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PRE-TRIAL DETENTION AND THE INEQUALITY OF JUSTICE*

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One of man's priceless possessions is his liberty. For man, in essence, is a lover of freedom. To him, any restraint, irrespective of cause or duration, is odious; and his abhorrence thereof instinctive, at times outspoken. In every race and region, human existence has been and, from indications will continue to be, one incessant struggle for the preservation of that freedom. History has often witnessed the sparks of revolt ignited because tyrants dared trample upon man's liberty and treat as balder dash laws that guaranteed the exercise of his freedom. The now classic expression, "Give me liberty, or give me death," first echoed on the American continent close to ten scores ago, still electrifies the imagination of the freedom-loving peoples of the world.

THE ALTERNATIVES: SUMMONS AND ARREST

Thus it is that, in the family of free nations, the universal craving for the free way of life has served as a stopgap against divesting a man of his liberty save only as punishment for crime. But this presupposes previous conviction thereof. The more vexing problem is what should be done during the period preceding trial and conviction. Today, two alternatives for bringing an accused before the bar of justice vie for acceptance: the mere issuance of summons to, or the forthright arrest of, the suspect. While the choice seems easy enough, countervailing considerations like the inviolability of human rights, the presumption of innocence, the need to insure the punishment only of the guilty and social defense, make the determination of the best course of action a matter of critical balancing.

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Easier to conjure up in the mind is that of summons. This is spawned by the seething dislike for curtailing man's freedom, such that a new outlook on detention is on the rise. Arrest is now frowned upon by many; it is to be exercised sparingly and under justifiable circumstances. Progressives argue that it should be reserved only for more serious offenses.[1] Criminal statistics compiled in various nations confirm the theorem that the issuance of summons to an alleged offender is a preferred alternative to arrest in a wide range of cases.[2] Cognizant of this, the delegates to the 1958 United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure held in Baguio City, Philippines, stressed the developing tendency throughout the world to diminish the need for arrest by extending the use of summons.[3] This inclination was further strengthened when the participants in the United Nations Seminar at Vienna reached an agreement that arrest and detention before trial should be exceptional and should only be adverted to when the nature of the offense demands it in the interests of justice.[4]

There are instances, however, where because of the gravity of the offense charged, arrest becomes imperative. Yet, even then, the harshness of the remedy could be softened by sparing the suspect from the ignominy of detention thru bail or conditional release in forms that vary with each country. Common throughout the world is the practice of releasing a person provisionally upon the posting of a bond or something of value, conditioned on his appearance on the day set for trial and for the service of sentence, if found guilty.

NECESSITY OF PRE-TRIAL DETENTION

What then of those whose alleged acts do not admit of the issuance of mere summons or of bail? What of those who, by the gravity of the crime charged, must be taken into custody pending trial? How must they fare? It is indubitable that, under some

[1] In the Philippines, however, arrest is the general rule, summons being resorted to only when the defendant is charged with violation of some law or ordinance the penalty of which is *arresto menor* (1 day to 30 days) or imprisonment for not more than one (1) month or a fine of not more than ₱200 or both, except when the defendant is a recidivist, or a fugitive from justice, or is charged with physical injuries, or does not reside in the place of commission of the violation, or has no known residence (Sec. 9, Rule 112, Rules of Court).

[2] Professor Caleb Foote.

[3] Report of Seminar, paragraph 35.

[4] Report of Seminar, paragraph 26.

circumstances, pre-trial detention is advisable, at times even well nigh necessary. A variety of purposes requires it. Foremost among them are: to hold the accused for questioning, to ensure the unhampered conduct of the investigation, to prevent his committing any criminal offense, to protect the accused, and to ensure his appearance at trial. The zeal to promote these ends of pre-trial detention, however, should never be allowed to shroud or obscure one of the vital guiding principles of criminal law: pending ultimate conviction, the suspect is, in the eyes of the law, still presumed innocent. Though detained, his guilt is still to be established. Though in custody, he still remains to be convicted. If tried, his innocence may yet stand unimpeached.

SAFEGUARD IN PRE-TRIAL DETENTION

Against the foregoing backdrop, the conclusion is irremissible that the pre-trial detention, the admittedly indispensable means to subserve socially and legally desirable ends, could actually amount to an infringement of liberty. Inevitably, a happy medium must be struck. Sufficient safeguards must be erected to insulate the rights of the suspect against undue and arbitrary invasions that exceed the limits prescribed by necessity without, however, impairing the effectiveness of the detention as a measure of protection for society.

Prevailing among jurists and penologists is the opinion that a detained person awaiting trial should not be exposed to the same prison regime as one who has already been convicted. At the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva in 1955, the delegates drafted a set of rules establishing minimum standards to which conditions of detention of untried prisoners must conform. Among the rules generally accepted are that detainees may not be compelled to work or perform prison labor, as are convicted prisoners, nor may they be required to garb themselves in prison uniform. They should be quartered in cells separate from those of convicts.

All these, of course, are laudable attempts to protect the detainee's right to liberty and the other rights that flow from it. But the fact remains that they are, at best, mere palliatives and by no means can be considered cure-alls. No matter how it may be camouflaged by such efforts to improve conditions, the naked truth still stands out that pre-trial detention will be felt and experienced by those subjected to it in a manner approximating a sentence of imprisonment. The stigma of detention, to say the least, is one difficult to erase; at times, indelible.

ADVERSE EFFECTS OF PRE-TRIAL DETENTION

Detention is not without its ill-effects.

Disrupts Relationships —

A disruption in the detained person's normal activities follows: he is thrust into an adverse set of circumstances; he is compelled to follow a pattern of life with little kinship to that to which he was accustomed; he is subject to the regimentation of prison life and the rigor of abnormal living conditions. Normal social relationships are cut off and less desirable ones substituted for them. Imprisonment limits or destroys family relations, interrupts contact with friends and co-workers in everyday society and disrupts the orderly flow of life. The detainee is unable to pursue his profession and carry on his calling as usual — a situation that might easily spark off a financial crisis in his family from which recovery is difficult, if not altogether impossible. Call it what you may, but the fact is clear and inescapable that pre-trial detention is a restraint on freedom.

A Factor in Crime

There is even reason to believe that detention may contribute to the increase of crime by hardening the prisoner. It is not impossible that incarceration may transform a person's character by arousing dormant criminal tendencies due to his being cast into an inimical set of circumstances. It may generate a profound psychic effect by instilling a sense of degradation and loss of social esteem. The end product: he may jump at the slightest provocation to assume that he has been a victim of injustice, and may temper his ruffled pride and feelings by harboring thoughts of revenge.[5] The victim: society, in whose interests the innocent man was originally detained.

Detention of Innocent —

Besides, the irony of the matter lies in the inevitable possibility that the person detained might after all be innocent. It is not an uncommon occurrence to witness persons detained pending trial only to be ultimately released for failure to secure a judgment of conviction. We should not discard the possibility of a man being detained for a period longer than that prescribed as punishment for the crime allegedly committed — only to secure in the end a belated acquittal. What of these unfortunate individuals who are compelled to withstand the strain of imprisonment in the name of justice, who after all become victims of abhorrent injustice? For them, acquittal arrives as a mere balm to assuage the difficulties they have had to undergo. But, at times, acquittal does not suffice to soothe the ill-effects of imprisonment. As savants say, what is done, cannot be undone.

[5] ROZYCKI, EARLY RECIDIVISM AMONG FIRST OFFENDERS.

Conditions After Release

Furthermore, after his acquittal and release, a whole series of questions waiting to be answered looms ahead for the detainee. How will his friends and family regard him? Will he be welcomed by society? Will he soon be made to realize that he is no longer acceptable to his acquaintances, or that his presence may even be considered a bad reflection on their reputation?

Attempts to obtain employment may further lead the detainee to assume that he has been ostracized. There are employers who will not employ a man because they regard imprisonment as a badge of untrustworthiness, entirely relegating into the background any consideration of actual innocence or guilt. It is difficult enough for an ordinary man to find work in these days of chronic unemployment. More so, however, when one bears the mark of arrest and imprisonment, a stigma spawned by false accusation and subsequently imprinted by figments of the mind of bigoted society.

After his release, the detainee may thus be shunned and avoided by society. And this, especially in a small community. Rejected, he may eventually drift towards those who will accept him and give him recognition and place him on an equal footing with themselves, towards those with whom he will feel at home. Not unlikely, his post-detention associates may be in the class of the undesirables — not to say criminally disposed.

The unsavory influences and experiences of a person detained pending trial have thus been stressed. Undoubtedly, not all those detained may be affected in the same manner outlined above. However, it cannot be denied that there is more than a grain of truth in what has been said.

REMEDIES

What steps then can be taken to remedy this deplorable situation? In a word, greater effort must be exerted to reduce to a minimum the instances in which one awaiting his day in court may be detained. Efforts in this direction can fall into two categories: *first*, greater use of summons than arrest; and *second*, allowing bail in more cases and to more persons.

The numerous advantages of summons have already been pointed out. It offers all the benefits of bail in addition to another vital one — the person involved can still answer "no" to the question "Have you ever been arrested?"

In the Philippines, the law on bail is particularly liberal. Consecrated in the Constitution is the right of every inhabitant to bail before trial in all cases except when a person is charged with a capital offense where evidence of guilt is strong.[6] Under the system of bail in the Philippines, even a person who has previously absconded from bail is entitled to conditional release. And more. Even after one has been convicted of a capital offense he may still be allowed to bail pending appeal, for humanitarian reasons, as in those cases where confinement has been proven to be injurious and detrimental to the accused's health.[7]

At times, however, one remains detained not because of the gravity of his offense, but because of his inability to post the bond required. The system of bail in the Philippines requires that one who has been charged with an offense and arrested must put up a sum of money or a surety bond to guarantee his appearance in court when the day of trial arrives. If at the time, however, his financial means are stringent and he does not possess the means to meet the amount required, he must remain in jail and suffer the concomitant hardships of imprisonment. In simple terms, he is detained because of his poverty.

To soften the impact of bail requirements, Philippine judges are given a wide range of discretion mainly directed at fixing bail in an amount fairly within the reach of the accused consistent with the right of the State to insure his presence at the trial and the reading of the sentence in case of conviction.

A report made in 1964 to the United States National Conference on Bail and Criminal Justice embodied an observation which is illuminating:

> Each year, the freedom of hundreds of thousands of persons charged with crime hinges upon their ability to raise the money necessary for bail. Those who go free on bail are released not because they are innocent, but because they can buy their liberty. The balance are detained not because they are guilty but because they are poor. Though the accused be harmless, and has a home, family and job which make it likely that if released he would show up for trial, he may still be held. Conversely, the habitual offender who may be dangerous to the safety of the community may gain his release.

[6] Section 16, Article III, CONSTITUTION.

[7] UN Baguio Seminar, Report, paragraph 36.

Thus it is that, in determining the amount of bail, regard must be had for the prisoner's pecuniary ability. The efficacy of the right to bail cannot be divorced altogether from the inexorable operation of the laws of economics. What would be reasonable bail to a man of means may actually amount to a denial of the right if demanded from a poor man accused of the same offense. To demand the same amount of bail from one belonging to a higher stratum of economic life as from one in a state of penury would imply, in the language of Professor Caleb Foote, "economic and class discrimination which is difficult to reconcile with the goal of equal justice." Inquiry into the capacity to give bail should be a standard requirement before any recommendation as to its amount is actually made. For, only then can a realistic approach to the problem of bail-fixing be achieved and justice be approximated.

Perhaps, a step in the right direction would be to discover substitutes for bail. "In England, the most commonly used device to guarantee appearance is a simple promise — a personal recognizance — to forfeit a stated sum in case of non-appearance. There, forfeitures are very rare, possibly because penalties are more lenient. In Italy, Sweden and Denmark, bail is frowned upon as undemocratic and as giving the rich an advantage over the poor. In Italy, 90 per cent of those charged with minor or moderately serious crimes are released without any kind of pledge or guarantee."[9]

[8] Freed and Wald, *Bail in the United States;* 1964, a 116-page printed report to the National Conference on Bail and Criminal Justice.

[9] Schweitzer, *"Punishment Before Trial"*, JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, June 1964.