1983 MEETING OF COMMONWEALTH LAW MINISTERS: MEMORANDA (1983). Commonwealth Secretariat, London, U.K. Pp. xv+597. Price £ 15.

THE MEMORANDA[1] under review is a useful compilation not only for the governments of the Commonwealth but for others as well. It also contains in-depth study by eminent scholars of matters ranging from principles governing assistance to small states to meet their legal needs to such complicated issues as discretionary factors in the decisions to prosecute, commercial crime, mutual assistance in criminal matters and complaints against the police.

In recent years there has been a spurt in international crime. The nature of criminal activity has undergone a significant change. There has been a shift of interest from traditional crime involving violence to white collar crime, trafficking in drugs, racketeering and fraudulent transactions involving considerable sums. At the same time new methods have been devised by corporations and individuals to evade prosecution and punishment for unlawful conduct of this type. The appointment of Commonwealth Fraud Officer in the Legal Division of the Commonwealth Secretariat in 1981 reflects the importance attached by the ministers to prevention and detection of commercial crime.

A new approach towards economic and commercial crime lays emphasis on the enforcement of civil liability against perpetrators of this type of criminal activity which has "insidious side-effects as regards national economies, political stability, market and investor confidence and the social structure generally".[2] The sanctions of criminal law are difficult to operate with loopholes in the law which is primarily tuned to suppression of violent behaviour. "Obviously, it must be the primary concern of the law... to endeavour to put down criminal activity, and to expose and deal with those concerned, by the direct application of the rules of criminal law .. ."[3] Yet it is also of utmost importance to devise effective remedies of civil nature for victims of commercial and corporate crime. The paper[4] prepared ay Liverpool on the subject is highly illuminating. According to him the law enforcement agencies are increasingly coming to recognise the practical utility of attacking serious organised crime through its assets. Mere imprisonment of this type of offenders does not prevent the activities of the group from being carried on effectively by surrogates or from prison.

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1. *1983 Meeting of Commonwealth Law Ministers: Memoranda* (1983).

2. L.S. Sealy, "The Enforcement of Civil Liability in Regard to Commercial Crime and Corporate Abuse", in *id.* at 220.

3. *Ibid.*

4. Nicholas Liverpool, "The Seizure and Forfeiture of Property Associated with Criminal Activity", in *id.* at 232.

Although the laws permit seizure, forfeiture and confiscation of assets or goods which have been stolen or obtained fraudulently, in defined situations, the recourse to these procedures has not taken place extensively in the past. The law on the subject is complicated, more so in the case of confiscation of illegal profits. In many cases it frequently transpires that "the profits of the crime far exceed the maximum fine which the court is empowered to impose."[5] To retain the assets many offenders prefer to undergo imprisonment rather than pay fine. The courts apply the rule of strict interpretation in confiscatory legislation which always favours the offender. The author makes many suggestions in this regard and concludes as under:

> It is suggested that confiscation should aim initially at the illicit profits of transactions when the transaction is illegal *per se*. When the immediate proceeds are sold, exchanged or transferred that other property should also be subject to confiscation, with adequate safeguards to protect the interest of innocent third parties and creditors of the accused.[6]

In this connection the (U.S.) Racketeer Influenced and Corrupt Organisations Act 1970 needs special mention. The legislation aims at suppressing organised criminal activity by creating new offences of (*i*) using or investing "dirty money" derived from a pattern of racketeering activity, (*ii*) acquiring interest in "control of any enterprise through a pattern of racketeering activity", and (*iii*) being associated with an enterprise of this character.[7] The convicted person does not forfeit his profits but only his interest in the enterprise. More stringent provisions have been enacted in the Controlled Substances Act 1970 which is limited to organisers, supervisors and managers of federal drug crimes.[8] The author has also discussed the Canadian and Australian experiences on the subject and prepared a memorandum regarding matters to be included in legislation and administrative measures to attack financial resources and illegal gains of drug traffickers and their supporters.[9] This is a subject of absorbing interest and social relevance, which could be taken up for study and formulation of legislative and administrative measures for suppression of economic offences in general and drug offences in particular.

The Commonwealth law ministers have expressed deep concern from time to time regarding international economic crime. Some of the problems in connection with the prevention of such crime relate to imposition of effective civil and criminal liability which have been touched upon

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5. *Id.* at 242-43.
6. *Id.* at 243.
7. *Id.* at 245-46.
8. *Id.* at 246.
9. *Id.* at 247.

briefly in the preceding paragraphs. However, the most intricate and difficult problem in this regard concerns mutual assistance by the Commonwealth nations in investigation, collection of evidence, intelligence, extradition and recognition of foreign judgments in criminal matters. The paper[10] prepared by Chaikin is a penetrating study on the subject, particularly with regard to problems raised due to conflict of jurisdiction. He favours adoption of such models of bilateral cooperation as exist between Switzerland and the United States in criminal metters.[11] The treaty contemplates "compulsory assistance measures" in:

(*a*) ascertaining the whereabouts and addresses of persons;
(*b*) taking the testimony or statements of persons;
(*c*) effecting the production or preservation of judicial and other documents, records or items of evidence;
(*d*) service of judicial and administrative documents; and
(*e*) authentication of documents.[12]

The legal assistance includes the disclosures of banking information. It has been suggested that this treaty provides a model for mutual assistance treaties between common law and civil law states. The author concludes:

> [T]here is a significant problem in the provision of judicial assistance in criminal matters at an international level, both within the Commonwealth and outside. ...Unless urgent and proper attention is given to the problems confronting those called upon by society to investigate and prosecute criminals operating on an international level our legal systems are being asked to fight with their hands tied behind their backs.[13]

Another matter which has received prominence in the *Memoranda* relates to discretionary factors in the decision to prosecute. Papers prepared by John Ll.J. Edwards, "Discretionary Factors in the Decision to Prosecute",[14] and A.N.E. Amissah, "The Decision to Prosecute",[15] together with "The Decision to Prosecute: Guidelines Presented to the Australian Federal Parliament on Behalf of the Federal Attorney-General",[16] and "Criteria for Prosecution: Memorandum of the Law Officers of the United Kingdom"[17] lay bare complex issues of law and policy in

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10. David A. Chaikin, "Mutual Assistance in Criminal Matters: A Commonwealth Perspective", in *id.* at 275.
11. See, for the text of the treaty, *id.* at 335.
12. *Id.* at 310.
13. *Id.* at 318.
14. In *id.* at 77.
15. In *id.* at 95.
16. In *id.* at 113.
17. In *id.* at 121.

this regard. In a democratic society there has been "a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions"[18] without public disclosure of reasons behind individual decisions. Edwards asserts that the balancing of competing values is the hallmark of discretionary power to prosecute which is based upon public disclosures made by Director of Public Prosecutions Sir Thomas Hetherington in England; the precedents set by him have been paralleled in other countries of which the United States, Canada, Australia and New Zealand can be cited for individual examples.[19] In all these countries, persons having the discretion to prosecute satisfy themselves with regard to following matters before they exercise discretion in favour of prosecution, namely, (*i*) there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw in the prosecution of a case, and (*ii*) the available evidence justifies prosecution—the so-called fifty-one per cent rule under which the first consideration is "whether the totality of the available evidence is of such quality that a reasonable jury (or magistrate, in respect of summary offences) is more likely than not to be satisfied beyond reasonable doubt that the accused is guilty of the offence charged."[20] There are certain policy factors such as staleness of the crime, youthfulness or advanced age of the perpetrator of crime, the gravity of the offence, which also enter into the decision whether to allow prosecution in specific cases. It is in the context of these developments that we have to examine the prosecutorial process in India. There is the common complaint that no objective or rational considerations are taken into account by persons charged with the duty to sanction prosecutions. That there is political interference in such decisions has generally been admitted by all and sundry. Such a state of law does not augur well for the sustenance of democratic institutions in India.

Another area of common concern in the *Memoranda* relates to redressal of grievances against the police. In many democratic countries attempts have been made to lessen the credibility gap which exists between the public and police by institutional reforms of complaint procedures. It has been widely recognised that maintenance of public order presupposes the existence of cordial public-police relations. To generate mutual confidence between the public and police it is necessary to create speedy and effective machinery for disposal of complaints against the police. The discussion paper[21] prepared by Marshall highlights some of the problems connected with the dealing of complaints against the police and procedures which should be instituted for their unbiased and quick redressal. He comes

18. *Id.* at 78.
19. *Idid.*
20. *Id.* at 82.
21. Roy Marshall, "Complaints against the Police", in *id.* at 438.

to the conclusion that there does exist "considerable support in every country...for the introduction of an independent element into police complaints peocedures. ...There are difficult problems of how best to reconcile conflicting interests between satisfying complainants and being fair to the officers complained against... ."[22]

Of late numerous instances of misbehaviour of the police have come to light in India. As a result the credibility of the police force has suffered a setback. Little precious has been done to evolve a comlaint resolution procedure which would be acceptable to the members of the community. It is to be considered whether we need an ombudsman system both at the Centre and at the states for this purpose. The proposed three-tier system of the Government of the United Kingdom for handling complaints against the police also needs serious consideration.[23]

The *Memoranda* contains valuable discussion papers on other matters which are of special relevance to developing countries. Among these mention may be made of legislative drafting, developments in statutory interpretation and the Australian experience in the establishment of a computerised legal information retrieval service. In this connection the paper prepared by Colin Campbell, "Computers and the Law: The Challenge to Governments", raises a number of issues in regard to the application of computor technology in the field of law.[24] He rightly points out that in improving legal research methods, promoting drafting and improving office automation, computers have proved useful. However, computer application in the area of law is expensive and depends for its success on adequate financial resources and trained manpower. In a developing economy computer technology in the field of law can be introduced in stages and with caution.

The *Memoranda* contains useful information regarding the developments in the field of law and its administration in areas of mutual concern to countries of the Commonwealth. Most of the discussion papers are illuminating in several respects. These are not only a mine of information with regard to the practice of Commonwealth nations on the relevant subject, their juristic importance lies in the fact that policy considerations behind rules of law and legal institutions have been examined threadbare with objectivity by the authors. By any standards the publication is an excellent piece of work. It is of great significance not only to lawmen but also to legislators, public men and enlightened members of the community.

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22. *Id.* at 447. Appendix C of the discussion paper contains information regarding public complaints commissioner, a civilian service set up to resolve disputes between lay public and the police in metropolitan Toronto. *Id.* at 455.

23. See appendix E of the discussion paper, in *id.* at 462.

24. *Id.* at 211.

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