



Third Study Commission
Criminal law and procedure

Meeting in Montevideo, 20 - 24 November 2005

Conclusions

CRIMINAL SENTENCING

The focus of the Third Study Commission's work was criminal sentencing. How does a judge decide upon the appropriate sentence in a criminal case? What steps if any are taken to see that different courts pass similar sentences in similar cases? May a sentence which is too lenient be increased by an appeal court? What guidance does a judge have? Are minimum or mandatory sentences becoming more common and how do they impact upon a judge's independence? Does admitting his guilt entitle a defendant to a more lenient sentence?

We also considered five typical criminal cases and discussed what each country would see as the appropriate sentence. Each case illustrated some of the problems we all face as judges. The cases were

1. The possession of a loaded handgun
2. Rape
3. Domestic burglary committed to finance a drug habit
4. Causing death by dangerous driving where the driver had been drinking alcohol
5. Theft in breach of trust.

Written reports were submitted by 27 countries, namely Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Cote d'Ivoire, Croatia, Denmark, England and Wales, Former Yugoslavian Republic of Macedonia, Germany, Greece, Italy, Japan, Liechtenstein, Lithuania, Luxembourg, The Netherlands, Norway, Portugal, Scotland, Slovenia, Sweden, Taiwan, Ukraine and the United States of America.

Delegates from 26 countries attended our meetings and contributed to a lively discussion in our two sessions. The countries represented were Argentina, Australia, Brazil, Cameroon, Canada, Cote d'Ivoire, Croatia, Denmark, England and Wales, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, The Netherlands, Portugal, Scotland, South Africa, Spain, Sweden, and the USA.

It was to be expected that the suggested sentences in the specimen cases differed quite markedly. For example, a bank manager who stole funds might expect six months suspended in Italy, about three years in Scotland and twenty years in the Cote d'Ivoire. In part, we agreed that this was because different social conditions mean that some serious crimes are more common and need to attract heavier, deterrent sentences. But in part it was clear that some countries regard long sentences as counter-productive; in effect making bad people worse, and that shorter sentences, especially those with a training or re-education element, better serve the public.

As a principle of justice, all criminal systems try to ensure that similar cases are dealt with broadly in the same way. Cases decided by higher or appeal courts guide lower courts and almost all judges now receive information on a regular basis about the appropriate level of sentences either in written form or via the internet. It appears that almost all countries now have a system which permits a prosecution appeal against a sentence perceived as unduly lenient.

It was recognized that the sentencing judge has to balance many factors in deciding the appropriate sentence. It is a process which the Australian delegate called "intuitive synthesis". The most important factors, but by no means the only factors, are the circumstances of the crime and the previous conduct of the defendant. An early admission of guilt and an expression of remorse, may often be a mitigating factor, but the Third Study Commission expressed its concerns that statutory rules or the exercise of a judicial discretion to reward someone who admits his guilt by imposing a more lenient sentence may lead to serious injustice, especially when a defendant is vulnerable or not properly represented by a lawyer. There may be considerable savings of time and money if a defendant admits his guilt but justice is more important than economics.

The Third Study Commission also expressed its anxiety about the introduction and the spread of mandatory or mandatory minimum sentences laid down by statute. Such laws remove judicial discretion and threaten independence. There appears to be a widespread dissatisfaction of the sentences passed by judges, and this dissatisfaction is fuelled by critical and even hostile media. Legislators respond by seeking to fetter judicial discretion by mandatory or mandatory minimum sentences. Members of the Third Study Commission were able to give striking examples of how such legislation can force a judge to pass unnecessarily harsh and inappropriate sentences, and lead to improper bargains between prosecution and defence to charge a less serious offence. It was the firm view of the Commission that where legislation sets out a minimum sentence, the judge should always retain the discretion to impose a more lenient sentence. Judges should be trusted to do the work for which they are trained and qualified. Where there is a system which allows for the review of a sentence perceived as too lenient, there is no real need for mandatory sentences.

Some countries, for example, England and Wales, Australia, and Scotland have set up or are in the process of setting up independent bodies, whose members are not all judges or lawyers, to make recommendations about criminal sentencing, to inform the public debate about sentences, in an attempt to increase public confidence in criminal justice. There was very little support for such independent bodies within the Third Study Commission, but some members felt that it was important for judges to express and explain their sentences in a way which was clear and accessible. By that route, it was felt that opportunity for public criticism of sentences would be reduced.

The subject for our discussion in 2006 will be: the way criminal systems deal with those who are mentally ill or mentally handicapped.

Montevideo, November 23rd, 2005