COUNCIL OF EUROPE
CONSEIL DE L' EUROPE

COMMITTEE OF MINISTERS

Strasbourg, 8 May 1984

restricted
addendum I to
CM(84)107
<CDPC(84)8>

FINAL ACTIVITY REPORT

The Criminal Record and Rehabilitation
of Convicted Persons

prepared by:

the Select Committee on the Criminal Record
and Rehabilitation of Convicted Persons (PC-R-CJ)

adopted by:

the European Committee on Crime Problems (CDPC)
at its XXXIIIrd plenary session
(2-6 April 1984)

Activity 23.4.1

of the Annual Programme of
Intergovernmental Activities (1984)

Summary

Draft recommendation and explanatory report on reforms desirable in legislation and practice concerning the criminal record and rehabilitation of convicted persons.

84.651
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I. TERMS OF REFERENCE OF THE SELECT COMMITTEE

1. Background

At its XXVIIth plenary session (May 1978) the European Committee on Crime Problems decided it was desirable to set up a select committee on the criminal record and rehabilitation of convicted persons (PC-R-CJ). Because the Select Committee was to take account of the conclusions of the meeting organised in 1979 by the International Penal and Penitentiary Foundation on the same subject, it was decided that it should not start work until 1980. This conclusion was later approved by the Committee of Ministers (CDPC/37/31078).

2. Purpose of the study

According to its terms of reference, the Select Committee on the criminal record and rehabilitation of convicted persons should:

- make a summary of existing legal provisions on criminal records in all Council of Europe member countries;
- consider the implications of legislation on amnesty, rehabilitation, pardon etc for extracts from criminal records issued to individuals;
- suggest the reforms required in this field in order to further the rehabilitation of the convicted person;
- examine the problems arising from the computerisation of records;
- consider the expediency of devising a standardised European criminal record.

The Select Committee should take account of the proceedings and conclusions of the meeting organised in 1979 by the International Penal and Penitentiary Foundation on the same subject. It should produce a report and a draft resolution and, possibly, a model for a standardised European criminal record.

3. CDPC's work on the criminal record and the rehabilitation of convicted persons

The study on this subject was included in the 1980 Work Programme under No. 22.12.7 and in the 1981, 1982, 1983 and 1984 Work Programmes under No. 23.4.1.

The Select Committee was originally presided over by Mrs M Mavrommati (Greece), who withdrew from the CDPC in October 1981. She was replaced as Chairman by Mr A Laguya (Spain). In his absence Mr Røstad presided over the fifth meeting of the Select Committee. The Select Committee consisted of the representatives of Austria, Belgium, Cyprus, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, Spain, Switzerland, Turkey and two consultants (Mr H Røstad of Norway and

Mr C M Glennie of the United Kingdom). It is also attended by observers from Canada, Interpol and the International Association of Penal Law and the International Penal and Penitentiary Foundation.

The Select Committee met six times. It has prepared a draft report and recommendation. These drafts were examined by the XXXIInd plenary session of the CDPC (April 1983). Noting the wish of some delegations for broad consultation at national level before the final adoption of these drafts the CDPC decided to examine them again at its XXXIIIrd plenary session (1984). In the meanwhile, the CDPC Bureau, at its meeting in November 1983, examined the observations submitted by the member States on the draft recommendation and prepared a revised version of this draft.

The draft recommendation on the criminal record and rehabilitation of convicted persons was adopted by the CDPC at its XXXIIIrd plenary session (2-6 April 1984). The CDPC also approved the publication of the explanatory report.

II. LIST OF POINTS SUBMITTED TO THE COMMITTEE OF MINISTERS

The Committee of Ministers is requested to:

- examine and, if appropriate, adopt the draft recommendation on the criminal record and rehabilitation of convicted persons;

- authorise the publication of the report.

III. REPORT OF THE EUROPEAN COMMITTEE ON CRIME PROBLEMS ON THE CRIMINAL RECORD AND REHABILITATION OF CONVICTED PERSONS

Introduction

A. Background

The criminal record, which was first instituted in France in 1850, was, from the beginning, hailed as an ingenious and humanitarian (it replaced branding) method for providing the courts with information on the accused person's antecedents. This information was needed in order to take account of the accused's previous offences when imposing sentence. The criminal record spread fairly rapidly to other countries and has also been used for other purposes (police investigation, recruitment to the civil service etc).

After the first flush of enthusiasm the disadvantages of this institution became apparent: it stigmatised the convicted person and constituted an obstacle to his efforts to live a law-abiding life after serving his sentence.

Several congresses were devoted to this problem and tried to find ways of improving the operation of the criminal record, whose usefulness was not challenged.

After the second world war, the criminal record was discussed (inter alia) at the Congress of the International Penal and Penitentiary Commission at The Hague in 1950, as part of one of the subjects studied by the 7th International Congress of Penal Law in Athens in 1957 and, more recently, by the meeting organised in 1979 by the International Penal and Penitentiary Foundation at Neuchâtel.

The importance of the problems relating to the operation of the criminal record caused the European Committee on Crime Problems to include this question on its work programme with a view to elaborating common principles of criminal policy on the subject.

B. Working method adopted by the Select Committee on the criminal record and rehabilitation of convicted persons

The CDPC's Select Committee of Experts instructed to study the criminal record and rehabilitation of convicted persons reviewed the position in the member States of the Council of Europe by using a questionnaire.

The first part of the present report gives a synoptic view of the legislation and practice relating to this subject in the member States.

The second part sets out the principal ideas which guided the Select Committee and which are reflected in the draft Recommendation on the criminal record and rehabilitation of convicted persons.

Finally, the third part reviews problems connected with international co-operation.

In addition to replies to the questionnaire by member States, the Select Committee drew inspiration and information from the reports presented to the meeting of the IPPF by MM F Clerc, H Røstad, J H Hurtado Pozo and H Schultz (1) as well as notes prepared by some of its members on specific questions.

(1) See International Penal and Penitentiary Foundation "Criminal records and rehabilitation" - Proceedings of the meeting of Neuchâtel (30 August/1 September 1979), Editions Ides et Calendes, Neuchâtel, 1982.

Part I

LEGISLATION OR PRACTICE RELATING TO THE CRIMINAL RECORD AND REHABILITATION OF CONVICTED PERSONS IN THE MEMBER STATES OF THE COUNCIL OF EUROPE (*)

A. AUTHORITIES RESPONSIBLE FOR CRIMINAL RECORDS

All member States have a central criminal records office, and some of them also have decentralised offices.

The authorities responsible for the central criminal records office are generally the Ministry of Justice (Belgium, France, Greece (1), Italy, Netherlands, Norway, Portugal, Spain and Turkey), the public prosecutor (Iceland, Luxembourg), the High Court (Liechtenstein), the national police headquarters (Austria, Cyprus, Denmark, Ireland, Sweden, Switzerland (2), the police (United Kingdom); in the Federal Republic of Germany they are held by the federal prosecutor attached to the Federal Supreme Court.

The authorities responsible for decentralised criminal records offices are:

a. the regional public prosecutor's department within whose area the place of birth comes (France (3), Greece and Italy). For persons born abroad, Greece has made provision for a special criminal records office at the Ministry of Justice;

b. the judicial authorities (Spain);

c. the police, who keep the criminal records of persons convicted in their region (Denmark (4), Norway, United Kindom); and

d. the mayor ("bourgmestre") of the place of residence or his representative (often the head of the local CID) (Belgium).

In Norway, apart from central criminal records, decentralised criminal records and a fines registry, there are also centrally held records of personal data for the kingdom as a whole; these contain personal data which may help the police to investigate offences and punish them.

In the Netherlands a distinction is drawn between "the general documentation register" which contains all the criminal information relating to the person concerned and the "criminal records" which only contain final criminal decisions.

(*) Member States are mentioned in the following paragraphs in a purely indicative way. Measures or provisions similar to those evoked may exist in other member States.

(1) In Greece there is legislative provision for a central criminal records office but for technical reasons it is not operational in practice.

(2) In Switzerland the "Bureau central suisse de police" is part of the Federal Public Prosecutor's Department, which depends on the Federal Department of Justice and Police.

(3) In France it is foreseen that in 1985, when computerisation of the criminal records will be completed, national criminal records, kept by the Ministry of Justice, will replace both central and decentralised records.

(4) In Denmark decentralised criminal records will be abolished shortly.

Both are operated by the judicial documentation department for which the Minister of Justice is responsible. The department is, however, decentralised; a section of the department is attached to the registry of each of the 19 courts and managed under the responsibility of the registrar. For persons born abroad an additional section is attached to the Ministry of Justice.

In Switzerland the cantonal criminal records are held by an authority designated by the canton. Any person convicted by the cantonal authorities is recorded along with any other convicted person born in the canton.

In Turkey there is in each administrative district a decentralised criminal records office which holds details of convicted persons whose civil-status records are held in that district.

Several arguments are put forward in favour of centralising criminal records. In particular it is pointed out that a central criminal records office:

a. makes it possible to apply the law uniformly and to employ full-time specialist staff;

b. facilitates computerisation of criminal records;

c. facilitates research work and statistical studies; and

d. strengthens the confidentiality of records.

Decentralised criminal records offices also have advantages, however:

a. they ensure accuracy and continuity of information (given that a decentralised office follows the individual from birth); and

b. they enable extracts from criminal records to be made available rapidly to those living in the provinces.

Moreover, some member States consider it expedient for security reasons to have two parallel systems, even though this is undesirable from the economic point of view. If the central criminal records office were to be destroyed, it could be reconstituted using decentralised criminal records.

B. THE CONTENTS OF CRIMINAL RECORDS

1. The criminal decisions entered in criminal records are:

a. final judgments involving penalties (exceptions: in Italy fines are not included; in Norway there are decentralised fines registries);

b. decisions of military courts or ones taken in pursuance of the Military Criminal Code (Belgium, Cyprus, Italy, Luxembourg, Netherlands (general documentation register), Portugal, Switzerland);

c. decisions taken by juvenile courts (Austria, Belgium, France, Greece, Federal Republic of Germany (in this member State educational and correctional measures are not entered in the criminal records but in a separate register for educational measures), Ireland, Italy, Netherlands and Switzerland (from the age of 15)). In Norway decisions to transfer offenders as a penal sanction to the authorities responsible for protecting young people are also included;

d. decisions on conditional measures (Austria, Belgium, Cyprus, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Norway, Netherlands, Portugal, Sweden, Switzerland and Turkey);

e. decisions on acquittals (in Greece, Netherlands (general documentation register) and Portugal) where these are on grounds of non-culpability. In Italy, other than in the case of discharge for not having committed the alleged act or because the act is not considered an offence in law;

f. decisions relating to the confinement of mentally ill offenders (Austria, Belgium, the Fedederal Republic of Germany, Netherlands and Sweden). In Austria decisions of criminal courts are not entered in the criminal records in cases where the person cannot be held criminally responsible. Conversely, cases in which the offender has been held responsible for his actions and sentenced by a criminal court to confinement in a psychiatric institution are included;

g. decisions relating to various security measures (Belgium, Federal Republic of Germany, Italy, Netherlands (general documentation register), Norway, Switzerland), notably:

   i. placement in a detoxification centre (Federal Republic of Germany, Switzerland),

   ii. preventive detention (Federal Republic of Germany),

   iii. supervision after release (Federal Republic of Germany),

   iv. placing recidivists and habitual criminals at the disposal of the government (Belgium);

h. amnesties (Portugal), pardons and conditional release (Austria, Belgium, France, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland);

i. revision of criminal sentences (Austria, Luxembourg, Netherlands, Norway, Portugal, Switzerland);

j. transactions (Belgium (municipal criminal records office), Netherlands (general documentation register));

k. disqualifications ordered by a criminal court (Belgium, France, Federal Republic of Germany, Italy, Luxembourg, Norway, Switzerland).

Some member States enter in the criminal records convictions for some minor offences - "contraventions" (Belgium, France, Italy, Luxembourg, Portugal, Spain, Switzerland).

In France and the Federal Republic of Germany and Spain details of wanted persons are also entered.

In Cyprus and the United Kingdom the contents of criminal records are not governed by law; but they do not contain any information which might be regarded as falling outside the criminal sphere.

2. As regards decisions other than criminal ones, criminal records in some member States record:

a. deprivation of parental power or of guardianship (Belgium, France and Italy);

b. decisions taken on the grounds of psychological immaturity or unsuitability or unworthiness refusing an application to enter a profession or business or else withdrawing authorisation already given, prohibiting the practice of a profession or the carrying on of a business, withdrawing authorisation concerning the recruitment or training of apprentices, and prohibiting employment, supervision, control or education of children and young people (Federal Republic of Germany);

c. judicial measures concerning declarations of bankruptcy (Belgium (1), France, Italy and Luxembourg);

d. losses of civil and political rights incurred in pursuance of the provisions relating to the punishment of collaborators (Belgium);

e. placing vagabonds and beggars at the disposal of the government for a specified period (Belgium);

f. measures concerning revocation or withdrawal of licences to carry firearms (Federal Republic of Germany);

g. administrative measures concerning loss of citizenship (Italy);

h. decisions refusing, withdrawing or restricting the validity of passports (Federal Republic of Germany);

i. decisions concerning the expulsion or turning back of aliens (France, Greece, Italy, Federal Republic of Germany);

j. dismissals from the army (Belgium).

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(1) Municipal criminal records.

3. In most member States foreign criminal decisions are entered in criminal records on certain conditions, viz:

a. that the decision relates to a national of the State where the decision is to be recorded or a person residing in that State;

b. that the offence giving rise to the decision is recognised in the State where the decision is to be recorded and that the punishment is not incompatible with that State's legal system;

c. that there is a convention or bilateral agreement requiring such entries. Several member States mention that such entries are made mainly in pursuance of the European Convention on Mutual Assistance in Criminal Matters. However, the agreements entered into by the Benelux and Nordic countries and other bilateral agreements are mentioned, notably by Belgium, Denmark, the Federal Republic of Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain and Switzerland. There is also an informal agreement in existence between the United Kingdom police and the Garda Siochana (Ireland).

Austria mentions as a condition that the decision must not be at variance with the European Convention on Human Rights. Belgium mentions that decisions by foreign military courts are excluded.

Foreign decisions are not systematically recorded in the United Kingdom or Cyprus. In the latter State, however, decisions concerning Commonwealth citizens are usually recorded.

The effects of foreign criminal decisions differ from State to State.

They:

a. have no other effect besides entry in the criminal records in Cyprus;

b. have the same effects as national decisions in Austria, Belgium (especially decisions taken in Benelux countries in the field of customs), Greece and the Netherlands;

c. have no formal effect in France, the Federal Republic of Germany and Portugal but are taken into account as aggravating circumstances when a sentence is being passed or an administrative decision taken (eg expulsion);

d. are treated like national decisions in certain cases (probation, discharge from bankruptcy, etc) in Iceland, Italy, Liechtenstein, Luxembourg, Spain and Switzerland.

C. TYPES OF EXTRACT FROM CRIMINAL RECORDS

Extracts from criminal records vary from one country to another. In some member States (Austria, Cyprus, France, Greece, Italy, Luxembourg and Spain) there are three types of extract, viz:

a. extracts issued in connection with criminal proceedings and solely to judicial authorities, prosecutors' departments and the police, giving all the information entered in the records;

b. extracts issued to any other authorities, which list only the more serious convictions; and

c. extracts issued to the person concerned and in some countries to other private individuals (1), which mention only the more serious convictions or the most recent ones (2).

In the Federal Republic of Germany and Switzerland there are different forms for judicial authorities and (Federal Republic of Germany) for some senior administrative authorities (unrestricted information), for administrative authorities and for individuals (the extract issued in these latter cases is called in the Federal Republic of Germany a "certificate of conduct").

In the Netherlands extracts from the "general documentation register" are as a rule issued to the judicial authorities and extracts from the "criminal record" to third parties.

In Norway, apart from the extracts issued to judicial authorities or the police, anyone can ask for information about the entries concerning him. The application is submitted to the police, who decide in what form the information is to be supplied. Unless there are special reasons for preferring a different method, the information is supplied orally by the police authorities.

In Turkey there is only one extract from the criminal record.

In Belgium there is also only one extract from criminal records, but its contents will differ according to the recipient and the reason for requesting it.

In the United Kingdom there are no regulations governing the form in which information from criminal records must be divulged, and practice is based on custom.

D. AUTHORITIES OR PERSONS ENTITLED TO BE GIVEN EXTRACTS FROM CRIMINAL RECORDS

Differences may be noted between the member States of the Council of Europe in respect of the authorities officially entitled to be given extracts from criminal records and in respect of the conditions attaching to the issue of such extracts.

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(1) See D(e) and (f).

(2) In France any person producing evidence of his identity may be shown, by applying to the deputy public prosecutor at the regional court in whose jurisdiction he resides, a list of all entries concerning him in the criminal records. No copy of such list may be issued. One result of this rule is to forestall any pressure which employers might put on applicants for a job to get around the provisions relating to certificate No. 3.

a. Judicial authorities

These authorities have the right in all member States to be given extracts from criminal records - in virtue of statutory provisions in Austria, France, Greece, Italy, Luxembourg, Netherlands, Federal Republic of Germany, Norway, Portugal, Sweden, Switzerland and Turkey; in virtue of ministerial circulars in Belgium; and of regulations in Cyprus. In the United Kingdom access to criminal records is not governed by law. Criminal courts, however, have the right to order the police to communicate to them the contents of the criminal record of an individual who has been found guilty, but such information is commonly forwarded to the courts automatically. Judicial authorities are generally the only ones to whom the contents of criminal records are sent in their entirety.

b. Other public services

Certain other public services are often entitled to be given extracts from criminal records in virtue of statutory provisions (Austria, Greece, Italy, Luxembourg, Federal Republic of Germany, Norway, Sweden, Switzerland and Turkey); in virtue of ministerial circulars (Belgium); or of regulations (Cyprus). In the United Kingdom these extracts are supplied to police forces, prosecutors who prosecute on behalf of the Crown, prison governors, defence counsel in Crown Court cases, to the Ministry of Defence in the case of soldiers being court-martialled, and probation officers in cases in which a court has ordered a social enquiry report.

As regards the circumstances in which extracts from criminal records are issued, the following may be mentioned in particular:

i. criminal investigations by the police (Federal Republic of Germany, Ireland, Iceland, Italy, Luxembourg, Netherlands),

ii. clemency appeals (Federal Republic of Germany),

iii. disciplinary proceedings (Luxembourg),

iv. civil service entrance examinations (Greece, France, Italy, Luxembourg, Netherlands),

v. allocations of works or public contracts (Luxembourg),

vi. applications for licences to sell alcohol (Cyprus, France, Luxembourg) or decisions concerning applications for firearms and explosives licences (Cyprus, Luxembourg, Federal Republic of Germany),

vii. consideration of requests for authorisation concerning all professional activities in the financial world (France, Luxembourg),

viii. examination of applications to practise medicine (Luxembourg),

ix. preparation of files of applicants for driving licences (Luxembourg, Switzerland), and

x. naturalisation formalities and cases concerning foreigners (Luxembourg, Federal Republic of Germany).

c. Other organisations (eg professional organisations, banks)

In some countries (Greece, Italy, Netherlands) these organisations are entitled to ask to be given extracts from criminal records, notably when holding their entrance examinations. In Austria, Belgium, Cyprus, the Federal Republic of Germany, Norway, Switzerland and Turkey this type of organisation is not authorised to request extracts from criminal records.

d. Foreign authorities or persons, international organisations

These authorities can obtain extracts from criminal records in virtue of conventions (for example the European Convention on Mutual Assistance in Criminal Matters), other statutory provisions (Austria, Federal Republic of Germany, Iceland, Portugal, Sweden), regulations (Cyprus, Italy) or ministerial instructions (Belgium), principally for the following purposes:

i. criminal proceedings,

ii. emigration, and

iii. recruitment of staff.

e. Individuals other than the person concerned (eg employers)

In Austria, Belgium, Cyprus, Greece, Luxembourg, the Federal Republic of Germany, Netherlands, Portugal, Switzerland, Turkey and the United Kingdom individuals do not have the right to be given extracts from criminal records. In Italy a statutory provision gives this right to individuals, for judicial or electoral reasons or to take on an employee.

In Denmark the National Commissioner of Police may, on request, transfer single items of information from the records to private persons or enterprises who can provide documentation for their legitimate interest in securing the information in question.

f. The person concerned

In some States the person concerned has always the right to request extracts from his criminal record. In others he must put forward reasons, such as:

i. travel abroad,

ii. emigration,

iii. obtaining a public or private position, etc.

In the Federal Republic of Germany the type of extract given to the persons concerned, on application and on payment of a fee, is the certificate of conduct.

In Belgium the persons concerned can only be given an extract from their criminal record if one is needed for inspection by a foreign authority. Individuals can, however, obtain a certificate of conduct from municipal criminal records offices.

E. AUTHORITIES OR PERSONS HAVING ACCESS TO ALL THE DATA IN CRIMINAL RECORDS

In several member States the statistical services (generally public bodies) have access to the entire contents of criminal records (Austria, Belgium, Greece, Iceland and Luxembourg). In the United Kingdom statistical services may have limited access to criminal records if specially authorised.

In Austria, Luxembourg and the United Kingdom research departments may also have access to criminal records if specially authorised.

In Cyprus, France, Italy, the Federal Republic of Germany, Liechtenstein, Norway, Portugal, Switzerland and Turkey only the staff working for the criminal records department have access to these data. Information may be given to statistical or research services by the Chief of Police (Cyprus), the Federal Public Prosecutor (Federal Republic of Germany), the Central Police Office (Switzerland) and the Ministry of Justice (Norway).

In some member States where the police (or sections of the police) are not responsible for criminal records, they may have access to the entire contents of criminal records, generally after special authorisation (Cyprus, Greece, Norway). The same is true of the Ministry of Justice in Norway and of the Public Prosecutor and the Chief Registrar in Turkey (for decentralised criminal records).

The general requirement of those who have access to all the data in criminal records is that any use made of these data should completely preserve the anonymity of the persons entered in the records.

F. PROBLEMS RELATING TO CRIMINAL PROCEEDINGS

1. Stage of the criminal proceedings at which criminal records are communicated to the court

In Cyprus, Ireland and the United Kingdom, criminal records can only be communicated to the court after guilt has been established. Moreover, the Cypriot prosecutor has a discretion not to inform the court of the contents of an accused's criminal record. As a general rule, however, this information is communicated to the judicial authority once guilt has been established.

In the other member States the contents of the criminal records are communicated to the court at the outset of the trial.

According to the replies of many member States this practice has the advantage of making available to the court all information concerning the accused person. However, it may lead to an enquiry influenced by this knowledge of the criminal record.

2. Reading-out of criminal records during the trial

In Austria, Cyprus, Denmark, Greece, Ireland, Italy, Liechtenstein, Norway (summary), Sweden and Turkey criminal records are read out during the trial. In the Federal Republic of Germany the President of the Court decides whether or not the accused's criminal record will be read out during the trial and, if so, at what moment.

Such records are not read out in Belgium, Iceland, Luxembourg, Netherlands and Switzerland, but are sometimes mentioned by the judge or the representative of the public prosecutor's department in his speech or by both parties in the trial. They are not read in Spain unless one of the parties expressly so requests.

Criminal records are mentioned in the sentence in Austria and the Federal Republic of Germany (only if the penalty is heavier as a result of it), in Belgium, Greece, Italy, Liechtenstein, Netherlands, Norway (summary), Portugal, Spain and Sweden, Switzerland and the United Kingdom (if needed to justify the sentence).

3. Disclosures of criminal records by the press

The possibility that the press will disclose criminal records is a difficult problem everywhere given the need to respect press freedom. However:

i. the Federal Republic of Germany, Liechtenstein and Netherlands consider that the press exercises fairly efficient self-censorship;

ii. this self-censorship appears to be the only possible response likewise in Austria, Belgium, Greece, Luxembourg and Switzerland;

iii. in Cyprus the press may be prosecuted for contempt of court if it divulges criminal records during the initial stages of criminal proceedings;

iv. in Iceland a court of justice may prohibit the divulgence of details of a criminal investigation by the press. Penalties are foreseen for those contravening this prohibition. However, the press usually obeys the principle of prudence dictated by its ethics.

In some countries special provisions have been set up involving collaboration between police, prosecution, court and the press to emphasise the need for such prudence.

G. SECRECY PROBLEMS

All the authorities and the third parties mentioned in foregoing sections are required to keep secret the information communicated to them and not to use this information in any other purpose than that for which it was delivered to them.

Failure to fulfil this obligation is treated as an offence of abuse of power or of breach of professional secrecy or of the secrecy binding civil servants who learn of information or of the contents of a document in the course of their duties. Provision is made for imprisonment or a fine in such cases. Furthermore, a breach of secrecy by a public servant is a disciplinary offence which may lead to disciplinary measures being taken (eg in the Federal Republic of Germany, Ireland, Norway and Netherlands). In France violation of secrecy can give rise only to liability under administrative law.

Moreover, in the Federal Republic of Germany information supplied to a superior administration in the Federal Government or to a Land may only be passed on to subordinate departments if absolutely necessary in order to avoid damage to the interests of the federation or a Land or where failure to pass it on would appreciably jeopardise or complicate the work of a public service.

In Denmark any abuse of the records may be brought before a Government Register Inspectorate, which exercises supervision of all public computerised registers.

H. ENTRIES IN CRIMINAL RECORDS

Entries are automatically made in criminal records in most member States (Austria, Belgium, Cyprus, Greece, Italy, Liechtenstein, Luxembourg, Federal Republic of Germany, Norway, Netherlands, Spain, Sweden, Switzerland and Turkey).

In France the court has no power of discretion with regard to entering a conviction in certificate No. 1. The trial court may, however, decide that a conviction which ought to be entered in certificate No. 2 or No. 3 shall not be so entered. Similar provisions exist in Italy. Conversely, in France the court may require a conviction normally excluded from certificate No. 3 to be entered therein.

In Portugal entries are made by virtue of a specific "order" issued by the court (order, jugment or decree). The court may require an instruction to be entered in the report to the effect that the decision is not to be communicated for private purposes.

In the United Kingdom only convictions for serious offences are entered automatically.

Cyprus, the Federal Repbulic of Germany, Norway and Spain do not consider it desirable that the entering of information in criminal records should depend on a court decision. Conversely, Greece, Liechtenstein and Switzerland consider that such a system would make it easier to adapt the criminal process to the individual. Switzerland, however, points out that the criminal record would then change its legal nature and an entry would become an "accessory punishment".

The consequences of an entry are that the decision concerned is mentioned in extracts or certificates issued until such time as the entry is deleted.

I. USE OF COMPUTERS

Criminal records are computerised in Austria, Denmark, the Federal Republic of Germany, Ireland, Italy, Luxembourg, Norway (centrally held criminal records), Spain, Sweden and, partially, the United Kingdom. Computerisation is being contemplated in Greece, Iceland, the Netherlands, Portugal, Switzerland and Turkey.

Member States who have computerised their legal records consider that the system works satisfactorily. France and the Federal Republic of Germany mention that technical processes enable the plausibility of the data to be checked, and the possibility of error is thus reduced to a minimum. Austria, Norway and Switzerland point out that computerisation would make information available more rapidly, improve security of data and lead to reductions in the number of staff working in criminal records offices. However, Spain points out that errors or manipulation of the computer are not excluded. Italy and Spain mention also the considerable expense of computerisation. On the contrary, other member States (eg Austria and Sweden) indicate that computerised criminal records cost the same as (or even less than) manual criminal records.

None of the member States considers that computerising criminal records jeopardises human rights in any way.

Various measures are taken for the protection of data against unauthorised enquiries: devices impeding unauthorised access to criminal records premises, special authorisation given to individuals external to the service for entrance to these premises, codes, strict controls, etc. In Norway the central criminal record is not linked to other records.

J. REHABILITATION

By this term is meant both the removal of entries from criminal records, the deletion of entries ("radiation") and the omission of decisions from criminal-record extracts (rehabilitation in the legal sense) as well as steps taken to remove the social consequences and prejudices associated with convictions (rehabilitation in the social sense or social reintegration) (1).

A. Rehabilitation in the legal sense

Rehabilitation in the legal sense may be automatic, by judicial decision or by administrative decision.

a. Automatic rehabilitation

This is found in most member States which replied to the questionnaire (Austria, Belgium, Cyprus (for certain sentences), Denmark, France, the Federal Republic of Germany, Greece, Iceland, Luxembourg, Liechtenstein, Portugal, Spain, Sweden and Switzerland). Some of these simultaneously have judicial rehabilitation (eg Belgium, France and Luxembourg).

Some member States (eg Austria) distinguish partial rehabilitation - which consists merely in restricting the contents of criminal record extracts of type "b" or "c" - from full rehabilitation, which consists in deleting entries from the criminal record and putting an end to all the unpleasant consequences of conviction.

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(1) In the Federal Republic of Germany, however, the term "rehabilitation" in the legal sense means the restoration of rights and capacities of which a person was deprived by virtue of his conviction.

Automatic rehabilitation intervenes:

i. when the convicted person reaches a certain age (eg in Switzerland: 80 years);

ii. when a certain period of time, the length of which varies according to the penalty imposed and the State concerned, has elapsed after the conviction, if the convicted person has not been reconvicted.

In some member States such rehabilitation does not apply in the case of life imprisonment or very long prison sentences.

In Norway neither automatic rehabilitation nor judicial rehabilitation exists. Extracts from criminal records used in criminal proceedings always contain full details, whatever length of time has elapsed since conviction. But extracts delivered to other authorities contain only partial information.

In Iceland too an entry remains on the criminal record if the decision is not quashed on appeal.

In the Netherlands entries in the "general documentation register" relating to minor offences are expunged after five years and the other entries 80 years after the birth of the person concerned. Entries in the "criminal record" are "removed" automatically after four years, this period being eight years for sentences imposing unconditional emprisonment. Moreover, a criminal card is not removed so long as there is another card on the criminal record. In the same State in certain circumstances the court may order a minor's criminal card to be removed from the criminal record.

b. Rehabilitation by judicial decision

Rehabilitation of this kind exists in Belgium, France, Italy, Luxembourg, Portugal, Spain, Switzerland and Turkey among other countries. The requirements for being granted such rehabilitation vary from country to country. The commonest are:

i. lapse of a specified term,

ii. absence of a new conviction, and

iii. discharge of financial obligations arising from the conviction (unless the convicted person can prove that he/she is unable to do this because of penury or other reasons for which he/she cannot be blamed).

In the Federal Republic of Germany the Federal prosecutor can, of his own motion or on application, order the omission of convictions from extracts of the criminal records or certificates of conduct, unless it would be against the public interest.

c. Rehabilitation by administrative decision

In Cyprus a conviction can be omitted from extracts from criminal records 15 years after it is pronounced at the discretion of the Chief of Police. This practice seems to have the approval of the Supreme Court of Cyprus which considers that 10 years should be the time-limit after which entries are no longer mentioned.

In Iceland the President can also grant rehabilitation to a person when at least five years have lapsed from the time the penalty was served in full, time limited or amnesty granted, if the petitioner shows proof of good conduct.

In Norway the police and the Ministry of Justice may decide (depending on the offence and the time which has elapsed) that some information should be omitted from certificates issued by the police (for purposes other than judicial ones).

In Spain deletion of entries in the criminal records may be ordered by the Ministery of Justice on the application by the person concerned and on the recommendation of the judge or court which convicted him.

2. Rehabilitation in the social sense (social reintegration)

All member States consider it necessary to remove the social stigma attaching to the conviction once the penalty has been served. This attitude reflects not only humanitarian sentiments but also the practical consideration that if one is to prevent a convicted person from committing further offences his/her social reintegration must be made as easy as possible.

Greece mentions the contribution of prison welfare officers and the volunteers from charitable welfare associations in this sphere. It also stresses the importance of informing the public about the subject through newspaper articles and reports, radio and television broadcasts and lectures given by experts. The same reply adds that this kind of action should be organised with great care in order to avoid giving the public the impression that crime is being condoned. A distinction must be made between delinquency, which consists in deeds which threaten society, and delinquents, who are unfortunate creatures needing understanding, assistance and protection in order to become resocialised and incapable of causing harm again.

Austria mentions that "Zentralstelle für Strafentlassenenhilfe" exists in Vienna and other cities (Zentralstelle für Strafentlassenenhilfe is an office that helps released persons find a job, a place to live and so on). Furthermore, Article 113 of the Austrian Penal Code provides a prison sentence of up to three months or a fine for every person who accuses another of an offence for which the sentence has already been served and which can or could be perceived by a third person. It may also be helpful for former offenders that, in most cases, information on the criminal record is limited.

In France, while sentence is being served, the prison administration prepares the offender for his reintegration into society by a number of traditional methods, including instruction, vocational training, sport and work. Prison regimes also provide a transition between imprisonment and return to freedom outside: leave permits, semi-custodial measures and conditional release are the most frequently applied. Successive Acts have also extended social security schemes to offenders and their families. Finally, the Act of 11 July 1975, aimed at encouraging the rehabilitation of sentenced offenders, enables the court which sentenced or sentences a person to free him, in whole or in part, from the prohibitions or disqualifications, deprivations of civil rights, declarations of legal incapacity or publicity measures of whatever kind, resulting from the sentence. Similar measures exist in Belgium.

Norway also mentions various measures facilitating the reintegration of sentenced persons: special flatlet complexes, sheltered jobs, training facilities, etc, have been initiated to make it possible to provide temporary assistance and occupation as a first step towards resocialisation in the community.

Spain mentions the Constitution of 1978, many articles of which give directions for the reintegration of sentenced persons, as well as the Penal Law of 1979 and other penal laws providing measures in this field.

In Cyprus (Law on the rehabilitation of convicted persons, 1981) and the United Kingdom (Rehabiliation of Offenders Act, 1974) various provisions are aimed at facilitating the social reintegration of the rehabilitated person (eg prohibition (with some exceptions) to mention the spent sentence, etc).

K. EFFECTS OF PARDONS AND AMNESTIES ON CRIMINAL RECORDS

a. In most member States the granting of a pardon does not entail deletion of entries in criminal records nor the omission of decisions from criminal record extracts (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Sweden and Switzerland). In Austria, however, a pardon granted by the President may in some cases entail deletion or omission of entries. Similarly, the Ministry of Justice in Norway can decide to grant deletion or omission of entries along with a pardon.

Pardon implies deletion of entries in Cyprus, Ireland and the United Kingdom.

A pardon customarily restores any losses of rights or capacities attaching to the original conviction.

b. Amnesties are not granted in Cyprus or Norway. They are rare in Iceland where, in principle, they imply deletion of the relevant entries. However, the Head of the State Penal Registry may decide otherwise if it is justified for special reasons.

In Turkey pardon or amnesty is not granted in the case of some offences (theft, breach of trust, banditism, etc).

In other countries the effects of amnesty vary: in Belgium, France, Portugal and Turkey amnesty has the effect of annulling entries in the criminal records, as also, depending on the particular case, in the Federal Republic of Germany, Italy and Luxembourg. It does not have this effect in Austria, Greece, Ireland, Liechtenstein or Switzerland.

L. ADVANTAGES AND DISADVANTAGES OF CRIMINAL RECORDS - SPECIFIC PROBLEMS

a. Advantages: Several member States point out that criminal records enable judicial authorities to give judgment with full knowledge of the facts and to reach a decision which will make offenders' social reintegration easier (Austria, Belgium, Greece, Italy, the Federal Republic of Germany, Portugal, Switzerland and the United Kingdom).

Some member States consider it desirable that the potential employer should be told about the past criminal history of a person who is to be taken on, in the case of employment implying certain responsibilities (Austria, Greece, Portugal and the United Kingdom). In some States this information is given only in the case of employment in the public sector.

The Swiss reply indicates that the State should only take into account the previous history of applicants for jobs in the public sector if the job entails a certain degree of responsibility. By setting an example in this way the State puts itself in a position to require from individuals a more magnanimous attitude to all those who, having been convicted, seek to reintegrate themselves into society.

Some member States point out that criminal records also help the police in the prevention and detection of crime.

b. Disadvantages: Most member States agree that the major disadvantage of the criminal records system is that it stigmatises the convicted person and subsequently makes it difficult for him or her to find a job, and this in turn prevents social rehabilitation and may lead to recidivism.

c. Specific problems: Spain points out that a serious problem affecting efficacy of criminal records is that of the harmonisation of methods for the identification of persons figuring in the records. This is a question of great importance, particularly with regard to the international communication of criminal histories.

M. RESEARCH

In the Netherlands there is a study on the effects of the Criminal Records Act (Mrs Singer-Dekker: "Justitiële Documentatie en Antecedentenonderzoek", Nijmegen, 1980).

The United Kingdom mentions research on:

i. the reliability of entries in central criminal records as compared with that of entries in local criminal records, by Steer. In the same field mention is made of work by Bottomley and Coleman at the University of Hull and by McCabe and Sutcliffe at Oxford;

ii. stigmatisation and its consequences, by Farrington at Cambridge; and

iii. the progress of convicted persons, especially from the point of view of recidivism (estimates) by the Home Office Research Unit (mentioned in the appendix to the report "Living it down" published by the Howard League and Nacro in 1972).

N. CERTIFICATES OF CONDUCT

Such certificates are unknown in Austria, Denmark, France, Greece, Iceland, Liechtenstein, Norway, Portugal, Sweden and the United Kingdom.

In Belgium, Italy, Luxembourg, Netherlands and Turkey these certificates are issued by municipalities.

In Cyprus and in Ireland (and in some cases in Luxembourg) they are issued by the police. In Switzerland they are issued either by the police or by the municipal authorities.

In the Federal Republic of Germany such certificates are issued by the authority responsible for criminal records.

In Spain such a certificate is issued by mayors or the police and contains extracts from the criminal record.

The use of such certificates varies. It is needed for civil service entrance examinations (eg in Italy), to travel abroad (Cyprus), to emigrate (in Ireland), in order to stand for political office (Spain), etc.

The contents of such certificates also seem to vary from one country to another. In certain countries a certificate only contains some entries from criminal records (eg in the Federal Republic of Germany), while in others it may contain subjective assessments of the character of the person concerned (eg Switzerland). In the latter case, the certificate's reliability may be questionable.

In Belgium a working party has been set up to revise the instructions relating to certificates of good conduct and good morals, with the main aim of making the rehabilitation of convicted people easier.

In the Netherlands the certificate has been subjected to very strict regulations. These regulations indicate what kind of information may be taken into account. Moreover, a certificate contains only a statement of the mayor that, on the basis of the information available to him and in view of the purpose for which the certificate has been requested, there are no objections against the person concerned. In case a certificate has been refused, appeal may be made to the district court.

0. REFORMS UNDER WAY OR DESIRABLE IN THE AFOREMENTIONED SPHERES

There are draft laws concerning criminal records in the following member States:

a. Belgium (1965). Parliamentary work on the matter has been hindered because of the setting-up of committees responsible for reforming the Code of Criminal Procedure and the Criminal Code;

b. Greece. The Bill contains provisions to make rehabilitation easier. Criminal records will henceforth be the responsibility of the public prosecutor's department and not of the Ministry of Justice. The types of extract are reduced to two: A - for judicial and prison authorities; and B - for others;

c. Italy (1980). This draft concerns the legal regulations of the computerisation of criminal records;

d. Spain. Draft texts aim at simplifying and consolidating the Law on Criminal Records.

Minor legislative reforms are planned in the Federal Republic of Germany. A reform envisaged in Sweden aims at giving to the person concerned the right to receive an extract of his own criminal record. Switzerland and Turkey are contemplating computerising criminal records. France and Norway are extending computerisation which has already been commenced. A revision of the judicial Documentation Act is under consideration in the Netherlands.

Part II

PRINCIPAL CONSIDERATIONS GOVERNING CRIME POLICY IN RELATION TO THE CRIMINAL RECORD AND REHABILITATION OF CONVICTED PERSONS IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

(Explanatory report on the draft recommendation on the same subject)

A. FOREWORD

After examining the position in the member States, the Committee made some recommendations on the policy to be followed by member States as regards the criminal record and rehabilitation of convicted persons.

These recommendations do not concern all questions connected with the operation of the criminal record. Some such questions (eg the authority responsible for the records) are closely bound up with the judicial and administrative structure of each country and therefore a matter to be regulated according to the traditions, general legislation and practice of the country concerned.

On the other hand, the Committee considered that some questions should be regulated according to the common principles which are set out in its draft recommendation and explained below.

B. POLICY CONCERNING THE CRIMINAL RECORD AND REHABILITATION OF CONVICTED PERSONS IN GENERAL (PREAMBLE TO THE DRAFT RECOMMENDATION)

1. Policy for crime prevention and the social reintegration of offenders (para 1)

Since it was set up, the CDPC has striven to promote a policy for crime prevention and the social reintegration of offenders in the member states of the Council of Europe.

Crime prevention both by extra-penal measures (social prevention) and penal measures (penal prevention) is the object of several studies by the CDPC (1).

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(1) Crime prevention has recently been examined by the Select Committee on the relationships between the public and crime policy. The organisation of crime prevention is now studied in depth by a select committee which began work in 1983.

Doubts have in recent years been raised as to the effectiveness of traditional penalties. This scepticism has led to a development of alternatives to such penalties.

The mistrust for the treatment of offenders has not done away with - and ought not to do away with - the idea of trying to resocialise offenders undergoing penalties. This idea, which has had the support of the CDPC (1) can also be based on pragmatic considerations, namely using the opportunity offered by the penalty to give assistance and support to the offender in need of them.

The Committee has decided to examine the questions submitted to it from this angle of crime prevention and the social reintegration of offenders.

2. Function of the criminal record (second paragraph)

It has already been mentioned (2) that the original object of creating the criminal record was to inform the judicial authorities of the accused person's antecedents.

Subsequently, other authorities have also sought to take advantage of the information contained in this record. At present one can distinguish the following functions of the criminal record:

- judicial function: means of "individualisation" (personalising the penalty);
- police function: data bank for the police and a means of channelling investigations in a given case to a particular person;
- administrative function: supervision of probationers and conditionally released offenders; means of enforcing penalties; summary or substitute for personality file;
- scientific function: means for research on sentencing; basis for criminological and penological research;
- social function: reference for those seeking employment; certificate available to prospective employers.

The member States affirm that the judicial function is preponderant and, in particular, taking the antecedents of convicted persons into account in order to obtain an "individualisation" of the sentence.

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(1) For example: Resolution (76) 10 on certain alternative penal measures to imprisonment, and Resolution (78) 62 on juvenile delinquency and social change, etc.

(2) See Introduction - A.

The "police function" is also present in several countries: moreover, in a number of countries the police authorities are also responsible for keeping the criminal records. In fact in several countries it is not easy to distinguish between the "criminal record" and the "police record".

In spite of some restrictions, the administration relies on the criminal record for various purposes (prison treatment, emigration, issue of driving licences, etc). Public organisations and (sometimes) private employers also insist on having information when appointing employees.

The use of the criminal record for statistical purposes was one of the objects which has been mentioned ever since the creation of this institution (1). More recently, whilst safeguarding the privacy of individuals some States have allowed the use of criminal records for research purposes.

By stressing that the criminal records are principally intended to provide the authorities responsible for the criminal justice system with information on the antecedents of the person on trial, in order to assist them to make a decision appropriate to that individual, the Committee wished to indicate that the criminal record should be an important component of the personality file placed at the disposal of these authorities.

3. Restriction of the use of the criminal record (third paragraph)

Pursuing the reasoning mentioned in the foregoing paragraph, the Committee recalls the serious dangers involved for individuals and the social reintegration of offenders in the extended use of the criminal record.

In recent decades criminological literature has frequently stressed the danger of stigmatising the offender and the "secondary deviance" which results (2).

For these reasons the Committee stressed the need to restrict the use of the criminal record in recommendation I (1-5).

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(1) See F Clerc, Opening speech at the IPPF meeting (Neuchâtel, 1979), Proceedings, page 11.

(2) See, for example, Studies in criminological research, Vol. IX - Attitudes towards deviance and crime, Council of Europe, 1972.

4. Collaboration between member States of the Council of Europe (4th and 5th paragraphs)

Collaboration between the member States of the Council of Europe in the field under consideration may be obtained:

a. by accepting common principles for criminal policy and introducing them into national legislation and practice; this is the object of the draft Recommendation;

b. by ratifying the European Convention on Mutual Assistance in Criminal Matters which contains provisions on the criminal record;

c. possibly by the establishment of a European criminal record.

C. PRINCIPLES CONCERNING THE OPERATION OF THE CRIMINAL RECORD

1. Authorities or persons entitled to obtain copies of extracts from the criminal record

a. General considerations (Recommendation I.1)

According to the principle of restriction of the use of criminal records, underlined in the preamble to the resolution, information in criminal records should only be communicated in the form of extracts and contain data indispensable for the legitimate interest of the recipients. The concept of "legitimate interest" should be interpreted in accordance with the general principles governing the draft Recommendation, namely, crime prevention and the social integration of the offenders.

The form and the categories of extracts from the criminal records vary from country to country.

b. Authorities having the right to receive the full list of entries on the criminal record (Recommendation I.2)

It is obvious that authorities responsible for the criminal justice system must be entitled to a full list of the entries on the criminal record. For the purposes of the Recommendation this term should be interpreted as covering criminal courts, prosecuting authorities, police authorities, authorities responsible for the execution of penalties and clemency authorities.

According to practice in some countries, a full list may also be delivered to courts acting in cases other than criminal cases as well as other public authorities, for example those concerned with internal or external national security, registration of foreigners etc. The committee was of the opinion that these cases should be exceptional. The said authorities should be defined explicitly and in a restrictive way in the legislation on criminal records.

c. Other public bodies / the person concerned (Recommendation I.2 and 3)

Other public bodies should only be given a partial extract from the criminal record (eg the most recent or most serious convictions) - provided they can show that they have a "legitimate interest" (see C.1.a above). Thus, for example, it might be considered that the appointment of a civil servant to a very responsible post constitutes a legitimate interest in being informed, at least in part, of a person's antecedents.

The Committee considers it desirable to avoid communication of the criminal record (even in an abbreviated form) to individuals. This prohibition could not be extended to the person concerned himself, who should, on proving his identity, be entitled to inspect the full text of his criminal record (1). This right would permit individuals to check the exactness of the entries concerning them and, in consequence, the good operation of the services responsible for the record. However, the Committee, following French and Norwegian legislation and Belgian practice on this point, was of the opinion that he should not receive an extract containing a full list of entries. If this precaution were not taken, employers or other private persons not entitled to obtain a copy of the individual's criminal record would be able to obtain it through the person concerned. However, overriding reasons provided for in the legislation might permit in certain cases a written communication of the full list of entries to the person concerned. It is, in particular, the case of persons living abroad. In any case, the person concerned may receive a partial extract from the criminal record.

Finally, statistical or research services should be given, by special authorisation, access to all data of the criminal record, under the condition that they will strictly respect the anonymity of persons entered in the records.

d. Exclusion of a conviction from copies of the criminal record by the judicial authority (Recommendation I.4)

Again following French legislation (2), the Select Committee decided to recommend that member States consider the possibility of enabling the judicial authorities to order that a conviction should appear only in extracts of the criminal record issued for their use.

This measure has not been accepted by all without reservations. It was, for instance, pointed out that such a power affects the nature of the entry on the criminal record, which assumes the form of an additional sanction (3). Fear was also expressed that a measure of this sort could undermine the credibility of the criminal record.

However, this possibility facilitates the "individualisation" of the sentences and the offenders' social reintegration. Consequently, it should be taken into consideration by member States when reforming their legislation on criminal records.

e. Decisions relating to minors (Recommendation I.5)

In the hope of increasing the chances for the resocialisation of minors, the Select Committee recommended restricting, as far as possible, the communication of decisions relating to them to any authority or person, with the exception of the authorities responsible for the criminal justice system.

In addition, the legislation on criminal records might define the agencies acting within the child welfare system, which should receive extracts of the criminal records and specify the conditions for the use of this information in order to avoid any abuse.

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(1) Cf. article 8 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

(2) See Part I, paragraph H.

(3) See H Schultz, Report to the IPPF Conference, Neuchâtel, 1979, page 56.

2. Problems relating to criminal proceedings

a. Communications of the criminal record to the judicial authorities

This communication is arranged differently in countries which follow:

- the Anglo-Saxon system of dividing the trial into two phases (conviction and sentence);

- the continental system, where the criminal trial in general constitutes a single unit.

In the first case, communication of the criminal record takes place after the decision of guilt. In this way the court may decide the question of guilt without being influenced by the accused's antecedents.

In the second case the criminal record is ordinarily communicated to the judicial authorities at the start of the investigation. It was pointed out that though this means that the criminal record can influence the decision on guilt it may also constitute a useful guide for investigating the facts.

The Select Committee has not made any recommendations on this procedural problem which depends upon the entire criminal system adopted in each country.

b. Reading out of the criminal record during the trial (Recommendation II.6)

That criminal trials should be held in public is a principle recognised in all democratic societies. It is also guaranteed by the European Convention on Human Rights (Article 6.1, "Everyone is entitled to a fair and public hearing").

However, though the principle of a public hearing requires the reading out or mentioning of the documents on the criminal file, another principle also recognised and guaranteed by the same convention (Article 6.2), namely that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law" calls for a certain caution being exercised in this respect. Moreover, not only the possibility that the accused may be innocent but also the risk of his stigmatisation (whether he is innocent or guilty), which compromises his chances of social reintegration require that, as far as possible, his antecedents should not be made public (unless there are compelling reasons, eg, where there is a direct and important connection with the issue being tried).

Taking into account these considerations, the committee recommended that member States avoid, wherever possible in the framework of each particular State's legislation and practice, reading out of the criminal record during criminal proceedings.

In some cases (as is provided for in such cases by the Convention on Human Rights; second sentence of Article 6 (1)) trial in camera might be considered in order to reduce the disadvantages attendant on the criminal records being read out in court.

c. References to the criminal record in the press (Recommendation II.7)

Freedom of expression and the right to receive and communicate information are also principles widely recognised in democratic societies and spelt out in constitutions and the European Convention on Human Rights (Article 10).

Although the communication of information concerning accused persons' criminal records by the press is in accordance with the above mentioned principles, it should nevertheless be restricted in view of the disadvantages and risks mentioned in the preceding paragraphs.

The Convention on Human Rights states in paragraph 2 of Article 10 that the above-mentioned freedoms may be subject to certain restrictions for "the prevention of crime", "the protection of the reputation or rights of others" or even maintaining "the authority and impartiality of the judiciary".

Rather than any form of regulation which (even though legally permissible) might infringe the freedom of the press, which is a principle of the highest importance, the Select Committee preferred to recommend close co-operation between the judicial authorities and the press. This would lead to a better understanding of the problems and risks entailed in publishing the antecedents of an accused, and thus indirectly to self-censorship by the press. This was in fact the system applied in most member States of the Council of Europe (1).

3. Protection of information contained in criminal records

a. Protection of computerised information (Recommendation III.8) (2)

In spite of many advantages (speed of producing copies of the criminal record, centralisation of information), the gradual computerisation of the criminal record in member States nevertheless entails certain risks.

Particularly when the data relating to the criminal records are contained in a large data bank it is possible that unauthorised persons may have access to them either voluntarily or involuntarily.

Various technical measures are already in use or under study in the member States. Among these one can mention the thorough protection of the premises where computerised criminal records are kept against any destruction (eg fire), the strict control of those entering these premises, and the use of codes by the staff.

b. Non-authorised disclosure of information (Recommendation III.9)

The unauthorised disclosure of information contained in criminal records by a person having access to such information (staff responsible for the criminal records, judges or prosecutors, police etc) may amount to a violation of "official secrecy" or even in some cases (eg barristers) professional secrecy.

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(1) See Part I.F.3.

(2) See also article 7 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Such violation can amount to a disciplinary offence or a criminal offence (or both). Appropriate administrative or criminal sanctions should be provided for such cases, which may not only have serious adverse repercussions for the convicted person but may also bring the whole administration of criminal justice into disrepute.

4. Rehabilitation

1. Rehabilitation in the legal sense

a. General considerations

In spite of the advantages of criminal records which led to their general use in the second half of the 19th century it nevertheless soon became apparent that they had one serious disadvantage: the convicted person was subject to permanent stigmatisation, which constituted a severe obstacle to his resocialisation.

This realisation induced countries to introduce the rehabilitation of convicted persons into their legislation (1).

b. Automatic rehabilitation or rehabilitation on the application of the person concerned (Recommendation IV.10)

Automatic rehabilitation occurs after a certain time or when the person concerned reaches a certain age. As a rule fairly long periods are required for such rehabilitation. This is the reason why in several countries a convicted person who can establish good conduct may, after a certain period, apply to the judicial or administrative authorities (depending on the country) for his rehabilitation.

The Committee was of the opinion that the legislation of member States should provide for automatic rehabilitation after a reasonably short period of time. The assessment of what is a reasonably short period of time should be made having regard to the scale of penalties and time limits existing in the country as a whole.

The possibility of a more rapid rehabilitation, on the application of the person concerned, might also exist in order to increase the chances of a convicted person achieving, as soon as possible, his social reintegration.

According to the opinion expressed by a member State a central judicial or administrative authority should take the decision on rehabilitation on the request of the person concerned in order to avoid discrepancies at local level.

d. Information of the persons concerned (Recommendation IV.11)

A convicted person is often unaware that the time limit for his automatic rehabilitation has elapsed. He is also unaware that (in several countries) he may apply to the judicial or administrative authorities for rehabilitation. In view of the principle that "no one is deemed to be ignorant of the law" most countries have not concerned themselves with informing convicted persons of these matters.

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(1) See H Schultz, Report to the IPPF meeting, Neuchâtel, 1969, page 63 et seq.

The ignorance of convicted persons about the possibility of rehabilitation (and a certain hesitation about resuscitating the past) results in the number of convicted persons who make use of their right to apply for rehabilitation being extremely small.

The Committee was of the opinion that the authorities should inform convicted persons of their right to apply for rehabilitation and the conditions in which it can be exercised. This information could be disseminated by using brochures, written or oral communication or any suitable means.

e. Social enquiries with a view to rehabilitation (Recommendation IV.12)

It is customary to hold an enquiry into the convicted person's conduct and the extent of his resocialisation with a view to his judicial or administrative rehabilitation. It is obvious that this enquiry should be undertaken with great discretion by officers in plain clothes who should avoid informing the neighbours or workmates of the person concerned of his conviction. Otherwise, particularly when several years have elapsed after the conviction and this has been forgotten, the enquiry might compromise the convicted person's social reintegration more than the existence of an adverse criminal record.

f. Prohibition of references to the convictions of the rehabilitated person (Recommendation IV.13)

The consequences of the convicted person's rehabilitation may be either the removal of the entry in the criminal record so that it cannot be obtained by any authority or the cancellation of the entry. In this last case, communication of the entry to certain bodies (eg the judicial authorities) contains the entry "cancelled".

After rehabilitation any mention of the sentence by the press or individuals without compelling grounds provided for in national law should be prohibited and punished by law.

2. Rehabilitation in the social sense (social reintegration) (Recommendation V.14)

In the social sense the rehabilitation of the convicted person requires a large number of measures of various sorts, eg:

- an effort to persuade the public to accept the presence in the community of persons given non-custodial sentences;
- an effort to alter the hostile or suspicious attitude of the public to a released prisoner even after he has "paid his debt to society";
- measures to assist a probationer or released prisoner to find employment, accommodation, etc.

The problem of the offender's social reintegration as a whole transcended the limits of the Committee's terms of reference. Moreover, this problem has been the subject of various studies by the CDPC (1).

The Committee merely observed that efforts to bring about social rehabilitation must commence while the offender is serving his prison sentence. At this stage it is necessary to reinforce the links between the convicted person and the community so that his release may be effected without problems.

With this in view, it is desirable:

- to encourage visits by the convicted person's family;
- to give the convicted person prison leave so that he may see his family or contact future employers;
- to encourage sporting and cultural associations to organise activities with prisoners.

D. CONDUCT CERTIFICATE

The institution of the "certificates of conduct", which is related to the criminal record, exists in several member States. This certificate, which is issued by the mayor or the police, may be a simplified and less formal version of the criminal record, or may contain, apart from his convictions, other information relating to the private life or morals of the person concerned.

The use of this certificate in the past for political purposes, the danger of the intrusion by the authorities into an individual's private life and even the risk of arbitrary value judgments have caused several member States to abolish these certificates. Others have regulated their issue very strictly (eg these certificates may only be issued in the cases specified by the law).

For the above-mentioned reasons the Committee recommends that the issue and use of conduct certificates be restricted and that these should only contain the convictions of the person concerned.

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(1) See, for example, Resolution (70) 1 and the report on the practical organisation of measures for the supervision and aftercare of conditionally sentenced or conditionally released offenders, Resolution (76) 38 and the report on certain alternative measures to custodial sentences, the most recent work of the Select Committee on the Relationship between the Public and Crime Policy and Resolution (82) 16 on prison leave.

E. RESEARCH

The criminal records have been operating in many member States of the Council of Europe for more than a century. Though the legal literature on this institution is abundant, empirical data in this field is scarce.

Empirical research on the operation of the criminal record and its repercussions on the social reintegration of convicted persons would therefore be desirable. They could for instance verify:

- the number of persons applying for judicial or administrative rehabilitation, their reasons for taking this step and the problems they face;

- the number of persons who have been rehabilitated and committed further offences;

- the effects of the criminal record when a convicted person is seeking employment or as regards his social reintegration in general.

The results of such research might assist governments when revising their legislation and practice in relation to criminal records and the rehabilitation of convicted persons, eg by changing the periods required for automatic rehabilitation or rehabilitation on application by the person concerned.

Part III

INTERNATIONAL CO-OPERATION ON CRIMINAL RECORDS

A. FOREWORD

A large number of foreigners reside in or are in transit through the member States of the Council of Europe for various reasons (migrant workers, tourists, businessmen, students, etc). Some of them occasionally appear before a criminal court. For these foreign nationals as for its own citizens each country's judicial authorities must have information about any criminal history so that the court can try the case with full knowledge of the facts.

There are various difficulties in communications between the authorities of different countries (delays in correspondence, differences of language and law, etc). Foreign nationals are consequently often tried without their criminal record being known to the court and this can be prejudicial both to their own interests and to those of society at large.

It is accordingly obvious that arrangements must be found to step up international co-operation, notably between the member States of the Council of Europe.

B. POSSIBLE FORMS OF CO-OPERATION BETWEEN MEMBER STATES IN THIS SPHERE

The committee discussed various forms of international co-operation to ensure rapid, efficient communication of criminal records.

1. Creation of a European criminal records office

Setting up a European criminal records office within the Council of Europe or as an independent body would naturally be the most efficient way of centralising information and communicating it rapidly to authorities concerned.

There would be several difficulties, however, with establishing such an office, both from the methodological point of view (different definitions of offences, different languages etc) and from the financial point of view (a central criminal records office for member States would need a large staff and ample facilities).

2. Intercommunication of member States' computerised criminal records

Given that the criminal records of several member States are computerised, the committee also discussed intercommunication of these criminal records at the level of member States as a method of co-operation in this sphere.

This solution, which seems promising at first sight, has a number of drawbacks, however:

i. not all member States have computerised criminal records; and

ii. those which do have them do not always have compatible software.

Lastly, it was pointed out that automatic communication of entries might create problems with regard to human rights and could hinder the social rehabilitation of offenders.

3. Co-operation through the European Convention on Mutual Assistance in Criminal Matters

Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters set up a system for co-operation between member States as regards criminal records.

Such co-operation could be stepped up, in particular by all member States' ratifying the convention and withdrawing any reservations they have made.

A standardised list of the offences which would have to be communicated under Article 22 of the convention and the establishment of national criminal records which would contain convictions for these offences could also substantially facilitate co-operation in this sphere.

4. The committee's conclusions

In view of the economic difficulties facing governments, the committee decided not to envisage setting up a central European criminal records office in the immediate future. It did, however, think that this topic ought to be on the CDPC's programme of future activities.

The history of the idea of a European criminal records office and the associated problems have been described in a memorandum by a member of the committee, Mr A Spielmann (Luxembourg).

The committee considered that it would be premature to discuss intercommunication of national criminal records, given that computerisation of criminal records was far from having been implemented by all countries.

It accordingly decided to draw up recommendations to member States' governments concerning co-operation under the European Convention on Mutual Assistance in Criminal Matters and to suggest to the CDPC that lists of offences might be drawn up which could be used for national criminal records and designed for international co-operation.

C. RECOMMENDATIONS ON CO-OPERATION IN THE SPHERE OF CRIMINAL RECORDS UNDER THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

1. Ratification of the convention

The European Convention on Mutual Assistance in Criminal Matters was signed in 1959. It came into force on 12 April 1962. Hitherto fifteen member States have ratified the convention (Austria, Belgium, Denmark, France, the Federal Republic of Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland and Turkey) and two non-member States (Finland and Israel) have acceded to it.

Obviously ratification of the convention by all member States would among other things ensure government co-operation in the sphere of criminal records (exchange of information on specific cases - annual communication of convictions involving nationals of Contracting Parties).

2. Obligations arising from Articles 13 and 22 of the convention

Under Article 13 of the convention:

"1. A requested party shall communicate extracts from, and information relating to, judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.

2. In any case other than that provided for in paragraph 1 of this article, the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested party".

The article thus distinguishes between communication of extracts from criminal records for the purposes of a criminal case (paragraph 1) and other cases (civil or administrative cases, paragraph 2).

It may be noted that in the last-mentioned cases, the convention, like the draft recommendation drawn up by the committee (paragraph I,1,2), envisages that far greater safeguards should apply on the communication of information from criminal records than in criminal matters.

Under Article 22 of the convention:

"Each Contracting Party shall inform any other Contracting Party of all criminal convictions and subsequent measures in respect of nationals of the latter party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these parties, unless the person is a national of the party in the territory of which he was convicted".

This article establishes the rule that convictions relating to nationals of other Contracting Parties which appear in criminal records shall be communicated automatically. The "subsequent measures" refer primarily to rehabilitation.

Despite its inadequacies and the difficulties it may raise (eg delay in replying, excessive intervals between automatic communications), the system established in the convention, if strictly applied by member States, can effectively help judicial authorities to tailor sentences to the individual in cases involving foreign nationals.

3. Reservations in respect of Articles 13 and 22 of the convention

Under Article 23 of the convention any Contracting Party may, at the time of signing or depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the convention.

The reservations made in respect of Articles 13 and 22 by member States which have ratified the convention are the following:

Article 13

Paragraph 1. Denmark, Norway, Sweden and Finland have stipulated that the obligation to communicate extracts from criminal records and any information relating to the latter shall apply only to the criminal record of a person charged with an offence.

Paragraph 2. Denmark, Norway and Sweden have made reservations covering the whole of this clause.

Switzerland has stipulated that it reserves the right not to comply with requests made under Article 13, paragraph 2, unless it is established that it is necessary to obtain such an extract through official channels.

Article 22

Finland has made a reservation covering the whole of this article.

Sweden has stipulated that it will not notify measures taken subsequent to a conviction.

Belgium, Luxembourg and the Netherlands have stipulated that they will not notify subsequent measures except insofar as the organisation of their criminal records allows of so doing.

Israel has declared that it will not undertake to notify subsequent measures automatically but will use its best efforts to do so.

Spain has reserved the right not to notify other interested parties of deleted criminal offences in the case of Spanish nationals.

The foregoing reservations substantially restrict co-operation between member States on communicating information from criminal records. This is why the draft recommendation invites governments to consider the possibility of withdrawing reservations made in respect of Articles 13 and 22.

4. Concluding remarks

The above recommendations are designed to secure maximum benefit from the functioning of the European Convention on Mutual Assistance in Criminal Matters in the sphere of mutual communication by member States of the criminal histories of persons charged with an offence.

Pending arrangements for more intensive co-operation which might be implemented in the future, this is the most realistic course to take.

A N N E X E I

A P P E N D I X I

Liste des participants
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Réunions du Comité restreint / Meetings of the Select Committee

(1) 1er au 3 décembre / December 1980

(2) 13 au 15 mai / May 1981

(3) 4 au 6 novembre / November 1981

(4) 29 au 31 mars / March 1982

(5) 3 au 5 novembre / November 1982

(6) 21 au 23 février / February 1983

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APPENDIX II

Draft recommendation on the criminal record and rehabilitation of convicted persons

The Committee of Ministers, acting under Article 15 (b) of the Statute of the Council of Europe,

Considering that a crime policy aimed at crime prevention and the social reintegration of offenders should be pursued and developed in the member States of the Council of Europe;

Considering that criminal records are principally intended to provide the authorities responsible for the criminal justice system with information on the antecedents of the person on trial, in order to assist them in making a decision appropriate to that individual;

Considering that any other use of criminal records may jeopardise the convicted person's chances of social reintegration, and should therefore be restricted to the utmost;

Considering the need to promote close co-operation between Council of Europe member States on the basis of common principles for crime policy in this area;

Having regard to the European Convention on Mutual Assistance in Criminal Matters and to the work done by the CDPC on the treatment of offenders,

Recommends that the governments of member States review their legislation and their practice relating to criminal records with a view to introducing the following measures where necessary:

I. With regard to authorities or persons entitled to receive extracts from criminal records

1. Provide that the information mentioned on the criminal record will only be communicated in the form of extracts whose content will be strictly limited to the legitimate interests of the recipients;

2. Ensure that only the authorities responsible for the criminal justice system and those exceptionally authorised under the legislation on criminal records may receive the full list of entries on the criminal record; other public bodies or the person concerned receiving only partial extracts;

3. Wherever possible, enable any person proving his identity to inspect his entire criminal record; unless necessary for overriding reasons provided for in the legislation, avoid written communication of the record, in order to prevent any risk of misuse;

4. Consider the possibility of enabling the judicial authorities to order that certain entries should appear only on criminal records issued for their use;

5. Restrict to the utmost the communication of decisions relating to minors.

II. With regard to criminal proceedings

6. Avoid, wherever possible, unnecessary public disclosure of criminal records during criminal proceedings, so as not to stigmatise the person concerned;

7. Encourage close co-operation between the judicial authorities and the press, so that the latter may be made aware of the risk which references to an accused person's criminal record may pose to his social reintegration.

III. With regard to the protection of information in criminal records

8. Take appropriate steps to protect information contained in criminal records, particularly when the latter are computerised;

9. Provide appropriate sanctions for the breach of the confidentiality of information contained in criminal records.

IV. With regard to rehabilitation

10. Provide for an automatic rehabilitation after a reasonably short period of time and, if appropriate, in addition a possibility of rehabilitation at an earlier moment at the request of the person concerned;

11. Take steps enabling the persons concerned to be informed:

- of the conditions for automatic rehabilitation;

- of the procedure for applying for rehabilitation.

12. Provide that enquiries in connection with rehabilitation proceedings be conducted discreetly in order to avoid harm to the person concerned.

13. Provide that rehabilitation implies prohibition of any reference to the convictions of a rehabilitated person except on compelling grounds provided for in national law.

V. With regard to social reintegration

14. Organise, within penal institutions, activities aimed at strengthening the convicted person's links with the community in order to promote his social reintegration.

Recommends that governments of member States review their legislation and their practice concerning the issue of certificates of good conduct for the purpose of restricting their use and of ensuring, in any case, that they cover only criminal records and do not refer to the private life or morals of the person concerned.

Recommends that the governments of member States encourage research on the questions mentioned above taking account of the findings when revising legislation or practice.

Invites the governments of member States

- to ratify, as soon as possible, the European Convention on Mutual Assistance in Criminal Matters, with a view to promoting international co-operation in this area;

- to give full practical effect to their obligations under Articles 13 and 22 of the convention within the limits of the commitments accepted by signatory parties;

- to study the possibility of withdrawing reservations relating to Articles 13 and 22 of the aforementioned convention.

Recommends that the governments of member States ensure that the European Committee on Crime Problems' report on the criminal record and the rehabilitation of convicted persons is widely distributed to the authorities concerned.