

TNI – IDPC – Sentencing Council

Expert Seminar on Proportionality of Sentencing for Drug Offences

London – 20th May 2011

The Expert Seminar on Proportionality of Sentencing for Drug Offences was an initiative of the Transnational Institute ('TNI') working together with the International Drug Policy Consortium ('IDPC') and co-hosted by the Sentencing Council of England and Wales ('SC'). The seminar was funded by the European Commission and the Open Society Institute and took place in London, England on 20th May 2011. Thanks are due to Mike Trace for chairing.

This seminar is the third in a series of expert discussions on drug policy designed to feed into moments of opportunity for policy and law reform at national and international level with detailed technical analysis and through examples of best-practice from across different jurisdictions. The moment of opportunity in this case was the Sentencing Council's consultation on sentencing for drug offences which is due to produce definitive sentencing guidelines for England and Wales in the next year. The first in the seminar series was on the classification of controlled substances¹ and the second on threshold quantities². Two more are currently scheduled for this year; one on mild plant based stimulants such as khat, coca, ephedra and kratom, and another on the future of the UN drug conventions³.

The seminar was held under Chatham House rule to ensure confidentiality and to allow participants a free exchange of ideas. A total of 31 people attended and comprised a mixture of domestic and international policy officials, the judiciary, and practitioners as well as representatives from non-governmental organisations and academic institutions.

Four themes were covered over the course of the day:

- Proportionality; the International Human Rights Perspective
- The UK Experience and Consultation on Sentencing for Drug Offences
- The Concept of Proportionality with a Focus on Different Levels of Involvement in Drug Offences
- Drug 'mules'

¹ TNI Expert Seminar on the Classification of Controlled Substances, Amsterdam, 10th December 2009; <http://www.druglawreform.info/images/stories/documents/classification-expert-seminar.pdf>

² TNI Expert Seminar on Threshold Quantities, Lisbon, 20th January 2011; <http://www.druglawreform.info/images/stories/documents/thresholds-expert-seminar.pdf>

³ References to the UN Drug Conventions in this text refer to the following: The Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol ('The 1961 Convention'); The Convention on Psychotropic Substances, 1971 ('The 1971 Convention'); and, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ('The 1988 Convention').

Background papers⁴ were disseminated to all participants in advance of the discussion. Each theme was prefaced by the introductory remarks of key participants, in order to stimulate reflection and dialogue, followed by frank discussion. This report aims to conflate the varying contributions and precise the background information so that the reader can appreciate the context and highlights of the discussion; no individuals are quoted, however, in keeping with the anonymity stipulated by the Chatham House Rule. The ideas expressed were those of individuals in their capacity as experts in the field of sentencing for drug offences and should not be interpreted as reflecting consensus among the group, or endorsement by the organisers.

Introduction

There has in recent years been a renewed interest in the principle of proportionality in sentencing policy for drug offences. There has been official analysis of the issue by the International Narcotics Control Board ('INCB') and several national initiatives that have emphasised a requirement for proportionality when sentencing in statute or penal code, asserted it through the courts, or, as with the UK Consultation on sentencing for drug offences, are continuing to explore the concept through policy processes⁵.

Proportionality has indeed become an essential safeguarding tool for fundamental human rights but, as regards sentencing, it is nevertheless inextricably linked to the question of punishment, and specifically, how much punishment should be inflicted. Accordingly, the current trend in many jurisdictions for decriminalization of drug offences has raised the specter that proportionality may be an inappropriate concept by which to determine the appropriate response to drug offences because of the inherent presupposition of punishment. Moreover, the lack of consensus across the international and domestic drug-policy bodies as to what parameters should be used to determine the harmfulness of controlled substances and, in any event, the inability of these bodies to assert scientific recommendations over political considerations⁶ has cast into doubt the ability to gauge

⁴ Suggested Reading: SC 'Drug Offences Guidelines; Professional Consultation' UK, March 2011; INCB 'Annual Report 2007' Chapter 1; EMCDDA 2009 'Drug Offences: Sentencing and Other Outcomes' Portugal; IDPC 2010 'Drug Policy Guide' UK - Chapter 2.1; Metaal, P. 2009 'Pardon for 'mules' in Ecuador, a Sound Proposal' TNI / Wola; Sentencing Advisory Panel 2009 'Consultation on Sentencing for Drug Offences' UK; Sentencing Guidelines Council 2004 'Overarching Principles of Sentencing; Definitive Guideline on Seriousness' UK; Report of the TNI Expert Seminar on the Classification of Controlled Substances, *op cit*; Report of the TNI Expert Seminar on Threshold Quantities, *op cit*; *The Tokyo Rules*, adopted by GA Res 45/110 1990, particularly rules 1.5, 2.3 & 2.7; Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; Report from the Commission on the Implementation of Framework Decision 2004/757/JHA; Jensema E 2010 'A Matter of Substance; Fighting Drug Trafficking with a Substance-Oriented Approach' TNI; Harris G. 2010 'Sentencing for Drug Offences in England and Wales, Law Reform without Legislative Reform' TNI; Carbonell M 2008 'El Principio de Proporcionalidad y la interpretación constitucional' Ministerio de Justicia y Derechos Humanos, Quito Ecuador; Ristroph A. 'Proportionality as a Principle of Limited Government' Duke Law Journal 2005 Vol. 55: 263 – 331; Von Hirsch A. 'Proportionality in the Philosophy of Punishment' Crime and Justice, Vol. 16 (1992) pp. 55 – 98; Fleetwood J. 'Penalties and Practice in the International Cocaine Trade' Brit. J. Criminol. (2011) 51. 375 – 393; TNI / Wola 2011 'Systems Overload; Drug Laws and Prisons in Latin America' Amsterdam / Washington.

⁵ See also the May 2011 New Zealand Law Commission Report 'Controlling and Regulating Drugs; A Review of the Misuse of Drugs Act 1975' which is underpinned by the concept of proportionality see e.g. Part 1; para 1.54 and Part 2; para 12.117. The concept of Proportionality was also considered in depth by the South African Law Commission in its Discussion Paper 91 'Sentencing (A New Sentencing Framework) in 2000.

⁶ See the discussion on the classification of coca in Henman, A. & Metaal, P (2009) 'Coca Myths' TNI as well as the UK Government's rejection of the harmfulness appraisals of their expert advisory committee: 'It is our view that the system should be based on evidence, but it should also be based on the considered view of those responsible for policy making' House of Commons Hansard Debates for 9th February at Column 1094.

proportionality of sentencing for drug offences as this requires a measurement of the severity of a sentence against the seriousness (i.e. harm) caused by an offence.

In this context, it seemed timely to explore the concept of proportionality as a policy and legal tool and accordingly the seminar had two objectives. First, broadly, to consider the meaning of the concept and its relevance, utility and practicality in determining effective and humane sentencing for drug offences. Second, to discuss and feed into the current UK consultation on sentencing for drug offences which touches on many of these themes.

In particular, the UK consultation has raised the question as to whether an offender's 'role' (as a reflection of their level of involvement in the drug trade) makes for a good parameter when measuring seriousness and with it proportionate sentencing. This, being felt to be a question of international application, was allocated particular attention in the expert seminar. Likewise, the treatment of drug 'mules' was given separate attention in the seminar, as it is in the UK consultation, because it seemed that not only do such cases engage many of the issues set down for discussion but that with this group so often subject to exceptionally punitive disposals, there was real call for urgent debate.

Session 1 – Proportionality: the International Human Rights Perspective

International Law

The kernel of proportionality was seen within Article 29(2) of the Universal Declaration of Human Rights ('UDHR'), which provides: *'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'*. Here, as in many of the international legal instruments, a requirement for proportionality *per se* is not made explicit; rather, the theory underlying it is articulated. Similarly, Article 6(2) of the International Covenant on Civil and Political Rights ('ICCPR') provides that *'sentence of death may be imposed only for the most serious crimes'*. It was noted that this rating of seriousness to gauge the appropriateness of a response, would now be termed 'proportionality' but, at the time of the drafting of these instruments (1966 for the ICCPR and 1948 for the UDHR), would have sat more naturally within the old adage of an *'eye for an eye; a tooth for a tooth'*.

As time has passed, proportionality has become a specific marker in international human rights jurisprudence. The Human Rights Committee ('HRC') has ruled that where any restriction of a right protected under the ICCPR is made *'States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right'*⁷. With the rights to life, liberty, security of the person, privacy, and freedom from torture (amongst notable others) protected by this Covenant, it was said that sentencing for drug offences is clearly brought within the remit of proportionality.

⁷ HRC 2004 'General Comment No 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant' U.N. doc. CCPR/C/21/Rev/1/Add.13 (2004)

What is meant by proportionality is spelled out in a separate General Comment on Freedom of Movement as follows: '*Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected*'⁸. Other human rights bodies equally foreground the need for proportionality in the restriction of fundamental human rights and concur as to the meaning of the concept; for example, the Committee on Economic, Social and Cultural Rights ('CESCR') provides as regards restrictions on the right to health – a fundamental right extremely relevant to the sentencing of drug offences - '*such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitation are available.*'⁹

In a separate exposition of the principle, '*arbitrariness*' - in the sense that something is not necessary in all the circumstances of a case - has been held to confound the principle of proportionality¹⁰. In fact, this version of proportionality is part of the written law of the European Community – '*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*'¹¹

At the regional level proportionality is also an entrenched principle. For example, the Inter American Court of Human Rights specifically endorses the proportionality principle in the context of sentencing as follows: '*no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.*'¹² Equally, the Charter of Fundamental Rights of the European Union, Article 49(3) provides '*the severity of penalties must not be disproportionate to the criminal offence*' thus rendering the principle of proportionality binding in domestic jurisdictions across Europe.

In an exposition of proportionality in judgments that stretch across the gamut of different fundamental rights, the European Court of Human Rights ('ECHR') has, likewise, asserted the need for proportionality. The ECHR requires that there must be a '*reasonable relationship of proportionality*'¹³ between the means employed to restrict fundamental rights and the aim sought to be achieved with '*a fair balance*'¹⁴ struck between the general interest of the community and the requirement to protect individual rights. In particular, the phrase '*necessary in a democratic society*' has gained currency, meaning that interference with fundamental rights must, inter alia, correspond to a '*pressing social need*' and be '*proportionate to the legitimate aim pursued*'¹⁵.

Participants commented, however, that these generalities may all be well and good but few ECHR cases deal with proportionality 'on point' that is, with regard to sentencing for drug offences. On the contrary, there appear to have been a failure to engage with the specifics of this issue, instead allowing many lengthy sentences of imprisonment for drug offences to

⁸ HRC 1999 '*General Comment No 27, Freedom of Movement (Article 12)*' U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999)

⁹ CESCR '*General Comment No 14: The Right to the Highest Attainable Standard of Health*' E/C.12/2000/4,

¹⁰ *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997) Para. 9.2: '*remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context*'.

¹¹ Treaty of Lisbon, 2007 Art. 3(b). See also, Treaty of Maastricht, 1993, Art 3(b).

¹² *Gangaram Pandey Case*, January 21st 1994, Inter American Court of Human Rights at Para. 48

¹³ *Case Relating To Certain Aspects Of Laws On Use Of Languages In Education In Belgium (Merits)* 1474/62; 1677/62; 1691/62 [1968] ECHR 3 (23 July 1968)

¹⁴ *Sporrong and Lönnroth v Sweden* 7151/75 [1982] ECHR 5 (23 September 1982)

¹⁵ *Silver and Others v the United Kingdom (Article 50)* 5947/72; 6205/73; 7052;75 [1983] ECHR 11 (24 October 1983)

pass under its jurisdiction without comment or analysis on that aspect¹⁶ but, where directly tasked, upholding, for example, severe confiscation orders for drug traffickers on the basis of deterrence¹⁷. It was suggested that there was, therefore, a real call for further strategic litigation in this regard.

In any event it was concluded by participants that proportionality is clearly established in International Human Rights Law with a meaning that requires States, when seeking to meet legitimate policy and legislative aims, to adopt the least intrusive measure available which is capable of and necessary to meeting those aims.

In the context of sentencing, however, it was noted that a requirement for proportionate sanctions is often accompanied, by an equal requirement that sanctions be ‘effective’ and ‘dissuasive’¹⁸. Indeed, the ‘least intrusive’ doctrine often gets lost when discussing criminal sanctions with proportionality often referenced to enhance punishment; i.e. to ensure sufficient severity of sanctions. For example, the International Convention for the Protection of all Persons from Enforced Disappearance (2006) Art. 7(1) provides: ‘*Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness*’. In a similar vein, the framework decision of the European Council on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (‘The EC Framework Decision’), provides: ‘*Each member shall take the measures necessary to ensure that the offences defined in Articles 2 and 3 [i.e. drug trafficking offences] are punishable by effective, proportionate and dissuasive criminal penalties.... of a maximum of at least between one and three years of imprisonment.*’¹⁹ Further, reporting on the implementation of this Framework Decision, the European Commission commented: ‘*The Commission considers that Article 4(2) has been satisfactorily implemented in terms of the scale of penalties... offences relating to drug trafficking within the framework of a criminal organisation are subject to much higher sentences than those established in the Framework Decision, and we can conclude that the penalty scales are respected.*’²⁰

The same can be said of the way proportionality is expressed in the UN drug conventions. The context for the proportionality calculation is the two-fold objective of the Conventions - to restrict non-medical use whilst ensuring availability for medical purposes – but it was reflected upon by participants that there was an element of contradiction between these competing interests that requires review at the highest level. Concerns were raised as to the skewed emphasis on the need to restrict non-medical use and the language deployed in the Preambles of the UN drug conventions was also remarked upon by participants in this regard. In particular, the language emphasises the gravity and seriousness of drug use and trade in such a way as to elevate the starting point for a calculation of proportionality to the

¹⁶ See e.g. the case of *Hermi v Italy* 18114/02 [2006] ECHR 875 (October 2006) in which the ECHR adopted a limited analysis of the case before it, accepting as admissible and focusing only on the issue of the right to participate in an appeal under Article 6 of the European Convention, ignoring the fact that lengthy custodial sentences for purported personal possession had been handed down.

¹⁷ See e.g. the case of *Phillips v the United Kingdom* 41087/98 (2001) 11 BHRC 280

¹⁸ The UN Convention against Transnational Organised Crime, 2000 Art 10(4) provides: ‘*Each state Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*’ Likewise, The International Convention for the Suppression of the Financing of Terrorism, 1999 Art. 5(3) provides: ‘*Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.*’

¹⁹ Art. 4(1) Council Framework Decision 2004/757/JHA of 25 October (*op cit*)

²⁰ European Commission 2009‘Report from the Commission on the implementation Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking’ Brussels 10.12.2009 COM(2009)69 final [SEC (2009)1661]. pp. 5-6

extent that very severe sanctions for drug use can be justified by reference to the UN drug control conventions. For example, the Preamble of the 1961 Convention asserts '*that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind*²¹'.

As regards sentencing specifically, the UN drug conventions talk about the need to take '*rigorous measures to restrict use*²² but the strictness of control varies according to the assessment of potential harm and the therapeutic value of particular substances, that is, where they are placed in the various Schedules²³ and also according to whether the offending is '*serious*' or '*minor*²⁴. Nevertheless, the up-scaling of sanctions by reference to proportionality is clearly visible. For example, in the 1988 Convention on trafficking offences the language used is as follows: '*each party shall make the commission of the offences established in accordance with Para.1 of this article liable to sanctions which take into account the grave nature of these offences*²⁵. Furthermore, the 1988 Convention asserts: '*A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.*²⁶

The INCB, exercising its role of promoting compliance with the UN drug conventions misses an opportunity to cross-reference with the need for compliance with international human rights law - accordingly, its exposition of proportionality reads as follows: '*the conventions constitute the world's agreed proportionate response to the global problems of illicit drug abuse and trafficking... The conventions set minimum standards only.*²⁷ It was remarked upon that this failure to recognise the 'least intrusive' doctrine in the context of sentencing for drug offences represents a damaging disconnect between the approach of international drugs law and policy and that of international human rights law which asserts the 'least intrusive' doctrine and, per one background document, sees proportionality as '*far away from the conservative discourse that always wants to find a way to limit fundamental rights, on the contrary it is a technique of interpretation whose goal is seen best as a way of expanding as much as possible the scope of protection, but doing so in a way that all rights are compatible with each other, as far as is possible.*²⁸

It was recognised that there is a lack of clarity as to the status of international human rights law as compared with the UN drug conventions and the tension between them causes problem for incorporation at the domestic level²⁹. Participants were exhorted, however, to remember that the overriding concern of the UN drug conventions is for '*the health and*

²¹ Likewise, the 1988 Convention talks, in the Preamble, of the '*illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural, and political foundations of society*'. Furthermore, the 1988 Convention is silent on the competing objective to ensure the availability of drugs for medical and scientific purposes.

²² Preamble to the 1971 Convention

²³ See the discussion in the report of the Expert Seminar on the Classification of Controlled Substances pp. 5 – 7.

²⁴ 1988 Convention, Art 3(4)(c): '*in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.*'

²⁵ 1988 Convention, Art 3(3)(a)

²⁶ 1988 Convention, Art 24

²⁷ INCB 2007 (*op cit*) p.1

²⁸ Translated by the author of this paper from Carbonell M. 2008 (*op cit*) at p. 10: '*El discurso sobre el principio de proporcionalidad no empata ni de lejos con el discurso conservador que quiere ver siempre limitados a los derechos fundamentales; por el contrario, se trata de una técnica de interpretación cuyo objetivo es tutelarlos de mejor manera, expandiendo tanto como sea posible su ámbito de protección, pero hacienda que todos los derechos sean compatibles entre ellos, en la medida en que sea posible.*'

²⁹ A similar example was given of tension between the intellectual property rights conventions and international human rights law and the problems caused as a result at the domestic level.

*welfare of mankind*³⁰ and to refer back to this as a starting point or linking concern where tensions arise between mandates. Certainly, the primacy of the human rights approach was preferred by many in attendance.

It was said that although the UN drug conventions and bodies like the INCB may perpetuate State Parties' justification of up-scaling sanctions for drug-offences, sanctions will be disproportionate under international human rights law where they result in the violation of other fundamental rights. The example was given of incarceration without access to drug dependence treatment which is a violation of the right to health and the right to be free from cruel, inhuman and degrading punishment.

It was also suggested that criminalisation fuels discrimination with a disproportionate impact seen upon the poorest of the poor and felt that currently too little space had been given to the issue of decriminalisation within the jurisprudence of the international human rights bodies or the drafting of the international legal instruments; rather, criminalisation is assumed. Positive trends away from this position were noted, however, with the recent report by the UN Special Rapporteur on the Right to Health exploring these issues³¹ and other UN bodies such as UNAIDS³² clearly stating that criminalisation impacts disproportionately on the exercise of fundamental human rights. It seemed to some in attendance that these international developments had created an opportunity for policy change as regards discussion of the prohibitory framework, one that should be seized in the domestic context.

Domestic Law

It was noted with disappointment that although in many jurisdictions judges are technically able to implement the rights and doctrines enshrined within international jurisprudence directly through their judgments these powers are sadly underused and the example of Russia was given. The question was therefore posed as to how best to use the international instruments and jurisprudence to assert the 'least intrusive' doctrine of proportionality in a domestic context; the hope expressed was that such an exercise would result in more 'mild' sanctions for drug offences.

It was said that State Party signatories to the UN drug conventions and the international human rights instruments are indeed legally bound to follow a proportionate approach to sentencing for drug offences as, separately and therefore doubly, are members of regional bodies, such as the EU. Some States have also enshrined the concept as a constitutional principle (e.g. Greece³³, India³⁴, the United Kingdom³⁵, and Canada³⁶) and elsewhere it is a specific requirement for sentencing prescribed by targeted statute (See e.g. the Finnish, German and Swedish Penal Codes).

Participants reflected on the role of the judiciary. On the one hand it was recognised that the judiciary is supposed to defer to larger legislative wisdom on policy questions – whether

³⁰ Preamble to the 1961 Convention

³¹ See Grover. A. (2010) 'Annual Thematic Report of the Special Rapporteur on the Right to Health' (A/65/255)

³² Sidibé. M. UNAIDS Executive Director, speaking at the 'Leaders on Discrimination' Session at the 18th International AIDS Conference in Vienna, Austria on 22 July 2010: 'We resolve that harmful laws that criminalise... drug use and drug possession... must be repealed and must not be replaced by a regulatory system that is equally prejudicial. Not only do these laws lead to serious human rights abuses, but they grievously hamper access to HIV services.'

³³ Art 25(1) Greek Constitution (2001 Amendment)

³⁴ *Bachan Singh v State of Punjab* (09.05.1980 – SC) per the dissenting opinion of J. Bhagwati

³⁵ *R v Offen* [2000] EWCA Crim 96 (09 November 2000)

³⁶ Note *R v Smith* (Edward Dewey) [1987] 1 S.C.R. 1045

to criminalise or not, for example, was said to be a question for the legislature rather than judges. On the other hand, it was said that the judiciary are crucial to the checks and balances fundamental to democracy and that it was thus for the judiciary to resist the irrationality that has gripped drug policy in so many jurisdictions; the consequences of which (for example, the power and violence of organised crime, prison overcrowding, and violations of the right to health) are themselves threats to democracy. There was support from attendees, in particular, of the approach of the ECHR which has asserted that proportionality is part of the rule of law³⁷ and as such, the judiciary should not shy away from their duty to engage with the issues thrown up by drug policy.

It was said that the usual outcome of this tension is for the courts to castigate policy whilst refraining from interference and that such an approach can be very successful. An example was given of what had been a very typical case in India in which a person caught with 100 mg heroin, (worth approximately 35 US cents) was sentenced to 10 years imprisonment by a court with no other option under law but to do so, the prosecution having insisted on charging possession for sale because there was no evidence of the defendant experiencing withdrawal when arrested. This case then went to the Supreme Court³⁸ which heavily criticised the situation, ruling that such a small quantity of drugs could not possibly have been meant for sale and a public outcry followed to the extent that in 2001 the Indian Parliament felt compelled to revise the drug law. More rationalised sentencing was introduced which revolved around whether drug quantities were 'small', 'intermediate', or 'commercial'.

Participants were reminded of the need to recognise and distinguish between the powers of the judiciary in common law as opposed to civil law countries; it was said that in States where the courts have an overarching jurisdiction and where the judiciary embrace this³⁹, such as Argentina and Brazil, there is real opportunity through the route of strategic litigation.

The example of Brazil was given where the Supreme Court asserted the proportionality principle to overturn a statutory requirement of mandatory imprisonment for small-time dealers⁴⁰. The example of Germany was also given as showcasing an example of a successful constitutional challenge to sentencing for drug offences on the basis of proportionality⁴¹.

It was said that countries like the UK provide the contrasting example. Participants reflected that in such jurisdictions the courts are often besieged with criticism when they are thought to overstep their mandate (with cries, for example of '*unelected judges*'). It was argued by some that in such a context opportunities for policy change are more readily available outside of the court-room e.g. by lobbying parliamentarians or the current public consultation on sentencing. It was countered by others, however, that this was too stark and unrealistic a distinction as applying legal instruments to instant cases always involves interpretation of those instruments and with it an incursion into policy.

³⁷ See, e.g. the ECHR case of *Scoppola v Italy* (No. 2) Application No. 10249/03 dated 17th September 2009 at Para. 108: '*In the Court's opinion it is consistent with the rule of law... to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate.*'

³⁸ *Raju v. State of Kerala* AIR 1999 SC 2139

³⁹ Reference was made to Judge Zaffaroni of Argentina who sees himself as a '*garantista*' - a supporter of the individual guarantees granted by the Constitution as first principles.

⁴⁰ *Habeas Corpus* No. 97,256

⁴¹ *Bundesverfassungsgericht* (Federal Constitutional Court), Second Senate, decision of 9 March 1994, BVerfGE 90, 145

In any event, it was recognised that the international instruments give only high level guidance on proportionality and State Parties are afforded a great deal of latitude in identifying and weighting the legitimate aim they are pursuing in the sentencing of drug offences as well of course, in how they calculate the seriousness of drug offences. In particular, the UN drug conventions recognise the importance of constitutional and legal rules at national level and recognise the legitimacy of judicial discretion in sentencing, albeit directing State Parties more towards stringency in the exercise of their discretion than towards leniency⁴². Perhaps naturally, therefore, participants heard how different jurisdictions have adopted different readings of the principle so while in many jurisdictions, the 'least intrusive' doctrine is upheld (e.g. see Canada⁴³ and India⁴⁴), elsewhere, different variants of the concept can be seen.

For example, in South Africa, the balancing exercise required by proportionality is framed thus: the relevant considerations are the nature of the right that is limited and its importance in an open and democratic society; the purpose for which the right is limited; whether the desired aims could be achieved through other less damaging means⁴⁵; and, moreover, there is a real focus on the right to dignity in the context of such enquiries, it being said that '*without inquiring into the proportionality... is to ignore which lies at the heart of human dignity*'⁴⁶. Similarly, participants heard that Argentina links the constitutionally enshrined principles of humanity and dignity very much with the concept of proportionality in sentencing. In this jurisdiction, it was said, prison overcrowding, in part a consequence of lengthy sanctions given out for drug offences, was seen to lead to disrespectful treatment of human dignity in prison settings and was one of the catalysts for their recent constitutional review of sanctions for possession for personal use⁴⁷.

In contrast, a large number of jurisdictions have developed a 'gross disproportionality' test, most notably the United States. For example, the case of *Coker v Georgia* 433 U.S. 584 held '*The Eight Amendment bars not only those punishments that are "barbaric," but also those that are "excessive" in relation to the crime committed, and a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.*' However, in the later Supreme Court Case of *Solem v Helm*, 463 US 277 (1983), the court held that death penalty cases such as *Coker v Georgia* did not have application to sentences for other types of crimes for which '*A court's proportionality analysis... should be guided by objective criteria. Criteria that have been recognized in this Court's prior cases include (i) the gravity of the offence and the harshness of the penalty; (ii) the sentences*

⁴² Art 3(6) 1988 Convention: '*The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*'

⁴³ See the Canadian Supreme Court case of *R v Oakes* [1986] 1 S.C.R. 103 in which Dickson, J. described the three components of proportionality as follows: the measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations; the means even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question; and there must be a proportionality between the effects of the measures, and the objective which has been identified as of sufficient importance.

⁴⁴ See the Indian Supreme Court case of *Santosh Kumar Satishbhusan Bariyar v State of Maharashtra* (13 May 2009) 6 SCC 498: '*the Constitution prohibits excessive punishment borne out of undue process... the question is whether the punishment granted impairs the right to life under Article 21 as little as possible.*'

⁴⁵ See the South African Constitutional Court Case of *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 which discussed the death penalty in the context of the offence of murder.

⁴⁶ See the South African Constitutional Court Case of *Sv Dodo* 2001 (3) SA 382 (CC).

⁴⁷ See the case of *Arriola*, Argentinian Supreme Court, 25th August 2009

imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions’. Participants commented that this latter criterion was potentially a very helpful one indeed. However it was also noted that the Solem case has been reconsidered subsequently by the Supreme Court in the case of Harmelin v Michigan 501 US 957 (1990) which reasserted the gross-disproportionality test, upholding a mandatory life sentence without parole imposed on a first offender convicted of simple possession of more than 650g cocaine.

Reflecting on this judgment, a number of participants respectfully disagreed with the US Supreme Court’s notion of gross disproportionality; it was said that since there is no question of taking life directly for drug offences, there should be no question of life imprisonment.

Referring back to the discussion as to the reticence of the judiciary to intervene in policy matters, ironic comment was passed on the capability of the courts to use intellectual dishonesty both to do so and to avoid doing so. The example of Harmelin was again referred to. Here, the Supreme Court had required that the sentence be both cruel and unusual before it could be struck down; accepted as being cruel, the sentence was nevertheless upheld. It was noted, however, that subsequently a State Supreme Court had struck down this particular sentence using its separate jurisdiction, remarking that if punishment were either cruel or unusual, this was sufficient to be disproportionate and therefore unlawful.

In rather more general terms, criticism was also attracted by the failure of many jurisdictions to apply the more circumspect doctrine of proportionality which involves a requirement of necessity, effectiveness, and least intrusion; were this properly applied, it was said, we should not see such lengthy custodial sentences for drug offences.

Reflecting on the need to acknowledge and maximise the interaction between policy and political imperatives and the due judicial process, the first session concluded with participants looking forward to the opportunity afforded by the next scheduled discussion on the UK consultation to focus these broad concepts of proportionality down to the realities of a particular jurisdiction.

Session 2 – The UK Experience and Consultation on Sentencing for Drug Offences

The Sentencing Council of England and Wales (‘SC’) is currently consulting on appropriate tariffs for the sentencing of drug offences.

Discussion of the Consultative Process

Historically, sentencing has been a fully discretionary process in the UK. Judges, working beneath a maximum sentence laid down by Parliament, were tasked with calculating a sentence *‘commensurate with the seriousness of the offence’*⁴⁸ according to general guidance laid down by statute, for example, that imprisonment should be a last resort⁴⁹.

⁴⁸ S2(2) Criminal Justice Act 1991, now repealed.

⁴⁹ S1(2)(a) Criminal Justice Act 1991, now repealed

Since the early 1980s, however, there has been an appetite for sentencing guidelines and these were, at first, formulated opportunistically by the highest courts. Indeed, as regards sentencing drug offences, there are many precedent cases in force which direct judges on the relevance of such matters as an offender's role and any drug-dependency, as well as drug quantity, purity, and street value and which have exhorted the lower courts to elevate '*deterrence*' to the main purpose of sentencing⁵⁰.

It was noted that there is, in the UK, a very real demarcation between personal use and supply. Whilst supply is prosecuted very firmly, personal use is dealt with, in the main, outside the criminal justice system with warnings and fixed penalties or with rehabilitative welfare-type measures⁵¹; these are practices that have evolved mostly through police⁵² and prosecutorial guidelines⁵³ rather than through statute. Participants from other jurisdictions remarked, therefore, that they did not know whether the UK is a very strict or a very liberal country: on the one hand the laws prescribe one of the highest maximum penalties for cannabis possession in the EU, but at the same time there are police guidelines which restrict the likelihood of arrest.

In 1998 Parliament laid down requirements for the courts on how to formulate their sentencing guidelines. Specifically, it was provided that '*the Court shall have regard to: (a) the need to promote consistency in sentencing; (b) the sentences imposed by courts in England and Wales for offences of the relevant category; (c) the cost of different sentences and their relative effectiveness in preventing re-offending; (d) the need to promote public confidence in the criminal justice system; and (e) the views communicated to the court... by the Sentencing Advisory Panel.*'⁵⁴ This Panel ('SAP') was a research and consultative body designed in part to ensure that guideline judgments were no longer formulated on the basis of the narrow issues in the instant case before the court, but that the wider interests of third-parties were taken into account⁵⁵.

The judiciary were initially reluctant to forgo their autonomy⁵⁶ and Parliament thereafter fortified the framework creating a second consultative level, comprised, amongst others, of senior judiciary, to whom SAP should report. This body was named the Sentencing Guidelines Council ('SGC') and it was their remit to take on board the advice of SAP, consult further with the Government, and issue definitive guidelines. In doing so, SGC was subject to exactly the same mandate in formulating guidelines as the Court of Appeal had been⁵⁷ but invariably the advices of SAP were transformed into definitive guidelines by the

⁵⁰ See in turn: R v Alfonso [2005] 1 Cr App R (S) 99; R v Aramah (1982) 4 Cr App R (S) 407; R v Aranguren (*op cit*); R v Patel [1987] Crim LR 838; R v Aramah (*op cit*) per Lord Lane C.J. at 407 '*Anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving these class A drugs should be done*'

⁵¹ SC 2011 '*Analysis and Research Bulletins - Drugs Offences - March 2011*' at p. 3: '*In 2009, over 47,000 drugs offences committed by adults were given cautions or PNDs1 and a further 89,100 received cannabis warnings. 69,300 cases went on to be seen in the courts, of which over 50,000 were eventually found guilty and sentenced...In 2009, the most common outcome received by adults sentenced for drug offences was a fine. 20% of adults were sentenced to a community order whilst 18 % of adults sentenced were sent to prison.*'

⁵² See, e.g. The Association of Chief Police Officers 2009 '*ACPO Guidance on Cannabis Possession for Personal Use*'

⁵³ See e.g. Crown Prosecution Service '*Drug Offences, Incorporating the Charging Standard*' March 2011

⁵⁴ S80(3) Crime and Disorder Act 1998, now repealed.

⁵⁵ S81 Crime and Disorder Act 1998, now repealed.

⁵⁶ The tariffs suggested by SAP in their first advice on environmental offences were rejected by the courts in preference for a consideration of each case on its own facts. See SAP 1999 '*Environmental Offences*' and R v Yorkshire Water Services Ltd [2002] Env LR 18 and R v Anglian Water Services Ltd [2004] Env LR 10.

⁵⁷ S170(5) Criminal Justice Act 2003: '*the matters to which the Council must have regard include – (a) the need to promote consistency in sentencing; (b) the sentence imposed by courts in England and Wales for offences to which the guidelines relate; (c) the cost of different sentences and their relative effectiveness in preventing re-offending; (d) the need to promote public confidence in the criminal justice system, and (e) the views communicated to the Council... by the Panel.*' This is exactly the same wording as applied to the higher courts under s80(3) Crime and Disorder Act 1998.

SGC with limited tinkering⁵⁸. It was said in the seminar, however, that despite this involvement in the formulation of the guidelines, concern amongst the judiciary as to the fettering of their discretion, does remain.

Legislation was brought in that made it a legal requirement for a sentencing judge to 'have regard'⁵⁹ to the relevant SGC definitive guideline and to justify⁶⁰ cases where a sentence fell outside the recommended range. Also, statutory guidance for sentencing in general was handed down. First, courts must have regard to the following aims in sentencing: '(a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences'⁶¹. Second, courts were instructed on the calculation of a proportionate tariff: 'in considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.'⁶²

Although for a number of years there have been sentencing guidelines for drugs offences in the lower courts⁶³ these have been of limited application as they apply only to offences which do not attract imprisonment of more than 6 month custody. On the contrary: the average custodial sentence in 2009 across all supply offences was 2 years 11 months; and, the average across all importation and exportation offences was 6 years 5 months⁶⁴.

Accordingly, in 2009, SAP initiated a public consultation of sentencing for drug offences⁶⁵. Doing so was part of SAP's general mandate to produce advice for those offences which appear before the courts in large numbers and which often result in lengthy imprisonment; however, it was also triggered by a high-profile controversy over the comparative harms of different substances⁶⁶. As such, as well as consulting on the relative weight of the usual ingredients measured by judges in determining the seriousness of drug offences⁶⁷, respondents were asked to consider high level questions such as the relative seriousness of drug offences compared with other forms of offending behaviour and the effectiveness of deterrent and other forms of sentencing.

The outcome of the consultation was an advice⁶⁸ to the SGC recommending sentencing guidelines that would mean, in effect, a sea change in the sentencing of drug offences in England and Wales. This was because the advice counselled against the use of deterrent sentencing by way of lengthy custodial sentences, recognising 'the absence of evidence to substantiate the effectiveness of the current approach'⁶⁹ and asserting that 'research suggests that potential offenders are more likely to be deterred by the perceived risk of

⁵⁸ Annual Report 2009 / 2010 SGC & SAP p. 9 'virtually all the Panel's proposals have found their way into law.'

⁵⁹ S172 Criminal Justice Act 2003

⁶⁰ S174(2) Criminal Justice Act 2003

⁶¹ S142(1) Criminal Justice Act 2003

⁶² S143(1) Criminal Justice Act 2003

⁶³ SGC 2008 'Magistrates Court Sentencing Guidelines' UK

⁶⁴ For full details of current sentencing practice in the UK, see the Sentencing Council 'Analysis and Research Bulletins – Drugs Offences' March 2011.

⁶⁵ http://www.criminalbar.com/86/records/285/drug_offences.pdf

⁶⁶ See the discussion in the 'Report of the Expert Seminar on the Classification of Controlled Substances' (Op Cit) at pp. 16 -18.

⁶⁷ E.g. *inter alia*: the effectiveness of confiscation and other ancillary orders as a deterrent; whether it is right to cross-reference role against quantity or scale of an operation to determine seriousness; the relevance of purity, street-value, and open-market trafficking; and, human factors such as, e.g. drug-dependency, self-medication, and vulnerability.

⁶⁸ SAP 2010 'Advice to the Sentencing Guidelines Council; Sentencing for Drug Offences' Crown Copyright.

⁶⁹ SAP 2010 *ibid* Para 21

*being apprehended and convicted than by the sentence that is likely to be imposed.*⁷⁰. This was a conclusion vocally supported by many in attendance at the seminar.

Having published this advice, however, a definitive sentencing guideline was not then produced as before this could occur SAP and the SGC were disbanded and their functions combined in the new SC. The Ministry of Justice spelled out its hopes and intentions for the new body in an impact assessment⁷¹. The problems identified in the SAP, SGC structure were *'cumbersome procedures'* and the fact that *'there is currently no assessment of the impact of guidelines or the nature of adherence to guidelines... There is also no independent assessment of the impact of Government policies or legislation.'*⁷² The new framework was intended therefore to *'place a duty on the Council to assess the impact and application of its guidelines and in doing so to collect new sentencing data. To enhance the role of the Council in assessing the impact of policies and legislation on correctional resources with the intended effect of allowing Government to plan better for demand on correctional services.'* Amongst the benefits sought, it was said: *'Closer adherence to sentencing ranges could arrest historical trends in upward sentencing drift... Arresting sentencing drift could potentially mean avoiding the need to build some 1,000 additional prison places (build cost of which is around £150m, running costs around £37.5m).'*⁷³

The statutory requirements upon the SC for how to formulate their sentencing guidelines are exactly the same as they were for SAP and the SGC except that there are two additional aspects to which the Council must have regard: *'the impact of sentencing decisions on victims of offences'*⁷⁴ and *'the cost of different sentences and their relative effectiveness in preventing reoffending'*⁷⁵.

It was accepted by participants that the above changes necessarily meant the need for further consultation on the discrete points of victim impact, cost, and effectiveness and that there would be some delay during which period the courts would uphold the traditional tariffs⁷⁶. However, it was said by some participants to be surprising that the SC did not make the drugs guideline their first project and that when they did turn to it, they consulted on many of the same issues as had SAP, but notably avoided explicit discussions of principle, for example on the comparative seriousness of drug offences vis-à-vis sexual and violent offences and on the effectiveness of deterrent sentencing. Rather, the SC consultation aims *'to increase the consistency of sentencing while leaving the average severity of sentencing unchanged.'*⁷⁷ This was remarked on by some participants to be a missed opportunity and seemingly out of line with the Parliamentary intention behind the scheme and the legislative mandate outlined above and it was suggested that unless

⁷⁰ SAP 2010 *ibid* Para 20

⁷¹ Ministry of Justice 'Impact Assessment of Sentencing Council for England and Wales' 13th January 2009. See also the report of the Sentencing Commission Working Group 2008.

⁷² *Ibid.* p. 1

⁷³ *Ibid.* p. 4

⁷⁴ S120 (11)(c) Coroners and Justice Act 2009

⁷⁵ S120 (11)(c) Coroners and Justice Act 2009

⁷⁶ A legal challenge was brought against lengthy custodial sentences for drug couriers further to SAP's advice but the Court of Appeal upheld the traditional sentencing regime as follows: *'Until there is a definitive guideline issued by the Sentencing Council, although the proposals of the Sentencing Advisory Panel are of considerable interest as part of the background which sentencing judges may wish to bear in mind, the proposals themselves do not constitute guidance to sentencers which serve to displace, or amend or in any way undermine the authority of the guidance issued in guideline decisions of this court. They therefore provide no justifiable basis for interfering with a sentencing decision in which the sentencing judge applied the existing guidance of the court. For the avoidance of doubt -- and we understand from Sir Jonah that there may be some inconsistency of judicial approach -- the way in which Judge Kathuda applied the guideline decision in *Aramah* was entirely correct'* R v Valentas & Tabuns [2010] EWCA Crim 200 at Para. 18.

⁷⁷ SC 2011 'Drug Offences Guideline Professional Consultation' p.4

average severity was put at issue, no real progress could be made in terms of securing more proportionate sentencing.

In rebuttal, participants heard it argued that proportionality had played a central role in the SC's consultation guideline. It was said that there had been a real attempt to ensure that all sentences are proportionate to the offending but, in the broader context, the SC had had to bear in mind the statutory framework of criminalisation and the maxima established by Parliament which, for example, is set as high as life imprisonment for the importation of heroin.

The difficulties caused by the setting of mandatory minimum sentences for drug offences, were also referred to, it was said that, bearing in mind that proportionality has to be judged across all types of offending, when Parliament sets such minimums (as it did with the setting of a 7yr minimum for a third class A trafficking offence in 1997⁷⁸) it tenses the whole system and whether proportionate or not, a starting point of a lengthy custodial sentence for supply offences is required by law. Overall, however, it was suggested that comparative seriousness (i.e. where drugs should fit in the wider framework of offending) had been overlooked somewhat in the consultation and that recognising the lesser seriousness of drug-related crime as compared, for example, with violent crime, could assist with obtaining a more proportionate response as well as public buy-in. It was suggested that another similar route towards such constructive outcomes would be to compare drug harms with other types of harms and then cross-reference the penalties afforded; speeding offences were ripe for such a comparison, it was said.

In any event, the argument was made that to reduce sentencing tariffs for drug offences considerably would mark a sea change in law or policy that the SC was not mandated to do; the most it could do would be to tilt the rudder (or direction) of sentencing. It was said that SAP had been able to do otherwise because it was constituted mainly of academics, but that the judiciary, including those sitting as members of the SC, had to be more careful.

This was the heat of the morning's discussion, as participants tried to understand the insistence that to do so would mark a change in the law that was not mandated when the exercise appeared to many to have a clear statutory remit to affect real changes in sentencing practice and particularly to redress the sentencing up-drift of recent years. Note was made in particular of the fact that current sentencing guidelines for drugs are judge-made and that the scheme of dealing with possession outside of the criminal justice system has been able to evolve through police and prosecutorial guidelines. It was suggested that a way out of these difficulties might be to cloak efforts in the terms discussed in the morning session; that as part of the checks and balances of democracy, there is a duty to mitigate the effects of bad law when opportunity arises. Indeed, the protestations on the SC's lack of mandate to impact on policy was decisively refuted by some; it was said that a process such as this for an independent advisory body to make sentencing guidelines clearly has policy-import and would therefore be unthinkable in other jurisdictions (the example of Brazil was given).

It was recognised that this was a very difficult topic not least because the public seem to want harsh laws and public confidence is hugely important both as a statutory aim of the exercise and a practical concern. Experts were reminded that a fundamental driver in criminal justice interventions is to avoid the public taking the law into their own hands through dissatisfaction. It was said that it is of course tempting to forget the scrutiny of the

⁷⁸ S3 Crime (Sentences) Act 1997, now replaced by S110 Powers of Criminal Courts (Sentencing) Act 2000

public and get lost in theoretical debate about proportionality of sentencing for drug offences, but participants should remember the inherent fragility of public confidence and the public's appetite to scrutinise sentencing practices. Note was taken, in particular, of the controversy raging at the time of the seminar over the UK Minister of Justice's remarks over the comparative seriousness of different forms of rape⁷⁹. Accordingly, it was argued that considerable weight should be given to the results of the SC research into public attitudes on sentencing for drug offences⁸⁰. Whilst the public in this study did not want to see custodial offences for possession, they did want substantial custodial offences for small scale supply / importation and surprisingly lengthy sentences for medium to large scale supply and for large scale importation. So, for example, when faced with large scale heroin importation most participants selected a life sentences with a notional determinate term of between 15 and 50 years custody⁸¹; however, the reality in the UK is that such an offender would receive a determinate sentence and serve 10 – 12.5 years.

On the other hand, it was said that simply because the public are blood-thirsty this should not translate directly into policy because: a) it is also the role of the State to respect, protect and fulfil the human rights of those charged with drug offences; and, b) there are other statutory aims to be accommodated not least the need to have regard to the cost of different sentences and their relative effectiveness in preventing reoffending which, if they were duly noted, it was said would result in very different guidelines indeed. It was remarked that a pragmatic strategy, and one that the SC seemed well equipped to perform, is to raise public awareness about the realities of sentencing and the various factors involved in determining tariffs. It was acknowledged, however, that such efforts would be made more difficult in the UK by the positioning of the tabloid press.

The importance attributed to the statutory aim of consistency through the SC consultation was also questioned by participants. On the one hand it was recognised that where there is a real disparity between sentences handed down from one area to another or towards one demographic and another, this can have a negative impact on public confidence with sentencing appearing, as a consequence, arbitrary, not evidence-based, and disproportionate. Examples were given of like problems in other jurisdictions, including France. It was particularly commended that one of the aims of the sentencing guideline process is to reduce discrimination⁸². However, it was also reflected that the statutory mandate is to have regard to current patterns of sentencing, not replicate them and that, if one can really pick and choose which statutory aims to prioritise, cost and effectiveness would appear to be more relevant and useful options.

At the heart of the debate was recognition that sentencing for drugs offences presents a real challenge as a highly complex area of policy. Harms are often indirect if not disputed entirely, culpability or role is very difficult to determine, and deterrence is very difficult to grapple with rationally when there is evidence that defendants are more likely to be deterred by the risk of being apprehended than by notional length of sentence and so it

⁷⁹ See e.g. the Guardian 'Comment is Free' for 18th May 2011 'Should Ken Clarke resign over his 'serious rape' comments'.

⁸⁰ SC 2011 'Public Attitudes to the Sentencing of Drug Offences'

⁸¹ Ibid p. 16

⁸² SC 2011 'Equality Impact Assessment Initial Screening – Relevance to Equality Duties' at pg. 3: 'The Council anticipates that the guideline on drug offences will have a generally positive overall impact on equalities issues, as one of its principal aims is to promote consistency in sentencing. This, in combination with the applicability of starting points to all offenders (rather than first time offenders) and the increased transparency that the Council hopes to promote by issuing a clear guideline, should ensure that there is as little scope as possible for any discrimination.'

would be better affected through changes in law enforcement practices, but it remains, nevertheless, a statutory purpose behind sentencing.

The Consultation Itself

Having spent so much time debating the aims of the consultation exercise and its focus, there was little time, in fact, to debate the specific questions raised within it but some attention was given to these issues and the following is an overview of this discussion.

The SC had hoped to produce a single document for courts across the UK to use to ensure consistency and, within these constraints, to set down a proportionate framework. The recommendation is to follow a step by step process. First, the court will be required to determine the category or sentencing range in which an offence should be placed based on the factual elements of the case and reflecting the degree of seriousness involved. Second, determine what aggravating or mitigating elements should affect the general starting point given within the appropriate range and factor in various matters which, under statute, need to be reflected in sentence – e.g. reductions for guilty pleas and assistance to the prosecution. Third, where a person is being sentenced for more than one offence, cross-reference the provisional sentence against the totality principle⁸³ and determine whether sentences should be consecutive or concurrent. Having decided the sentence, the court must then go on to consider whether any confiscation or other ancillary orders should be made, give its reasons for the sentence, and decide whether to give credit for time spent on remand.

In terms of setting what the sentencing range should be for different factual circumstances, this is where the meat of the consultation really lies and indeed, participants of the seminar felt drawn to respond on a number of the different questions set by the SC as follows:

Separation of Offences

The SC separates out drug offences for different sentencing treatment under different headings: 1) importation / exportation; 2) supply / possession with intent to supply; 3) production / cultivation; 4) permitting premises; and, 5) possession. It was notable that the SGC had, in contrast, conflated guidelines for importation / exportation with supply but otherwise this passed without comment in this session though it was returned to in the separate discussion on drug ‘mules’, reported below.

In the later session on role comparisons were made at length as to practice in other jurisdictions with regard to separation of offences for sentencing purposes, for which see below. Participants did reflect favourably, however, at this point, on the flexibility afforded by the proposed guideline despite the differentiations between offence-types, in the sense that it was agreed that it was right, in terms of proportionality to seriousness, to refer courts dealing with supply offences involving very small quantities instead towards the sentencing ranges for possession offences.

Purity

The SC recommends making no assumption about purity but instead base quantities on the entire product recovered, catering for analysis where available and acknowledging the contextual information purity may provide, including aggravating a sentence.

⁸³ i.e. whether the cumulative sentence for a number of offences dealt with together are appropriate to the overall offending behaviour and balanced.

On this topic, participants rehearsed at length the discussions of the previous expert seminar on Threshold Quantities⁸⁴. The same concerns were raised about the unfairness of using purity as a criterion of seriousness because few defendants are aware of or have control over purity and also the unfairness of not using it as a criterion – because where total mass includes licit substances, individuals are subject to punishment for non-criminal behaviour which is clearly wrong.

Also the arguments were again given, and new evidence was cited⁸⁵, as to the danger that a focus on purity could be manipulated to the advantage of traffickers; this was said to have been a real sticking point in the recent Polish reforms. On the other hand, it was said that a focus on purity could be seen as advantaging proportionality. The example of India was given in which legal challenges are being mounted on the basis of purity, to bring down the quantities on which individuals are sentenced and so avoid the death penalty. Purity as a criterion was therefore said potentially to offer a helpful downscaling influence on sentence.

Recognising resource issues, however, and the scope allowed for analysis of purity in cases that were challenged, the SC recommendation did appear to many to be a good half-way house and in fact tallied with the conclusions of the previous expert seminar on this topic. Whilst concerns continued to be iterated about the danger posed by binding thresholds (as in e.g. Slovakia) to the presumption of innocence, the point was made and welcomed that the SC guidelines are not tram-lines; the burden of proof remains on the prosecution.

Separation of Substances

The SC recommends making distinctions for the purpose of sentencing between different classes of drugs. It was said that this is in part necessary because statute differentiates between the classes with different maximum penalties, but also desirable as it would enable a more measured approach to be able to be taken to substances in the lower categories.

However, a number of the experts in attendance expressed that this tie-in to what was agreed to be a generally faulty system of classification, ill-linked to the actual harms of various substances, represented a fundamental weakness in approach and a bar to achieving truly proportionate sentencing⁸⁶. It was argued that cannabis in particular should be taken out of the regime and dealt with separately. It was said that to acknowledge these issues openly might not have been easy for the SC, but it would have made the exercise much more meaningful.

Aggravating and Mitigating Factors

For each offence, the proposed guideline would direct judges towards various aggravating and various mitigating factors. A comprehensive review of the various factors suggested for each offence was impossible within the time-frame of the seminar, but participants did feel it important to underline the appropriateness of recognising self-medication as a factor which should reduce sentence. Indeed, participants went so far as to lament that there is no defence of medical necessity available for cannabis offences in the UK⁸⁷. Other factors were addressed during the discussion on role which is reported below.

⁸⁴ See the report of the 'Expert Seminar on Threshold Quantities' (*op cit*) pp. 7-8

⁸⁵ Fleetwood J. 2011 (*op cit*) at 388: 'Since professional traffickers were aware of the five-kilo threshold in sentencing guidelines that is designed to punish serious offenders more heavily, most chose to carry amounts below this threshold.'

⁸⁶ See the discussion in the report of the 'Expert Seminar on the Classification of Controlled Substances'

⁸⁷ R v Quayle [2005] EWCA Crim 1415

Quantities

The SC is consulting as to whether quantity as cross-referenced against the role of an offender is the appropriate way to measure seriousness. The discussion of role was separated in the seminar and is reported in the next section.

The SC has rated quantity an indicator of harm, which cross-referenced against culpability, gives the measure of seriousness and so enables a proportionate response to be calculated. The rationale is that the greater the quantity the more users will be exposed to the harm of drugs. This was said to be a fundamental question of the SC consultation and indeed a number of participants expressed doubts about the directness of the link between quantity and harm. It was said that you can neither be sure that the fact that a particular person is arrested or a particular amount of drugs confiscated will mean one consumer less as an outcome – the market will still exist; nor can you be sure that the drugs would have been used in a harmful way or to harmful effect were it not for the harms caused by global drug control. These themes were revisited as part of the final discussion on deterrence in the drug ‘mules’ session, reported below.

Looking at the actual figures suggested by the SC, it was suggested that the quantities are too low in general. It was said that if there is a starting point of 14 years imprisonment for importers caught with 2.5kg, what response is left to confront the true gravity of the drug trade where high-level trafficking deals more in the region of 1.5 tonnes⁸⁸ and over. It was argued that because of the preponderance of low-level offenders caught by the system and dealt with as traffickers, the whole scale of sentencing had been put out of line and was disproportionate. These aspects were again revisited later as part of the discussion on ‘mules’.

There were some compliments, however. The SC has sought to reflect the different quantities that currently could be expected for each type of offence and, as already discussed, looks at total mass rather than purity. Accordingly, some advances in the representativeness of quantities suggested have been made in comparison to the SAP advice and the SC was commended by participants for this. For example it was noted that under SAP it was presumed that *‘many couriers would come within the ‘subordinate role category’* but grounded this within the presumption *‘that the quantity of drugs involved will be relatively small’*⁸⁹. However, in fact, the quantity of substances couriered by drug ‘mules’ would as a general rule have tended to fall within the moderate or substantial quantities as defined by SAP, and occasionally satisfy the *‘very high’* category. Indeed, in a study of 3150 internal drug couriers apprehended by the Dutch Ministry of Justice, they were found to carry *‘an average of 400g of pure cocaine per person (range 15-1900g)’*⁹⁰. It was said that the SC has better recognised the realities of drug-couriering, however, with their suggestion that *‘a drug mule importing 800g (large quantity) of cocaine should be classed as playing a subordinate role.’*⁹¹

⁸⁸ Reference was made to the seizure of the ship *‘Dances with Waves’* by the Portuguese, Irish, US, and UK authorities working together in 2008; the boat carried 1,875 kg cocaine.

⁸⁹ SAP 2009 *‘Consultation Paper on Sentencing for Drug Offences’* Para 105

⁹⁰ Algra, P et al (2007) *‘Role of Radiology in a National Initiative to Interdict Drug Smuggling: The Dutch Experience.’* AJR 2007; 189 pp. 331-336.

⁹¹ SC 2011 *‘Drug Offences Guideline; Professional Consultation’* p. 32

On the other hand it was said that the SC had made considerable mistakes in assessing equivalent quantities between substances. So for example, it was said that terming 20 – 99 tablets of ecstasy as equivalent to 5 – 50g ketamine made no sense in real terms⁹² and in any event, most people who are looking after drugs have no idea of what they are carrying and so should not be held responsible in this regard. This was acknowledged to be a very difficult area of discussion and one that required further research to be undertaken.

As regards the relevance of quantity to offences of possession for personal use, it was suggested that the harm rational did not really apply except in terms, potentially, of self-harm. However, as starting points for possession of all quantities are given as non-custodial, this did not become an issue in the seminar, nor indeed, did the fact that possession in prison is recommended to be dealt with more punitively to reflect that drugs are used as currency in such a situation. What was at issue, however, was the continuance of the 'out of court' disposals for possession for personal use; it was hoped by all that these would continue but it was noted that the Director of Public Prosecutions reviews charging standards after the finalisation of any sentencing guidelines to ensure that they mesh. In light of the non-custodial starting point recommended by the SC problems were not foreseen in this regard, however, and certainly these efforts at coherence across the system were commended by participants.

It was proposed that in assessing what makes for an effective and proportionate sentence it is essential to look at the example of other jurisdictions and participants noted the absence (in either the research documents published by the SC to support the consultation, or the questions posed by the consultation itself) of this issue of comparative sentencing. A comparison of three scenarios, in particular, was made with Dutch sentencing practice as follows:

- 1) A drug 'mule' with 800g cocaine could expect a starting point of 6.5 years custody under the SC consultation whereas the guideline for the same facts in the Netherlands is a range of 3 – 7 months.
- 2) Cultivation of 100 cannabis plants would trigger a starting point of 5 years custody under the SC consultation whereas the guideline for the same facts in the Netherlands is 6 weeks custody.
- 3) Street dealing with less than 5g cocaine or heroin would result in a starting point of 5 ½ years custody under the SC consultation whereas in the Netherlands the guideline would be 6 weeks.

Reflecting on this exercise as useful indeed and expressing a hope that further examples from other jurisdictions could be fed into the consultation, there was nevertheless concern, referring back to the discussion on public confidence, that there would be an outcry were guidelines suggested in the UK equivalent to the Dutch levels. However, a number of participants, reflecting that the lengthy custodial sentences meted out in the UK were from the vantage of their jurisdictions disproportionate in the extreme, pressed the SC on the need to find some accommodation. The example of Portugal was given, which had managed to turn about their drug policy, even to the point of decriminalisation, and had done so without the sky falling in despite a conservative and previously resistant electorate and media.

⁹² It was said that 10g ketamine was more equivalent to 90 tablets of ecstasy.

Some participants also reflected with disappointment that the SC had felt constrained from deploying confiscation and other ancillary orders in the place of lengthy custodial sentences. This was because it was felt by some that such orders had great deterrent potential and examples in this regard were given from other jurisdictions, including Brazil. On the other hand, strong arguments were made that organised crime had become too sophisticated to see much return from the use of such instruments with it now being too difficult to get to the money. In any event, it was accepted that the making of a confiscation order is a process separated by statute from determining the appropriate sentence and therefore although it had been a clever way for SAP to make lower tariffs more palatable to the general public, it was not in fact an option for the SC.

Overall, the quality and precision of the consultation was admired and it was said that it would provide a very useful template for other jurisdictions. The methodology, in particular, was commended for the opportunity of the consultation process and the democracy this would inject in such an important policy-field. There was admiration also, for the SC's built in mechanisms to raise public awareness and to secure public buy-in as well as to monitor and evaluate the outcomes of the guidelines once they are in force; it was said that such monitoring is absolutely critical to achieve evidence-based and effective drug policies.

However, a number of participants returned to the earlier discussion and repeated that they continued to be troubled by the presumption of the consultation that the current severity of sentencing is proportionate and should be the starting point for assessing appropriate tariffs. It was remarked that without consulting or acting on the fundamental issues of, for example, comparative seriousness and effectiveness, the SC will just be tinkering around the edges of sentencing for drug policy and only capable of a superficial or cosmetic impact. The hope was expressed that the wonderful opportunity presented by this consultation would not be lost but rather that, the SC would be able to foreground these fundamental discussions of proportionality in the remainder of its work on this topic.

Concluding this session, it was said that even though there may be a distinction between parliamentary and judicial processes, it is not possible to conduct an exercise such as this without taking a policy position. It was suggested that in the event that the SC truly felt constrained from fundamentally adjusting what had become bad sentencing practice, the following question could at least be posed: how can we tilt the current system so that it becomes more effective and proportionate, improving the ability of our sentencers to have good rehabilitative impacts?

Session 3 – The Concept of Proportionality with a Focus on Different Levels of Involvement in Drug Offences

In the UK context, the seriousness of an offence (against which a proportionate disposal is to be measured) is determined by cross-referencing *'the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.'*⁹³ Applying this to drugs offences, the SC has rationalised that *'the concepts of an offender's role and the quantity of drug involved are simply a reflection*

⁹³ S143(1) Criminal Justice Act 2003

of the wider concepts of culpability and harm'⁹⁴. As such, role and quantity are put forward as the key determinants of seriousness.

For each offence under the proposed guideline, the sentencing range is set by cross-referencing against the quantity of drugs involved with whether the defendant played a 'leading role', a 'significant role' or a 'subordinate role'. General, non-exhaustive guidance is given for each offence as to what activities should suggest the different roles. The example for supply offences is as follows⁹⁵:

Leading Role

- Top tier organisational role in own / another's operation, for example funds / arranges purchases from importer
- Uses business to aid and conceal illegal activity
- Expectation of substantial financial gain
- Direct supply to drug users for gain, for example street dealer
- Evidence of professional dealing, for example deal lists, drug dealing paraphernalia, such as scales, packaging or quantities of cash inconsistent with any legitimate source of income
- Abuses a position of trust or responsibility, for example law enforcement / prison officer
- Supply by prisoner

Significant Role

- Mid-tier organisational role in operation that is not their own, for example acts as a link in the chain
- Engages others in illegal activity whether by pressure, influence, intimidation or reward
- Limited / no influence on those above them in the organisational chain
- Expectation of some gain, either financial or benefit in kind
- Supply to prisoner (other than by prison officer)

Subordinate Role

- Performs a limited function under direction, in operation which is not their own, for example runners
- Engaged by pressure, influence, intimidation or relatively small reward
- No expectation of gain, for example introducers
- No influence on those above them in the chain
- If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis, such as reefer.

⁹⁴ Sentencing Council 2011 '*Drug Offences Guideline; Professional Consultation*' P. 11

⁹⁵ *Ibid*, P.20 Table 4

In discussion, experts compared the proposals with examples from other sentencing frameworks and participants remarked on the helpful resources⁹⁶ of the European Monitoring Centre for Drugs and Drug Addiction ('EMCDDA') in this regard.

Immediately it was clear that the SC proposals do not replicate those found in most European jurisdictions. Rather, from the top down, there is elsewhere more of an emphasis on what the offence is, rather than the role played by an offender in committing such an offence. With notable exceptions such as Finland and Sweden which subdivide their various drug offences into minor, medium, and major categories, it was remarked that there are usually three different types of offences described in law – supply, possession for personal use, and consumption – with the latter two sometimes being taken out of the criminal sanction framework to be dealt with as a civil or administrative misdemeanour. In particular for sixteen European States possession (and consumption) remain imprisonable criminal offences whereas eight States take such cases outside of the criminal justice system and impose civil or administrative fines (e.g. Portugal, Spain and Italy); still others, though retaining a criminal framework, impose no punishment (e.g. The Netherlands). Other oddities were cited such as Romania, where consumption is an offence but no penalty has been legislated for it and Estonia and Latvia where albeit the offences of possession and use are incorporated into their administrative offences code, the penalty can be up to 30 days locked in police cells. Participants were keen to note that the EMCDDA expects to publish a map of such variants in the upcoming Annual Report. In practice, research so far suggested that across Western Europe personal possession is most likely to be dealt with by way of a fine, and across Eastern Europe, by way of suspended sentence. It was suggested that further research on the impact of early release and bail schemes, as well as policing, prosecutorial and judicial approaches to implementing the sentencing frameworks written in law, would also add value in this field.

Such high level categorisations in preference over distinctions of role were thought to be reflected in the EC Framework Decision. The Framework Decision distinguishes only between crimes linked to trafficking e.g. production or sale, cultivation, precursor offences etc⁹⁷ without delineating different penalties for major or minor roles under these headings albeit roles are aggravated by participation in a criminal organisation.

It was acknowledged that distinctions are made by the EC in other respects, however. A base line maximum of 1 – 3 years imprisonment is required for all trafficking offences⁹⁸ but scope is also provided for reducing penalties where a person has either '*renounced criminal activity relating to trafficking in drugs*' or provided assistance to the authorities in some way⁹⁹. On the other hand, an uplift to '*a maximum of at least between 5 and 10 years imprisonment*' is required where an offence involves '*large quantities of drugs*' or '*those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons*'¹⁰⁰. As discussed by the SC consultation, it was noted that such variants are more indicative of harm, than culpability, and it was noted that many jurisdictions do choose to gauge seriousness along such indicators as these, for example: causing injury or death (e.g. Belgium, Czech Republic, Germany, Luxembourg, Poland, Slovak Republic); the scale of the act (e.g. Czech Republic); quantity (e.g. Denmark,

⁹⁶ For background reading see: 1) European Monitoring Centre for Drugs and Drug Addiction ('EMCDDA') 2009 '*Drug Offences: Sentencing and other Outcomes*' Luxembourg; 2) EMCDDA 2011 '*Topic Overview; Illegal Drug Trafficking*' at <http://www.emcdda.europa.eu/html.cfm/index5766EN.html>

⁹⁷ Art. 2(1), Council Framework Decision 2004/757/JHA

⁹⁸ Art. 4(1) (ibid)

⁹⁹ Art 5 (ibid)

¹⁰⁰ Art. 4(2) (ibid)

Germany, Estonia, Lithuania, Austria, Slovak Republic, Norway); and street value (e.g. Ireland).

As regards distinctions by drug, there were said to be only four countries in Europe that factor such in only for personal use offences and six countries that do so only for trafficking offences; for trafficking, usually the drugs are not named, and the framework distinguishes only between classes of drugs or between drugs and more dangerous drugs, for example (Turkey is a notable exception). Countries that distinguish between drugs for sentencing both possession and trafficking offences include Cyprus, the Netherlands, Portugal, Romania, the United Kingdom and Bulgaria.

As regards distinctions by quantity, it was said that these can sometimes undermine efforts to separate personal use from supply offences. For example: *'an offender found with more than two user doses of heroin, amphetamine or cocaine in Norway would probably be convicted of a standard drug offence rather than a user offence'*¹⁰¹. Participants referred back to the discussion of the morning on threshold quantities.

It was noted in particular that quantity and type of drug are, in general, more often set down as determinants of seriousness and sentencing than role. Reference was made for example to Denmark which distinguishes between small and larger quantities and soft and hard drugs but make no distinction between traffickers and user-dealers. It was argued that it was really important to distinguish, for the purpose of sentencing, both by substance and role, as indeed suggested by the SC. However, it was also commented, that it was very difficult to get such distinctions right not least because roles are often blurred and therefore narrow distinctions often do not fit with reality. The question was posed as to how narrowly roles should be drawn, and this led to a much wider discussion on the merits of sentencing guidelines at all which is reported later in this document.

At the very least, it was said, there should be distinctions made between trafficking and micro-trafficking, a concept deployed in many Latin American countries and one which allows street-dealers, for example, to be dealt with more proportionately than in a framework where they are placed in the same category as organised criminals. Looking at these other frameworks, however, it was noted with disappointment that there is no universal definition for micro-trafficking with some countries identifying micro-traffickers according to their role, others by the quantity of drugs that they have in their possession, and still others (e.g. Ecuador) have only this free-standing term that, without more, is very difficult for the judiciary to apply consistently.

Moreover, it was said that there is insufficient information as regards mean drug quantity seized to enable meaningful gradations of seriousness to be undertaken. It was said that most European countries do not log the quantities of a substance seized in any particular case, merely the sentence. The point was made that the statistics that there are, suggest that whilst it might make sense in principle and in theory to distinguish between macro and micro-traffickers, in practice, this will have no impact unless law-enforcement practices are improved because macro-traffickers are seldom brought to justice. In particular, participants heard that in Rio de Janeiro, 94.9% of cases regarding cannabis involved less than 10kilos of the substance whilst 50% involved less even than 100g. The Polish example was also given, whereby, further to the 3g quantity threshold being brought in, police could achieve their numbers more easily by arresting low-level offenders due to this low-level threshold and the numbers of real traffickers brought to justice decreased exponentially. It was

¹⁰¹ EMCDDA 2009 (*op cit*) p. 10

agreed that it would be good to have a universal database through which to collect and share such information.

Further to this discussion it was noted with grave concern that street-dealers are ascribed a 'leading role' in the SC consultation and as such can expect a starting point of 5 years 6 months custody even for the very smallest quantities – this was articulated by some in attendance as being grossly dis-proportionate to the seriousness of the offending both in and of itself, but also in light of the fact that many street dealers are users themselves. It was noted with particular disappointment that the SC doesn't include user-dealer in its variants of role, but limits drug-dependency to the function of a mitigating factor.

On the contrary, experts commended the incorporation of the role of 'user-dealer' in various sentencing paradigms, either through statute (e.g. Belgium, Greece, Hungary, Austria) or in judicial practice (e.g. Cyprus, Poland, Slovenia, Slovak Republic). It was said that in some jurisdictions, such a categorisation results in drug treatment, probation, or suspension of punishment in the place of imprisonment (e.g. Germany, Belgium). Participants generally expressed support for such disposals as being potentially more effective and therefore more proportionate than imprisonment and there was concern that even where the law provides for such disposals, there is either little awareness of the option amongst legal practitioners or defendants, willingness on the part of the judiciary, or sufficient funding or infrastructure in place to actualise them. The example was given of Poland where all three problems exist and last year only seven people out of ten thousand were given drug treatment through the criminal justice system. In particular, it was said the Polish judiciary are not attracted to the treatment option because it means they have to keep a case under review rather than dispose of it immediately, and in any event they are not pressed to do so because 80% of offenders are unrepresented.

A further salutary tale was recounted of the situation in some US States where despite the best of intentions to make drug treatment available, the separate and pronounced focus on recidivism in their sentencing structure, means that such is often not available to those with a prior record. This was said to have had a disproportionate and discriminatory impact on low-income and minority individuals because of their greater likelihood to be the focus of law-enforcement efforts. It was said that the US and Polish examples emphasised the need to ensure coherence across both the sentencing and enforcement frameworks.

On the other hand, concern was aired about the fact that in many jurisdictions drug treatment is compulsory under the criminal justice system; the example of Turkey was given. Even where not ostensibly compulsory, however, there were still concerns raised about the ethics of treatment in the criminal justice context at all. In particular, it was said that drug treatment should be about health and not linked to punishment and it was said to be no surprise, albeit disappointing, that the Pompidou Group of the Council of Europe had been unable to draft a common treatment protocol for drug dependency in the context of criminal justice, despite their best efforts over many years.

Participants reflected that for the most part, however, this discussion was academic as categorisation as a 'user-dealer' most often results only in a reduction in the length of imprisonment (e.g. Spain). The particular example of France was given where roles are broken down by reference to 'user dealers' for whom in 2006/2007 the average sentence

was 10 months imprisonment; 'retail traffickers' who averaged 17 months imprisonment; and 'import / export offences' for which 28 months custody was average¹⁰².

The question as to whether it was right to treat those who were drug dependent differently from those who were not but otherwise commit exactly the same offence was one that truly held the attention of participants. In particular, the restriction of mitigation by the SC where supply is '*only of drug to which offender addicted*' or '*determination and/or demonstration of steps having been taken to address addiction or offending behaviour*'¹⁰³ was roundly criticised by participants. The first limitation, for failing to recognise the reality of street-dealing practices, and the second, for failing to recognise that drug dependency is defined by the World Health Organisation as '*a multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease*'¹⁰⁴. Some participants voiced concern that it was potentially disproportionate and discriminatory to reflect other health problems with reduced sentences, such as mental disorders and learning disabilities as the SC does, but not to do the same for drug dependency.

Returning to the high-level guidance, with regards to sentencing in terms of culpability, the EC Framework Decision does provide for a further uplift to '*a maximum of at least 10 years of deprivation of liberty where the offence was committed within the framework of a criminal organisation*'.¹⁰⁵ Perhaps as a consequence, across Member States jurisdictions, involvement in organised crime is one of the most common variants of role reflected in sentencing paradigms (see, e.g. Belgium, the Czech Republic, Austria, and Portugal). It was said that most usually there is simply a separate standard offence of membership, but sometimes, there are further distinctions made such as between '*member, leader, or provider of finance*'¹⁰⁶; It was noted that a distinction is made between participant and leader in only five countries. Portugal provides an example, prescribing 10-25 years for drug trafficking for anyone with criminal associations and 12-25 years for anyone who heads or leads a group or criminal organisation.

Reflecting on the generally vague and disparate categorisation of roles within the context of organised crime across the various jurisdictions, it was suggested that the 'good' distinctions of the Palermo Convention¹⁰⁷ should perhaps be adopted uniformly. Recognising the potential value of such efforts achieving consistency across different jurisdictions was seen as ambitious by others, however. In any event, participants also noted a down-side to putting such distinctions in statute rather than in sentencing guidelines in that prosecutors are sometimes reticent to lose a case by charging a person as a leader rather than as a member.

¹⁰² EMCDDA 2009 (*op cit*) p. 14

¹⁰³ SC 2011 '*Drug Offences Guideline; Professional Consultation*' p. 1

¹⁰⁴ WHO / UNODC 2008 '*Principles of Drug Dependence Treatment*' p.2

¹⁰⁵ Art. 4(3) Council Framework Decision 2004/757/JHA

¹⁰⁶ European Commission 2009 (*op cit*) p. 6

¹⁰⁷ See Art. 5 UN Convention Against Transnational Organised Crime 2000: '*(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group; (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim; (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.*

Other determinants of culpability factored in to sentencing frameworks elsewhere are as follows: acting on a commercial basis or to obtain benefit (e.g. Austria, Germany, Poland, Czech Republic); Recidivism (e.g. Latvia, Slovak Republic, Sweden, the UK); supply on prison premises (e.g. Hungary); acting as part of a conspiracy, gang, or group (e.g. Germany, Latvia, Austria, Slovenia); and abuse of position (e.g. Estonia, Greece, Hungary). On this last factor, participants learned that the Turkish penal code doubles its penalties for illegal supply of drugs when undertaken by a doctor; it was remarked that it was not surprising that grass-roots harm reduction has not taken off in Turkey.

Recidivism as a reason for uplifting sentencing was also subject to particular criticism for causing penalties to 'sky-rocket' in some jurisdictions and so becoming wholly out of proportion to the instant offence. The example of California was given with a 3rd felony attracting 25 years imprisonment to life. It was said that such sentencing frameworks often do not take into account law enforcement practices which focus on low-income or minority groups, out of all proportion to the levels of drug use within those groups, and so end up with discriminatory outcomes. These sentencing frameworks do not consider dependence as a mitigating factor either.

There was wide-spread support for the assertion that 'social-supply' was of low-level seriousness and that this should be reflected in sentencing paradigms and accordingly, there was support for the placement of such offences, by the SC, in the bracket of a subordinate role. It was said that the treatment of individuals in the UK is currently wholly disproportionate to the gravity of their offending. Rather, countries like Poland which distinguish supply for benefit as a separate more serious role than simple supply and Malta - which recently dis-applied the mandatory minimum sentence of imprisonment of 4 years for trafficking to social suppliers in favour of what was thought to be a more proportionate 6 months in custody - were moving in a better direction.

Another commonly utilised factor of culpability that raised comment was the involvement of minors (e.g. Belgium, Czech Republic, Germany Greece, Luxembourg, Poland, Slovakia) and, in particular, the common statutory uplift for supply in proximity to a school. It was said that proximity to a school, in and of itself, means nothing. The universal application of such aggravating factors was particularly criticised, from 100 metres in Malta to 500 metres in some American States so that in densely populated urban areas almost 95% of the people will be subject to uplifted sentences because of proximity to a school even where there is, for example, a drug sale at 2am between consenting adults completely out of the sight of any child.

Argentina Case Study

In Argentina¹⁰⁸ the Supreme Court reviewed drug sanctions in 2009 and ruled that repression of possession for personal use was unconstitutional¹⁰⁹. This ruling was informed by the principles of privacy, autonomy, and the rights to health and human dignity, and it bore in part from concern as regards the extreme overcrowding and poor conditions in Argentinian prisons. It was said that albeit there remains resistance amongst the police and lower courts to this judgment (reflected in their enforcement practices) this ruling was a good and proportionate step in the right direction that would do well to be replicated for trafficking offences.

¹⁰⁸ For background reading see Corda. A. 'Imprisonment for drug-related offenses in Argentina' at pp. 11 – 20 in TNI / WOLA 2011 'Systems Overload; Drugs and Prisons in Latin America'.

¹⁰⁹ See the case of Arriola, Argentinian Supreme Court, 25th August 2009

Argentinian drug-trafficking laws¹¹⁰ do not distinguish between trafficking activity in small amounts of drugs (micro-trafficking) as opposed to large scale trafficking or involvement in organised crime. For all such offences there is a four to fifteen year custodial penalty that can be uplifted to 20 years in cases of 'aggravated trafficking'. It was said that this law, in making no distinctions between roles, allows judges to disproportionately punish offending behaviour because it cannot be right to treat within the same bracket, the family business that supplies its neighbourhood out of financial necessity, user-dealers, drug 'mules' from socially and economically depressed areas, and those involved in large-scale trafficking. Such disproportion was compounded by the fact that having set the range tariff to take into account more serious offenders, high level traffickers are seldom brought to justice with the predominant offence before the courts 'possession for sale' dealt with by an average sentence of 4 years and 7 months imprisonment.

Concerns were raised that vulnerable groups including minorities, women, and those from poorer socio-economic backgrounds are more often caught up by the Brazilian framework – for example it was said that 33.5% of all female inmates are imprisoned for drug offences. Moreover, prison-population growth associated with the drug-laws from December 2009 to September 2010 has been 28.2% with an overall overcrowding rate of 55%. Indeed, Argentina continues to be criticised by the Inter American Commission on Human Rights for the impact prison conditions have on the dignity and physical integrity of inmates¹¹¹. The example of the treatment of one offender was put forward as paradigmatic¹¹²; sentenced to 3 years in prison for possession of 20g of marijuana and 10 plants of the same substance within his own home, once in prison the man was shackled, brought to his knees and severely beaten by penitentiary staff.

The focus on all trafficking without distinction, compounded by the corruption of police and other officials, was said to have led to a major systemic failure - few real players in organised crime are brought to justice and instead the courts are saturated and the prisons overcrowded with small cases involving those from lower socio-economic brackets. For these reasons, the sentencing framework was described by one participant as infringing the Argentinian principles of: harmfulness – i.e. the State should not injure legally protected interests or actions that are exercises of moral freedom and do not offend public order, morality, or any other third party; humanity – whereby the fact that a person is imprisoned does not permit the suppression of rights and safeguards inherent to human dignity; and, of course, proportionality.

It was said that the lesson of Argentina should be that State strategies as regards drugs should always consider social inclusion imperatives and contain integral assistance plans for drug users. Practically, it was suggested that Argentina should legislate a lower tariff for micro-trafficking (as has been done in Peru, Mexico, Chile, and Spain) which provides for the possibility of alternative disposals and interventions rather than custody. There was indeed some optimism on this point as participants heard that the Argentinian Government was working with an advisory committee of drug policy experts who are, at the current time, proposing exactly such strategies to introduce greater proportionality by way of distinction between trafficking levels.

¹¹⁰ Law 23,737

¹¹¹ IACHR 2010 'IACHR Rapporteurship Confirms Grave Detention Conditions in Buenos Aires Province' Press Release No 64/10

¹¹² Participants were discussing the case of Williams Vargas from the State of Mendoza in Argentina. The ill-treatment was filmed by a prison guard and uploaded to you-tube, here: 'tortura a un preso en una prision de Mendoza, Argentina' <http://www.youtube.com/watch?v=dKWfqcchrll>

Brazil Case Study

Brazil¹¹³ passed a new drugs law in 2006¹¹⁴ which decriminalised use and cultivation for personal use but provides rigorous punishment for trafficking offences. It was said that this brought a notable improvement in cases of shared consumption or social supply which under the previous law had been equated with trafficking and punished at the same level but now commands reduced penalties. Otherwise, however, participants reflected that the new law is much more repressive for all types of trafficking including street and user-dealers. It was said that such micro-traffickers are caught by the new framework which applies a mandatory minimum of 5 years imprisonment for all trafficking offences and this has led to a marked increase in the prison population that the country cannot afford either financially or in terms of its human rights record.

Participants reflected on the fact that although the law provides for up to a two third reduction in sentence for first-time offenders who are not involved in on-going criminal activity or a criminal organisation, such reductions are rarely applied in practice. The reason for this, it was argued, is a mixture of corruption, social bias, and prejudice amongst the judiciary. In particular, it was said that when judges are sentencing people from the favelas there is an assumption that they cannot be selling drugs without the involvement of organised crime and so the reduction is seldom given (other than to 'mules' as discussed later), and almost never to those from poor backgrounds. The impact on equality of such distinctions was made: middle class users have no need to sell drugs to fund their habit, whereas the poor might, and so the poor are disproportionately affected by such laws. It was felt that this explained how 90% of those in Brazilian prisons (of whom approximately 20% are currently detained for drug offences, and which number is increasing) come from lower socio-economic backgrounds.

The example of the UK was also given where the judiciary have been known to take particular exception to the levels of crime in their area and supplant the national sentencing guidelines with their own tariffs. This was said to be the practice in Isleworth Crown Court, an airport feeder court, as regards drug 'mules', as well as City of Westminster Magistrates Court (which covers London's tourist centre), as regards pick-pockets.

It was said that even if the law as to discretionary mitigating factors is well written, the judges will exercise bias and, if they can, refuse to apply them. This occurs particularly in Rio where drug trafficking is seen to be linked to terrible levels of urban violence. It was said that the challenge, for Brazil, is how to achieve a real remit for mitigating factors to influence the system, because although the legal framework allows for discretion, this discretion is exercised towards greater severity rather than towards greater humanity. It was suggested that the problem perhaps lay in the message sent by Parliament's setting of mandatory minimums and that the failure to act on this sentencing up-drift problem reflected that drug laws are, in reality viewed by policy makers as a means of social control. The answer to the problem was seen by some to lie in more precise statutory mitigating factors, and more precision as to 'role' in the sentencing framework.

The problem was seen as one that had filtered down from high-level drug policy and the UN drug conventions in particular which had influenced greatly the drafting of the Brazilian framework. It was said that looking at the Conventions, many aggravating factors are

¹¹³ For background reading see Boiteux L. 'Drugs and Prisons: The Repression of Drugs and the Increase of the Brazilian Penitentiary Population' at pp. 30 – 38 in TNI / WOLA 2011 'Systems Overload; Drugs and Prisons in Latin America'.

¹¹⁴ Law No. 11,343/2006

itemised but mitigation is virtually forgotten, and this structure has been copied in Brazilian domestic law. It was said that mitigating factors should, instead be foregrounded, and drafted with precision to address, in particular, vulnerability and social inequality. It was suggested for example, that where a person is from a lower social class or suffered social problems, this should be sufficient to constitute a reduction in sentence. An emphasis on mitigation, rather than aggravation, it was said, would be more in line with what a proportionate sentencing framework would like, in line with the least-intrusive approach of international human rights law as already discussed.

Closing this case-study, participants remarked with optimism on the Supreme Court of Brazil's foray into drug policy last September 2010¹¹⁵, when it had ruled that the drug law was unconstitutional for denying small time traffickers the opportunity of alternative penalties to prison and that going forward whether drug treatment or other disposals were more appropriate should be decided on a case by case basis. It was said that this augured a more proportionate approach and a lessening of strain on the penal system, but there remained concern that the judiciary at State level would find ways to avoid implementing these reforms.

Discussion

Focus turned to the respective utility of different legislative and policy tools in bringing about more proportionate sentencing outcomes.

For many, judicial discretion was seen to be key. It was said that the same sentence can have different effects on different people, for example there can be gendered and cultural impacts; obvious examples were suggested of primary carers being distanced from their children or foreign nationals experiencing particularly difficulty in prison settings. It was argued that the wide variety of human impact cannot possibly be foreseen or taken into account by static guideline frameworks; sentencing has to be individualised and every human being ought to be heard.

The retort was made (referring back to the discussions of Argentina and Brazil) that judicial discretion can often veer, however, more to the severe than to the proportionate and so discretion does not result in more humane outcomes. Participants also noted, however, the contrary examples of the USA (where the judiciary have recently been departing down from the advisory federal guidelines) and of the UK, Ireland, and Malta. In Ireland a law passed in 1997 required that those caught trafficking drugs valued in excess of 13,000 EUR should receive a minimum of 10 years in jail unless there were serious mitigating factors, however when this law was reviewed five years later, of the 55 offenders to which it had applied, only 3 had received the mandatory minimum. Likewise, the judiciary in the UK were said to have avoided imposing the 7 years mandatory minimum sentence for a third class A trafficking offence in most cases whilst the judiciary in Malta, exercising their limited discretion, have apparently never imposed the statutory presumption of life imprisonment for possession of drugs with intent to supply. Some participants ventured that down-tariffing in the case of mandatory minimums was more to be expected than where general sentencing ranges are provided because such prescriptions are so anathema to sentencers' usual habit of taking into account all the facts of an offence and personal circumstances of an offender in determining a proportionate and human rights compliant sentence. Indeed it was noted that

¹¹⁵ Habeus Corpus No. 97,256

in some jurisdictions (e.g. Canada¹¹⁶) mandatory minimum sentences have been struck down on exactly such grounds.

There were competing examples still from other jurisdictions. In particular, in Singapore and Malaysia it was said that what when tight guidelines had been imposed, albeit scope for judicial discretion had been retained, the judiciary had, because of the legislative prompt, lost confidence in using that discretion to the point that no matter what arguments were put forward (e.g. on quantity, role or personal mitigation) these were ignored. It was said that the situation has degenerated in Malaysia to such an extent that there are now mandatory death sentences. Participants wondered how long it took for such a process to take hold and what conditions it required to do so. Further to this, participants reflected on a comment made that when judiciary in the UK want to exercise their discretion in favour of defendants they are often reminded by colleagues of the danger of being referred to the Court of Appeal by the Attorney General for an overly lenient sentence and being publically criticised for it, and so regularly desist.

Some participants mooted the advantage of sentencing guidelines in that they are potentially able to address inconsistent, disproportionate, and discriminatory outcomes within discretionary frameworks. It was said that there is a real lack of understanding amongst sentencers, and particularly amongst magistrates in the UK, as to the realities of drugs, in favour of prejudice, and that this can only be addressed through better training. However, it was also said that training requires significant resources as well as buy-in from those being trained and clear and specific sentencing guidelines therefore provide an alternative way to address the problem; but where to pitch it? Over-definitions were said to lead to problems due to the common blurring of roles in the drug trade whilst under-definitions lead to a need for judges to use their discretion more, importing all the problems already discussed.

An example from the SC consultation was explored and the question was asked what does an 'organisational role' mean? Is it a person with administrative duties only, is it someone who is organised, i.e. keeping a tick list and a record of their transactions, or does it mean someone in a directional capacity? It was said that Judges, at least in the UK, tellingly tend to prefer clichés like Generals, Commanders, and Foot-Soldiers, and that more prosaic distinctions such as 'organisational role' would just baffle them. It was also said that just as much as the circumstances of a particular offender can be nuanced, the judge will bring his own life, situation, and experiences to the role of sentencing and so whatever the rigidity of sentencing guidelines laid down, there will always be the two shifting points of the judge and the defendant which cannot be accounted for and so the desire to overcome 'inconsistency' is unlikely to be realisable.

It was said that the trick perhaps is to impose guidelines with sufficient specificity to be directional and so address inconsistencies and restrain prejudice, but that also allow scope for judicial discretion to take into account the reality of the human-situation before them.

In the short term, various practical suggestions for safeguards were made within such a framework. First, that there should be a presumption of a subordinate role and low-purity unless evidence is produced to the contrary. Second, that judges should have to rationalise and state their reasons for imposing a particular sentence in public. Thirdly, that minimum sentences should be avoided in favour of maximum caps. In the long term, it was said that further data needs to be collected as to the different impacts of various policy and legal

¹¹⁶ See the Supreme Court of Canada decision in *R v Smith (Edward Dewey)* [1987] 1 S.C.R. 1045

tools on the behaviour of sentencers in order to understand better what has the potential to make the judiciary behave in a more humane way when they are able to exercise discretion.

In conclusion, it was conceded by many that an offender's 'role' (as a reflection of their level of involvement in the drug trade) makes for a good technical parameter for calculating culpability and with it proportionate sentencing but participants were exhorted not to forget the policy perspective. It was said that we have gone through a historical process, across the globe, of setting harsh drug laws and enforcing them punitively and we are now in a phase where we should be grappling, at a macro level, with the question of whether our approach is proportionate and humanitarian. Rather, it was felt by some that such discussion as had been aired today on the relevance and utility of role and other technical aspects of sentencing calculations were little more than harm-reduction in the context of rationalising an irrational system where using criminal law as a tool has failed.

Session 4 – Drug 'mules'

Implicitly endorsing the argument that role is relevant to proportionate sentencing, participants first set about defining what is meant by the term 'drug 'mules' and exactly to what category of person lesser culpability and therefore lesser sentences should be ascribed.

It was remarked that historically, and still in many jurisdictions, there is only one categorisation, of 'drug-trafficker' with 'mules' not distinguished from other types of offenders. Since the 1990s, however, it was said that efforts have been made to address this lack of focus, particularly in Europe. For example, the Airports Group of the Council of Europe's Pompidou Group has discussed, in successive annual meetings, the profile of drug couriers with particular emphasis on the routes they take and their transport strategies albeit it was remarked that foreseeable difficulties have been encountered in these attempts to monitor a phenomenon that is never static. It was also noted that, within academia, there has been a constructive emphasis on distinctions within drug trafficking in recent years¹¹⁷ though a standard profile has not yet been achieved.

It was felt that greater efforts should be achieved to collect and process the data held by small charities that work directly with drug 'mules', such as Hibiscus in the UK, in order that profiles, sentencing outcomes, and the impact of sentencing could be better known and fed into the develop of more proportionate sentencing frameworks; participants were delighted to note that the SC is working on exactly such a task. Participants were also keen to note that the EMCDDA has been consulting with various national police and customs agencies as well as Europol to produce a common European definition of a drug courier, aiming to be published at the end of this year.

¹¹⁷ References were made to: Green. P (1996) *'Drug Couriers; a New Perspective'* Howard League for Penal Reform, Quartet Books; Abernethy R and Hammond N (1992) *'Drug Couriers; A Role for the Probation Service'* London Middlesex Area Probation Service; Ambos K. (1993) *'Die Drogenkontrolle und ihre Probleme in Kolumbien, Perú und Bolivien : eine kriminologische Untersuchung aus Sicht der Anbauländer unter besonderer Berücksichtigung der Drogengesetzgebung'* Max Planck Institute; and the Report of the European Conference on Drug Couriers, Mannendorf Switzerland, 1-5 May 1996.

Portugal Case Study

The lesson of Portugal was given as an example of proactive steps taken to address the lack of distinction between 'mules' and 'traffickers', and with good results. In the late 1990s, a study was undertaken to delineate amongst traffickers who, as a general group, made up approximately 12% of the prison population. Researchers were sent to interview these convicted individuals and quickly found that the majority were more rightly placed in the category of 'courier' than 'trafficker' or 'consumer'. Having identified the couriers each was interviewed further on the course of their lives and their criminal motivation and four further types of offender were identified. Of these, one type was classed as a typical 'mule': a person not otherwise involved in criminal or 'deviant' activities (inc. drug use or prostitution). Within this type, further allowances were made for those who were female as they were felt to be more vulnerable. With this greater understanding came an appreciation that the culpability of such offenders was low indeed.

The Portuguese research also alerted the authorities to the reality faced by the foreign national drug courier in prison, their situation of need and vulnerability, as well as the fact that they are introducing only 'tiny' amounts of drugs into the Western markets. It became commonly understood in Portugal that heavy sentencing of 'mules' has little deterrent impact as criminal organisations tolerate the interception of couriers in economic terms and moreover, it does not address the desperate poverty and lack of opportunity which compels most 'mules' into offending. It was said that this new understanding naturally took a few years to take hold within the legal community, but that once it had filtered through there was no option but to recognise that the sentencing framework for drug couriers involved excessive punishment. Accordingly, Portugal has seen sentences reduce from an average of 8 years imprisonment in the 1980s, to 5 years in the late 1990s, and now even further, with suspended sentences for such individuals a real possibility.

The comment was made that Portugal showcased both the importance and utility of developing knowledge about offender profiles in order to achieve proportionate sentencing.

Profile of a Drug 'Mule'

It was felt by some that the definition of 'mules' could be clarified further than in the Portuguese example, however, and discussion returned to this point. In doing so, it was said that it is necessary to reflect on many factors: e.g. economic and social circumstances; criminal motivation; treatment after arrest; and ultimately, the severity of the sentence handed down. Two studies of drug couriers were compared, the first of which¹¹⁸, it was said, emphasised the need to conduct a descriptive analysis focusing upon the offender's state of knowledge and the second¹¹⁹ which emphasised more external criminological, sociological and historical factors. It was said that the first approach, emphasising culpability, particularly merited greater attention in sentencing frameworks.

Participants reflected on the conclusions of a recent study, based on interviews conducted with convicted drug traffickers imprisoned in Quito, Ecuador, defining a 'mule' as '*a person who carries drugs paid for by someone else across international borders. The person may*

¹¹⁸ Fortson R (1996) '*The Sentencing of Drug Couriers*', *Drug Couriers: A New Perspective*, edited by P. Green. London. Quartet

¹¹⁹ Agra C (2002) in '*Drugs Crime and Deviant Pathways*' edited by Brochu. S. University of Montreal, Canada. It was said that this work identified four categories of drug trafficker, those for whom: 1) illegal activities, including trafficking, are part of a socially integrated way of life; drug trafficking is associated with other 'deviant' activities such as drug use and prostitution etc; their way of life is immersed in crime; their way of life is both criminal and delinquent.

*or may not be paid... the quantity of drugs to be carried is always decided by the person who pays*¹²⁰. Within this bracket, further subdivisions were made by whether the 'mule' was experienced or not as some respondents indicated that they had successfully made multiple trips. The label included those who carry drugs internally, those who carry drugs strapped to their bodies or in their clothes, and those who carry drugs in their luggage – it was said that the latter knew the least about what they were carrying. It was concluded that *'mules may be deliberately misled in order to play down the penalties that they would face'*¹²¹.

This definition of 'mules' was given in contrast to that of 'professional traffickers' who *'carried drugs that they had paid for... worked alone or as part of small partnerships... a third knew what sentence they would receive if they were arrested...carried smaller quantities than mules... while professionals were willing to risk going to prison, they preferred to carry small amounts that they thought would result in a lower sentence.'*¹²²

Participants reflected that 'mule' is almost a pejorative term describing an ignorant person who has been taken advantage of whilst a courier is a sophisticated person who knows what they are doing and may have some level of control over their offending.

In the context of these conclusions, it was remarked that the cross-referencing of role against quantity did not make much sense for drug 'mules' proper, for whom their low level culpability was best demonstrated by the large amounts they are compelled to carry by others and the fact that the type of drug too is not within their control. Furthermore, the assertion was made that many 'mules' do not know they are even carrying drugs as opposed to some other less harmful but nevertheless contraband substance. However, whilst it was accepted this may hold true for those by whom the drugs are carried in luggage, some participants expressed themselves unconvinced in respect of 'swallowers' and in any event, in English law this did not provide a defence.

It was also remarked that it would be very difficult to tell in practice the difference between drug 'mules' proper and professionals of higher-culpability as candour on the part of the latter group could not be expected prior to sentencing and as it is so hard to substantiate the mitigation of foreign nationals.

It was agreed that a person could match the profile of a 'mule' whatever their nationality, but there was an assumption underpinning the discussion that the majority of such individuals were foreign nationals, and indeed statistics were given to support this, for example that 70% of drug couriers imprisoned in Rio de Janeiro, Brazil are foreign nationals.

It was said that there should be recognition that the vulnerability of drug 'mules' to disproportionate sentencing frameworks is compounded when they are foreign nationals as they may not understand the laws which they have broken, and even within a good legally aid system that ensures representation for all they may not understand or trust the advice they are given. Moreover, it was said that foreign nationals may be overly influenced by other aspects of a sentencing framework and especially the prospect of a discount for pleading guilty and of losing that discount if, for example, they challenge the basis on which they are sentenced, e.g. the amount seized or their knowledge as to the nature of the

¹²⁰ Fleetwood. J. (2011) (*op cit*) at 382.

¹²¹ *Ibid* at 386

¹²² *Ibid* at 386 - 387

substance they are carrying¹²³. Concrete examples were given of innocent and less culpable individuals who have pleaded guilty or not challenged the basis of their sentences in the UK for fear of losing the substantial credit otherwise available and it was said that policy-makers should reflect carefully on the operation of such sentencing tools on the presumption of innocence and the right to a fair trial. It was accepted that legal practitioners were in a difficult position because they have to advise clients within this morass but that they should nevertheless be particularly alert to the difficulties of their foreign national clients.

The SC consultation proposes reducing the sentences of a particular category of drug courier *'where it is established that an offender who has imported drugs on or in their person or in their luggage, was involved as a result of naivety and comes within the general category of being a person who is poor or disadvantaged and motivated primarily by need rather than greed, in the absence of evidence of previous involvement in such activity, their role should be regarded as subordinate.'*¹²⁴ Further detail is given about the assumed profiles of such individuals taking into account: *'the frequent vulnerability of individuals who would fall under this description, whose naivety and lack of knowledge of the consequences or of the drug laws (and penalties) in countries are often exploited and whose involvement, as suggested by the case studies on drug mules can often be due to a misplaced trust in a family member, friend or acquaintance.'*¹²⁵

The SC suggests that current sentencing levels which can broadly be put at an average of 8 years imprisonment¹²⁶ are *'disproportionate'*¹²⁷ and recommends a sentencing range of between 6 – 7½ years imprisonment as more appropriate.

Whilst there was great support in the room for the principle that the sentencing of drug 'mules' in the UK is disproportionate and that better distinctions should be made between such individuals and professional drug traffickers both in theory and in penal tariff, many expressed concern that the reductions proposed by the SC did not go far enough. Referring back to the role of the judiciary, however arguments were countered that to suggest a free ticket home in the place of a substantial sentence would truly be outside the legislative framework and that it is not for an advisory body such as the SC to propose such substantive changes in the law, but for the people. Irrespective of this, concerns were raised that the difficulties substantiating mitigation for drug 'mules', accepted in the SC's own research¹²⁸ would mean that an individual would not be able to *'establish'* their status as required and the hoped for reduction in sentencing would not be applied in practice.

Participants dwelled at length on the profile of drug 'mules', as opposed to their role. It was said that the ratio of male to female drug 'mules' is almost 2:1 and it was cited that at one point there were 1000 male to 600 female drug 'mules' of Jamaican origin in prison in the

¹²³The UK withholds credit for pleading guilty where a person challenges the basis on which they are sentenced but fails to meet the standard of proof in doing so. See *R v Newton* (1983) Crim LR 198; *R v Underwood* 2004 EWCA Crim 2256; and SGC 2004 (Revised 2007) *'Reduction in Sentence for a Guilty Plea; Definitive Guideline'* at Para 4.3(iv) See also, the case of *R v Dooley* 2008 1 Cr App R (S) 637 where a defendant pleaded guilty to possession of heroin with intent to supply but claimed she believed the drugs were cannabis, she then did not persist in a Newton hearing and the Judge reduced her discount for pleading guilty because she had put forward a false story to try to reduce her sentence.

¹²⁴ SC 2011 *'Drug Offences Guideline; Professional Consultation'* at p. 10

¹²⁵ SC 2011 *'Drug Offences Guideline; Professional Consultation'* at p. 32

¹²⁶ SC 2011 *'Drug 'mules': Twelve Case Studies'* at p. 5

¹²⁷ SC 2011 *'Drug Offences Guideline; Professional Consultation'* at p.4

¹²⁸ SC 2011 *'Drug Mules: Twelve Case Studies'* at p. 2 *'Given the qualitative approach for this work, it is important to note that it does not purport to present any robust, objective information. The interviews were designed to allow the women to tell their own 'stories'; this document therefore needs to be read in the knowledge that the information provides only their subjective perspective and that no attempt has been made to verify the accuracy of the details that have been presented.'*

UK. Likewise, in Brazil, 30.5% of drug 'mules' dealt with by the federal court were said to be women.

It was said that a number of studies had confirmed that the motivation of drug 'mules' is different to the motivation behind other types of offending; specifically, these individuals are motivated by need rather than greed and their offending is driven by poverty, absence of opportunity, and often threats of some sort also.

It was recognised that 'mules' from different countries of origin can have different profiles – in particular, it was remarked that many of the drug 'mules' coming out of central Asia did not act out of poverty, but out of duress. However it was said that across the board, the common nationalities represented by drug 'mules' in UK prisons - Jamaica, South Africa, Mexico, Nigeria and Ghana – exemplified situations of foreign debt, displacement and poverty and it was no surprise that more and more people and particularly women, were so desperate to seek security for their families, that they were willing to risk their health with drug couriership. It was also noted that the number of European (especially Portuguese and Spanish) drug 'mules' in Brazilian prisons tripled in the 2 years after the economic crisis although it was said that most drug 'mules' in this jurisdiction were from Colombia and Africa, particularly Angola.

Whilst it was accepted that many of the same socio-economic factors suggesting lower-culpability applied irrespective of gender and so there should be a reduction in sentence tariff across the board, it was argued that female drug couriers should be given especial consideration. It was noted that at the moment there are 900 women in UK prisons for drug couriership from various countries of origin, but that at one point there had been 600 women from only one small country with a population of merely 3 million.

There was focus on the archetype of the 'trafficked' woman from a developing country who carries only small amounts in the context of the wider drug market and who, on their return to country of origin, is often re-trafficked to pay off the debt of the lost drugs. An example was given from Argentina where for fear of such occurring, it was said that there was very low take-up of the option for drug 'mules' to return to their country of origin in place of enduring a lengthy sentence.

It was said that when a man goes to prison, female partners often keep a home running for when he gets back, but that such support is rarely reciprocated man to woman and harder for women to redress because of the stigma they face on return, having been incarcerated. Sentencers were urged in particular to remember that women are often the main carers for children in countries where there is no social welfare and to think what might happen to the children in the woman's absence when sentencing. Certainly it was said that this is something that preoccupies women during their incarceration, and together with their usual loss of home, it was said that the pain of imprisonment is usually much more severe for women than for men.

It was argued that female 'mules' have become the scape goats of the drug control system; caught with tiny amounts in scale to the drugs market with none of the power of the drug barons or their riches they are dealt with disproportionately to their culpability and they languish in gaol while their children suffer. The example was given of a seven year old in Jamaica who thought that if he hung himself and died, his mother would come home because in Jamaica everyone comes to a funeral.

Against such compelling circumstances, the current UK practice of disallowing mitigation for 'mules'¹²⁹ was roundly criticised and the efforts to reinstate mitigation for drug 'mules' by the SC commended. Indeed, examples were given from other jurisdictions where mitigation is applied doubly for foreign national drug couriers. For example in Brazil the statutory mitigating factor earlier discussed as seldom used for poor Brazilians caught up in trafficking, is invariably applied by the Federal Courts to foreign national drug 'mules' because it is thought that they simply cannot be connected to organised crime in a leading role. As such, in Brazil, foreign national drug couriers usually face a sentence of 1yr 8 months compared to internal couriers who often deal in lower quantities than the 'mules' but are lucky if they avoid the minimum 5 years imprisonment.

The question was raised – what is the relevance to seriousness of the cross-border element of drug-couriering? Indeed, it was suggested that local 'mules' are equally problematic as international 'mules', with youngsters often being exploited to transport drugs across London, for example. Participants asked is someone bringing drugs into the country the starting point for all the trouble - whether that be addiction, violence or the creation of illegal markets - and therefore in a scale of proportionality properly liable to be sentenced quite severely, or should there be more recognition of the imperatives of consumer demand for drugs? The answer was proffered that a shared responsibility approach was merited but only to the extent that it should bring down sentences on the supply side which have been artificially inflated because of the mistaken emphasis on supplier's responsibility for demand; nobody argued that sentences for drug users should be elevated in kind. Indeed, whilst it was argued that we were not discussing a victimless crime and that however duped the 'mules' may be we must not forget the end user (the youngsters who become dependent on the heroin and the cocaine, and whose families fall apart as a result) it was also said that what would help the victim is health treatment, not criminalisation of them or punishment of the supplier.

This brought participants back to the concept of proportionality with its requirement that sentences be effective and necessary to achieve a legitimate aim.

Discussion

As regards effectiveness, there appeared to be consensus in the room that deterrent sentencing in the form of lengthy imprisonment had failed as the drug couriers keep coming and the wider drugs market does not shrink. Moreover, it was said that this had been a very costly failure. For example, a Portuguese study was referred to which had calculated that each drug courier cost the State 40,000 EUR bearing in mind the price of the investigation, arrest, 4 years in prison, and the cost of deportation. In UK, the expense was put much higher with a study having been made by one participant of 15 drug couriers that had been dealt with over the last six months and who were expected to cost the State £1.9 million over the course of their lengthy imprisonment. The question was asked: why have governments consciously decided to spend lots of money on holding foreign nationals in prison to no effect. The answer was proposed that from a policy maker's perspective it was easier, and even cheaper, to keep up with such doomed efforts because they looked good to the electorate and the tabloid media in principle, even if they didn't work in practice, and because the other options might be even more expensive.

¹²⁹ Attorney General's Reference No. 14 of 2001 (Maria Das Dores Fietosa) [2003] 1 Cr App R (S) 17 per Lord Justice Rose: *'the vulnerability and personal characteristics of the offender can play only a very small part in the sentencing process'*.

This was refuted, at least as regards one alternative however; that is for awareness-raising and education programmes. It was said that if only 10% of the £1.9 million referred to above had been spent on such campaigns in the usual countries of origin of drug 'mules', real outcomes would be seen. Returning to the discussion of the general profile of drug 'mules', it was said that the majority of 'mules', as opposed to traffickers, were ignorant of the consequences that followed with detection. Moreover drug barons target those most likely to be ignorant and can rely on the complicity of their past-victims in this regard, who are usually unwilling to warn others in their community of what is likely to happen, outcast by the shame and stigma of having been convicted.

In the face of these problems, it was said that there were real examples of deterrent success from public awareness campaigns; for example the '*Maame Goes to London*' Campaign by UK Charity Hibiscus in Ghana. It was said that prior to this campaign 4 – 5 women a month were being detected coming from Ghana with 4-5 kilos of cocaine in their Luggage, but afterwards the numbers of women dropped by approximately 90%. Participants noted that Hibiscus prepares its campaigns by asking women who had been convicted what would have stopped them offending in the first place, the answer being '*if only someone had told us what would happen*'. As a consequence, campaigns (see e.g. the Caribbean-targeted '*Eva Goes to Foreign*'¹³⁰) focus not just on the lengthy prison sentences, but on the social cost to the 'mules' including what happens to children and extended family in their absence, as well as the physical dangers they are running if packages swallowed burst or from the violent overtones of the drug market.

Some participants expressed surprise, however, at this example of successful deterrent practice when recidivism rates for drug trafficking are generally so high. The question was posed, how can targeted awareness raising amongst vulnerable populations possibly work when those who have been directly affected by sentencing practice are not themselves deterred? For example it was said that in Germany 61% of those convicted for drugs offences had been sentenced at least 3 times before and that in the Netherlands, most were repeat offenders¹³¹.

Seeking to tally these two experiences, participants referred to the earlier discussion as to how 'mules' often face stigma and shame and are made outcast on return to their countries of origin after imprisonment. It was postulated that such individuals had nothing to lose by re-offending whereas awareness-raising might work amongst those who were yet to embark on their downfall. It was suggested that the targeted awareness raising work of Hibiscus when combined together with the tough sentencing in the UK could be an example of successful micro-deterrence and discussion centred on whether a distinction could be made between micro-deterrence, which in certain circumstances can work, and macro-deterrence, which simply doesn't.

A further example of successful micro-deterrence was given from local sentencing practice in the UK where a number of child drug couriers from the same community in West London had received lengthy sentences in the region of 2 years for drug-running across London but since these sentences had been imposed few such crimes had been detected in the area.

It was argued that getting the message across and retaining high penalties was too simplistic a formula, and participants noted many examples where there had been no

¹³⁰ To see the video go to <http://fpwphibiscus.org.uk/?cat=5>

¹³¹ EMCDDA 2009 (*op cit*)

micro-deterrent effect further to such strategies. For example, participants heard that the strategy to imprison every person who was caught taking a knife to Notting Hill Carnival in London has not worked; people still do so regularly. It was suggested that policy-makers should look to the frame in which people make their decisions for better micro-deterrent strategies and the example was given of professional footballers, who according to every theory (because of their income and age) should be using lots of drugs but aren't.

Looking at the frameworks of the drug-trade it was said that the micro-deterrent strategy of high sentences plus targeted awareness-raising may work for 'mules' but would not work for professional traffickers. Such individuals, it was commonly agreed, are not deterred by potential prison sentences as they are working on a commercial-basis with economic parameters. They are more likely to be deterred it was felt, by the certainty of punishment, i.e. by effective law enforcement.

The example of the Schiphol Action Plan in the Netherlands was given¹³². In 2002, Schiphol Airport (which services Amsterdam) had been flooded with drug couriers coming in. Initially the traditional punitive sentencing practices were upheld and efforts were made to build more gaols but quickly there was a realisation that this was a costly and disproportionate response. The Government instead instituted 100% law enforcement controls (meaning that every crew, passenger, piece of luggage and plane was searched) together with a substance oriented approach whereby drugs were confiscated whilst couriers were deported immediately and placed on a travel blacklist. Numbers of drug couriers reduced by 96% and the approach was commended by the World Bank and the UNODC¹³³.

Some participants referred back to the discussion on recidivism and reflected with surprise that offenders had not chosen to return to the Netherlands knowing they were risking so little compared to other European countries. Others responded that such behaviour was not evidenced in the experience of other jurisdictions; for example it was said that since Brazil reduced its sentences for drug 'mules' there has been no increase in drug couriers targeting the jurisdiction. In any event, the Dutch conundrum was said to be understandable on principle in the context of the 'total controls' including travel blacklists as regards the individual 'mules', and due to the economic impact of the certainty of detection upon both 'professional traffickers' and those who trafficked the 'mules' but did not run the risk of imprisonment themselves – such individuals were losing too much product to make it viable to continue.

It was said that where you have a global response, as in the Netherlands, policy makers can support a lower sentence, whereas if the likelihood of being caught is low, the correlating punishment must be higher to retain public confidence. The lesson of the example was seen as being the need for a systemic approach.

It was also remarked that compared to the Dutch example, countries such as the UK without total controls are simply applying very strong deterrent sentences accidentally to a few people and this, being arbitrary is, in itself, disproportionate.

¹³² For background reading see Jensema E. 2010 'A Matter of Substance; Fighting Trafficking with a Substance-Oriented Approach' TNI Series on Legislative Reform of Drug Policies, Nr. 7 July 2010

¹³³ UNODC and the Latin American and Caribbean Region of the World Bank (March 2007) 'Crime, Violence and Development: Trends Costs, and Policy Options in the Caribbean' Pg. 97, par 7.13 and 7.19: 'the focus was on the drugs, rather than the couriers, and was based on incapacitation, rather than traditional deterrence... the strategy appears to have been remarkably successful... While the controls have remained quite consistent throughout, the number of couriers detected has dropped dramatically, from a peak of 463 couriers in the second quarter of 2004 to less than 20 per quarter today, a 96% reduction.'

The session was not able to conclude, however, that an answer had been found because a systemic approach in one jurisdiction was felt to be inadequate – it was said that the drugs market is a global market and as a consequence, a global response is needed. Returning to the example of the Netherlands, it was said that the substance oriented approach had worked for Amsterdam, but a balloon effect had been seen with increased drug trafficking coming through both the Dutch ports and through other European countries. Likewise, it was said that when the numbers of female drug ‘mules’ coming to the UK from Ghana had reduced further to the Hibiscus campaigns, the numbers from Eastern Europe had risen.

The prospect of a successful global response was, however, not rated by those in attendance. It was said that the drug trade is now so large, so established, and so resilient that even if the international community worked together to affect total controls and a substance oriented approach, it could not be eradicated. In the background of the discussion was awareness that despite the best efforts of the international community to achieve ‘*a drug-free world*’¹³⁴, within ten years of the 1998 Political Declaration¹³⁵, the most that could be heralded was ‘*stabilisation*’ and ‘*containment*’¹³⁶. Participants noted moreover that drug control efforts had themselves caused significant harm, or in the terminology of the former Executive Director of the UNODC, ‘*unintended consequences*’¹³⁷.

Bearing all this in mind and the inability of the evidence to demonstrate that any particular sentence imposed on a drug courier has or could lead to one consumer less, it was argued that all repressive efforts were disproportionate in the sense that they were not necessary to achieve a legitimate aim; moreover, how could they be necessary, it was asked, if they are not effective?

In conclusion, however, it was accepted that steps towards proportionality could be achieved by recognising the low-level role and culpability of particular players within a drugs market, such as drug ‘mules’, and by ensuring that sentencing frameworks were devised systemically (i.e. combined with effective law enforcement and awareness-raising programmes but not undermined by the operation of other factors, such as reductions in sentence for a guilty plea or limited access to effective legal representation). However, a number of participants argued that a proportionate framework for responding to drug-couriers, and in fact to all drug offenders, was an impossibility unless a way to overcome the cultural and political barriers was devised that enabled a real discussion to begin about regulatory models. Without such, it was said, the most that could be achieved by exercises like that of the SC was harm-reduction.

Conclusions

It would have been exceptionally ambitious to expect, in the course of one day, to determine what a proportionate sentencing framework for drug offences should look like

¹³⁴ Pino Arlacchi, Executive Director of the United Nations Office for Drug Control and Crime Prevention speaking at the General Assembly Twentieth Special Session of 8th – 10th June 1998.

¹³⁵ 1998 A/RES/S-20/2

¹³⁶ UNODC 2008 ‘*World Drug Report*’ p. 3

¹³⁷ Costa A 2008 ‘*Making Drug Control Fit For Purpose: Building on the UNGASS Decade; Report by the Executive Director of the United Nations Office on Drugs and Crime as a Contribution to the Review of the Twentieth Special Session of the General Assembly*’ E/CN.7/2008/CRP.17

and indeed, the debates on the many issues raised by this theme raged until the very last moment of the seminar with no space for conclusions to be drawn. There were points, however, where a broad consensus appeared to be reached during the course of discussion and certainly there were a number of themes that recurred. This section on conclusions is therefore the author's effort to draw these aspects together and apologies are made if there is any mistaken emphasis.

It was a point of consensus that sentencing for drug offences lies within the remit of proportionality as defined by international human rights law that: States, when seeking to meet legitimate policy and legislative aims, should adopt the least intrusive measure available which is capable of and necessary to meeting those aims. There was however, concern that the concept of proportionality has been misappropriated by sentencing frameworks in general and drug policies in particular in order to enhance punishments. It was said that were proportionality properly applied to the sentencing of drug offences, we should not see such lengthy custodial terms, particularly for drug 'mules'. To address this damaging disconnect, some participants called for greater use of strategic litigation before the regional and international human rights organs which have, until now, failed to look closely at the issue of sentencing for drug offences other than in death penalty cases.

It was also said, at many junctures, that challenge on the basis of type and length of sentence and the weightings of the various constituent parts of an offence as to seriousness, would not be enough to ensure a proportionate response to the drugs issue. It was said that drug control itself should be brought into such discussions and the issue of decriminalisation and regulation put squarely on the table; until such was done, efforts like that of the SC, would merely be papering over the cracks of a disproportionate system.

It was likewise a recurrent theme that unless discriminatory law-enforcement practices are addressed, sentencing frameworks will have the potential to compound negative impacts on equality. For example, where recidivism is an aggravating factor, sentences are often up-tariffed for groups of individuals, such as those from lower socio-economic backgrounds and minorities, on whom the focus of the police have fixated. The need for a systemic approach including total law-enforcement controls and awareness-raising and educational programmes was emphasised more widely still. Without such, it was said that sentencing frameworks such as that in the UK merely scapegoat the unfortunate few who happen to be detected with excessively severe sentences because this is the only way that policy-makers feel they can retain public confidence whereas in fact, the evidence shows that only certainty of detection has deterrent effect.

As a stop-gap, however, the SC consultation was commended highly: first, for its consultative nature as an example of democracy in action exemplified perhaps best by the willingness to meet and engage squarely with criticisms of its processes and proposals in the course of this expert seminar; second for the quality and precision of the work undertaken; third for its efforts to raise public awareness and secure public buy-in; and fourth, and perhaps most of all, for its efforts to improve data collection in the field and particularly its intention to monitor, evaluate, and keep under review whatever sentencing guidelines are put in place.

On the other hand, there was broad concern that fundamental issues of principle – such as the effectiveness of deterrent sentencing and the comparative harmfulness of types of offending – were not addressed. Moreover, the SC was roundly criticised for its failure to put the current average severity of sentencing in the UK at issue. It was suggested the SC

had lost sight of the variety of its legislative mandate, favouring consistency over other equally important aims like justice and cost and effectiveness but that, in any event, unless such questions were addressed a proportionate framework could not hope to be achieved through this exercise.

As regards the detail of the consultation, there appeared to be broad support for the technique of cross-referencing role against quantity to gauge seriousness although it was said that as regards the former, roles can often be blurred, and as regards the latter, quantity will not always directly relate to harm and in any event, the quantities set were in general too low. It also appeared to be a matter of agreement that it was important to distinguish between micro and macro traffickers and that social-suppliers and user-dealers should be dealt with as at the very lowest-range of seriousness, as should drug 'mules' whose treatment was agreed by all to exemplify a disproportionate approach. It was also argued in strong terms that street-dealers should not be categorised as having a leading role but that there should be a distinction made between such individuals and those with higher profiles within organised crime. Other parameters of seriousness were discussed throughout the course of the day and are referred to in the body of the report.

Whether sentencing guidelines are the appropriate tool to bring about more proportionate sentencing was a question at the heart of the day. It was commonly agreed that sentencing should be individualised and particular note taken of the different gendered and cultural impacts that result from sentencing disposals. However it was also recognised that inconsistency, discrimination, and up-tariffing can result from judicial discretion. It was concluded that the trick perhaps is to impose guidelines with sufficient specificity to be directional and so address inconsistencies and restrain prejudice, but which also allow scope for judicial discretion to take into account the reality of the human situation before them. Within such structures, certain practical safeguards were suggested in particular: a presumption of subordinate role and low-purity; a requirement for the judiciary to give reasons when sentencing; a focus on mitigating factors, not aggravating factors; and, an avoidance of minimum sentences in favour of maximum caps.

Reflecting on the unique gathering of experts from so many jurisdictions, there was hope that the opportunity presented by the UK SC mechanism for open and assiduous consultation on sentencing for drug offences was something that could be replicated elsewhere. However, there was also, in the end, broad concern that such opportunities should not be lost through failures to maximise interaction with policy, as here. It was indeed said many times that with proportionality essential to the rule of law the judiciary (and, where relevant, other mechanisms such as the SC) should not shy away from their duty to place a check and balance on the irrationality that so commonly grips drug policy and which undermines our democracies.

Genevieve Harris, 2011

With financial support from



Drug Prevention and
Information
Programme of the
European Union



OPEN SOCIETY
FOUNDATIONS

The contents of this publication are the sole responsibility of the author(s) and can in no way be taken to reflect the views of the European Union or the Open Society Institute