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DETENTION OF ADULTS PRIOR TO SENTENCE

Observations submitted by the International Association of Penal Law

Yugoslav Group

PLAN OF LEGISLATIVE STUDIES ON THE DETENTION OF ADULTS AWAITING TRIAL

An international tendency to provide guarantees with regard to personal freedom as well as the other human rights has lately become manifest. The Declaration of Human Rights has already been drawn up, but in an unrealistic form.

It is particularly in respect of detention pending trial that the protection of personal freedom should be guaranteed internationally. While this type of detention is, in fact, necessary for criminal procedure, it has given rise to serious violation of man's personal freedom. Such violation has occurred at all times and in all places, and for that reason the international regulation of the institution of detention pending trial would serve a useful purpose.

Detention pending trial, throws into relief two conflicting interests -- the social and the individual. In other words, from the point of view of subjective law and that of ethics, there is a clash between the social right to defence against crime and the right of the individual to his personal freedom and his ethical property namely the dignity of the human person. It is therefore a conflict of properties similar to that occurring in the case of the state of necessity in criminal law. In detention pending trial, however, the conflict is a legislative one, which the legislator must solve. Whatever solution he may provide for this conflict of interests, the injury to personal freedom from detention pending trial imposed by the competent agent of the State will be a lawful act, unlike the act of the state of necessity which is still illegal although its agent is not liable to punishment.

/A legislative

A legislative study on detention pending trial should, in our opinion, be along the following lines:

1. Different types of detention pending trial

First it must be determined whether only one type of detention pending trial should be recognized or, on the other hand, whether two or more types would be appropriate. In certain codes of criminal procedure (including the German Code) there is only one kind of detention pending trial. In other codes (including the French Code) there are two, the more serious being detention pending trial by warrant of arrest, that is, imprisonment during the investigation proceedings, and the less serious, detention pending trial by warrant of commitment, that is imprisonment during the hearing of witnesses.

2. Cases of special detention pending trial

In the main, this would mean detention pending trial in cases of disturbance, riot and other offences in which many persons participate, when the guilty persons cannot be discovered immediately. The question here is to determine whether in such cases the examining magistrate should have the power to arrest suspects in the immediate vicinity of the scene of the disturbance, and, after interrogation within the prescribed time limit under what conditions he could detain the pending trial. One such condition might, for example, be that detention during the investigation could be ordered.

Another special case of detention pending trial might be that the examining magistrate for the place in which the criminal offence was committed would, for the purpose of investigation, prohibit any person in respect of whom he deemed such prohibition necessary from leaving the place for a period of one or two days, with the power were that order to be disobeyed, to arrest the person for the purpose of investigation and, if necessary, punish him by imposing a fine.

3. Conditions for the application of detention pending trial

Where the sacrifice of personal freedom in the interest of criminal proceedings, is recognized by the legislator, applying in this case the solution of the legislative state of necessity, such sacrifice should naturally be kept within the bounds of strict necessity, and should thus be required only if inevitable. This appears obvious, yet it is not, and never has been, sufficiently taken into account by the legislators, who often consider only the general interest, which in this case is misunderstood.

/The law

The law must clearly stipulate the conditions in which detention pending trial seems inevitable to facilitate the hearing of witnesses and the investigation of criminal cases. It would not be sufficient, except perhaps for the most serious crimes, merely to indicate, for example, the types of penalties that have to be imposed, to enable detention pending trial to be ordered, as is the case with certain codes. The causes arresti should be enumerated precisely and fully, so that, so far as possible, false imprisonment and the possibility of differing interpretation concerning their application may be avoided. The various codes of criminal procedure show wide divergencies on this point, and are greatly in need of international unification.

4. Authority competent to order detention pending trial

The great majority of codes attribute such competence only to the examining magistrate. The public prosecutor has no authority in the matter. As, however, there are countries in which this rule is not recognized, there should be an international regulation on the subject.

Moreover, it should be determined in what special cases a warrant for detention pending trial may be issued by a magistrate who is not normally competent to do so or even by a police authority (in cases of urgency for the proceedings).

5. Compulsory and optional detention pending trial

In view of the state of the different codes, it must be determined whether in certain cases detention pending trial should be compulsory for the examining magistrate or whether the measure should in general be an optional step in the proceedings. According to certain codes, it is unconditionally compulsory in the case of criminal offences, if the penalty imposed is death or penal internment for life or if these penalties are imposed with alternatives.

6. Detention pending trial in relation to the division of offences into more or less serious offences.

The decision must be whether detention pending trial should be recognized only for crimes in general or under certain conditions, or also for offences in general or under certain conditions, or even for contraventions in certain cases (for example, whether committal to a work institution may be ordered).

/7. Arrest procedure

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The question here is to determine the obligation to interrogate the accused and the time limit within which this should be done, the form and contents of the warrant for arrest, its notification to the accused, the time-limit for such notification, the obligation to issue a copy of the warrant for arrest and the time-limit/^{within} which that obligation should be discharged.

8. Grounds for appeal

The question to be settled is the right of appeal of the person detained pending trial, the time-limit for the exercise of such right, the authority (the court) competent to take a decision in the matter, the duty of the examining magistrate, if the accused has not availed himself of his right of appeal within the specified time, to send the warrant for arrest as a matter of routine (to the court).

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(signed) (Professor) Thomas Givanovitch.