



Third Study Commission
Criminal law and procedure

Meeting in Macao, 23-27 October 1989

Conclusions

PRE-TRIAL DETENTION, ITS LEGAL RULES, APPLICATION AND ALTERNATIVES

On the basis of the written reports of the delegates of Australia, Austria, Belgium, Brazil, Denmark, the Federal Republic of Germany, France, Finland, Luxembourg, Norway, Portugal, Scotland, Senegal, Spain, Sweden, Switzerland and Tunisia, the oral reports of the delegates of Canada and Italy and the general report drafted by the President Raymond Screvens, the Commission has adopted the following conclusions:

Pre-trial detention is a necessary and inevitable incident of the system of criminal justice notwithstanding that it is contrary to the principle of the presumption of innocence. Therefore it is strictly regulated in different ways by the criminal procedure of the countries represented.

Because of the exceptional character of pre-trial detention, judicial disposal of criminal cases should take place with the minimum of delay.

Pre-trial detention must be limited to the necessities of its principal purposes which are:

- a) to ensure that the defendant appears for trial
- b) to prevent his tampering with the evidence
- c) to prevent his committing further crimes

Pre-trial detention should be as short as possible.

Consideration should be given to the provision of counsel for the defendant who must have access to the file or to the particulars of the charge.

There should be provisions for regular judicial control and the person detained should have the right to apply for his release from custody.

Recourse should not normally be had to pre-trial detention if other resources, less restrictive of personal liberty, can achieve the decided objectives.

Alternative measures should be used only if they can effectively replace pre-trial detention. The choice should be left to the judge who should have the power and the means to exercise his discretion in each case.

Such measures will be selected by the judge only if they appear likely to be effective.

It is necessary to ensure that the victim of illegal or unjustified pre-trial detention may seek compensation once the proceedings have been determined.

The increase in the number of persons detained in the various States and in the average duration of pre-trial detention is due to increases in the rate and gravity of crime. These elements overburden the capacity of the courts.

While some legislators commonly promote partial and piecemeal reforms of pre-trial detention, the problem is much greater and concerns the whole of criminal procedure and judicial administration. Furthermore it is indispensable to increase the efficiency of the administration of justice by expediting the trial process.

To this end and in those States where the situation is unsatisfactory:

- a) it would seem to be useful to provide for the rapid determination of appropriate cases, for example, where proof of guilt is clear;

- b) the resources at the disposition of judicial officers, prosecutors and investigators should be augmented;
- c) the number of judicial officers and prosecutors should be increased;
- d) international cooperation should be improved.