



Third Study Commission
Criminal law and procedure

Meeting in Tunis (Tunisia), 10-14 September 1995

Conclusions

IMPRISONMENT

The participants in the Third Commission represent Australia, Austria, Belgium, Brazil, Canada, Chile, Denmark, Eire, Finland, France, Germany, Greece, Iceland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Morocco, the Netherlands, Norway, Portugal, the Republic of Taiwan, Romania, Senegal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tunisia and the United Kingdom (England, Scotland and Wales).

This final report is based on the national reports of the judges representing Australia, Belgium, Brazil, Canada, Denmark, Eire, England, Finland, France, Germany, Iceland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Morocco, The Netherlands, Norway, Portugal, Romania, Scotland, Slovakia, Slovenia, Sweden, Switzerland, Tunisia, United States of America.

1) Restrictions on the power of the judge to impose a sentence.

Imprisonment, a punishment which deprives an offender of his liberty, can only be imposed by the judges in accordance with the restrictions of the law.

The imposition of a sentence of imprisonment is often subject to certain restrictions, such as the duty of the judge to first consider whether there are less severe alternative penalties which are more appropriate.

Although judges have the discretion to impose a sentence of imprisonment, this power is circumscribed by the necessary guarantees for a fair trial.

In practice, it can be observed that in a number of countries short sentences of imprisonment are not enforced, which constitutes a restriction on the ability of the judge to function effectively.

Some countries already have legislation which allows almost automatic replacement of the short prison sentence by non-custodial alternatives (fine, community service).

This solution, which the members of the Commission would wish to be universally applied, could remedy the feeling of demoralization felt by the judges if their decisions are without effect.

2) Is execution of a sentence of imprisonment suspended in the event of an appeal?

In general the execution of a sentence of imprisonment is suspended in the event of an appeal.

However, if the defendant finds himself in pre-trial custody this measure is prolonged in most cases.

In Scotland execution of the sentence may be suspended in the event of an appeal, but the decision is up to the discretion of the judge.

The execution of the sentence is not suspended in England, unless the Appeal court guarantees bail. Bail is normally only granted where the appeal seems likely to succeed.

3) The role of the judge in relation to the execution of a sentence of imprisonment.

In general the judge has no role to play in the execution of a prison sentence, by which is meant the actual incarceration of the condemned person.

On the other hand the modalities of serving a sentence and its implementation are often carried out by decision and under supervision of one or more judges specifically appointed to perform this task, as for instance the "*juge d'application des peines*" in France.

The Commission considers that in any case the supervision of the implementation of the prison sentence, in view of human rights, should be given to a body either judicial or administrative; in the opinion of the various countries such a body ought to be independent of the prison authorities.

4) Release before the whole sentence has been served.

Usually release on parole is the manner in which the prisoner is released before the whole of his sentence has been served.

In nearly all countries such a release is subject to specific conditions and is granted after between one to two thirds of the sentence has been served, except for some Australian states.

This form of release can be accompanied by alternative measures (probation, supervision by the parole-board, semi-release).

The widening gap between the sentence as passed by the judge and the actual time spent in detention causes negative effects when applied as a matter of course.

- public opinion considers justice as ineffective

- the prisoners consider an early release as a right whereas it should be an incentive for rehabilitation

Most of the members of the Commission wish to express their regret about this situation which devalues the work the judge seeks to accomplish in good conscience and in accordance with the oath of office he has taken.

5) Is a greater uniformity of sentences between states desirable?

The Commission considers that a harmonization of decisions for the same type of crimes would be desirable, but that it is difficult to establish a model-type of international penal code as has been proposed by the Brazilian reporter.