c) cases when juveniles commit administratively punishable offences;

d) cases of other antisocial behaviour of juveniles;

e) cases of juveniles who shirk study or work.

As can be seen the list of cases of juvenile delinquency which are by law enclosed within the competence of juvenile commissions is very wide: practically any offence committed by a person younger than 18 years can be the subject of a hearing by the Commission. Only cases of dangerous crimes committed by such persons are an exclusion. Decision on cases of acts of juvenile delinquency taken by juvenile commissions is preceded by consideration of the materials of these cases by investigating agencies or by the court.

As provided for by articles 8–10 of the Criminal Procedure Code of the Russian Soviet Federative Socialist Republic (RSFSR), materials of crimes committed by juveniles are considered by investigating agencies or by the court and can be transferred to the Juvenile Commission if criminal proceedings have not been instituted or as the result of the criminal case being dismissed at the stage of preliminary investigation or during trial proceeding.

There might be the following reasons for the investigating agency or the court to take the decision to pass a case over to be heard by the juvenile commission:

a) the investigating agency or the court establishes the fact that the act committed by the juvenile, though containing characteristics of a crime, does not have great social danger.

8. See records of the Supreme Soviet of the RSFSR, 1977, No. 12, art. 259 (Russ.).

b) the existence of materials showing that the given juvenile can be corrected and re-educated without measures of criminal punishment being administered to him.

The offender and his legal representative (parent, guardian, trustee, etc.) are being informed by the investigating agency or the court of the fact that the case is dismissed and materials transferred to the consideration of the juvenile commission.

These persons have the right in the course of 5 days to lodge a complaint against this decision to a court of higher instance in case the decision has been taken by a court or to the procuracy in case of decision taken by an investigating agency. On having received the case, the commission studies the materials sent to it and has the right in case of disagreement with the decision taken by the investigating agency or the court to return the materials received for their additional examination or for the purpose of deciding to have criminal punishment measures be administered to the adolescent.

The hearing by the commission of materials on the juvenile's delinquent act must take place in the course of 15 days from the moment the materials were received.

On having arrived at the decision to hear such materials, the commission is able to have them additionally verified, to subpoena missing documents, to conduct an investigation at the home of the juvenile or at the places of his study or work.

On considering the preparation of the case completed, the president of the commission, his deputy or one of the members of the commission acquaints the juvenile, his parents or persons who hold their place, and if necessary representatives of educational institutions as well, with all the materials of the case. Next the case is fixed for hearing and the procurator informed of it.

At the session of the commission when a case of that kind is heard, the presence of the juvenile and his parents or persons replacing them is obligatory.

The law does not provide for a strict regulation of the procedure of hearing cases of juvenile delinquency by commissions; however, it does stress that the procedure of hearing should contribute to the education and correction of the offender.

In accordance with the results of the hearing of a case of juvenile delinquency, the Commission is able to make a choice among the following treatment measures:

a) to oblige the offender to make an apology to the victim in public or in another form;

b) to issue a warning;

c) to announce a reprimand or strict reprimand;

d) to oblige the juvenile to compensate the material harm by the work of his own hands in case the damage does not exceed 20 roubles;

e) to fine the juvenile in case he is older than 16 years and has his own earnings—the amount of the fine being provided for by the law;

f) to place the juvenile under the supervision of his parents or persons holding their place, or social organizations or collectives of working people if they agree to it or there is an application to that effect;

g) to send the juvenile to a special medical-educational institution, to an educational establishment or to a vocational-technical school.

A complaint against the commission's decision on a concrete case of juvenile delinquency can be lodged in the course of 10 days to the executive committee of the Soviet of working people's deputies under which the given commission is functioning.

Release on surety. The criminal and criminal procedure legislation of the USSR and of the Union Republics provide for the possibility to dismiss under certain circumstances

criminal prosecution in respect of a first offender who committed a less dangerous crime and to release this person on surety to a collective of working people or to a social organization. The law, articles 50–51 of the Criminal Code of the RSFSR and respective articles of the criminal codes of the Union Republics, provide for the rule that the person who has committed a crime and does not constitute a grave social danger can be freed from criminal responsibility, the offender being entrusted for re-education and correction to a social organization or collective of working people.

Release on surety is possible only under the following conditions:

a) the person released on surety was not previously convicted for an intentional crime;

b) the person had not been previously released on surety;

c) the crime committed by the person being released on surety does not have great social danger and has not resulted in grave harm;

d) the person released on surety confesses to his guilt and is open-heartedly remorseful of having committed the crime;

e) there is a request from a collective of working people or social organization expressing the wish to stand surety for the person.

It should be stressed that an investigating agency, a procurator or court is able to come to a decision of releasing a person on surety only when the conditions enumerated exist in total.

The order of the dismissal of a crime case in view of the release of the offender on surety is regulated by the criminal procedure legislation of the USSR and of the Union Republics. Art. 9 of the Criminal Procedure Code of the RSFSR states the rule that the decision of the investigating agency to dismiss a case and to release the offender on surety is to be sanctioned by the procurator. The court takes a joint decision of release on surety by way of issuing an order to dismiss a case.

The victim is informed that the case is dismissed and the offender released on surety. The victim may lodge a complaint against the decision of the investigating body to the procurator of a higher rank or against a court order to a court of higher instance.

The law provides for the rule that in case the person to be released on surety objects against this procedure the case is not to be dismissed and is to be investigated and tried in the usual order.

In case the person released on surety does not take the path of improvement and re-education and in the course of a year does break his promise to improve or if he quits working in the collective which stood surety for him so as to avoid corrective educational treatment, the social organization or the collective of working people which had stood surety for such a person may withdraw their surety by means of a written information to that effect addressed to the agency which had taken the decision to dismiss the case.

In these circumstances criminal proceedings may be instituted anew and the person who had been previously released on surety but avoided educating treatment may be brought to trial.

The issue of submitting the application to release someone on surety is usually decided upon in meetings of working collectives or at sessions of social organizations. Decisions are taken by simple majority vote of those present.

These are some of the forms of enlisting the public and workers' collectives in the cause of combating crimes in the USSR.

The realization of these forms is based on the desire that in law enforcement activity,

the force of public impact might be made use of for the re-education and correction of persons, particularly first offenders, committing acts with characteristics of crime but of minor social danger.

China (Taiwan)
DIVERSION AND MEDIATION

Jyun-hsyong Su

I. Introduction

In the Chinese legal tradition, the dominant philosophy of criminal law was known as "Hsin Chi Wu Hsin", meaning the main purpose of criminal justice is not to punish, but finally to obviate the need for punishment. This motto had great and deep influence, both in legal thought and legal practice, in China.

A formal program of diversion, as in the United States, was not systematically developed in China however. Still, according to Chinese legal thought, especially Confucian teaching, mediation, political persuasion and social compensation were viewed and often used as expedient means of social control in traditional society. Even nowadays, we can easily find traces of such thought in the social life of modern China in Taiwan.

II. Structure of Powers of the Public Prosecution

Modern criminal justice in the Republic of China (ROC) is modeled after continental law systems, such as German law or Japanese law, and theoretically emphasizes the rule of compulsory prosecution. According to Art. 228 of the Code of Criminal Procedure, the procuratorate has a legal duty to begin investigation into every offense that comes to its notice, either through complaint, information, voluntary surrender, or other means. This rule is anchored in the idea of "General Justice" (Allgemeine Gerechtigkeit), with the purpose of ensuring equality of prosecution. However, the rule of compulsory prosecution has frequently been qualified in favor of the discretion of the procuratorate, whereby careful selection sparing some offenders from formal prosecution is practised, in consideration of social justice or the policy regarding criminals' social rehabilitation. The guiding ideas behind this practice are "Concrete Justice" (Billigkeit) and expediency; these along with the nature of individual cases, are weighted more heavily than general justice.[1] Therefore, under certain conditions and for certain types of petty offenses, the Code of Criminal Proceedings recognizes the discretionary power of the public prosecutor not to take any action and allows the prosecutor to exercise such diversion power discreetly. To this extent the principle of opportunity is recognized in Chinese law.

> Art. 253 of the Code of Criminal Procedure says: "If a procurator considers it appropriate not to prosecute a case involving one of the offenses specified in Art. 61 of the Criminal Code after having taken into consideration the provision of Art. 57 of the Criminal Code, he may make a ruling not to prosecute."

The offenses specified in Art. 61 of the Criminal Code belong to the category of minor offenses considered less threatening to social order. They include:

1. Offenses for which the maximum basic punishment is imprisonment for not more

than three years, detention, or a fine, with certain exceptions concerning the legal interests of the public;

2. Offenses of larceny, as specified in Art. 320 of the Criminal Code of China (hereafter CCC);
3. Offenses of misappropriation as specified in Art. 335 of the CCC;
4. Offenses of fraud as specified in Art. 339 of the CCC;
5. Offenses relating to stolen property as specified in Art. 349, Sec. 2 of the CCC.

Apart from the offenses mentioned above, there are some legal criteria provided for the public prosecutor in using his discretionary power. These criteria may be divided into three types:

1. Background of the offender: a) his living conditions; b) his conduct, including character, age, experience, inheritance and habits; c) his general knowledge; d) the relationship between the offender and the victim.
2. Nature of the offense, such as the motive, purpose, provocation at the time of the offense, and the means employed to commit the offense.
3. Circumstances such as the danger or damage caused and the conduct of the offender after the commission of the offense.

By exercising his discretion to grant diversion, the public prosecutor may order some formal discreet intervention under consideration of all the circumstances, with the consent of the complainant. The discreet forms are usually:

a. apology to the victim;
b. writing of a report of his repentance;
c. payment to the victim of a suitable sum as compensation.

These types of intervention should be kept on record; compensation payment also constitutes civil compulsory execution, according to Art. 253, Sec. 4 of the Code of Criminal Procedure.

Under the criminal justice of the ROC, diversion and mediation may be used in legal practice, so far as the Principle of Opportunity is recognized for the public prosecutor; under them, cooperation with the police and some local community mediation councils, especially for cases subject to private complaint, is possible.

Moreover, the Code of Juvenile Justice (Art. 29) has expanded the principle of opportunity, enabling the prosecutors and the courts to exercise greater diversionary power in handling juvenile delinquents. A large number of criminal cases involving offenders less than 18 years old have been handled in this manner.

III. Practice of Diversion

In accordance with the questions suggested for the national reports, some remarks and statistical data will be presented here, in order to give some views on the practice of diversion in Taiwan, ROC.

1. Since the opportunity principle is recognized in Chinese law under certain conditions for certain types of minor offenses as mentioned above, some cases have been diverted by public prosecutors using their discretionary powers. The following statistics might help us to understand the situation:[2]

	Total number of criminal offenders	Diverted by prosecutor
1975	188 704	3 009
1976	234 123	2 799
1977	237 041	2 670
1978	184 382	2 446
1979	210 025	2 170
1980	237 731	1 979
1981	237 981	2 108

Diversion was exercised especially for property offenses and libel; in 1980, for example, over 68% of such kinds of offenders were diverted by the prosecutors.

High percentages of juvenile delinquents, offenders between 14 and 18 years of age, have been diverted by the juvenile courts in recent years, as reflected in the following statistics:

	Cases	Offenders	Prosecuted	Diverted persons
1977	4 969	7 834	216	7 618
1978	5 528	8 345	222	8 123
1979	6 570	9 797	170	9 627
1980	9 530	14 869	389	14 480
1981	9 737	15 478	551	14 927

Moreover, police officers are under a legal duty to investigate every offense that comes to their notice. However, for private complaints, police officers also play the role of mediator in practice. A large number of cases were dropped in this way, too.

2. To exercise the power of diversion, public prosecutors are not legally bound to perform any discreet intervention. However, the law grants prosecutors the power to order the offender to:

a. apologize to the victim;
b. write a report showing repentance;
c. pay the victim compensation.

Such types of intervention are important factors for the prosecutor in considering whether an offender should be diverted or not, especially for private complaints, in which the consent of the victim is required. The order to pay compensation to the victim constitutes legal grounds for civil compulsory execution; therefore, it is important to ask the prosecutor to pay more attention to the trial with offender and victim, as stipulated by decree of the Justice Administration. All interventions ordered by public prosecutors for diversion must be recorded in written rulings of non-prosecution.

Regarding cases involving juvenile offenders, more intervention measures are adopted by the courts for the purpose of rehabilitation and social preservation. The measures employed include:

a. admonition (warning);
b. protective control, exercised by the police, a community body, a charitable institution, the nearest family relatives or other appropriate persons, for a certain period not exceeding three years;
c. reformatory education;

d. other measures, such as consultation, advice, and persuasion.

The measures most used in practice are admonition and protective control. Nearly 50% of the diverted juvenile cases are resolved through such intervention.

3. Apart from diversion in the criminal justice system, a great number of criminal offenses subject to private complaint are disposed of through mediation by a community, police, or other social organization. According to the Rules Governing Organization of Mediation Councils of Local Communities, each local community can set up a mediation council under the community administration to help police officers or public prosecutors drop minor offense cases, so far as the above-mentioned opportunity principle of prosecution is allowed.

In practice, some criminal cases arising out of private complaint are handled through mediation in the community. In 1982, 131 cases were resolved by means of community mediation in the Province of Taiwan, with a success rate of 56%.[3] In the process of mediation, the consent of the victim is always required, and some discreet measures or intervention are usually implemented, too.

4. In Taiwan, there are no "comrades' courts" to serve the function of diversion. All measures for rehabilitation through labor must be promulgated by court order, for the sake of human rights.

5. In the criminal justice system, the exercise of diversion is under the discretionary authority of the prosecutor. However, the decree of the Ministry of Justice issued on Feb. 28, 1968 (last revised on Oct. 7, 1982) requires prosecutors to take great care in such cases, which should be diverted only with an order of payment to the victim for compensation, to protect the balance of interests between the offender and the victim.

6. A decision for non-prosecution made by the public prosecutor has the same effect as a final judgement; double jeopardy is not allowed. Therefore, such decision is subject to non-suspense or termination conditions. If any payment for compensation is ordered, it may only constitute a title for civil compulsory execution, but it has no other influence on the decision. Therefore, it could be said, diversions made by the prosecutor have been very successful.

IV. Evaluation of Diversion

Generally speaking, the phenomenon of diversion, especially mediation, is viewed favorably in Taiwan, based on traditional Confucian teaching and modern criminal policy in respect of the ideas of resocialization and reducing the burden of the criminal justice system. However, according to the principle of the rule of law, prosecution is still emphasized in the practice of criminal justice. The opportunity principle is viewed more or less as contrary to the rule of law, due to its lacking objective criteria, and is considered also as contrary to the principle of equality of prosecution. These factors might cause some hesitation on the part of prosecutors thinking of using their discretionary powers for justice. As a result of this observation, the outcome may be that the more objective guidelines and criteria for exercising the power of diversion are established, the more diversion can be practised to reduce the burden of the criminal justice system.

In order to enhance the functions of the community mediation councils, some reforms have been undertaken by the Taiwan Provincial Government, such as putting more jurists and professional mediators on these councils.[4] In the past 10 years, the number of crimi-

nal offenses handled by the mediation councils has totalled about 2000 cases. Their functions are still rather limited. In 1982 alone, there were 9897 cases of private complaint offenses, like bodily harm and offenses against morals, marriage and family, handled by the courts. If these cases could have been diverted to community mediation, then according to the success rate of 56% for community-mediated criminal offenses, about 5500 cases might have been dropped from the criminal courts in one year. Therefore, a provincial-level organization in charge of the systematic guidance of the community mediation councils will be established within the Department of Civil Affairs. This undertaking is considered as favorable to social change and social concerns about criminal justice policies. It is a hopeful sign in the development of diversion and mediation in Taiwan.

Notes

1. Chen, Pu-sheng: The Practice of the Law of Criminal Procedure, Taipei, 1982, p. 318.
2. Statistics of Ministry of Justice, 1982, pp. 87, 106.
3. Freedom Daily (Chu-yu jih pao) April 14, 1983.
4. Official Record, No. 1648th Meeting of the Taiwan Provincial Government Council, on Feb. 28, 1983.

Thailand
DIVERSION AND MEDIATION

Sirisak Tiyapan

I. Introduction

This report is prepared upon the request of Dr. Ryuichi Hirano, President of the University of Tokyo and President of the Japanese National Group of the A.I.D.P., on the occasion of the Preparatory Colloquium of the XIII International Congress of Penal Law on Topic of "Diversion and Mediation", the meeting of which will be held in Tokyo from 14–16 March 1983.

Although diversion refers to any deviation from the usual criminal process or any disposition short of serving the entire mechanism of the criminal justice administrative system, the so-called pre-trial diversion which results in some forms of the suspect's treatment in lieu of prosecution seems to meet the clear-cut perspective of the requester in accordance with the "Revue Internationale de Droit Pénal (vol. 52) pages 601–608" enclosed together with the request, at the most. Therefore, the highlight of this report will deal exclusively with the diversion at the stage before judicial interference as the major substance.

In broad view, the requester seems to anticipate the reflection of the situation and opinion of the particular country towards the pre-trial diversion to be discussed exclusively. However, it deems to be pertinent also to add some attitudes toward the topic as the general viewpoint.

Therefore, this report will be classified into 2 parts, namely:

1. General Viewpoint
2. Diversion and Mediation in Thailand

II. General Viewpoint

In view of the current approach, perhaps "diversion" or in some range "diversion and mediation" is the practice that offers the best benefit to all concerned in the respective criminal cases due to the inherent objectives for cost saving, rehabilitation of the culprit, expeditious settlement of the crime resulting in conflict, and more humane treatment of the offender.

By and large, diversion refers to any deviation from the usual criminal process or any disposition short of serving the entire mechanism of the criminal justice administrative system. As a result, it may occur at any stage of the handling of the criminal case in the form of a substitute for arrest, prosecution, trial, punishment and so on.

However, as mentioned in the introduction of this report, the main theme of the general viewpoint will be specifically devoted to the diversion at the pre-trial stage or so-called pre-trial diversion.

In connection with pre-trial diversion, the material facts to be taken into account before the diversionary treatment is offered to the offender, as the alternative to com-

mitting him to undergo the normal criminal process, usually concern the offender himself or the category of crime committed.

Many of those whose actions committed were defined as criminal law violations are the people who have never before in their lives been involved with any evil conduct; or for some special reasons labelling them with criminal conviction is deemed to be improper or unduly harsh. Furthermore, even some groups of the offenders such as the vicious criminal, the murderer and the recidivist do deserve punishment; yet, for those who are only the drunken, the mental-ill people, the vagrant, the prostitute, the beggar and so forth, diversion with its less drastic nature may prove better and more effective in reforming their lives.

As regards the category of crime, it certainly seems fair and proper for those who believe in conviction as the essential sanction for criminal deterrence and suppression to treat the suspect at every stage of the traditional criminal process which usually ends with conviction. Of course, to punish anyone who dares to commit offence of any kind should be just and fair in their sense.

Even though it is quite right to deal with the criminal whose behaviour falls into the category of inherent wickedness crime, or *mens rea* in the English approach, by prosecuting and imposing a penalty upon him, nevertheless, in cases of those concerned in some types of offence against property which lie on the borderline between criminal area and civil conflict, or whose conduct constitutes only the so-called regulatory crime, the same treatment seems to be wrong.

In fact, no one would expect to be seen committing such a serious crime as murder or robbery without prosecution and punishment ensuing, but the situation is quite different in case of less severe crimes such as road traffic offence, petty offence and so forth.

For the most part, wrongdoing against property or offences involving negligence are also of the category in which ordinary criminal process and punishment inflicted upon the culprit seem to be less favorable, in view of the victim, than the redressing fund. The injured person in such a case usually is satisfied to be compensated as soon as possible and never mind whether the offender be faced with the ultimate criminal procedure or not.

It is quite frequent that several kinds of petty offence are considered to be too trivial and not worth the time, effort and expenditure devoted to prosecution and trial. Thus, the offender is warned, treated with a tongue-lashing, fined or released under some conditions rather than prosecuted in the court. In this manner, the dropping of cases in such situations before prosecution, then, is deemed to be one form of diversion.

Despite its characteristic as an effective shortcut of case handling, an argument against diversion instead of furtherance proceeding is still persistent in some communities.

In this respect, a rising tide of public insecurity and fear of increasing crime due to the growing disrespect for law may lead to increase public demand for more effective crime control by conviction. As a result, the support for the entire administrative system of criminal justice will be increased.

Furthermore, for those countries in which the "legality principle" approach is adopted the argument in connection with diversion in lieu of prosecution seems to be more intensive.

The Colloquium of the XIII International Congress of Penal Law, going on in Tokyo from 14–16 March 1983, is, then, anticipated to attain its goals in discussion and evaluation of these situations.

III. Diversion and Mediation in Thailand

As regards the current situation in Thailand towards diversion and mediation, this report will deal only with the practice in the pre-trial stage due to the reasons cited in the introduction. Moreover, since mediation is usually deemed a form of diversion or a condition to be achieved by the offender before diversion is granted, it will not be discussed separately as an independent item but be incorporated into the word "diversion".

In the area of juvenile diversion, reflection of the current situation and opinion related thereto will be also excluded conforming to the prospective requirement set forth in the "Revue Internationale de Droit Pénal (vol. 52) pages 601–605" enclosed with the request to prepare this report.

Initially, this part will deal with general aspect of the criminal process at the pre-trial stage as the basic background. Then, it will move to discussion on forms and stages in which diversion may occur.

The effort of the public prosecutor to introduce the prosecutory suspension as the new form of pre-trial diversion in 1977 will also be described and included in this part.

The final issue will be about the evaluation and conclusion of current situation in Thailand towards diversion.

Therefore, this part of the report will be classified as follows:

—General aspect of the criminal process at the pre-trial stage;

—Forms and stages in which diversion may occur;

—Struggle to institute prosecutory suspension as the new form of diversion;

—Evaluation and conclusion.

General Aspect of Criminal Process at the Pre-trial Stage

Perhaps it would be fair to say that the criminal procedure at the pre-trial stage in Thailand is a unique one due to separation of the inquiry functioning mechanism from the prosecutory ambit. This means that the power to handle the functions concerning the inquiry affairs—namely, receiving of complaint, making investigation, performing arrest, keeping the suspect in custody, holding an inquiry, provisional release—exclusively belongs to the inquiry official, not to the public prosecutor. In addition, it is not until the inquiry official decides that he has completed the inquiry that he concludes the inquiry file and forwards it to the public prosecutor together with the suggestion as to cease inquiry, prosecute or not prosecute the suspect.

It is obvious that the inquiry official in Thailand usually contemporarily holds the position of the police or administrative officer, except that when an offence is committed outside territorial boundary the responsible inquiry official is the Director-General of the Public Prosecution Department or the person in charge of his function or his delegate.

The public prosecutor, on the other hand, seems to have very limited roles in comparison with the police inquiry official, due to a deep-rooted political policy which it is beyond the scope of this report to discuss.

Upon receiving the investigation file from the inquiry official, the public prosecutor will review all details that appear in the file, and if he is of the opinion that the inquiry is uncomplete yet or something must be done to correct or amend the defect, he is competent to require the inquiry official to do so.

In connection with the prosecutory function at the pre-trial stage, the public prose-

cutor may issue order of prosecution, non-prosecution, or instruct the inquiry to be stayed in accordance with the facts and laws relevant thereto.

Apart from the inquiry official and the public prosecutor, sometimes in the rural area criminal cases may be handled informally by the head of the local community or the senior people respected by the parties of the incident, in form of informal mediation, but, of course, this is not always approved as the lawful practice.

Forms and Stages in which Diversion may Occur

Considering diversion in terms of handling of criminal cases at the pre-trial stage in lieu of prosecuting the suspect or the offender, pre-trial diversion in Thailand, persuant to the general aspect of criminal process as mentioned before, may take place both formally and informally as follows:

1. Diversion at the Stage before Official Interference

Generally speaking, the informal settlement of the criminal case known as community absorption or natural diversion has not been adopted in Thailand yet. Nonetheless, it is believed that in some parts particularly in the rural area this practice has really existed.

The most conspicuous character of diversion of this kind is the non-official interference or non-legal process at all. That is to say, when the crime takes place the parties concerned may willingly settle or compromise the case themselves or under guidance and recommendation of the head of the local community, or any person respected and accepted by the parties such as the senior scholar, the local headmaster, the high-ranking monk and so on, instead of bringing the incident to the police officer or to any other authority.

In this respect, the sanction applied to the offender is usually based on the local custom and practice which may result in the offender's formal apology and sometimes monetary payment of the sum fixed by the arbitrator as the compensatory damage for the victim.

Mutual consent of both parties to compromise is essential to be achieved in a case of diversion like this because lack of consent even on one side causes the whole process to fail.

With respect to the informal diversion like this, it seems more possible for the parties concerned to attain settlement of their disputes in the so-called compoundable offence rather than other categories. This is due to the presumption that the case of this kind is likely to affect directly and personally the victim, not the society as a whole.

Most of the compoundable offences are the ones that are classified by the current Penal Code as such, for example trespass, defamation, seduction, cheating and fraud, rape and so on.

Persuant to the current Criminal Procedure Code, the victim and the offender may cease their case by the withdrawal of the complaint or of the prosecution or by lawful compromise.

Apart from the general prescription as defined in the Penal Code, the compoundable offence is also subjected to the special procedure that the victim must make a complaint within 3 months calculated from the time when he became aware of the incident and knew the offender who had committed it, or else his case will be barred by the special prescription. Likewise, the pre-trial diversion in the case of this kind may occur if the

victim, upon compromising with the offender, makes no complaint in such period and lets the incident go without informing the responsible official.

In cases of serious crimes which affect the society as a whole, such as murder, gang robbery, theft, etc., the situation is varied a lot because in such cases, even though the victim has agreed with the offender to divert their case from the purview of the criminal process, still the offender may face the usual process initiated by the police or the inquiry official.

Although diversion at the stage before official intervention may exist in some parts of Thailand, it is quite difficult to collect data or statistics of the practice because the case is likely to be terminated or dropped before access to official handling.

2. Diversion at the Stage of Arrest

In Thailand, the power to arrest is vested not only in the police officer, but also in the other officials empowered by the law to act as such. This can be testified by section 2 (16) of the Criminal Procedure Code which provides that:

"Administrative or police official means an official invested by law with the power and duty to keep the public peace. It includes chief gaolers, excise, customs, harbour, and immigration officials and all other officials when performing acts in connection with the arrest of offenders or the suppression of crime which they have the duty to arrest or suppress."

In broad view, the authoritative power to arrest is mandatory not discretionary. Nevertheless, it seems usual for the police or other arresting official anywhere to exercise broad discretion to decide whether or not to arrest, particularly when an offence of unharmful conduct is involved.

It is, then, probable that the police or administrative official in Thailand has applied warning or tongue-lashing as a substitute for arrest in traffic offences, petty offences and so on. Thus, these offenders are diverted at the stage of arrest in the sense that they have been dropped from undergoing the usual process.

Furthermore, it is believed that, to prevent unnecessary overload of cases, sometimes after an offender is brought into the police office, the case may be dropped completely and informally on condition that the offender stay out of trouble, behave himself, make compensation to the victim, etc.

It is quite hard also to collect statistics or data concerning this practice because no record appears in the formal list of the officer.

3. Diversion at the Stage of Inquiry

Since diversion in the pre-trial stage refers to any deviation from furtherance of the case to the court through prosecution, the following measures of the inquiry official are considered to be diversion in this sense:

a. *Psychiatric treatment for the lunatic offender*

Persuant to section 14 of the Criminal Procedure Code, whilst holding an inquiry, if there is reason to believe that the offender is of unsound mind and is unable to put up a defence, the inquiry official shall suspend the inquiry and have the power to send such person to a lunatic asylum or to deliver him to his custodian, the Provincial Commissioner or any other person willing to take charge of such person, as is deemed expedient.

b. *Settlement of criminal case*

Conforming to sections 37 and 38 of the Criminal Procedure Code, the offences which can be settled are classified as: (1) offences punishable only with fine; (2) petty offence or offence against Revenue punishable with fine not exceeding two thousand baht; (3) petty offence or offence punishable only with fine not exceeding two thousand baht when committed in Bangkok; (4) offences which may be settled in accordance with other laws.

The settlement of these cases is achieved by payment of a fine to the inquiry official or any other competent officers.

In settling these offences, if any case involves a claim for compensation the inquiry official shall fix the amount of the compensation as he thinks fit or as agreed upon by the parties concerned.

Upon completion of settlement, the note thereof must be referred together with the file to the public prosecutor for review and approval.

c. *Refraining from holding inquiry*

According to section 122 of the Criminal Procedure Code, the inquiry official may refrain from holding inquiry in the following cases:

(1) when the injured person, after having requested assistance, refuses to make a regular complaint;

(2) when the injured person himself has instituted a criminal prosecution without having previously made a complaint;

(3) when a written denunciation is anonymous or when the person who makes an oral denunciation refuses to disclose his identity or refuses to affix his signature to the denunciation or the note recording the denunciation.

The consequence of refraining from holding inquiry is that the public prosecutor shall not enter a charge of that case in the court; this conforms to section 120 of the Criminal Procedure Code.

This conduct, then, is considered to be one form of diversion in the sense that it renders prosecution of the offender to be barred.

4. Diversion at the Stage of the Public Prosecutor

At the stage of the public prosecutor, diversion may be handled in 2 forms, viz: (1) settlement of criminal cases by the order of the public prosecutor; (2) issuance of non-prosecution order.

As regards the first category, if the offence is one which may be settled and the public prosecutor thinks fit, he may order the inquiry official handling that case or any other inquiry official to settle the case in stead of forwarding the offender to the public prosecutor for issuance of prosecution order.

In the second category, the issuance of non-prosecution order is deemed to be one form of diversion at the pre-trial stage in view that it causes the case to be dropped before furtherance into the judicial mandate.

The argument on which approach between "legality principle" and "opportunity principle" should be applied by the public prosecutor in exercising discretionary power whether to prosecute the offender or not, is still persistent at present.

Under the current practice, however, the public prosecutor may issue the non-prosecution order on the grounds of facts and laws as appeared in the file or by other reasons.

If the public prosecutor is of the opinion that the suspect has not committed the al-

leged crime or the evidence is inadequate, he will drop the case by issuing non-prosecution order.

The public prosecutor may also drop the case on the grounds of laws in the following situations as provided by section 39 of the Criminal Procedure Code:

(1) by the death of the offender;

(2) in case of a compoundable offence, by the withdrawal of the complaint or of the prosecution or by lawful compromise;

(3) by settlement of the offence in accordance with section 37;

(4) by a final judgment in reference to the offence for which the prosecution has been instituted;

(5) by the coming into force of a law subsequent to the commission of the offence, abolishing such offence;

(6) by prescription;

(7) by amnesty.

In connection with other reasons apart from the grounds of facts and laws as appeared in the file, the public prosecutor may issue a non-prosecution order on some special grounds, for example, exclusion of some offenders from the prosecutory purview for fulfilment or repairing the defect of evidence and witness, or drop the case on the grounds of public policy.

Realizing the fact that the Public Prosecution Department is the bureau whose function is to co-operate with the Government in any policy, to the extent it is not contrary to its duty and fairness, the Director-General of the Public Prosecution Department, in 1975, used to issue an order of non-prosecution of the poor and needy who had been alleged of intrusion for planting within the national preserved area, on the grounds of public policy conforming to the request from the Government.

Therefore, public policy is deemed to be one of the grounds for non-prosecution at present.

Struggle to Effect Prosecutory Suspension as the New Form of Diversion

The effort to introduce prosecutory suspension as the new form of diversion in Thailand identified itself for the first time in October 1976, when the Public Prosecution Department proposed its scheme of prosecutory suspension to the Ministry of Interior[1] for primary approval and eventually attained permission to continue the plan.

The ad hoc working group of the Public Prosecution Department was of the opinion that prosecutory suspension was included within the ambit of the discretionary power of the public prosecutor, and in issuance order thereof it was unnecessary to amend any legislation or enact the new law; but for harmony and unity in practice, the Director-General may set up a departmental regulation for this purpose upon the power conferred by the Public Prosecutor Act B.E. 2498.

The Public Prosecution Department then, thereby, proposed the Draft Regulation on Prosecutory Suspension B.E. 2520 (1977) to the Ministry of Interior for furtherance to the Government for approval.

Under the regulation, the public prosecutor could issue order of prosecutory suspension in certain categories of cases where the suspects confessed their guilt and were

1. In Thailand the Public Prosecution Department is attached to the Ministry of Interior.

willing to compensate the victims. In this regard, the offender was entitled also to apply motion for prosecutory suspension under some conditions of parole.

The basic objective goals of this scheme were to decrease the overburdening in case handling and to render better opportunity to the offenders in rehabilitation of their lives in lieu of prosecution and punishment.

Unfortunately, however, the scheme proposed by the Public Prosecution Department was strongly opposed by the judiciary during the consideration of the cabinet on the grounds that it was contrary to the existent provisions of the Criminal Procedure Code.

Before the cabinet made any decision about the scheme, there came about the changing of the Government which brought the progress of prosecutory suspension to a standstill since then. However, this scheme has not been cancelled yet, because the struggle to effect prosecutory suspension as the new form of pre-trial diversion still continues at present.

Currently the scheme has been proposed and incorporated once again in the Operative Plan of the Ministry of Interior conforming to the current National Five Years Plan of economic and social development for 1982–1986.

Therefore, it is anticipated that this scheme will be brought into effect in the due time soon.

IV. Evaluation and Conclusion

Considering the already existing laws concerning criminal process and general practice as previously described, it appears that the pre-trial diversion in Thailand still has very limited forms in practice.

This is not due to unawareness of importance and usefulness of diversion at this stage, but perhaps because the long adopted legal system of accusatorial approach has placed the official handling of criminal cases at pre-trial stage in the position against the suspect or the offender.

In this manner, the practice of bringing the offender to undergo the thorough criminal process, in particular to charge him in court, seems to be mandatory not discretionary.

Likewise, it is inescapable for the arresting officer to arrest, the inquiry official to hold an inquiry and the public prosecutor to prosecute every suspect whose case has adequate evidence and reasonable grounds to prove guilt.

Moreover, according to the current provisions, it is likely that the laws have regarded diversion at the trial stage by the court as somewhat more significant than pre-trial diversion by other justice officials such as the inquiry official or the public prosecutor.

This assumption perhaps stems itself from the provision relevant to suspension of punishment which grants the court a fairly broad discretionary power to apply various programmes of diversion upon the offender in substitution for adjudication or punishment.

Under sections 55–58 of the Penal Code, the court, upon passing judgment of guilty with the intention to inflict imprisonment not exceeding 2 years, may suspend the imposition of the punishment or impose the punishment but suspend the execution thereof and then release the offender with or without conditions of probation so as to confer him with an opportunity to reform himself within the fixed period not exceeding 5 years, provided that the offender has no previous record of being punished with imprisonment, or if the previous imprisonment is for a negligent or petty offence only. After the ex-

piration of the fixed period, the offender who has achieved all conditions imposed will be permanently released from that case.

In this area, the court is authorized broadly to exercise discretion upon the grounds for suspension of punishment such as age, past record, behaviour, intelligence, education and training, health, condition of the mind, habit, occupation, environment of the offender, the nature of the offence and in particular other extenuating circumstances.

The scheme of prosecutory suspension proposed recently by the Public Prosecution Department has demonstrated the endeavour to introduce the new form of diversion into the mainstream of the criminal process.

This proposal has caused a great deal of diversity in views towards pre-trial diversion among the legal professionals, in particular the judge, the public prosecutor, the private lawyer and the university law professor.

While the majority groups were of the opinion that it would be possible and suitable for the public prosecutor to apply the pre-trial diversion, as a substitute for prosecution, in order to save cost, to handle the case more expeditiously, and to grant the offender a better opportunity to reform himself, instead of labelling him with an emblem of the accused, the others, especially the judiciary, have contradictory views.

For those who have objected to the scheme, the public prosecutor, in their views, should not be authorized to exercise the discretion which eventually might result in termination of the criminal case without prior approval from the court. In addition, pre-trial diversion by the public prosecutor was not final in nature when one or both parties in the relevant case failed to comply with the conditions agreed to before the pre-trial diversion took place.

The court, with the character of the sovereign body in criminal process, therefore, would be better, in their sense, than the public prosecutor in exercising the discretionary power of this kind.

However, the current indication of the increasing national trend to adopt pre-trial diversion is persistent widely. In this area, the incorporation of the scheme for prosecutory suspension as a part of the Ministry of Interior's Operative Plan to implement the current National Plan of Economic and Social Development is one of the vivid indicators.

It is anticipated that the effort to make progress in pre-trial diversion in the Thai criminal process will attain its objective goal soon.

Poland
DIVERSION AND MEDIATION

Stanislaw Waltoś
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I.

The set of notions and concepts referred to in our report will be that suggested by the General Reporter. Hence, we will use the notions of simple diversion, diversion with intervention, and covert diversion.

Nevertheless it has seemed to us that the division into various forms of diversion should be supplemented with an additional criterion, one that takes into account the conditional or unconditional use of diversion. This criterion has been introduced into our division accordingly.

Conditional diversion occurs, in our interpretation, when, due to the fact that the perpetrator has met the conditions required of him, his case will not be subject to judicial proceedings which either are not instituted at all or are discontinued. To avoid misunderstanding, for instance of terminological nature, we would like to explain that in our report *diversion stands for resignation from penal-law reaction to an act forbidden by a penal Act.*

Before we proceed to discuss diversion in Polish penal law, we will try to present the scope of penal law in Poland. In fact, it comprises two basic[1] categories of acts forbidden and liable to prosecution: offenses and contraventions. The former are subdivided into felonies (acts liable to deprivation of liberty for a time not shorter than three years or a more severe penalty) and misdemeanors (other acts liable to the penalty of deprivation of liberty exceeding three months, limitation of liberty for three months or a fine of 20,000 Zlotys).

Contraventions are acts liable to the penalty of detention up to three months, limitation of liberty up to three months, a fine up to 20,000 Zlotys or a reprimand. The catalog of contraventions comprises acts directed against objects similar to those aimed at by offenses, some of them traditionally regarded as being of criminal character (e.g., petty thefts, petty deals in stolen goods, or petty frauds causing damage to consumers). They are also, as can be seen, liable to penalties similar to those inflicted for offenses (deprivation of liberty included) though being, as a rule, less severe. Hence in Poland the problems pertaining to contraventions are included within the range comprised by the regulation of penal law. Actually, it cannot be said about contraventions in this country—as it is in some other legal systems—that they are acts which exclusively transgress upon the administrative order and belong to the sphere comprised by the legal administrative regulation.

The problems of offenses are regulated: by the Penal Code (later on referred to as P.C.) in the sphere of substantive law, and the Code of Criminal Procedure (C.C.P.) in the sphere of procedural law (both 1969). The problems of contraventions are regulated: by the Code of Contraventions (C.C.) and the Code of Procedure in Cases of Contraventions (C.P.C.) (both 1971). Thus, all these Acts in the Polish legal system are

the sources of penal law, regulating the principles and procedure in bearing responsibility for acts liable to prosecution.

As regards the respective procedures and principles of bearing responsibility, the rules concerning both sphere of prohibited acts are similar.

Some differences, however, also occur, of which two seem to be vital:

(a) the only agency authorized to hear a case of offense is a court of law, whereas the basic agency resolving cases of contraventions is not a court of law but an arbitration court in charge of cases of contravention; the range of judicial control over the judicature of this agency is very narrow and is restricted to the cases only in which the arbitration court has inflicted a penalty of detention or limitation of liberty; in cases where any other decisions have been taken, they can be appealed against to the arbitration court of second instance;

(b) all perpetrators of offenses are subject to court decisions, whereas the decisions of arbitration courts, and by the same responsibility for contraventions upon principles provided for in the Codes of Contraventions and Procedure in Cases of Contraventions does not extend to every perpetrator of these acts; in fact, soldiers, Civic Militia officers and prison officers bear disciplinary responsibility only for any committed contraventions.

II.

Now we'll try to answer the questions as listed by the General Reporter.

(1) Practice of Diversion

A) This question is practically unapplicable to Poland.

B) The concept of "diversion", the scope of its applicability and the forms it assumes, are in Poland closely related to the problems involved in two procedural principles, namely, legalism and opportunism.

In the sphere of penal law regulating liability for offenses, the problem of legalism or opportunism is integrally linked with the existence of the substantive element in the definition of offense according to which an offense is only an act prohibited by a penal Act which simultaneously is recognized to be socially dangerous.

Let us try, therefore, to put some order into the interrelations between the concept of "social danger" and the principles of legalism and opportunism, and then to elucidate which of these principles, and to what extent, is valid in Poland.

The legal concept of "social danger" (formerly known as "social harmfulness") first appeared in this country in 1949. It was introduced into the Code of Criminal Procedure as a basis for discontinuance of proceedings (Art. 54, later 49). The 1969 codification transferred this concept to the Penal Code where it was put expressis verbis into the definition of offense as one of its elements. Art. 1 of the P.C. reads as follows: "Penal liability shall be incurred only by a person who commits a socially dangerous act prohibited under threat of a penalty by a law in force at the time of its commission."

We are going to present below a concise synthesis of many opinions uttered on the subject of social danger in the Polish theory of penal law and court decisions.[2] This seems

necessary, as the range of "social danger" will serve to delineate (among other things) the chances for applying diversion in Poland.

We think that this synthesis can be presented in several points, as follows:

1. The prevailing theory in Poland is that social danger is composed of both subjective and objective elements.

Subjective elements consist of mental processes leading to the commission of the offense and occurring during that act itself. These include, mainly, deliberate intent or its absence, incentives, motives, aims of behavior.

As to objective elements, these are, in the first place, the type of damage incurred or threatened and the way in which the offense has been committed (e.g., by accident, or under provocation, as a reaction to the behavior of the injured person).

Opinions diverge as to whether the commonness of the offense should be treated as an intrinsic feature of social danger. According to some, the commonness of an offense does not affect social danger[3] while others assert that the commonness of deeds of a given type, and even circumstances having a bearing on the perpetrator's previous behavior (e.g., recidivism), do affect the extent of social danger.[4]

2. Outside the concept of social danger are, therefore, the personality of the offender and his behavior before and after committing the offense, being relevant for the inflicting of the penalty only.

3. Not only the absence of social danger but even its insignificance is enough to consider the given act as not constituting an offense (Art. 26 P.C.).

4. However, the absence or insignificance of social danger does not necessarily lead to an acquittal. By virtue of Art. 361 § 2 C.C.P. it causes only discontinuance of the proceedings, i.e. a form of concluding the proceeding which in the public opinion does not exculpate the accused.

5. The discontinuance of the proceeding for that reason does not deprive the court or the procurator (the latter in the event of discontinuance of preparatory proceedings) of their respective rights to remand the case to be heard in disciplinary proceedings, before an arbitration court in the social organization among whose members the accused is listed.

As it results from the above comments on the concept of social danger in Poland, the principle of legalism and opportunism has a different aspect in this country as compared to many others.

Art. 5 § 1 C.C.P. provides that the public prosecutor shall have the duty to institute proceedings in the matter of an offense prosecuted ex officio, the same duty being vested with the Civic Militia. This means that *the principle of legalism is valid in Poland.*

For the sake of precision, however, this principle should be given another definition; namely, *the principle of substantive legalism.* This is, in fact, involved in the substantive definition of offense, a definition a component part of which is social danger. Hence, social danger is a factor introducing a correction into the classical procedural principle of pure legalism.

As long as refraining from penal prosecution is the result of the insignificance of the social danger of the act (Art. 26 P.C.), the procedure is not inconsistent with the principle of substantive legalism.

Thus, the principle of substantive legalism is not infringed upon in cases of:

1. diversion after the institution of the proceedings if it has occurred pursuant to

Art. 26 P.C. and strictly within the bounds of the concept of the insignificance of social danger involved;

2. diversion even before the formal institution of preparatory proceedings (investigation or inquiry), if it has also occurred pursuant to Art. 26 P.C. and has found expression in a formal order issued by the procurator refusing to institute preparatory proceedings (Art. 258 § 1 C.C.P.).

Diversion pursuant to Art. 26 P.C. may be either simple diversion, or diversion with intervention.

(a) Simple diversion pursuant to Art. 26 P.C. occurs in the overwhelming majority of cases when this legal rule is applied. The procurator or the Court (the latter not until the charge sheet has been brought in) discontinue the proceedings against the accused permanently without taking any re-educational or re-socializing steps.

(b) Diversion with intervention pursuant to Art. 26 P.C. occurs rather infrequently. Its legal basis is Art. 26 § 2 P.C. which provides that the liability of the perpetrator before another state organ, institution or social organization, within the limits of their competence, is not excluded.

Is then opportunism altogether non-existent in Poland? The rules of logic preclude the question: in fact, the principle of opportunism, inconsistent with that of legalism, cannot simultaneously be valid in the same procedural system where the principle of (substantive) legalism is valid. Here we mean of course the principle of legal opportunism, i.e. the directive which provides that the proceeding is not instituted or conducted if there is a legal Act stating that this would be irrelevant in view of other assets. And even though this principle is not valid in Poland, there are several exceptions foreseen in Polish legislation, going in the direction of opportunism (Art. 116 P.C., Art. 50 § 1 and Art. 289 C.C.P., Art. 478 § 3 of the Code of Criminal Procedure, 1928, which continues to be valid with respect to juvenile cases).

The situation is different in the case of off-law opportunism which practically often amounts to covert diversion: off-law opportunism means refraining from prosecution as a result of various considerations with respect to the person of the perpetrator, his merits, his behavior after committing the offense (when, for instance, he has compensated the damage of his own will). All these facts are outside the category of the absence of social danger in the deed committed, as pointed out above, and could be relevant for the extent of the inflicted penalty.[5] Such actual opportunism which often stands for covert diversion occurs in practice. The absence of empirical investigations in this field, however, does not permit us to say how frequent this occurrence is.

Admittedly, actual opportunism is facilitated, in spite of any specific definitions as listed in our report, by a certain vagueness of the concept of social danger referred to under Art. 1 and 26 P.C. To find an efficient remedy to this, however, it would be necessary not so much to amend either of the above Articles P.C., but rather the provisions of the Code of Criminal Procedure. This can be achieved, first and foremost, by introducing full judicial control (interlocutory appeal) over every decision issued in preparatory proceedings.

For every kind of opportunism, and actual opportunism in particular, involves two serious threats: first, that the principle of equality before the law can be undermined (when not everybody is treated in the same way), and, secondly, that doubts can arise as to the application of law (some hard-to-explain surprises can occur in the practice of the administration of justice).

We hope that it is self-evident, in the light of what we have written so far, that we do not oppose simple diversion or, still less, diversion with intervention. We are of the opinion, however, that diversion must be consistent with the principle of substantive legalism.

In the law of contraventions the substantive definition of the prohibited act is also valid, the relevant provision being contained under Art. 1 of the Code of Contraventions. It constitutes an equivalent (or, to be more precise, a counterpart) of the definition of offense contained in the above-quoted Art. 1 P.C. It provides namely that only an act involving social danger can be considered as a contravention. Unlike the case in penal law with respect to offenses, however, the law of contraventions does not contain any norms which would refer to the gradation of social danger or connect legal effects of any sort with it. In particular, the law of contraventions does not contain any counterpart of Art. 26 P.C. which would state that a deed whose social danger is insignificant is not a contravention. This is due to the fact that in proceedings in cases about contraventions the principle of opportunism is valid. This has been expressed, better than anywhere else, in Art. 40 C.C. which provides that with respect to the perpetrator of the contravention "it may be enough to resort to measures foreseen in labor regulations, in disciplinary proceedings, in proceedings before social courts, or to other measures of re-education adequate to induce the perpetrator to respect the law and observe the rules of co-existence in the community, without remanding the case for examination by a decision-taking organ". Hence, this regulation contains: first, an authorization of the subject (an authorization stated expressis verbis) entitled to bring in the charge about the contravention (a motion for inflicting a penalty on the perpetrator) to refrain from making such charge —while, secondly, it puts this subject under obligation to react against the fact of committing the contravention, either by resorting to measures of influencing the perpetrator other than those foreseen by the penal law, or by remanding the case to another organ or social organization authorized to have recourse to such measures. This means that a subject authorized to bring in the charge is not allowed to disregard the fact that the contravention has been committed. Special reference should be made to the general clause contained in the discussed regulation, "to resort . . . to other measures of re-education". This means that the measures resorted to with respect to the perpetrator need not necessarily have the character of legal measures. Instead, it may be an informal warning, a reprimand, a didactic talk, etc.

Polish legislation does not contain any provisions which would specify in detail the range of the prosecutor's rights after he has refrained from bringing in the charge. Neither does it determine the rights and duties of the perpetrator of the contravention or of the institution (organization) to which the case has been remanded. This entails the following legal consequences:

—refraining from bringing in the charge cannot be in such case made dependent on the formal advancing of the condition requiring that the perpetrator of the contravention should submit to an action of some sort or another, while on the other hand there is no prohibition of advancing such requirement in an informal way;

—it also means that refraining from bringing in a charge, which does not assume the form of a legally formalized act, need not be a final decision: the accusing organ may, in fact, bring in the charge in the event that, for example, it comes to the conclusion that the recourse made to educational measures has failed to bring about the expected effects;

—the organ (institution) to which the case has been remanded is not bound legally by the fact; neither is it bound in duty to institute proceedings in the matter; and, finally,
—the perpetrator of the contravention is not bound in duty to submit to "educational action" if it is not distinctly foreseen by the law.

There is in Polish law another provision, virtually restricting the prosecutor's right to bring in charges in cases of contravention. Namely, Art. 22 C.P.C. provides that in the event that the contravention in question is simultaneously a failure to fulfill a duty subject to administrative execution, then the state administration organ shall be under obligation to resort, in the first place, to measures foreseen in administrative law.

After bringing in the charge to the decision-taking organ (arbitration court), the latter will also be empowered to refrain from instituting a criminal proceedings. Namely it can, admitting that it will be sufficient to induce the perpetrator to respect the law and observe the rules of co-existence in the community, remand the case to the manager of the works or office where the perpetrator is employed (if his act has infringed upon his duties as an employee) or to a social court or social organization, with a motion for disciplinary measures or some other measures of educational nature to be applied (Art. 41 C.C.).

The decision-taking organ may remand the case at any chosen stage of the proceedings. Hence, this can be connected either with an order about the refusal to institute proceedings before an arbitration court, or—when the proceedings have been instituted —with an order about the discontinuation of the proceedings. The proceedings cannot be reopened, which is the principal legal consequence of such order. It is an order, therefore, which cannot be accompanied by legally binding conditions to be met by the perpetrator of the contravention. Similarly, as when a case is remanded by the prosecutor desisting from bringing in a charge, also in this situation the organ (institution, organization) to which the case has been remanded is not bound legally by a motion asking that disciplinary measures or educational measures should be resorted to.

The arbitration court may refuse to institute proceedings or to discontinue them also when some measures of an educational nature have already been resorted to with respect to the perpetrator of the contravention (Art. 25 C.P.C.).

The discontinuance of the proceedings pursuant to the above-discussed Art. 41 C.C. and 25 C.P.C. can occur either while the proceedings are pending, i.e. before the guilt of the perpetrator is formally stated by the arbitration court, or after it has been established as a result of the entirely concluded proceedings.

C) Covert diversion occurs in practice, as it does in any other country, where the principle of legalism is in force. The range of this phenomenon has not been sufficiently investigated so far.

D) Forms of diversion with intervention admitted in Poland are discussed below.

I. In Cases of Offenses

1. *Refusal to institute preparatory proceedings, or to discontinue preparatory or judicial proceedings by virtue of the above-presented Art. 26 P.C.*

Here we would like to explain briefly that a refusal to institute the proceedings or its

discontinuance on these grounds may take place *in any case about any offense* irrespective of the threatening extent of the penalty.[6]

Intervention, as we have said before, seldom occurs, considering that whether remanding the case elsewhere will be feasible depends on whether the accused is employed at an institution where it may be expected that he would be made answerable—or, alternately, on whether the accused is member of a social organization in which the necessary disciplinary proceedings would be carried out or in which an appropriate educational measure has the chance to be used.

On 13 March 1965 the Polish Diet (Seym) passed the Social Courts Act (Code of Laws No. 13, entry 92) which has sanctioned the previously existing—on an experimental basis—social courts. Two types were established: Commissions for Reconciliation functioning in towns, settlements and villages, and social courts sensu stricto in plants and offices.

Art. 8 § 1 of that Act (the functioning of these courts will be discussed below, under F) provides that the court or the procurator may address themselves to the social court asking to examine a case in which criminal proceedings have been discontinued but whose examination by a social court seems relevant. The above-quoted provision is closely linked with Art. 26 § 2 of the Penal Code. In 1965 it was assumed that social courts would be, above all, organs to which cases would be remanded after they have been discontinued pursuant to Art. 26 P.C. As it turned out, however, the situation in real life proved somewhat different. As in fact the activity of social courts at plants and offices was rather insignificant, cases in which proceedings had been discontinued pursuant to Art. 26 P.C. were remanded very infrequently, and at present not at all.[7] More frequent were cases remanded to the Reconciliation Commissions (an alternative form of social court, sensu largo, see above).[8]

2. *Conditional discontinuation of proceedings pursuant to Art. 27 of the Penal Code.*

This is a relatively recent institution, introduced for the first time to Polish penal law in the 1969 Penal Code, and is the only instance of conditional diversion with intervention in our penal law. It should be stressed, however, that the program in which the perpetrator of the offense participates (acting upon the person of the perpetrator during the probation period) is effected within the sphere of penal-law influence, by measures provided for by this very law.

The range of application of diversion with intervention has been determined by the Art. 27 P.C. The conditions are as follows: (1) the offense must not be threatened by a penalty exceeding 3 years deprivation of liberty, (2) the degree of social impact of the act committed is not significant, (3) the perpetrator must not have been previously penalized for an offense, and (4) the perpetrator's personality traits, his life conditions and personal character justify a favorable forecast. Further, the circumstances of the commission of the act must raise no doubts. The latter conditions are cited by the law because (among other reasons) conditional discontinuance of the proceedings may take place either while preparatory proceedings are pending (in which case the right to discontinue them is vested with the procurator) or in proceedings before the court. Hence it may occur (and so as a rule it does in practice) before the guilt of the accused is formally stated. It is, however, also possible to have the proceedings conditionally discontinued in the judgment, i.e. after the guilt of the accused has been formally stated.

Conditional discontinuance of the proceedings occurs for a period of probation ranging

from one to two years. The organ which orders the discontinuance of the proceedings (the court or the procurator) may put the perpetrator under the obligation (1) to repair the whole or some parts of the damage incurred by the offense, (2) to make an apology to the injured person, and (3) to carry out certain services or works for the benefit of the community. If the offense has caused damage in property and was not repaired, the obligation to make compensation ought to be imposed in every case.

Whether this institution is resorted to or not can be made dependent on a guaranty by a social organization of which the perpetrator is a member; by a collective body where he is employed, studies or makes his service; or by a trustworthy person. The guaranty-giver takes upon himself the obligation to do his best in order to ensure that the perpetrator during the probation period will respect and observe the legal order and, more particularly, will not commit an offense.

The probation period is considered to be successful if the perpetrator observes the legal order and fulfills his obligations if these have been imposed upon him. A blatant violation of the legal order or, above all, the committing of an offense or failure to fulfill obligations imposes upon the organ which has ordered conditional discontinuance the duty to reopen penal proceedings and to go on conducting it. Such reopening cannot, however, be made later than 3 months after the end of the probation period.

The Polish legislator, on introducing the institution of a conditional discontinuance of penal proceedings and making it assume the character of a probational measure, did not make its application dependent on the perpetrator's consent.

The institution of a conditional discontinuance of penal proceedings, under the existing form, has been the target of much criticism.

The principal objection is that the right to apply this institution is vested not with the court only but also with the procurator who by the same has been granted the right to issue legally binding decisions on the guilt of the suspect[9] (as he has to state that the fact itself of the commission of the offense as well as its circumstances "do not raise doubts"). Another objection against this institution as presented in the Code is that the perpetrator's consent is not required. Next, it is objected that the institution in question is applicable to a too narrow range of cases, which is most evident in the condition that the perpetrator must not have been penalized for any offense before.[10] In other words, a perpetrator who has been previously sentenced, for any kind of offense, to any penalty cannot benefit by this institution.

II. In Cases of Contraventions

Polish law provides for the following cases when diversion may be applied:

1. *diversion with intervention*—mainly applied by the prosecutor (which is strictly linked with the principle of opportunism, enforced in this sphere), as well as by the decision-taking organ which can do it at any stage of the proceedings; it assumes, however, a form of unconditional diversion only;
2. *diversion with covert intervention*—which can be informally (through not being prohibited) applied by the prosecutor.

On the other hand, there is no provision for *simple diversion* which results from the principle of limited opportunism imposing upon the prosecutor or the decision-taking organ the obligation to react, in one way or another, to the fact of the commission of the contravention.

E) Diversion with mediation

The oldest form of diversion in Poland is undoubtedly diversion with mediation, which consists in a discontinuance of proceedings brought on private accusation, as a result of agreement or reconciliation. This sort of discontinuance in the overwhelming majority of cases occurs in conciliatory proceedings preceding the court trial.

It was officially introduced to Polish court proceedings in 1960,[11] even before the practice had evolved of the judge inducing the litigant parties (the accused and the private prosecutor) to reach a reconciliation.[12]

The 1969 Code of Criminal Procedure (now valid) has kept in force, with a few amendments only, these conciliatory proceedings.

They can assume the form of either (a) conciliatory proceedings before a social court, or (b) a conciliatory session held in (public) court.

Ad (a) Pursuant to Art. 436 § 2 of the C.C.P., the president of the court, rather than designating a conciliatory session to precede the main trial, may, if he thinks it advisable, refer the case to a social court to conduct the conciliatory proceedings. The idea at the roots of referring the proceedings in question to a social court was to make the procedure less stiff and more informal, which would facilitate mediation. Mediation could be equally facilitated by the unprofessional character of social judges, considering that between the litigant parties and the social-court teams often a better understanding can be reached than between the professional judges and the parties.

However, there are some important arguments against referring cases on private accusation to social courts for reconciliation.

The injured person files his complaint, incurring serious expense, not to a social court but to a public one; the case is referred to a social court for reconciliation without obtaining the injured person's consent; in proceedings before a social court the appearance of counsel is not permitted, hence both the injured person and the accused are deprived of professional aid, in spite of the fact that, if they do reach a reconciliation, they will have nevertheless to pay the counsel's fee in the event that they have given their power of attorney to counsel before the case was referred to the social court; and, finally, social courts in more intricate cases may be unable to cope with legal complications involved in the reconciliation.[13]

Nevertheless, so far there is nothing to indicate that in spite of all these objections social courts would have to stop conducting penal cases on private accusation. It must be realized that such referring of the case to a social court to a great extent unburdens public courts, the more so as cases on private accusation, difficult to settle because of the frequently hostile attitude of the parties, are certainly not among the "favorites" of the professional judges.

Conciliatory proceedings before a social court can be concluded in two ways only: either the parties reach a reconciliation or they do not.

Reconciliation before a social court may assume the form of a simple reconciliation (agreement reached between the private prosecutor and the accused in which both parties state that they take upon themselves the obligation not to advance claims reciprocally about the offense and agree to have the proceedings on private accusation discontinued accordingly) or of an agreement (reconciliation in which some or all of the claims connected with the accusation are recognized).[14]

After the closing of conciliatory proceedings (reconciliation or agreement, or with a negative result) before a social court, the files of the case are returned to the Regional

Court, and, according to the outcome of the proceedings, either it shall be discontinued at the session of the Regional Court, or the President of that latter court shall designate the time for the main trial.

It has to be stressed that an agreement concluded before a social court is as valid as one concluded before a public (Regional) court. In fact, the Regional Court may grant it an execution clause making it by the same an execution title (Art. 200 § 3 of the Code of Penal Execution, and Art. 777 § 1 of the Code of Civil Procedure).[15]

Ad (b) Conciliatory proceedings before a public (Regional) court (the Regional Court being of competent jurisdiction to examine cases on private accusation in the first instance) assume the form of special conciliatory proceedings, which must always precede (unless the case is referred to a social court for reconciliation) the designating of the main trial.

A conciliatory session may be conducted, instead of by a professional judge, by a lay assessor, i.e. an unprofessional one. This depends on the decision of the President of the Court (Art. 437 § 1 of the C.C.P.).

Mediation carried out by a lay assessor may also give rise to serious objections. He is of course much less experienced in alleviating disputes than a judge, and has no adequate knowledge in legal matters to be able to construe an agreement properly, to settle sometimes highly complex problems related to civil and/or administrative law.

In the course of the conciliatory session to which both parties are summoned, evidentiary proceedings are not conducted.

Of vital importance in this mediation is the attitude adopted by the judge or the lay assessor conducting the trial. It is important to refrain from "enforcing" a reconciliation on the parties: in fact, such a reconciliation under mental pressure would hardly be likely to survive.

The fact remains that about 50 per cent of cases on private accusation are concluded owing to reconciliations and agreements.[16] Thus, diversion with intervention in proceedings on private accusation plays a most significant role. It cannot be asserted that the only objective pursued when diversion with intervation is applied is to protect courts against being overburdened with work, owing to the fear that a proceeding which does not end with reconciliation may be very strenuous and nerve-racking not only for the parties but for the court as well. Mediation is sought mainly because it is thought that reconciliation will be of greater prophylactic significance than an intrinsic court judgment.

This latter motive has found confirmation in the fact that most of the attempts made at reconciliation prove successful. Thus, research carried out a few years ago has shown that only in a small number of cases are litigations which have ended in an agreement resumed.[17]

F) Social courts

In Polish legislation, social courts may enter the diversion procedure in three situations. Firstly, when a public court has referred a case on private accusation in order to conduct conciliatory proceedings (as mentioned in our answer to the preceding question). Secondly, when the procedural agency has established the insignificance of the social danger of the act bearing the character of an offense (Art. 25 § 2 P.C.), and has referred the case to a social court. And, thirdly, when an organ authorized to conduct the proceedings in a case of contravention has referred the case to a social court recognizing

that proceedings outside that court would fulfill an "educational" role (Art. 40 and 41 C.C.). In the former case we have to do with diversion with mediation, in the latter two with diversion with intervention.

Social courts in Polish legislation are a specific institution differing in character rather vitally from that of such courts in the other European socialist states, with the exception of Yugoslavia. Their specificity consists in the fact that the citizen is not under obligation to participate in the proceedings before such court (there is no obligatory defendancy), whereas the execution of the decision issued by such court is not secured by a sanction of state-governed coercion. It is for that reason, too, that the decisions of the social courts are not subject to interlocutory appeal. For, in fact, the main assignment of these courts is preventive and educational action (Art. 3 § 2 of the Social Courts Act) and settling conflicts and controversies—the tendency to reconcile the parties (Art. 12), which of necessity must assume, on the one hand, the gratuitous character of the parties' participation in the proceedings, while on the other the freedom with which the social court has to judge whether the steps undertaken by it may prove effective.

The sphere of activity of social courts (it may be called, in quotation marks, the sphere of material competence) is very vast. Art. 3 § 1 of the Act provides that the social courts shall hear cases about breaking the rules of co-existence in the community or of the social order, such as, for instance, neglect of civic duties or of duties with respect to one's family and employers, an improper attitude towards employees, disturbing the peace and order at the place of one's employment or domicile, transgressing upon social property or the principles of its protection, transgressing upon other citizens' property, conflicts between neighbors in towns and villages.

Thus, the acts in question may infringe upon the norms of many branches of law (penal, civil, family, labor, and/or administrative law) or be simply reprehensible in the moral sense.

Irrespective of the character of the case, a social court may resort to educational measures and, wherever possible, to perform the part of mediator.

Cases about acts liable to prosecution (offenses and contraventions) can be examined by a social court—as by any other—upon its own initiative, upon a citizens' motion or upon a motion of the agency conducting the criminal proceedings. It cannot, however, examine a case in which criminal proceedings are pending (with the exceptions of cases on private accusation, in which the social court has to conduct conciliatory proceedings, the case having been referred to it by the public court). Yet, when a case about a prohibited act has been referred to a social court, the above-mentioned general rule will be applicable, namely, that it will not be under obligation to examine such case. In fact, a social court on its own "decides whether it will examine the case, and to what extent, taking into consideration the real chances such examination of the case may have to exert an educational and preventive action" (Art. 3 § 2 of the Act).

In the event that a case about a prohibited act has been accepted, the general rules of proceeding before a social court are also valid. Thus, the participation of the perpetrator of the prohibited act in the proceedings is gratuitous, as is also his subordination to the decision of the social court. By the same token, in the event that a social court has been included in the process of intervention, the outcome of that intervention will have no effect whatever on the further course of the case within the criminal proceedings, since this is diversion with intervention of unconditional character.

G) In Polish legislation there is no provision for rehabilitation through labor without a court order. Nevertheless, the problem is seriously discussed.

H) The controls prescribed by law to guide discretion in the making of diversion decisions are practised in the following ways:

—in the Procurator's office, in the first place through orders and directives issued by the Procurator General of the Polish People's Republic and other superiors of the procurators, according to the principle of hierarchical superiority;

—with respect to courts, mainly through directives issued by the administration of justice and judicial practice as well as the Supreme Court's decisions, which upon publication constitute an important directive to courts.

I) Procedure of this kind is applicable in penal cases only when there is conditional diversion with intervention. The only instance of such diversion in Polish law is conditional discontinuation of criminal procedure (see above item D). 2).

J) Diversion has been introduced with more positive goals in mind; however, the need to limit the caseload of the courts has significantly contributed to the development of diversion.

Diversion was introduced in Poland for many reasons. These may be listed in the following order:

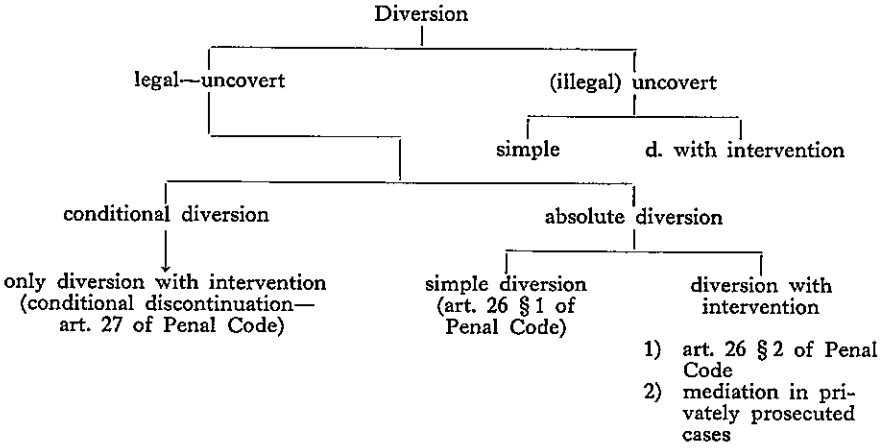
1. In many instances reconciliation between the accused and the injured person much more effectively liquidates the conflict than a court judgment; and it is just for this reason that diversion with mediation is admitted in cases on private accusation.
2. When the principle of legalism (also known as the legality principle) with substantive element was introduced into Polish law, its object was to maintain the proportion between the seriousness of the act committed by the perpetrator and the consequences involved in the criminal process. For the same reason the principle of opportunity is in force in cases about contraventions, thus allowing for applying diversion there.
3. Conditional diversion with intervention (conditional discontinuation) was introduced mainly in order to induce the perpetrator of the offense to self-control, to create new forms of educational action.

All these factors have become intensified under the influence of the doctrine, launched for the last two decades, of diversification of state's reaction to criminality. According to this doctrine, perpetrators of major offenses should be treated with great severity whereas penal reaction with respect to perpetrators of minor (prohibited) acts should be very restricted. The stress laid on the latter part of the doctrine had practical consequences in legislations dating since the early sixties, and has found a more pronounced expression in the Codes issued in 1969 and 1971.

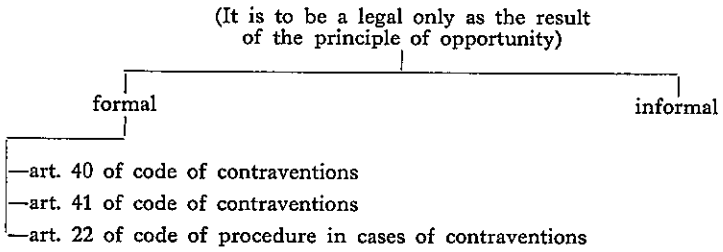
In the early sixties, in fact, a vital part was played by the doctrine proclaiming the necessity of a gradual taking over of the state's function by social organizations and workers' collectives. It was extended to comprise the whole legal order. It is evident that the concept of diversion follows the same line as this doctrine in the sphere of penal law.

Below, we present a diagram of diversion in the Polish penal law.

A. Diversion of penal cases.



B. Diversion of contraventions.



(2) Evaluation of Diversion

(a) Generally speaking, in Poland diversion is evaluated favorably, yet sometimes it is subject to criticism.

(b) Kinds of criticism.

—Diversion is always founded on a great deal of freedom of evaluation, which inevitably has to lead up to cases of excessive gratuitousness, or even voluntarism. This entails further consequences, particularly in the sphere of the feeling of equality among the citizens with respect to the law, in this case of *penal* law.

—The policy of state organs as far as the application of diversion is concerned, is not always stable and is subject to periodical oscillations, sometimes even considerable ones. As a result, the statistical picture of criminality may sometimes diverge too much from reality. As, however, the statistical data of criminality are always the main source for the evaluation of the extent, structure and dynamics of criminality, this may lead to erroneous forecasts, and as a result to taking wrong strategical decisions in the domain of prevention of criminality and in the measures undertaken to combat it. It may also lead to confusion of public opinion.

—Decisions on diversion are usually taken by those in charge of the prosecution (Civic Militia and the procurator), i.e. by organs functioning within structures of official

subordination. These decisions are to a small degree only controlled by the court.

—The application of diversion may lead up to a phenomenon known as "the paradox of affliction" which consists in the fact that the ultimate affliction incurred by the perpetrator as a result of his "benefiting" from diversion exceeds that which he would have incurred in the event that a penal measure should be ordered for him.

—Diversion with mediation in proceedings on private accusation, if its application is too broad, as a result leads to restriction on the right of the injured person to obtain a judgment in a case in which he had intended to claim for protection of his personal property before a criminal court.

(c) In Poland the suggestions towards modification of legal control over diversion have concentrated mainly on two of its variations in criminal cases: applied either pursuant to Art. 26 P.C. (simple diversion) or to Art. 27 P.C. (conditional discontinuation).

Various solutions have been suggested in order to reduce the gratuitous character of simple diversion. Thus it was claimed that at certain time intervals the Supreme Court should establish the maximum amount of damage which would allow for discontinuation of proceedings in view of the insignificance of the social danger of the act.[18] A variation of this suggestion was the idea of putting the Supreme Court under obligation to establish, at certain time intervals, strictly determined criteria of the social danger.

In our opinion, however, the main point at issue is judicial control over simple diversion by the procurator. At present, a procurator's order about discontinuation of preparatory proceedings which constitutes simple diversion may be subject to interlocutory appeal to a procurator of higher instance only, never to the court. Hence, the court ought to be granted the right to examine interlocutory appeals against such orders. The recently made suggestions have followed in this line, and we, too, give them our support.

Conditional discontinuation (Art. 27 P.C.) by the procurator should be equally subject to some judicial control. This means that any interlocutory appeal against such order should be examined by a court.

(d) The problem does not refer to Poland.

(e) The most recent (1981) suggestions for amendments to be introduced into the Penal Code foresaw a certain extension of the admissibility of applying conditional diversion with intervention (conditional discontinuation).

(f) The postulate for the development of every form of diversion, in order to make it possible to reduce penal reaction or even its total elimination, is certainly attractive and will long remain so. Nevertheless, we must bear in mind, however, that certain limits in refraining from the penal reaction should be maintained. These limits are designated, above all, by the feeling of security in the community and equality of the citizens before the law. These can suffer if, for the sake of the idea of diversion, the state neglects too much its duty to prosecute offenses by refraining from it too frequently, having in view a narrowly conceived pragmatic goal.

Notes

1. In our report we will restrict ourselves to discuss two basic divisions of Polish penal law which can be jointly defined as "Universal Penal Law". To make the presented material more

lucid we will omit the specialized domains of penal law, such as martial penal law, fiscal penal law, and penal law in juvenile cases.

Neither will we discuss penal-law norms valid for the time of martial law.

2. In greater detail, see T. Kaczmarek: Materialna istota przestępstwa i jego ustawowe znamiona (The substantive core of offense and its statutory traits), Wrocław 1969 Acta Uniwersystetu Wrocławskiego No. 100, pp. 24 f.; W. Wolter: Nauka o przestępstwie (The theory of offenses), Warszawa 1973, pp. 254 f.; I. Andrejew, W. Świda, W. Wolter: Kodeks karny z komentarzem (The Penal Code with a commentary), Warszawa 1973, pp. 22–26; J. Bafia, K. Mioduski, M. Siewierski: Kodeks karny. Komentarz (The Penal Code. A Commentary), Warszawa 1977, pp. 110–114.
3. J. Bafia, K. Mioduski, M. Siewierski: op. cit., p. 113.
4. Andrejew, W. Świda, W. Wolter: op. cit., p. 25.
5. Tylman: Zasada legalizmu w procesie karnym (The principle of legalism in criminal process), Warszawa 1965, pp. 175–203; A. Murzynowski: Istota i zasady procesu karnego (The essence and principles of criminal process), Warszawa 1973, p. 181.
6. Polish judicature has not accepted the suggestion that the application of Art. 26 of the Penal Code should be limited only to cases about offenses threatened by penalties of deprivation of liberty up to three years, set forth in 1970 during a conference devoted to the 1969 Codes (in greater detail, see W. Wolter, K. Buchała, K. Mioduski, F. Wróblewski: Materialne pojęcie przestępstwa i jego konsekwencje w prawie karnym (The substantive concept of offense and its consequences in penal law) in: Problemy nowego prawa karnego (Problems of the new penal law), Ossolineum 1973, pp. 35–37).
7. By 1974 already in the Voivodship of Wrocław the number of cases on private accusation referred for reconciliation to social courts in plants or offices was very scanty (ten only!). M. Lipczyńska: Oskarżenie prywatne (Private accusation), Warszawa 1977, p. 90. After August 1980 this number practically amounts to nought in all Poland (according to information obtained by the authors from practicians).
8. M. Lipczyńska: po. cit., p. 90.
9. Comp., e.g.: A. Marek: Warunkowe umorzenie postępowania karnego (On the conditional discontinuance of criminal proceedings), Warszawa 1973, pp. 156 f.; A. Murzynowski, o.c., p. 245–6; W. Michalski: Prawa obywatela a wymiar sprawiedliwości w sprawach karnych (Civic rights and the administration of justice in criminal cases), "Państwo i Prawo" 1979 No. 11, pp. 57–8; M. Cieślak, Z. Deda: The Code of Criminal Procedure in the light of its validity during the past decade (Kodeks postępowania karnego w świetle dziesięciu lat obowiązywania), "Państwo i Prawo" 1979, p. 57; D. Kunicka-Michalska: Warunkowe umarzanie — sąd czy prokurator (Conditional discontinuance: the court or the procurator?), "Gazeta Prawnicza" 1980, No. 24.
10. Comp. e.g., P. Kruszyński: Zakres normatywnej dopuszczalności orzekania warunkowego umorzenia postępowania (The scope of normative admissibility of conditional discontinuance of proceedings), "Problemy Praworządności" 1973, No. 11, pp. 44–5; S. Pawela: Dopuszczalność stosowania artykułu 26 względem osób uprzednio karanych (The admissibility of the application of Article 26 to recidivists), "Nowe Prawo" 1973, No. 1, p. 44; J. Jasiński: System środków karnych (The system of penal measures), "Państwo i Prawo" 1982, No. 8, p. 168.
11. For more details, see S. Waltoś: Postępowania szczególne w procesie karnym (Special proceedings in criminal process), Warszawa 1973, p. 227, M. Lipczyńska: op. cit., pp. 86 f.
12. Z. Ziembiński: Ugody w sprawach z oskarżenia prywatnego (Agreements in cases on private accusation), "Nowe Prawo" Nos. 8–9/1952, p. 50.
13. B. Trawicka: Glosa do postępowania Sądu Najwyższego z dnia 30 XI 1972 r. /VI KZP 47/72/ (A gloss to the decision taken by the Supreme Court on 30th November 1972 /VI KZP 47/72/, "Państwo i Prawo" No. 1/1974, p. 168.

14. S. Waltoś: op. cit., pp. 206 and 228.
15. Decision issued by the Supreme Court in a seven-judges panel on 17th December 1970 /VI KZP 63/70/ OSNKW entry 18/71.
16. M. Lipczyńska: op. cit., p. 101.
17. Empirical investigations carried out at the courts in Warsaw, Skarżysko, Cracow and Jarosław, which comprised cases on private accusation concluded by reconciliations and agreements in the years 1970 and 1971, have shown that of the 345 cases concluded with an agreement, the conflict between the parties was renewed only in 19 cases, which amounts to 5.5 per cent of the cases only./P. Blajer: Pcjednanie i ugoda w polskim procesie karnym (Reconciliation and agreement in Polish criminal process), 1977, unpublished doctoral thesis which served as basis for that author's Doctor's Degree awarded at Jagellonian University in Cracow.)
18. Z. Adaszewski: Kółko w paragrafie, ozyli art. 49 k.p.k. (A vicious circle in Article 49 of the Code of Criminal Procedure), "Nowe Prawo" 1957 No. 12, pp. 110–12.