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MEASURES TO COMBAT RACISM AND RACIAL DISCRIMINATION AND THE ROLE OF THE SUB-COMMISSION

Study on discriminatory treatment of members of racial, ethnic, religious or linguistic groups at the various levels in the administration of criminal justice, such as police, military, administrative and judicial investigations, arrest, detention, trial and execution of sentences, including the ideologies or beliefs which contribute or lead to racism in the administration of criminal justice (in accordance with Sub-Commission resolution 4 A (XXXIII))

Final report by Mr. Justice Abu Sayeed Chowdhury, Special Rapporteur

*/ The introduction and chapter I of the report were issued in document E/CN.4/Sub.2/L.766.

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1. Introduction

1. The criminal justice system involves the police, prosecutions, courts and corrections. It may be said that in most instances so far as dominant groups are concerned the system works well. However, the same apparatus for the administration of criminal justice is often seen by members of minority groups, racial, ethnic, linguistic and religious as a tool of the power structure and oppressive in nature. The inequities of the application of the system may be seen by examining certain criminal justice statistics. It has been shown, for example, that in proportion to their number in the populations, members of certain minority groups are more likely to be arrested than those of the dominant group. If arrested, they are more likely to be convicted and placed in institutions. Prison statistics reveal that, once convicted, members of certain minority groups are more likely to be placed in institutions. When imprisoned they receive longer sentences than members of the dominant group. The criminal justice system in some societies is regarded as a process riddled with inequalities.

2. The first agency in the system of criminal justice is, of course, the police. Encounters between the police and citizens are the microcosm that generates all cases for processing in the administration of criminal justice. The core of these encounters is a discretionary decision.

3. In Black's Law Dictionary 1/ police is defined as the function of that branch of the administrative machinery of Government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety, and morals and the prevention and detection and punishment of crimes. A police officer is defined as one of the staff of men in cities and towns to enforce the municipal police, i.e. the laws and ordinances for preserving the peace and good order of the community. Otherwise called "policeman".

4. Traditionally, the role of the police is solely to enforce the laws which are determined by legislative bodies. There should be strict separation of the functions of law-making, law enforcement, adjudication and dealing with convicted offenders. According to one writer:

> "... the criminal justice system has four successive stages. First comes the enactment by Parliament of the criminal laws, secondly the task of the police to enforce them. The third stage is the criminal trial, where the question of guilt is decided. Finally, there is the problem of what to do with the guilty. Each of these four stages has usually been considered in isolation. Each tends to be the province of a different group of people. Politicians make the laws, police enforce them, lawyers run the trials, and the prison or probation services deal with convicted offenders." 2/

1/ Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn. West Publishing Co., 1951).

2/ R. Mark, Policing a Perplexed Society, (London, Allen and Unwin, 1977), p. 24. See also The Sociological Review, vol. 28, 2 May 1980, p. 377.

5. The police are charged with the responsibility of detecting law violations, arresting suspected offenders, and gathering the necessary information to enable others to decide whether the case should be brought to trial and, if tried, on the guilt of the offender. 3/

6. It has been alleged that so-called persecution may go beyond the practice of surveillance. Certain minority groups feel that the police have a greater antipathy towards the lower class (particularly members of racial minorities) than towards other groups. In a number of cases it has been determined that there is a somewhat wider value gap between police and certain minority groups than between police and dominant groups.

7. The legality of police behaviour towards minority groups is an important area to be explored. While it may be said that one is not in a position to make findings on individual allegations of racially motivated police brutality towards minority groups, the sheer magnitude of such allegations must itself give grave cause for concern. According to one writer:

> "... if the police rely on their experience in determining the characteristics of persons more likely than the average to have committed crime, inevitably they will tend to suspect those who are alleged to have the characteristics of the people most frequently involved in crime. Since high crime rates are demonstrably intimately connected with poverty, the police will tend to be suspicious of the poor and disinherited minority groups: the blacks, Mexican Americans, Indians and Puerto Ricans." 4/

8. Any antagonism by police against minority groups can be self-reinforcing since such groups who resentfully hit back at police antipathy towards them confirm police stereotypes about the groups and thereby encourage further antipathy.

9. It is common knowledge that racial, ethnic, linguistic and religious minorities are more often than not at the lower rung of the socio-economic ladder in most societies. Bearing this in mind, one author points out that sociological studies on the administration of justice tend to echo the popular suspicion that there is one law for the rich and one for the poor. For example, they show that whilst there exist different rates and types of criminal behaviour between social classes, these are exaggerated and ultimately distorted. 5/ This distortion could conceivably occur at every level in the administration of criminal justice, i.e. police surveillance, apprehension, discretionary on-the-street decisions, arrest, pre-trial hearings, prosecution, defence facilities, verdict sentence and even parole. The aforementioned distortion often gives rise to the notion of a criminal class, which happens to be the economically less fortunate.

10. Consideration must be given to the political structure and ideology of a community if a true understanding is to be gained of the role of the police in respect to that community. It may be said that the police are not indifferent, rather they are responsive to those in any given community that possess the power. In this connection one writer states that:

3/ William J. Chambliss and Robert B. Seidman, Law, Order and Power (Massachusetts, Addison-Wesley Publishing Co., 1971), p. 265.

4/ William J. Chambliss and Robert B. Seidman, op. cit., p. 273.

5/ Robert L. Woodson, ed., Black Perspectives on Crime and the Criminal Justice System (Boston, G.K. Hall & Co., 1977), p. 82.

"... it might be even more appropriate to say that there exists almost as many police systems as there are police departments. This difference in policing styles can be attributed to the fact that the police tend to reflect the community setting in which they operate. Thus, there is a direct relationship between the homogeneity of the community and the polarization between the police and the community. In homogeneous communities, where there exist similar cultures, values, class, race and status, the police tend to be responsible to the controlling power structure of the community. Thus, the young, the poor and the minority groups (the powerless) view the police as an army of occupation because the police are supportive of the status quo and represent that which is seen as the sources of their oppression." 6/

11. In a report covering an inquiry of a fairly recent disorder in a metropolitan area where there were allegations of racial prejudice by the police, the author of the report stated that:

"The direction and policies of the Metropolitan Police are not racist. ... The criticisms lie elsewhere, in errors of judgement, in a lack of imagination and flexibility, but not in deliberate bias or prejudice. The allegation that the police are the oppressive arm of a racist state not only displays a complete ignorance of the constitutional arrangements for controlling the police. It is an injustice to the senior officers of the force.

"Such plausibility as this attack has achieved is due, sadly, to the ill-considered, immature and racially prejudiced actions of some officers in their dealings on the streets with young black people. Racial prejudice does manifest itself occasionally in the behaviour of a few officers on the streets. It may be only too easy for some officers, faced with what they must see as the inexorably rising tide of street crime, to lapse into an unthinking assumption that all young black people are potential criminals. I am satisfied, however, that such a bias is not to be found amongst senior police officers ...

"Nor is racially prejudiced behaviour by officers below the level of the senior direction of the force common: but it does occur, and every instance of it has an immense impact on community attitudes and beliefs. The damage done by even the occasional display of racial prejudice is incalculable. It goes far towards the creation of the image of a hostile police force, which was the myth which led the young people into these disorders. It is therefore essential that every possible step be taken to prevent and to root out racially prejudiced attitudes in the police service. This can be done through careful checks in the recruitment of officers, through training, through supervision and disciplinary arrangements ... The police cannot rest on the argument that since they are a cross-section of society some officers are bound to be racially prejudiced. Senior Metropolitan officers accept this. They recognize that in this respect, as in others, the standards we apply to the police must be higher than the norms of behaviour prevalent in society as a whole." 7/

6/ The Politics of Discreditability; Disarming complaints against the Police by Steven Bow and Ken Russell. The Sociological Review. New Series Vol. (23) 1974 University of Keele, Keele, Staffordshire p. 315.

7/ Lord Scarman, The Brixton Disorders, 10-12 April 1982 (London, Her Majesty's Stationery Office, 1981), p. 64.

12. In recent years a number of minority groups have engaged in negative rhetoric about the police establishment. Without burdening the present text with recitals of individual instances and cases, suffice it to say that there have been numerous and significant incidents of undesirable and questionable police practices vis-à-vis certain minority groups. To deal effectively with such undesirable practices it is necessary to understand the police structure (formal and informal), the social environment in which the police must work and how the structure, social ideals and philosophies affect the individual police officer in carrying out his task.

13. Regarding the informal police structure it has been said that:

> "To fully understand the police, it is important to realize that in addition to the formal police organizational structure, there is also an informal police organization. Thus, an examination of the formal organization of a police agency will probably not reveal any evidence of discrimination or double standards. The policies and procedures of the formal organization, to the contrary, clearly advocate objectivity, equal enforcement and the absence of discriminatory practices. Consequently, when one attempts to prove charges of discrimination and dual standards, it is almost impossible because the official policies and procedures can be used to disprove the charges. In the final analysis, charges against the police often boil down to the word of the policeman, and often more than one policeman, against the word of the complainant." 8/

14. It is now time to "develop strategies for eradicating undesirable police practices. The approach calls for an understanding of the police structure, the social milieu in which the police must work and how the structure, social ideals and philosophies affect the individual police officers. It is also important to understand how the police role is reinforced and supported by the interest of a dominant power structure." One should place in focus the true understanding of the role of the police in respect to society - the police as an occupational sub-culture. One source states that:

> "Police are not indifferent but rather responsive to those in any given community that possess the power". 9/

2. Discretion and use of force

15. In dealing with the human aspect of policing one should bear in mind that discretion is an important part of police work. It has been noted that the policeman exercises considerable discretion. Working with the minimum of supervision, he uses his discretion to make many decisions which might run the gamut from surveillance to detainment. It is very likely that the decisions which he makes will reflect his personal attitude not only towards law and morality but also towards the people he deals with. Sociologists have pointed out that the same social machinery that produces everyone else in the society also produces the police; the police reflect the attitudes of the society. Prejudiced societies will naturally produce prejudiced police.

16. Police discretion represents one of the most controversial issues in the administration of criminal justice. In most instances, as previously indicated, it is the police officer who decides whether the criminal justice process will be set in

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8/ Robert L. Woodson, op. cit., p. 80.

9/ Robert L. Woodson, ed., op. cit., p. 80.

motion against an individual. Inherent in this discretion is the principle of force-law enforcement which, by its very nature, carries with it the potential use of force. This discretionary power when misused has led to tragic mistakes. In the exercise of discretion, evaluation is difficult since there is little, if any, direct supervision and control of most officers. In this connection, it has been stated that:

"Proper control of police discretion also requires precise guidelines set forth by police departments and good training of officers. Official police guidelines are often so vague and conflicting that the average patrol officer is left in doubt regarding the limits on discretionary action. Internal mechanisms for reviewing discretionary decisions are often slow and inadequate; and police discretion is, for the most part, beyond the scrutiny of the legislature and courts. Poor training can result in inconsistent decisions and the replacement of objective analysis by personal bias and prejudice, which in turn may lead to actions either too harsh or too lenient for the situation at hand, or to unfair treatment of traditionally vulnerable groups, such as juveniles, minorities, and women". 10/

17. Regarding the question of discretion one author states that: 11/

"The police ... possess an enormous amount of discretion in the laws they choose to enforce. Laws are usually so numerous that police cannot hope to enforce all of them equally. They must make judgements about which are most important ... But if all laws cannot be enforced all the time, then how are the police to be guided in what they choose to do? Should they take their cues from society or should they follow the dictates of their own conscience? The police exercise discretion too in the choice of when and against whom laws are to be applied. ... The seriousness of an offence, and consequently the response of the police, varies with the people involved. ... Even assaults with a deadly weapon may be shrugged off by the police if the perpetrators are lower-class people, while they would occasion arrest and a sensational trial if those involved were wealthy or prominent.

"Laws are not self-starting - delicate acts of judgements are required and these choices are made by policemen on the spot. Whose code of conduct are they to enforce? ... Police usually deny that they have discretion; but in the minds of the public, whatever the police may say, the police are considered friendly or hostile agents depending on whose side they seem to be supporting. ... Police are an instrument for achieving conformity between human behaviour and human prescriptions. Even by doing nothing at all the police cannot avoid choosing sides and appearing to adopt one or another philosophy of life."

18. Police discretion and the form it takes are shaped by a variety of factors ranging from the nature of the law involved to the attitude of the individual officer. With respect to the latter, it has been previously stated that cultural and racial

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10/ Alan Kalmanoff, Criminal Justice, Enforcement and Administration (Boston, Toronto, Little, Brown and Company, 1976), pp. 119-120.

11/ David H. Bayley, The Police and Political Development in India (New Jersey, Princeton University Press, 1969), pp. 21 and 22.

attitudes and prejudices can significantly influence police discretion, despite administrative and training efforts to the contrary. Since most officers are recruited from dominant groups in a population, prejudice against minority groups often surfaces. Thus, the situation often arises where the police are of a different class or race than the community they service - in most large cities, for instance.

19. Civilian review boards are a device for controlling police discretion by providing a convenient forum in which citizens who claim to have been injured by the police can have their complaints heard. 12/

20. The use of force is the area of police responsibility that requires a great deal of judicious restraint and discretion. Contemporary social conditions have increased the use of force and the need to control it. On the other hand, it would appear that Governments have restricted the areas where force may be used in favour of non-violent means of achieving order, and some societies have constructed elaborate forms of behaviour to avoid or ritualize force. In an effort to clarify the legitimate applications of force, a number of progressive police agencies have instituted restrictions on officer use of force particularly with firearms.

21. The word "enforcement" implies a potential use of force. This potential to wield force is necessarily a part of the police image, and the public's opinion of how the police use this potential largely determines whether its image of the police is good or bad. It has been stated that:

> "A policeman's use of force against a citizen is criminal when the force used exceeds the minimum amount necessary to accomplish the objectives for which the privilege for using force is granted. Force in excess of the minimum necessary for these purposes is criminal ... (even if the actor is a policeman)". 13/

22. While police officers, in theory, are in many instances subject to limitations in the application of force, it should be noted that the degree of force legitimately available to law enforcement agencies is sometimes very broad. This is so because in most cases the police have been delegated nearly all of the Government's authority to employ force, including the right to restrain the use of force by others. To be legal, however, the use of force by police must be dispassionate, reasonable, and commensurate with the situation at hand.

23. In a number of instances, problems in police discretion and the use of force have given rise to some police-community tensions, and to efforts towards ensuring control and accountability of the police to the communities they serve. Abrasive relationships between police and various minority groups have often been a major source of grievance, tensions and ultimately, disorder. 14/

12/ William J. Chambliss and Robert B. Seidman, op. cit., p. 218.

13/ Ibid., p. 374.

14/ Alan Kalmanoff, Criminal Justice, Enforcement and Administration (Boston, Toronto, Little, Brown and Company, 1976), pp. 125 and 136.

3. Police attitudes

24. The attitude and behaviour of the police has often been regarded as significant in the implementation of certain biases in the administration of criminal justice. They can ascribe a wide range of interpretation to behaviour which they observe. Often put into issue is the question of how certain policemen recognize and react to threats and challenges especially vis-à-vis minority groups.

One author states:

> "The predisposing factor which has been most frequently put forward to explain an over-representation of lower-class people (which are invariably minority groups) in official records has been a belief among policemen that lower-class people are more criminal. This belief becomes a self-fulfilling prophecy via increased vigilance when observing the behaviour of lower-class people, a more pronounced assumption of guilt when lower-class suspects are being dealt with, and more concentrated surveillance in lower-class areas". 15/

The same author states:

> "The empirical support for the hypothesis that policemen believe that crime and delinquency emanates disproportionately from the disadvantaged is quite strong. How frequently this 'delinquency theory in mind' is translated into harsher treatment of lower-class suspects, and how frequently into more lenient treatment of them is an empirical question which merits further investigation. Nevertheless, one can fairly safely assume that it will be translated into greater surveillance of lower-class behaviour by the police". 16/

25. A study was conducted in a small industrial city with a high proportion of minority residents. Data were obtained from responses of ghetto residents to questions concerning their attitudes toward the police. The responses of the ghetto residents were then compared with the responses police officers predicted ghetto residents would make. On each of the questions the responses the police predicted the public would make were more anti-police than the actual public response. The police underestimated the amount of respect ghetto respondents would have for the police, and they overestimated negative responses to the police brutality question. When further tests were performed on the data, results showed that officers with less education and those with irrationally negative attitudes toward minority groups were most prone to exaggerate anti-police sentiment. 17/

15/ John Braithwaite, Inequality, Crime and Public Policy (London, Routledge and Kegan Paul, 1979), p. 34.

16/ Ibid., p. 35.

17/ "Police Overperception of Ghetto Hostility" - Journal of Police Science and Administration, vol. I, no. 2 (June 1973) pp. 168-174.

26. A police force cannot operate across the grain of what people want them to enforce. Respect for law is an essential ingredient of democracy; for the police to try to operate autonomously, without consideration for the desires of the people, would degrade the law and encourage the public to make common cause with lawbreakers against the law. The police must choose to enforce substantially what the public will permit and support. Police must close the gap that may grow in any society between those who enforce the law and those against whom it is enforced. Especially where an impersonal rule of law is something new, it is essential that the police demonstrate their common humanity with the citizenry at large. Law must be seen as a creative public-serving engine, and not as a restrictive one. 18/

4. Police and the community

27. The relationship of the police with a community consisting mostly of minority groups is a very important factor in assessing behavioural patterns or undesirable practices of the police. In many cases the police ideas about certain minority groups were formed vicariously from parents, friends, the schools and the news media controlled by the dominant group. The average policeman brings with him attitudes that reflect his sub-culture. In this connection it has been stated:

> "Only stupidity would prevent one from seeing the built-in conflict which is destined to occur under these conditions. The officer is going to experience cultural shock because the 'ethnic or racial' community is far from a carbon copy of what the officer is accustomed to. In 'self-defence' he is going to over-assert his authority and thereby perpetuate the attitude that all policemen are 'racist' and 'brutal'". 19/

28. Police interactions with minority groups at best have often been characterized as routine, impersonal, businesslike and bureaucratic. Police training is needed to discourage such impression of the police. Such a situation may call for a greater emphasis on training in human relationship.

29. It would seem that there is a need for law enforcement officers to promote, in their respective communities, a feeling of goodwill towards the police and try to bring about genuine solutions to police-related community problems.

30. Social order can only exist if there is a partnership between citizens of the community and the police. The purpose of a community relations programme is to establish such a partnership. In some jurisdictions there is a need to establish specific programmes to improve negative attitudes and reinforce positive attitudes.

18/ D.H. Bayley, op. cit., pp. 28-29.

19/ Robert Woodson, ed., op. cit., p. 85.

31. Perhaps what is needed in some areas are new operational guidelines in the areas of police administration, field operations, training, personnel procedures and conflict management. The success of any police-community relations programme will depend to a large extent on a strong administrative commitment and good police-community relations practices throughout all major police functions.

32. Problems surrounding police-community relations are most severe in heterogeneous urban areas, particularly in minority communities where stereotyping and racism may exacerbate any situation.

33. On the question of police-community relations, one source states that: 20/

> "Many police departments cling to the police-community relations concept as a panacea for problems with minorities. All too often such programmes have limited effectiveness because they are isolated from, and suspected by, the working police officer; all too often they are mere tokenism; all too often the programmes are only gimmicks. All too often, too, they are the only sincere and substantive efforts by police departments to overcome conflicts with minority peoples.
>
> ... [It is] suggested that, properly administered and located, police-community relations programmes will be effective. An essentially dominating and authoritarian system cannot gain minority group support with short-lived pacification programmes. As long as minorities remain second-class citizens, they will remain visible and deviant by the standards of white society. As sincere, empathetic and professional as many policemen are toward minority problems, they will not stop enforcing laws in minority communities. In the administration of the police power of government it is as dangerous to select only some laws to be enforced as it is to overcome laws. As long as dominant and minority group values differ, in substance or interpretation, conflict will continue even with neighbourhood control of police. It is the essence of the police function to mediate or control this conflict, and this process will always place police-community relations in jeopardy".

34. Scepticism about police-community programmes could conceivably be reduced if police would join with the public in accomplishing non-enforcement goals. For example they could co-operate in community work projects, set up youth clubs, promote programmes of village health and hygiene, or assist in distributing food to undernourished children, etc.

35. Many groups have argued in favour of decentralization of the police and for some form of accountability to the community. It is often alleged that the police show too little regard for human rights and constantly violate the fundamental rights of minority groups.

20/ Charles E. Reasons and Jack L. Kuykendall, eds., Race, Crime and Justice (California, Goodyear Publishing Company, Inc., 1972), p. 143.

36. Civil review boards have been proposed, in a number of jurisdictions, as a device for providing a convenient forum in which persons or groups who claim to have been injured by the police can have their complaints heard. However, these proposals have generally been attacked and defeated by the police themselves.

37. On the positive side it should be noted that in a certain jurisdiction (South Australia) a range of special provisions had been made for a minority group. At the top level, a Police Steering Committee of the group brings advice to the police from a variety of the group's organizations. The Community Affairs and Information Service Officers of that police force act as Liaison and Field Liaison Officers. Minority Group Field Officers are appointed to assist members of the Group in police custody. In addition, special training is given to police officers, including some language courses. The approach just described is considered "the most progressive attempt to date to come to terms with this serious situation". (Aboriginal Criminological Research - Report of a Workshop held on 3-4 March 1981).

38. In advertising for recruits for the police force in a certain metropolitan area, care was taken to show the universality of the appeal as well as the personal qualities required. For example, the advertisement stated that: 21/

> "Whatever your colour, creed or class, we need you in London's police. It is, obviously, a job of work for which qualities count as much as qualifications. No matter how plentiful your 'A' levels, they stand you in little stead if we find your outlook too narrow or your attitude over aggressive".
>
> The advertisement further states that:
>
> "... Once you become a police officer you're part of a small minority. A minority whose sworn duty is to police the freedom of everybody else ...
>
> "That is why we look for a particular type of person to join us. For while it takes all ethnic sorts to make a police force, it does not take all human sorts to make a police officer".

39. In the same jurisdiction, a select committee recommended a complete overhaul of the much criticized system of investigating complaints against the police. In this connection, the report of its legislative body recommended that the most controversial category of police complaints - those where a serious crime by a police officer is alleged - should no longer be investigated by the Director of Public Prosecutions but by a locally based Procurator Fiscal. This idea was criticized on the grounds that the said report failed to deal with the most central problem, the fact that "the police investigate themselves". (The Guardian, 10 June 1982, p. 24).

21/ The Guardian, 7 June 1982, p. 5.

B. Arrest and detention

1. Introduction

40. An arrest is, in effect, the beginning of imprisonment when one is taken by authorities and restrained of his liberty. The law of arrest is basically the same in all States. It has been defined as:

> "The apprehending or restraining one's person in order to be forthcoming to answer all alleged or suspected crime". 22/

According to common law and by statute today in many jurisdictions, a police officer is permitted to make an arrest without warrant if he has reasonable grounds to believe that a felony was committed and that the accused committed the crime. Arrests for misdemeanours typically may be made only if the misdemeanour was committed in the presence of the officer and the officer has reasonable grounds to believe that the accused committed the offence. Since warrants for arrest generally may be issued only if a probable cause has been presented, the concept of "reasonable grounds" for arrest has been equated to the requirement of probable cause.

41. The question that arises here is the degree of probability that must be shown before the awesome power of the State could be exercised coercively against an individual. The very nature of the law of probabilities makes it likely that persons who belong to a minority group with a so-called high crime rate will be subject to police suspicion rather more easily than others simply because of their group identity. To permit an arrest on that basis alone necessarily builds into the law of arrest the objective fact of discrimination. Members of minority groups often complain that the police frequently engage in wholesale violations of the norms laid down for their conduct in cases of arrest and detention. It is alleged that illegal arrests and detentions are made almost daily: police are often accused of making arrests knowing that such arrests are improper and using the detention incident to arrest as a form of sanction.

42. Very often, attention is directed to the plight of certain minority groups who constitute an inordinately high percentage of the prison population in certain jurisdictions. A number of writers have argued that the relatively high proportions of members of minority groups arrested, brought before the court, and the disproportionately high numbers of them in prison could mean:

(a) that the group or groups are more criminal than members of the dominant group.

(b) that the system itself is, in some way, biased against said minority groups.

(c) that said minority groups have a number of social problems which bring them more frequently into conflict with the law.

(d) that customs of minorities and the dominant law of the land are at variance.

43. It cannot, however, be said that any of the aforementioned explanations has been subjected to any rigorous research. The aforementioned generalization will, therefore, need to be tested.

22/ Blackstone's Commentaries 289, p. 1679 (1897 ed.).

44. Regarding juvenile crime, it should be pointed out that studies designed to ascertain the existence of racial, ethnic or religious bias in the handling of suspects have produced contradictory results.

45. In South Africa today interferences with personal freedom and security and powers of arrest and detention without trial are in large part directed against all opponents of apartheid irrespective of their racial group. However, a large number of laws provide for the arrest and detention of Africans only. The extent to which the laws of South Africa, criminal and otherwise, discriminate along racial lines may be seen from the following passages from one writer: 23/

"517. By the Bantu Administration Act, 1927, Section 8, as amended, the State President is 'Supreme Chief of all Bantu', and may order the arrest of any African whom he considers dangerous to the peace and detain him for a period of three months.

518. By Section 5 of the Natal Code of Native Laws, a Bantu Affairs Commissioner may command the attendance of any African 'for any purpose of public interest, public utility, or for the purpose of carrying out the administration of any law, at any reasonable time and under reasonable circumstances, and ... require them to render obedience, assistance and active co-operation'. Disregard of such a command is an offence, as is also disrespect to a Bantu Affairs Commissioner, after giving the offender an opportunity to give an explanation, with a fine not exceeding £10 or imprisonment not exceeding two months.

519. 'Peace Officers', who have powers to arrest under Section 22 of the Criminal Procedure Act No. 56 of 1955, are defined to include certain officials whose sole powers of arrest are in connection with Africans.

520. In view of the very wide range of offences, created by the influx control legislation in relation to the movement, residence and employment of Africans and in view of the power granted to a peace officer by Section 21 (1) (a) of the Criminal Procedure Act, 1955, to arrest 'any person who commits any offence in his presence', the powers of arrest without warrant of Africans are very extensive indeed. Most offences under influx control legislation are committed 'in the presence of' a peace officer if the African, for example, fails to produce the necessary documents or cannot show that he is at that moment authorized to be in the area.

521. Since the National Government came to power in 1948 over 5 million convictions have taken place under the pass laws in a country where the total African population, including children, is 13 million. 24/

522. 'Idle and undesirable' Africans may be arrested without warrant, by any officer authorized to demand production of an African's documents and brought before a Bantu Affairs Commissioner who may, by Section 29 of the Bantu (Urban Areas) Consolidation Act, No. 25 of 1945, in addition to powers to remove him from the area or place him in employment, order his detention in a retreat or rehabilitation centre or for not over two years in a farm colony, refuge, rescue home or similar institution established under the Prisons Act, 1959.

23/ Hernan Santa Cruz, Special Rapporteur, Racial Discrimination, (United Nations Publication, Sales No. E.76.XIV.2), pp. 160-162.

24/ Apartheid in South Africa, III; (United Nations publication, Sales No. 1966.1.7), p. 7.

523. While it is not strictly a form of detention, banishment of an African under Section 5 of the Bantu Administration Act, 1927, as amended, can have much the same effect. This provision enables the State President to order any tribe or part of a tribe or any individual African to remove from his home to a place indicated in the order and to stay there as long as the order is in force. If an African fails to comply with such an order, the State President may order his arrest and forcible removal, and no court may intervene to stop the removal pending an investigation into the legality of the order.

524. Section 2 of the Criminal Procedure Act, 1955, gives peace officers powers of arrest without warrant in respect of offences committed in their presence and persons reasonably suspected of committing certain listed serious offences. In other cases a warrant of a magistrate is necessary.

525. Bail is rarely granted in political cases, particularly if the accused is non-European. The General Law Amendment Act of 1968 empowers the Attorney-General to order that an accused person may not be released on bail.

526. In its reports, the Ad Hoc Working Group of Experts established by the Commission on Human Rights concluded that prisoners, detainees and persons in police custody in South Africa were subjected to torture and ill-treatment. In the view of the Group, the evidence it received in the course of its investigations confirmed the existence of an established order of discrimination on grounds of race in pursuance of the policy of apartheid. 25/ White prisoners were in some cases badly treated; Africans received the worst treatment, followed by Indian and Coloured prisoners in that order. There was evidence of disregard of the right to life, degrading and inhuman treatment with respect to discipline and punishment, accommodations, sanitary installations, facilities for health and cleanliness, clothing and bedding, food and medical services. Evidence of long-term solitary confinement, beatings, electric shock torture and the like, not only against convicted political prisoners but also against detainees held for the purpose of eliciting information, had been amply documented. The reports of the Ad Hoc Working Group of Experts have drawn particular attention to provisions of the 1962 Sabotage Act, 26/ which transformed relatively minor offences into 'sabotage' liable to sentences for treason and placed the substantial burden of proof upon the accused, and of the 1967 Terrorism Act, 27/ which in certain circumstances exposed any person committing an act intended to 'endanger the maintenance of law and order in the Republic' to conviction for terrorism and to the penalties for treason. Various provisions of both Acts, including the five-year retroactivity of the Terrorism Act and the transference of burden of proof, have been found to contravene the principles of the Universal Declaration of Human Rights. The Group also drew attention to the fact that the number of executions of persons condemned to death in South Africa has been consistently higher than in any other country in the world and that the burden both of sentences and of executions falls most heavily on the African population." 28/

25/ E/CN.4/984/Add.4, para. 45.

26/ General Law Amendment Act, No. 76 of 1962.

27/ General Law Amendment Act No. 83 of 1967.

28/ E/CN.4/1111, paras. 42-43, 46-47; E/CN.4/1135, paras. 18-19; E/CN.4/1159, paras. 36-37.

46. There are, however, basic principles which should govern arrest and detention pending trial. Arrest and detention pending trial should be exceptional measures, to be imposed only when the nature of the offence and the circumstances are such to make arrest and detention necessary in the interest of the observance of justice. A person arrested should immediately be informed of the reasons for his arrest and of the charges preferred against him. In addition, he should, as soon as possible and within a time limit provided by law, be taken before a magistrate or other authority different from that which initiated and carried out the arrest.

47. The police or other authority competent to make arrest should be placed under the supervision or control of a judicial authority or some other high authority to ensure that the police used their power of arrest correctly. Any abuse of such power should be punished by the scrupulous application of the appropriate penal and disciplinary measures.

48. It is proposed that the law should restrict the cases of arrest, over and above that of flagrante delicto, to the danger of escape, collusion, or the destruction of evidence and the danger that the accused might commit a further offence. In such cases, the safeguarding of human rights can be the outcome, not so much of the existence of a written provision of law, as of action taken by a magistrate or by a specially qualified body reaching its decisions in accordance with a general system based on the principle of legality. An effective safeguard might be provided by making it the duty of the magistrate or competent authority to state expressly the reasons why he or it considers detention pending trial to be necessary.

49. No physical violence or other form of constraint or ill-treatment should be used against a suspect or accused person.

50. A suspect or accused person should be treated fairly, and not be subjected to improper methods of obtaining information or confessions from him.

51. In the report of a workshop held by the Australian Institute of Criminology (Aboriginal Criminological Research - Report of a Workshop held on 3-4 March 1981) schemes being operated by police in some States for ensuring that an Aboriginal suspect is questioned in the presence of a friend or Justice of the Peace were described.

52. In many systems there is no legal requirement that a person should answer questions put to him by police. The practical working of such a provision is however affected by whether people know of that fact, and whether the police are required to inform people of their rights. In most jurisdictions police must tell a person, when they intend to accuse him, that he need not make any statement, but may do so if he wishes.

53. In any case, even where such detention is the normal procedure, it should cease when: (a) the grounds which gave rise to it no longer apply; (b) release on bail is ordered. Generally speaking release on bail should be facilitated. However, care should be taken not to give the impression of conferring any advantage on accused persons of ample means.

54. A person placed under detention should always be permitted to apply for conditional release and such application should so far as possible be examined according to a specific procedure or at least in a judicial manner. The person detained should always be able to appeal to a higher and independent authority against the decision placing or keeping him under detention pending trial.

55. There are certain principles and directives to which criminal procedure should conform. One must go beyond theoretical rules of law, and look into the specific dangers which may threaten human rights when arrest or detention occurs.

56. There have been allegations by some members of minority groups that during periods of arrest various methods which, although prohibited by law, or criticized in most civilized countries, continue to be used for the purpose of obtaining confessions. Such methods range from physical brutality and threat, to lie detectors, and hypnosis.

57. While the results obtained by such methods are usually not admissible as evidence in some countries, the methods are nevertheless said to be employed in order to obtain evidence that will be accepted in court.

58. The use of physical torture, violence and mental coercion, should be condemned together with any investigation of the unconscious, as a return to medieval barbarism and an affront to human dignity. The basis of this general prohibition is to be found in the Universal Declaration of Human Rights (articles 5, 11 and 30) and, at the level of municipal law, in the constitutional and statutory provisions which lay down that no-one may be compelled to be a witness against himself, or, in other words, that a statement by an accused person is not valid unless it was made without coercion of any kind and in the state of consciousness. While the purpose of criminal proceedings is the discovery of the truth, this does not imply any right to harass the accused and, even less, to subject him to psychological coercion. It is plain that a confession must not only be made by the person concerned but must also be made freely and voluntarily; in the investigation of the unconscious, however, any statement by the accused against himself, instead of being a true and legitimate "confession", is only an interpretation, made by an expert, of the mental processes of a subject deprived of the ability to reason normally - including the ability to refuse any statement or to lie.

59. Most of the devices or drugs used (lie detector, polygraph, barbiturates, etc.) are far from infallible from the point of view of technique, application or interpretation.

2. The rights and guarantees of persons accused, arrested or detained

(a) Information concerning the proceedings of the investigation

60. It is universally accepted that both the accused and his counsel should be informed as completely as possible and as early as possible, of the evidence and material relevant to the charge against him.

(b) Communication with family, friends and counsel

61. Private and unrestricted communication between a person and his family, friends and counsel is a fundamental human right. However, there may be cases when some restrictions have to be applied in the case of persons who are detained.

62. As regards communication with counsel, there is no question that the suspect or accused should have completely free and private communication. There may occasionally be abuses, but counsel must be trusted. Communication with family and friends may properly be restricted to prevent collusion and the passing of information which may assist the suspect's escape or assist accomplices who have not yet been found by the police.

(c) Conditional release prior to and during trial

63. As previously stated, detention before trial is something that should not be used without good reason.

64. Regarding the question of conditional release mention should be made of the procedure of permitting such release on deposit of a sum of money. This procedure could be objected to on the grounds that it would seem to favour persons of means, thus putting poor persons at a disadvantage. However, under a system of bail, sums are not required to be deposited but are promised commonly with two sureties, in default of the accused attending at trial. However, it is usually the practice to deny bail in very serious cases or to recidivists.

(d) Measures for the indemnification of persons wrongfully arrested, detained, prosecuted, convicted or imprisoned

65. Persons wrongfully detained, arrested, prosecuted, convicted or imprisoned should be entitled to compensation in accordance with national law. When criminal proceedings are instituted as a result of the accused's own behaviour, in the absence of malice or serious error on the part of the officials concerned, there should be no compensation for arrest or conviction.

66. It would be very interesting to conduct a study, from the standpoint of the protection of human rights, of the situation of convicted offenders while serving their sentences.

67. There are instances where minority groups have alleged discrimination in the application of certain criminal justice systems. It is well-known that racism and economic discrimination are manifest in that the poor and members of minorities groups, more so than the rich and members of dominant groups, find themselves in pre-trial detention. This is often due to archaic bail systems and inadequate pre-trial release programmes in most jurisdictions. In considering this question, it must be kept in mind that pre-trial detention could conceivably prejudice judges and juries in arriving at their verdicts and sentences. Given wide judicial discretion, racial prejudice of judges and juries may also be responsible for some sentencing differences. The question may be asked: if other variables are held equal, do judges and juries choose jail or prison more often for members of minority and racial groups than for other groups? Admittedly there has been little research on the question of racial discrimination in sentencing, and preliminary findings are not in agreement.

68. A fuller treatment of this subject matter is contained in the Study of the right of everyone to be free from arbitrary arrest, detention and exile prepared by a Committee established by the Commission on Human Rights (E/CN.4/826/Rev.1).

C. Judicial proceedings

1. Introduction

69. Acts of discrimination in judicial proceedings are not always readily discernible. In such proceedings the element of discretion must be given due consideration. The different ways in which discretion is exercised do not necessarily result from prejudice. During the debates of the Sub-Commission on Prevention of Discrimination and Protection of Minorities it was pointed out that differences in the treatment by judges or juries of similar situations are by no means always the result of discriminatory attitudes. Such differences are often

nothing more than the inevitable results of the independence expected of judges. 29/ The question of racial, ethnic, religious or linguistic bias in judicial proceedings must be considered in the light of the above statement.

70. There are, however, instances where discrimination may result from the exercise of discretionary powers. In this connection one writer points out that discrimination may be found in connection with the appointment of judges, 30/ juries or assessors, in that persons of a certain race or colour or other group may be excluded therefrom. In one African country all judges, magistrates and tribal commissioners are white. In another State, members of a particular minority group are excluded from juries on account of their race, there being a large element of unregulated discretion in the preparation of lists of possible jurors. In other countries also, the qualifications required of jurors are excessively vague and considerable discretion is permitted to the authorities who draw up the lists of names from which jurors may be chosen for particular cases.

71. In many countries, a prospective lawyer, in addition to possessing the academic qualifications, must meet a subjective standard of personal character which could be misapplied in a discriminatory fashion. Such standards include the following: "suitability", "fitness", "good reputation", "respectability", "a blameless citizen" etc. One can see the potential for excluding certain minority groups from the legal profession. In this connection it has been pointed out in the Sub-Commission 31/ that the exclusion of persons of certain groups from the legal profession may result in inequality in the administration of justice, since access to the profession governs the whole judicial system in many countries. De facto discrimination also exists when members of a particular race, ethnic, religious, linguistic or other group are discriminated against in the area of access to the legal profession.

72. In some instances discrimination may be shown by prosecuting authorities, who may be more energetic in bringing to court suspected criminals of a certain race or colour or those belonging to a certain group or class; in the Sub-Commission on Prevention of Discrimination and Protection of Minorities it has been pointed out that cases of discrimination of this nature in some countries have been noted, where the authorities have decided whether or not to bring criminal charges against a person on the basis of the religious, ethnic, economic or other group to which he belonged. 32/

29/ E/CN.4/Sub.2/SR.484, p. 7 and E/CN.4/Sub.2/SR.485, pp. 4 and 10.

30/ In many countries the qualifications required for the appointment of judges include, in addition to qualifications more easily established a subjective and vaguely defined quality of personal character which could be misapplied so as to exclude certain persons from the judiciary, on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Such qualifications required in various countries include for instance, "bonne moralité", "good reputation", "irreproachable character" and being a "fit and proper person" or a person of "good conduct and integrity".

31/ E/CN.4/Sub.2/SR.485, p. 9.

32/ E/CN.4/Sub.2/SR.460, p. 4.

73. Premature publicity concerning criminal trials (especially trials by jury) when critical of the accused can certainly undermine his enjoyment of the right to a fair hearing, and this is probably particularly true if the accused belong to a racial or other groups against whom prejudice exists in the community in whose midst the trial is being held or will be held. In some countries, committal proceedings may be reported on in the press, yet the accused may have reserved his defence and only the prosecution's case may therefore have been heard in the committal proceedings; such one-sided publicity may prejudice the attitude of persons later serving on a jury in the trial of the accused. In any type of judicial proceeding, and at any stage of the hearing, unfavourable and unfair publicity may work to the particular detriment of members of groups against whom prejudice already operates.

74. Discrimination may also exist where a judge has the discretion to decide whether or not to allow the provisional release of an accused person pending or during trial. As a result of prejudice certain groups may be excluded from being recognized as competent witnesses in judicial hearings; in the Sub-Commission it has been noted that "bad character" is often used as a pretext for not hearing witnesses belonging to certain ethnic, religious or other groups, or for not taking their testimony into account. 33/ Discrimination may also be demonstrated in the meting out of criminal punishment, since the judicial authorities often have some discretion in deciding upon the type and degree of punishment to be awarded after conviction for an offence. Discrimination may also appear when those authorities have a discretion to place offenders on probation instead of sentencing them.

75. In the context of discrimination based on race or colour, it is safe to say that such discrimination in the administration of criminal justice is for the most part de facto. There are few instances of de jure discrimination. For example in the Republic of South Africa, despite the fact that the non-white inhabitants form a majority of the population, section 114 of the Criminal Procedure Act nevertheless, as a result of the policy of apartheid, permits only "Europeans" to serve as jurors. On the question of discrimination as applied to non-white lawyers see paragraph 70 above.

76. Regarding certain countries that maintain separate systems of courts to hear cases involving specific ethnic groups see paragraphs 67 and 69 above.

77. With respect to discrimination based on religion, it should be pointed out that in some countries admission to the judiciary or some part thereof is limited, either by law or in practice, to persons belonging to a particular religion.

78. Where the law requires the taking of an oath by judges, upon their taking office, or by jurors, assessors or lawyers before acting as such, this requirement discriminates against those who object on religious grounds to taking oaths and those who profess no religion, to the extent that the formula for the oath is incompatible with their beliefs. In one country, the Constitution lays down a declaration which each judge must make and subscribe upon his appointment, and provides that "any judge who declines or neglects to make such declaration ... shall be deemed to have vacated his office". Similarly, where the law requires the taking of an oath before giving evidence in court, a person who objects to taking oaths in a manner which he deems to be incompatible with his religious or non-religious beliefs may be impeded in his defence in criminal proceedings or in presenting his case in civil or administrative matters. An accused or a litigant may similarly suffer if one of his witnesses or an interpreter who is to assist him is under the same disadvantage. 34/

33/ E/CN.4/Sub.2/SR.460, p. 4.

34/ Mohammed A.A. Rannat, Study of equality in the administration of justice (United Nations publication, Sales No. E.71.XIV.3), pp. 40-41.

79. On the question of law and justice, as they operate in the Asian and Pacific region, one writer states that:

> "Asia and the Pacific have been largely overlaid by Western systems of law and by law enforcement institutions modelled on the West: but the absolute sovereignty and the positivist theory of law which underlay so much of the Western law could never find a footing in the East; so that human rights, as being required by a standard above that of national or municipal law, is in full accord with Asian and Pacific traditions. In both Hindu and Buddhist teachings the ruler was never untrammelled. He could not do whatever he liked. His sovereignty was carefully qualified by his obligations to those he ruled, and by his spiritual liability. Therefore it is easy in this region to acknowledge rights which cannot be eliminated by the laws of men." 35/

80. The author continues:

> "Having a common penal or civil code for a State or a federation of States is no guarantee that the law will treat all citizens equally. Majority and minority interests sometimes receive inadequate attention in the drafting, and their reflection in the actual implementation of the law may depend upon the particular group's level of representation in the government or amongst those responsible for the administration of the law. Even the best intentioned legislation can become an abomination in the hands of the wrong people. Therefore some people, justifiably angered by the unfairness of the operations of the law and the disadvantages which it generates for some groups and individuals 36/ have called for more specific and precise legislation which will reduce the scope for discretion. This is a commendable aspiration but it is a sheer impossibility. Certainly, to eliminate discretion would be to reduce dramatically the opportunities for discrimination: but it cannot be done because legislators simply cannot even foresee all the situations for which they are drafting law. The courts have to exercise a measure of discretion in interpreting the laws - though they will be likely to reduce this over time if there is a doctrine of precedents. At the drafting or interpreting levels, getting minority representation in the legislative or in the judiciary is one way to ensure that their interests will not be overlooked. It takes considerable constitutional ingenuity however to ensure that all minority interests will not be overlooked. Everywhere the requirement is for different formulations of democracy to provide adequate representation without, however, fragmenting the country. Few constitutions satisfy everyone in a plural society where the very enjoyment of democracy is perceived as a conflict of rights."

81. In the Asia and the Pacific region, it is noted that, as in other areas, the courts have to exercise a measure of discretion in interpreting the law. They are, however, likely to yield to doctrines of precedents. At the drafting or interpretation levels, minority interests are best served by having their own representation in the legislative or in the judiciary. 37/ There are in the region in question a number of disadvantaged groups. There are, for example, some indigenous people, many still in tribal conditions; there are ethnic and sometimes nationalistic groups struggling for their identity and political rights; in addition,

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35/ W. Clifford, "Review of problems of racial discrimination or prejudice encountered by disadvantaged groups and individuals in the ESCAP region", a background paper prepared for the United Nations Seminar on recourse procedures and other forms of protection available to victims of racial discrimination and activities to be undertaken at the national and regional levels, with special reference to Asia and the Pacific, held at Bangkok, Thailand, from 2-13 August 1982 (HR/THAILAND/1982/BP.1).

36/ Likely to be shown by the fact that offenders prosecuted or defendants sued are usually those least likely to be able to defend themselves adequately.

37/ W. Clifford, op. cit., p. 21.

there are religious groups seeking full political representation, and an end to the economic or social disadvantages which they have suffered over the years and finally there are those falling under the caste system and millions of others who because of nepotism, corruption and mixed blood may be neglected or socially ostracized. 38/

82. The same writer points out that improvements in communications, travel facilities and in techniques for raising local issues to international proportions have united certain minority groups with similar problems, in many States of the region, thus making it more difficult for democratic governments to ignore their grievances.

2. Prompt and speedy trial

83. It is generally accepted that speedy trials are desirable. In most cases an accused person would want his case to be tried as soon as possible. Evidence is more satisfactory when it is fresh. It should be pointed out that delays are often occasioned by heavy court calendars which might suggest a need for improved legal administration.

3. Public trial

84. Admittedly the question of public trial cannot be settled entirely by considering the position of the accused. While a trial must not be a spectacle, televised or broadcast, it is nevertheless a public assertion of the maintenance of law and order and the balance of interest is in favour of public trial and freedom of the press to report the proceedings.

4. Secrecy of examination and the role of the press

85. A distinction should be drawn between secrecy in the police inquiry, which is highly confidential per se, and secrecy in the judicial examination for which an examining magistrate is responsible. The distinction is an important one for the person concerned because, while there is no obligation to keep a suspect informed of the initial police inquiries, once accused, he acquires new rights which must be safeguarded at the stage of judicial investigation.

86. In consequence of these rights there is, strictly speaking, no secrecy of examination so far as the accused is concerned. He must know exactly what the charges are and must be in a position to defend himself before the examining magistrate, whose function, moreover, is to investigate the evidence both for the prosecution and for the defence.

87. The major problem is secrecy in relation to the public - that is to say, in practice, in relation to the press, whose duty is to inform the public. There is need to preserve the secrecy of examination as regards the press. This position is based on two essential considerations. In the first place, secrecy of the examination is in the interest of the accused himself, since the revelation, especially through the press, of the proceedings against him might do him considerable and

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38/ W. Clifford, op. cit., p. 26.

irreparable harm. Secondly, it should be pointed out, that such secrecy as regards the press is essential to the proper conduct of criminal justice proceedings; it guarantees the impartiality of the judge and especially of the jury, who should not be influenced beforehand or by anything extraneous to the trial.

88. The normal function of the press is to inform the public; journalists cannot be blamed for giving information on crimes committed on the arrest of a suspect or in the course of a judicial case. However, what should be forbidden to journalists is any comment on the examination, any expression of opinion regarding the accused, and any discussion of the evidence collected against him. In any event, the accused should be protected from attacks and gossip in the press which would be injurious to him.

89. Where a person cannot afford to pay for counsel, adequate and skilled legal assistance should be provided for him. Taking into account the fact that counsel provided for poor persons are not always sufficiently diligent, some thought might be given to establishing an offence of public defence with paid defenders; either the State would pay defence counsel or counsel would be paid through the setting up of a system of mutual assistance or an organ of social security. In certain jurisdictions, there are legal aid services which are run by the legal profession, but on public funds.

5. Fact-finding and evidence in criminal procedure

90. The question of evidence is one of the most complicated in criminal procedure. The establishment of facts and evidence of the guilt or innocence of the accused is of decisive significance for the protection of human rights in criminal procedure.

91. The theory and legislation in different jurisdictions sometimes show considerable differences in the understanding of individual provisions of the law of evidence. However, despite such differences, there is unanimous agreement that a finding of guilt should not be based on conjecture and should be reached only if the guilt of the accused had been proved in the course of the trial. Only a court, after a public trial in which the right of the accused to defence was observed, could find the accused guilty of an offence and impose on him the penalty prescribed by law. An accused person is not obliged to prove his innocence. The burden of proof is on the accuser. There are instances where the burden of proof could be transferred to the accused, for example in the common law systems, where the accused relies on an alibi or is found in possession of burglary tools or explosives.

92. It is the duty of the prosecution to present real and factual proof of the guilt of the accused, and the duty of the judge and jury to base their decision on inner conviction. The court should state the reasons for its findings and show that the inner conviction of the judge and jury was the outcome, not of an intuitive impression on their part, but of their reasonable and objective appraisal of the evidence examined. In some countries, the decision on the guilt or innocence of the accused was left to the discretion of a jury, which did not state the reasons for its verdict. The basis of the jury's decision on the guilt or innocence of the accused was therefore unimportant.

93. A mere confession by the defendant at the trial, unsupported by other evidence or not in accordance with the facts of the case, should generally not

be deemed to provide grounds for a verdict of guilty. Accordingly, the refusal of an accused to testify should not influence the decision on the question of his guilt.

6. The admissibility of evidence obtained by wrong or unjust methods

Confessions

94. Black's Law Dictionary defines confession, as used in criminal law, as "a voluntary statement made by a person charged with the commission of a crime or misdemeanour communicated to another person wherein he acknowledges himself to be guilty of the offence charged and discloses the circumstances of the act or the share and participation which he had in it". 39/ A confession, to be acceptable, should be made freely. Hence a confession obtained by trickery, pressure or by offering any inducement, should be unacceptable. There was a diversity of view on the extent to which an accused person may be interrogated. In some jurisdictions an accused person may be interrogated subject to there being no pressure on him to answer. In others, such as the Anglo-Saxon systems, once a person is accused he cannot be interrogated at all.

95. It should be noted that in some jurisdictions a person cannot be convicted solely on his own confession. The tendency nowadays is to treat confessions as being ordinary evidence and not something special and apart from other probative material.

96. Under the laws of virtually every jurisdiction it is provided that an admission or confession improperly obtained is not admissible as evidence. It is incumbent upon trial courts to give careful scrutiny to all evidence of confessions to ensure that only truly voluntary confessions are admissible. The maintenance of strict rules by the courts has an effect on the police, because there is less temptation to obtain confessions improperly if a court will refuse to admit them.

7. Language difficulties

97. Where interpretation is required there should be a high standard of ability and trustworthiness. In some instances where countries have linguistic minorities, such minorities suffer difficulties in court unless proper provision is made on their behalf. In cases where there are numerous languages and/or dialects, the problem is even more acute. Aliens may also find themselves in similar difficulties in court. The question of language difficulties may affect not only accused persons or other parties to judicial proceedings but witnesses as well.

8. Legal assistance

98. The principle of legal assistance is universally accepted. It should be available at as early a stage as possible and a suspect or accused should be free to have the counsel of his own choice.

39/ H.C. Black, op. cit., p. 369.

D. Administrative proceedings

1. Introduction

99. The question of discrimination in administrative proceedings is complicated by the fact that organs which are termed administrative tribunals vary greatly in their nature, jurisdiction, functions and procedures. It is very difficult to discern at which level in the administrative procedure racial, ethnic, religious or linguistic discrimination occurs. However, it should be noted that in most administrative matters there is wide scope for discretion. It is in the exercise of such discretion that discriminatory practices could conceivably be carried out. The illegal exercise or abuse of administrative authority must be considered in any treatment of the subject of racial, ethnic, religious or linguistic discrimination in the area of administrative investigation. When we speak of racial, ethnic, religious or linguistic discrimination in administrative investigations, we are, in fact, speaking of illegal or abusive exercise of administrative authority.

100. Considering the growing complexity of administration in modern States and the tendency towards increasing administrative powers, the problem, in the context of the present study, is how to preserve the rights of racial, ethnic, religious and linguistic groups in matters relating to administrative proceedings.

101. In most instances, administrative law in many countries developed in the context of governmental efforts to regulate business rather than police activities. Persons aggrieved by administrative decisions were, therefore, mainly businessmen and lawyers whose means permitted recourse to judicial review.

102. On the question of procedure, no general rule can be laid down since the procedure would depend on the legislation of each country. In the case of a specific act, namely, the action of a government official affecting the rights of minority groups, there could be the following possibilities: (1) a system where a public official acts as the guardian of the rights of individuals (Danish system); (2) a system, called the English system of appealing to Parliament; (3) a more widely used system of appeal to a higher authority, usually known as the purely administrative procedure; (4) a variant of the foregoing, consisting in an appeal to an independent body after the exhaustion of administrative remedies; (5) the use of the normal judicial machinery; and (6) direct recourse to an independent tribunal, going over the heads of the responsible officials (ST/TAO/HR.6, p. 28).

103. It is not essential that a central appellate tribunal be set up to hear administrative appeals involving allegations of racial, ethnic, religious or linguistic discrimination. However, such appeals should always be subject to jurisdictional control, whether by independent administrative tribunals or by judicial tribunals.

104. With regard to the scope of administrative review, it is felt that an administrative act may be reviewed from the point of view both of its legality and of its intrinsic merits. An act is illegal when it is contrary to law (taking into account such matters as the competence of the administrative authority, adherence to essential procedures and sufficiency of evidence). A review on merits should involve an examination of opportuneness on advisability of the acts.

105. In matters relating to racial or other forms of discrimination, administrative decisions should be based on fact and law, and should be sufficiently reasoned to leave no doubt regarding their nature, scope or motivation. This is important since the reviewing authority should be aware of the legal basis of a particular decision and of the reasons therefor.

106. The principle should be applicable to both administrative acts based on powers granted by law and to discretionary acts.

107. To ensure fairness in administrative proceedings to all persons regardless of racial, ethnic, religious or linguistic origin, the following essential principles should be observed:

(a) The right to notice

(b) The right to a hearing

(c) The right to present evidence

(d) The right to be informed of the evidence used in the proceeding

(e) The right to present arguments

(f) The right to appear with counsel

(g) The right to have the decision based on adequate grounds.

2. Right to notice

108. It is the duty of every administrative authority to notify individuals of acts which affect him directly. Such notice should include information concerning the content of the act.

3. Right to hearing

109. As a general rule, the individual concerned should be entitled to a hearing before an administrative action is taken which affects him adversely. There are some who feel that what is important is not so much the right to a prior hearing but the right of the individual concerned to be able to challenge the administrative act which affects him adversely and to have its enforcement suspended during such proceedings.

4. Evidence and the right to present arguments

110. An individual has an essential right to present evidence and argument and to rebut fully the evidence presented by the administrative authority.

5. Right to have decisions based only upon known evidence

111. Decisions resulting from a review of administrative acts should be based exclusively upon known evidence.

112. The principal remedies which should be made available to victims of discrimination in administrative investigations may be listed as follows:

(a) Judicial review

(b) Administrative adjudication

(c) Other administrative procedures

(d) Action against public servants and the State.

6. Judicial review

113. Judicial review is a vital and essential safeguard against the illegal exercise or abuse of administrative authority (particularly so in common law countries). This is so because an independent judiciary is able to judge matters brought before it entirely free from political or other bias. It should be noted, however, that judicial review is normally confined to a review as to the legality of a decision and does not as a rule entertain a review of the propriety of a decision taken within the law. The review of the merits of administrative decisions usually falls within the province of some higher administrative authority or some administrative tribunal. Admittedly, there might be a difference of opinion as to whether it is desirable that control of administrative acts should be exercised by administrative tribunals. In any case, it will be agreed that the controlling body should be independent of the administrative authority, that is to say, there should be external control. In cases of allegations of racial, ethnic, religious or linguistic discrimination courts should be competent to look into the motives underlying the administrative act involved and to determine whether there is détournement de pouvoir. As a general rule, before seeking a judicial review of an administrative act all available administrative remedies must have been exhausted. The exceptions to this rule are administrative acts requiring immediate and effective enforcement.

7. Administrative adjudication

114. The question of administrative adjudication raises a number of troublesome questions to which there are no "cut and dried" answers. The problem centres about the methods and procedures of review, within the administrative machinery, of administrative acts or decisions. Some of the questions to be considered are:

(a) Should the reviewing body be independent of the original?

(b) Should a central appellate tribunal be set up to hear administrative appeals containing elements of racial, ethnic, religious or linguistic discrimination?

(c) What should be the scope of any administrative review?

(d) Cost of administrative litigation?

115. An individual against whom an administrative decision has been taken should be able to challenge the administrative act in question and to have its enforcement suspended during such proceedings.

Under any system of administrative review there should be some type of legislation regulating the procedure for contesting administrative acts.

8. Cost of administrative litigation

116. A number of authorities are of the opinion that the administration should pay the costs of contentious - administrative litigation, if a case on review is decided in favour of the individual. It should be pointed out, however, that in some countries, for legal reasons, it is not possible for a court to require the administration to pay the costs of litigation.

117. All administrative decisions should be subject to appeal either to special tribunals or to the ordinary courts of law. In addition, all countries that do not already have a code of administrative procedure should adopt one.

III. MILITARY CONDUCT AND PROCEEDINGS, INCLUDING ARREST, DETENTION AND TRIAL

A. Introduction

118. It might be useful to point out briefly the difference between military law and criminal law in civil life. The latter seeks to protect society from the depredations of its irresponsible members without prejudice to fundamental individual rights. Military law, on the other hand, must not only seek to attain the aforementioned ends but often goes further. Military law not only restrains individuals for the protection of military society but it is also an instrument which serves to assure that all members of a service march in a prescribed order. In this context, certain acts which are considered inalienable rights in civil society are offences in military society. For example, in civil life one is usually free to quit his employment. However, such an act in the military service would be desertion. Likewise in civil life if a group of people decide they do not like working conditions and walk off jointly, this would be termed a strike. In military services, it would be mutiny. Restated, military law is one of the means of achieving and maintaining a high state of discipline.

119. Virtually every Government has what might be termed a code of military justice. Behaviour and conduct of military personnel are regulated by such codes. In instances where these codes exist they are generally required to be explained to military personnel and must be readily available for examination to all such personnel. Every code enumerates in detail those persons who fall within its jurisdiction.

120. Under some codes, a person may be tried by court-martial after his legal separation from the service if all of the following conditions apply:

(1) The offence of which he is charged is punishable by confinement of five years or more;

(2) The offence was committed while the accused was subject to the code;

(3) The person cannot be tried in the civil courts;

(4) Trial is not barred by the statute of limitations.

121. For example, under a particular code, if a member of an armed force steals private personal property valued at $10,000 while serving in an occupied foreign country during the last month of his enlistment, and is not apprehended until a year after he has been legally separated from the service. He is charged with larceny. He may be punished by court-martial with confinement for five years; the accused cannot be tried in any civil court because the offence was committed in a foreign country; the statute of limitations for this offence runs three years. The accused may be tried by court-martial, for all of the required conditions have been satisfied.

B. Military justice

122. Military justice is the system through which punishment is imposed upon military personnel who violate set rules of conduct. It is a means of administering military law in the armed forces. There are obvious reasons why the military must have its own system of law. For example, in time of war, military necessity requires

that the prosecution of hositilities should not be hindered by unnecessary arrest and detention of members of the military service by civil authorities. Under such circumstances, it is felt that military authorities must have the paramount right to the custody of a member of the military service charged with an offence under civil law.

123. Both in time of war and peace, additional rules of conduct - not normal to civilian life - have been found necessary in the training and operation of a disciplined military system.

124. The result of the exemption of the military from civil jurisdiction is that it must have distinctive rules governing the conduct of its members and others subject to military law. These rules are usually found in the respective codes of military justice of States.

C. Military government and martial law distinguished

125. It is, of course, necessary to make a distinction between a military government and martial law. Military government is that form of government which is established and maintained by a belligerent by force of arms and over occupied territory of the enemy and over the inhabitant thereof. Martial law, on the other hand, is the temporary government of the civilian population through the military forces as necessity may require in domestic territory.

126. In the administration of occupied territories, the legitimate power of the occupied area passes into the hands of the occupant. The latter is required to take all necessary measures to restore and ensure, as far as possible, public order and safety for all, while respecting, unless absolutely prevented, the laws in force in the country. The military occupant may, however, suspend existing laws and promulgate new ones when the exigencies of the military service demand such action.

127. The occupant must also respect persons, religious convictions, etc. as well as family honour, rights and the lives of persons.

128. In return, it is the duty of the inhabitants to carry on their ordinary, peaceful pursuits; to behave in an absolutely peaceful manner; to take no part whatever in the hositilities carried on; to refrain from injurious acts towards the troops or in respect of their operations; and to render strict obedience to the official of the occupants.

D. Agencies through which crimes and offences are punished

129. Having indicated the various offences and authorized punishments for them, most States' legislatures have provided the means whereby the authorized punishment can be imposed. A system of courts-martial is generally established.

E. Nature of courts-martial

130. A court-martial is a military tribunal usually composed of one or more eligible members of the armed forces (the number depending upon the kind of court), the functions of which are to decide whether a person subject to military law has committed a violation of a particular military code and, if it finds him guilty, to adjudge punishment for the offence. It is an instrumentality through which military authorities

punish offenders. Unlike the criminal courts of States, it is not a permanent judicial body. It comes into existence only when appointed by competent military authority. Its members are generally selected by the officer who appoints it. Its sentences are carried out only when the authority who appoints it, or in some cases a like or higher authority, so orders. A court of law and justice which should determine each case only after considering competent evidence; it should be bound by rules of evidence and the fundamental principles of criminal law. Usually such a court is empowered to adjudge only such sentences as a particular Code and implementing regulations permit. Its findings and sentence, after approval, review, and affirmation as prescribed by said Code, are generally final and conclusive; it differs from civilian courts in that its findings and sentence constitute judicial recommendations as to guilt and maximum punishment which the reviewing authorities may affirm or reduce. In most cases, the orders publishing the results of its proceedings are binding on all departments, courts and agencies, subject only to action upon an application to a higher body or authority for a new trial.

131. Admittedly, the Special Rapporteur, in the time allotted him, cannot deal with all questions of procedure or substance which may arise in the administration of military justice. He will therefore discuss, in a general way, what he believes to be the more important procedural problems which may be useful for military judges and counsel of special and general courts-martial. The Special Rapporteur will seek to provide information relating generally to the duties of these individuals.

F. Functions and duties of courts-martial personnel

1. Military judges

132. Military judges of general and special courts-martial should have the same duties. A military judge should be the presiding officer at all open sessions of the court, and should be responsible for ensuring a fair and orderly hearing. The judge has a duty to ensure that the proceedings are conducted with dignity and that counsel perform their duties properly. The military judge should rule finally on challenges and motions for a finding of not guilty. The judge also should rule finally on all interlocutory questions of fact or law, with the exception of ruling on a defence motion to dismiss based on the accused's alleged lack of mental responsibility at the time of the offence. If the military judge chooses to consider that subject as a motion, any ruling is subject to objection by members of the court. The usual procedure is to submit the issues of mental responsibility to the court members alone for their resolution with the merits of the case. If there is a factual issue concerning the accused's mental capacity to stand trial, the judge rules finally. The judge's ruling should also be final on motions for a finding of not guilty unless such motion is based upon the accused's mental responsibility. A military judge sitting alone may determine all questions of law and fact, decide guilt or innocence and, if the accused is found guilty, adjudge an appropriate sentence.

2. President of a special or general court-martial

133. General. The senior court member present after challenges is president of the court for the trial of that case. The duties of the president vary substantially, depending on whether a military judge has been detailed to the court.

134. The President with a military judge. In a typical case, when a military judge has been detailed to the court-martial, the president's duties are limited. The president prescribes the uniform to be worn. The military judge is the presiding

officer and administers oaths to counsel as required. In open sessions the president's duties and powers are generally those of a member of the court. The president presides over closed sessions of the court and speaks for the court in conferring with the military judge and in announcing findings and sentence. But the president shall not interfere with the rulings of the military judge which affect the legality of the proceedings. The military judge generally rules finally on all questions of law and fact.

135. The President without a military judge. Under exceptional circumstances, when no military judge has been detailed, the president of a special court-martial is the presiding officer of the court and is responsible for the fair and orderly conduct of the proceedings in accordance with the law. The president prescribes the uniform to be worn, in conjunction with the trial counsel sets the time of trial, and recesses or adjourns the court as appropriate. The president has a duty to ensure that trials are conducted with appropriate decorum and dignity. The president rules on all interlocutory questions, other than challenges, that arise during the trial. Such rulings on questions of law, other than motions for a finding of not guilty, are final. Rulings on interlocutory questions of fact and motions for a finding of not guilty are subject to objection by any court member. A ruling is interlocutory unless it would terminate the case by deciding guilt or innocence. If an issue arises whether a question before the court is one of law or fact, the president's determination is conclusive.

3. Counsel

136. Prior to trial by special court-martial the accused should be afforded an opportunity to request legally qualified counsel. If, after proper advice the accused elects not to be represented by legally qualified counsel and such counsel is not detailed, the military judge, or if none, the president, should determine that this election was voluntarily and knowingly made. A legally qualified defence counsel should be detailed to a general court-martial and any special court-martial authorized to adjudge a bad conduct discharge. In addition to the right to qualified detailed counsel, the accused also has a right to retain civilian counsel at no expense to the Government or to be represented by individual military counsel of the accused's own choosing if reasonably available. The accused should also be advised of these rights and questioned about his or her understanding of them at trial. An accused person should be allowed, if he so desires, to conduct his or her own defence without assistance of counsel. Defence counsel should advise the accused before trial that, prior to assembly, the accused may request trial by the military judge alone. If the accused desires to request trial by the military judge alone, the defence counsel should prepare a written request signed by the accused and defence counsel and forward it through the trial counsel to the military judge for decision.

137. The Special Rapporteur does not, as yet, have any information on allegations of racial, ethnic, religious, or linguistic discrimination during ordinary periods of enlistment (speaking of criminal justice). However, discriminatory acts are most likely to occur during periods of military occupation. It is therefore necessary to have appropriate code, rules or regulations to deal with situations in those cases of a criminal nature, arising under such conditions. In the context of the administration of criminal justice, the Special Rapporteur will be concerned primarily with courts-martial procedures - general, special and summary.

138. In the limited time available to the Special Rapporteur it was not possible to deal with all the various procedures followed in every State. However, it might be useful to highlight those provisions which might serve to guarantee fairness and

equality in the administration of criminal justice. In one jurisdiction the uniform code of military justice provides that enlisted personnel may now serve on general and special courts-martial for the trial of any enlisted accused who has personally requested in writing that enlisted persons serve on it. However, no enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is a member of the same unit.

139. When an enlisted accused has formally requested enlisted members on the court-martial for his trial, at least one-third of the total membership must be enlisted unless eligible enlisted persons cannot be obtained because of physical conditions or military exigencies. In such an event the court may be convened and the trial held without enlisted members, but the convening authority must make a detailed written statement, to be appended to the record, explaining why eligible enlisted members could not be obtained.

140. Whenever practical, the senior member of a general or special court-martial should be an officer whose rank is above that of a junior officer. Unless it cannot be avoided, all members should be senior to the accused in rank or in precedence. Whenever practicable, a summary court should also have an officer whose rank is above that of a junior officer.

141. General courts-martial should consist of a law officer, who is not a member of the court, and any number of members, perhaps not less than five. Special courts-martial should consist of any number of members not less than three. A summary court-martial usually consists of one officer. For obvious reasons, no person should sit as a member of a general or special court-martial when he is the accuser. An "accuser" is a person who signs and swears to charges, any person who directs that charges nominally be signed and shown by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

G. Trials of civilians by military tribunals[40/]

142. In the Sub-Commission on Prevention of Discrimination and Protection of Minorities it has been pointed out that the distribution of jurisdiction among different classes of courts by a State may have discriminatory consequences, since the guarantee accorded to individuals accused of the same offence may not be the same in all courts. Mention was made of a military tribunal as an instance. [41/] Military tribunals in fact have jurisdiction over civilians in time of peace in a number of countries; the offences which they are empowered to try are often of a political character. In some countries, for example, the Government may create temporary military tribunals by decree. The military tribunals have jurisdiction over all offences affecting the internal and external security of the State. At the specific request of the Minister of the Armed Forces, permanent and temporary military tribunals try cases of murder, intentional bodily harm or wounding, resulting in death, and arson. A person who commits the offence of subversion may also be tried by a military tribunal in some countries. Again, in some others, a military court is competent to sit on cases involving offences committed by members of civil employees of the armed forces; it may also proceed against other persons in cases of offences

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40/ See M.A.A. Rannat, op.cit., p.48.

41/ E/CN.4/Sub.2/SR.485, p.9.

against liability to military service and of criminal acts prejudicial to the interests of national defence. The Supreme Court in one country ruled that a civilian subject to military trial because of alleged crimes against the security of the State in which he participated together with military personnel, must be judged in accordance with the Code of Military Procedure. Under the law on Military Courts of one State, Military Courts have the power to try various crimes committed by civilians, in particular the following: (a) a counter-revolutionary attack against the State and the socialist organization if the act is connected with undermining the military or defence power of the State; armed insurrection; organizing and smuggling armed groups, individuals, and materials into its territory; destruction of vital establishments of the national economy, and sabotage, if military installations are involved; and conspiracy against the Nation and the State; (b) larceny of arms, ammunition or explosives if such crime was perpetrated in a military unit, institution or enterprise, or in an agency of internal administration.

H. Arrest or confinement prior to disposition of charges

1. Necessity and purpose of restraint

143. If one is accused of having committed an offence or offences for which punishment may be required, the question of imposing some form of restraint must be considered. The purpose of restraint should be to insure the presence of the accused until such time as final action is taken on his case, and to prevent him from committing other offences in the meantime. It should not be mandatory that the accused be restrained at all before and during trial.

2. Preliminary inquiry into offence

144. No person should be placed under arrest or confinement unless the authority so ordering either has personal knowledge of the offence or has made inquiry into it. The purpose of this requirement is to prevent a person being deprived of his liberty on mere suspicion. A full and exhaustive investigation is, of course, not required, but the known facts should be sufficient to furnish reasonable grounds for believing that the offence has been committed by the person to be restrained.

3. Procedural steps to arrest

145. An arrest should generally be imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be oral or in writing. No particular formality is required. It is desirable to explain to him the meaning of arrest and the penalty which may be imposed if he breaks his arrest.

146. Military codes usually specify particular persons who may apprehend persons subject to such codes or subject to trial under them. For example, in one jurisdiction the code of military justice provides that all officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties may apprehend persons subject to the above-mentioned codes.

147. It is further provided that petty officers, non-commissioned officers, and enlisted persons performing police duties should not apprehend a commissioned or a warrant officer offender except on specific orders of a commissioned officer, unless such action is necessary to prevent disgrace to the service, the commission of a serious offence, or the escape of one who has committed a serious offence. In such cases, the apprehending individual will immediately notify the officer to whom he is responsible or an officer of the air police, military police, or the shore patrol.

148. An apprehension is effected by clearly notifying the offender that he is thereby taken into custody. The order may be either oral or written.

149. Under many codes there is a clear distinction between the authority to apprehend and the authority to arrest or confine. However, any person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified, notwithstanding limitations on his power to arrest or confine. In many cases, an enlisted person may be ordered into arrest or confinement by any officer, by an order, oral or written, delivered in person or through other persons subject to the code. A commanding officer may authorize warrant officers, petty officers, or non-commissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

150. An officer, warrant officer, or civilian may be ordered into arrest or confinement only by a commanding officer to whose authority the individual is subject. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. For this purpose, the term, "commanding officer," is construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty and the officer commanding or in charge of any other command who has power to appoint a summary court-martial.

151. It is practically a universal principle that an arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be either oral or written. A person to be confined is usually placed under guard and taken to the place of confinement. The authority ordering the confinement will deliver to the provost marshal, commander of the guard, prison officer, or master at arms, a written statement of the name, grade and organization of the prisoner and of the offence of which he is accused. The prisoner must be received and kept when the committing officer furnishes a statement, signed by him, of the offence charged against the prisoner. Under some codes, the commander of a guard, prison officer, or master at arms to whose charge a prisoner has been committed must, within 24 hours after such commitment, or, in the case of a commander of the guard or master at arms, as soon as he is relieved from guard, report in writing to the commanding officer the name of the prisoner, the offence charged against him, and the name of the person who ordered or authorized the commitment.

4. Types of restraint

152. (a) Arrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting him to a certain prescribed place or area pending disposition of charges. A person in arrest is restrained within the specified limits, not by physical force, but by his moral and legal obligation to obey the order of arrest.

(b) Confinement is physical restraint imposed by order of a competent authority, either oral or written, depriving a person of liberty pending the disposition of charges. The accused may be physically restrained either by being imprisoned in a guardhouse, or by being put under the control of a guard.

(c) Administrative restriction is moral restraint imposed by a commander upon an accused person, limiting him to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under such restraint. Thus, an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution administratively to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges.

5. Degree of restraint

153. The need for any restraint should be determined in the light of the offence charged and the character of the offender. If some restraint is deemed necessary, only the minimum required under the circumstances should be imposed. Confinement should not be imposed pending trial unless deemed necessary to assure the accused's presence at trial, or because of the seriousness of the offence charged, as for an offence involving moral turpitude (an act contrary to justice, honesty, principle, or good morals). For minor offences restraint in any form may be unnecessary; for example, there is usually no need to restrain a soldier who voluntarily returns after a few days absence without leave. The fact that he has returned of his own accord is a good indication of his intention to stay with his organization. His availability for trial a few days later can safely be assumed. On the other hand, a soldier who breaks restriction and remains absent without leave until apprehended probably requires confinement since his past conduct indicates that only physical restraint will hold him with his organization. Even a person who may have committed a serious military offence, such as a soldier who wilfully disobeys the lawful order of a commissioned officer, is not necessarily to be confined unless there is some basis for believing that otherwise he will flee before disposition of charges. The question to be decided in each case is: what restraint, if any, is necessary to ensure the presence of the accused pending disposition of charges and to prevent his doing harm to persons or property in the meantime.

154. It should be noted that under some codes there are provisions for penalties for any unlawful restraint of another's freedom of locomotion. Some of these provisions refer to offences committed by one who, being duly authorized to apprehend and arrest or confine others, exercises such authority unlawfully, and one not so authorized, who effects the restraint of another unlawfully. There are also provisions to ensure expedition in disposing of cases of persons accused of offences under particular military codes and to punish deliberate and intentional failure to enforce or comply with the provisions of such codes.

I. Status of person in arrest or confinement

1. Status of arrest

155. A person in arrest should be restricted to his barracks, quarters, tent or such larger limits as may have been specified in the order of arrest. He should not, if he is to remain in that status, be required to perform his full military duty,

since placing him on duty terminates his arrest. This, however, does not prevent his being required to do ordinary cleaning or policing up about his quarters, or to perform other similar nonpunitive details. He should not bear arms or exercise command of any kind.

2. Status of confinement prior to disposition of charges

156. A person who is confined pending disposition of charges or final action in his case is a prisoner. However, he should be treated differently from other prisoners who are in confinement pursuant to sentences which have been ordered executed. He should not be subject to punishment or penalties other than confinement for any offence with which he stands charged prior to execution of an approved sentence on charges against him. Accordingly, he should not be required to perform duties and drills (or to observe duty hours) devised as punitive measures, or required to perform punitive labour, or to wear other than the prescribed uniform during such period of confinement. However, he may be subjected to certain incidents of confinement, such as censorship regulations, which are reasonably necessary for the safekeeping of prisoners and the security of prison installations.

3. Duration and termination of arrest and confinement

157. When a person is placed in arrest or confinement, immediate steps should be taken either to bring him to trial or to dismiss the charge and release him. Normally, charges should be preferred within at least 48 hours after the accused is restrained. An officer who is responsible for unnecessary delay in investigating or carrying a case to a final conclusion should be punished. The proper authority to release the accused from arrest is normally the officer who imposed the arrest. Thus, a commissioned officer or warrant officer would be released from arrest by order of the commanding officer who has ordered his arrest. An enlisted person would be released from arrest by his own unit commander. The proper authority to order release from confinement is the "commanding officer" to whose command the guardhouse or prison is subject. Thus, a prisoner confined by a company commander in a post guardhouse would be ordered released by the post commander - not by the company commander: a prisoner confined by a battalion commander in a regimental guardhouse would be ordered released by a regimental commander - not by the battalion commander. Once the prisoner is turned over to the guard, he passes beyond the control of the officer who initially ordered him confined, and such officer is not a proper authority to order his release unless he is the "commanding officer" described above. The release of a prisoner without proper authority is generally a punishable offence.

4. Treatment of prisoners of war

158. There are certain well-established rules which seek to regulate the conduct of war among civilized nations. Many of these rules, commonly referred to as the written rules, or laws of war, are set forth in a number of treaties and conventions to which many nations are parties. There are, however, some rules of law which have never been incorporated in any treaty or convention and are commonly referred to as "the unwritten rules or laws of war". These rules are nevertheless well-defined by recognized authorities on international law, as well as by custom and usage of civilized nations. The question of prisoners of war is of particular importance in the context of the present study. The provisions governing the treatment of such prisoners are to be found in the Geneva Conventions Relative to the Treatment of Prisoners of War of 27 July 1929 and 12 August 1949.

159. Military force is subject to two basic principles, i.e. (a) the principle of humanity and (b) the principle of chivalry. The principle of humanity prohibits the use of any kind or degree of violence that is not actually necessary for the successful prosecution of a war; and the principle of chivalry denounces and forbids resort to dishonourable means, expedience, or conduct.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

160. Discriminatory treatment against members of racial, ethnic, religious or linguistic groups at the various levels in the administration of justice is, in a number of juridictions, a fact of current life. It would seem that as politically and economically subordinate minority groups seek to achieve self-determination and rise in the social structure, they are continually confronted by the legal structure. Many minority group members feel that the criminal legal system is heavily weighted against them and that the police represent a foreign, alien power.

161. If legal systems are to deal effectively with mounting attacks from minority group members, the issues and allegations at hand will have to be frankly discussed. The Special Rapporteur has attempted to address the relationship between the structure of the criminal justice system and minority groups. Rather than looking at one phase of this relationship, he has included the issues of police conduct, police and the community, factors of arrest and detention, the question of violence by the police, the factor of judicial proceedings, and finally, military justice.

162. The use of force by the police, causing great bodily harm and even death, figures prominently in complaints of minority groups against the police. That some policemen are killed is sufficiently impressive to underscore what might be termed the "dangerous" nature of the job, although the public image and the image of the police themselves have been known to exaggerate the real danger considerably. At any rate, society equips the policeman with instruments of violence for his own protection, because it is in society's interest that he be able to protect himself.

163. On the basis of certain statistics, it would appear that many more people are killed by the police than there are police killed in the line of duty. 42/ Homicides committed by police officers are of particular concern to certain minority groups since they continue to be the victims of these killings at a very disproportionate rate.

164. There is little indication, if any, that the norms which define the permissible use of violence by the police have, as a general rule, been internalized. Given the wide discretion and the absence of effective sanctions the police are apt to conform not to the requirements of due process of law, but rather to the pressures of the politically powerful.

165. Much of the friction between law officers and minority communities might be said to stem from the under-representation of members of minority groups in the police force of many communities.

166. The quality of the relationship between the police and the community is of utmost importance. How a policeman handles day-to-day contacts with citizens and minority groups in particular will, to a large extent, shape the relationship between the police and community.

42/ Vital Statistics of the United States, vol.2, Part A "Mortality", US Public Health Service, HA 203 U6, National Center of Health Statistics, Section 1.

167. The criminal court is one of the most crucial institutions in the criminal justice system. It is expected to meet society's demands to convict and punish serious offenders while at the same time ensuring that the innocent and unfortunate are not oppressed. The administration of criminal justice is an issue of great public concern; particularly as it relates to members of minority groups. The pervasive mistrust of such groups of the criminal justice system is said to be an important contributing factor to social discontent and upheaval; the police and the courts have been identified as sources of conflict between the dominant and non-dominant groups. 43/

168. During periods when we are witnessing what might be termed a proliferation of military hostilities, one can see the need for adopting, subscribing to and adhering to rules and regulations pertaining to the conduct of such hostilities among civilized nations. During these periods, certain rights of combatants and non combatants must be observed. Perhaps, in the light of today's advanced war technology, new rules and regulations of an international character might be called for

B. Recommendations

(1) Legislative provisions generally provide important safeguards to supplement the ordinary law, where ordinary law guarantees do not exist or do not operate satisfactorily. It is suggested that national legislation should recognize the need for special protection to ensure that the basic rights of minorities are observed.

(2) Provision should be made for effective and enforceable remedies, reporting procedures, complaint and investigative procedures and conciliation machinery and processes. In this connection, complementary action should be taken by administrative and executive authorities concurrent with action taken by legislative and judicial authorities.

(3) It is recognized that the principles on Equality in the Administration of Justice 44/ applies to all groups of society in general. It is suggested that in the administration of criminal justice the special needs and circumstances of minority groups should be given consideration in the interest of equity and justice. Courts should be relatively free and should have discretionary powers to interpret the law t' fit situations not foreseen by the legal draughtsman.

(4) Efforts should be made to bring minority groups into the various processes of government and administration so that their views can be adequately represented and also to enable them to identify with these processes.

(5) Criminal justice services should have officers recruited among minorities.

(6) Affirmative action where deemed necessary would induce confidence and provide the services with personnel capable of understanding problems of minority groups.

43/ Report of the National Advisory Commission on Civil Disorder (New York Basic Book, 1968).

44/ Mohammed A.A. Rannat, op.cit., annex III.

(7) Every effort must be made to protect those who may be innocent but especially vulnerable to the investigative and court processes by reason of their ethnic background or language difficulties.

(8) In the context of the contents of the present study, the Special Rapporteur, bearing in mind the importance of the role of law enforcement officers, also puts forward the following recommendations:

1. Code of Conduct for Law Enforcement Officials

(i) The Code of Conduct for Law Enforcement Officials adopted by the General Assembly of the United Nations 45/ should be favourably considered for incorporation into the domestic laws or regulations governing law enforcement agencies and the text should be made available to all officials;

(ii) Law enforcement officials, in basic training and in all subsequent training and refresher courses, should be instructed in the provisions of the Code of Conduct for Law Enforcement Officials and other basic texts on human rights;

(iii) Police should exercise discretion in accordance with rules which are regarded by the relevant public sectors as conducive to the official purposes of the police as defined by law. In addition, they should be subject to sanctions which would ensure that these new rules are obeyed;

(iv) There should be some measure of community control of policing since under such control the police would more likely respond more consistently to community priorities and would be held accountable for any abuse of police power;

(v) Law enforcement agencies should avail themselves of the experience and knowledge of outside groups. In this regard, university teachers, non-governmental organizations, workers' collectives and social organizations could assist in protecting the rights of minorities;

2. Selection and training of police

(i) All persons who meet the requirements set forth by domestic law should be admitted to the police force without any discrimination as to race, sex, or religion;

(ii) Consideration should be given to introducing psychological or aptitude tests for potential law enforcement officials in addition to the necessary educational, physical and medical standards;

(iii) Screening procedures should be developed to ensure that officers with superior ability, sensitivity and the common-sense neccessary for enlightened law enforcement, are assigned to minority group areas. Police officers with bad reputations among residents in minority areas should be promptly reassigned to other areas;

(iv) The educational and training programmes of the police should place due emphasis on human rights;

45/ General Assembly resolution 34/169 of 17 December 1979.

(v) Special or additional training courses should be introduced to ensure that law enforcement officials should not only know the laws and the provisions of the police codes of ethics, but they should apply them in the discharge of their duties; such laws and codes should be vigorously enforced;

3. Arrest and detention

(i) The existence of circumstances sufficient to warrant belief that a suspect has committed an offence should be a basic prerequisite of arrest in all legal systems;

(ii) No person should be placed under arrest or confinement unless the authority so ordering either has personal knowledge of the offence or has made enquiry into it;

(iii) All arrests should be made strictly in accordance with clearly defined procedural steps;

(iv) When a person is placed under arrest or confinement, immediate steps should be taken to bring him to trial or to dismiss the charges and release him;

(v) Irrespective of the right to communicate in general, a person in custody should "be allowed to inform immediately his family of his detention" (Standard Minimum Rules for the Treatment of Prisoners - Rule 92). 46/ Responsibility should be placed on the appropriate authorities to give notice of the arrest or detention to the family and other persons designated by the person in custody;

(vi) States should put into practice the principles contained in the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders);

(vii) A person arrested or detained should be immediately released when grounds on which he was arrested and detained no longer exist, or when a court of law grants bail;

(viii) During periods of arrest and detention the commission of any act of torture or inhuman treatment should be thoroughly and expeditiously investigated by the appropriate authority;

46/ First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report prepared by the Secretariat (United Nations publication, Sales No. 1956.IV.4), annex I.A.

(ix) In their observance of the Code of Conduct for Law Enforcement Officials all law enforcement officials in the performance of their duties relating to arrest and detention, should be held to scrupulous compliance with Articles 3, 5 and 6 of the Code;

(x) An arrested person should be given the opportunity in accordance with national legislation to make contact with a third person without delay unless this would impede the investigation in which case it should be allowed at the earliest moment possible;

(xi) Steps should be taken to ensure that persons in custody are apprised of their rights under the law and safeguards should be introduced to ensure that evidence obtained other than by lawful means is not used in court;

4. Administrative procedures

(i) Administrators should be subject to some constraints. They should act fairly and impartially. They should not abuse their authority and should not mistake or misconstrue their power. Most informed opinion deems judicial control of administrative action to be essential; the only difference is the degree of control that should be permitted to the courts and the method through which it is to be organized. Since the problem raised by modern administrative action is one of co-ordinating power with law, it is felt that such co-ordination cannot be effected without judicial control;

(ii) Litigation costs and attorney's fees hamper the easy access of many members of minority groups to available remedies. In such cases legal aid should be provided free of charge;

(iii) Steps should be taken to raise the level of "legal consciousness" among minority groups with respect to administrative procedures;

(iv) Administrators should receive "in-service training"geared not so much towards upgrading their administrative skills, but rather towards enhancing their ability to perceive and minimize the abuse of authority and to assure human rights for all citizens;

5. Military law

(i) States which have not as yet done so should formulate rules of procedure or codes of military justice relating to such matters as preventive and corrective measures, arrest and confinement, courts-martial-appointment, jurisdiction, and procedure, etc;

(ii) Countries which have not as yet done so, should become signatories to existing international instruments regulating the conduct of war among nations;

(iii) Taking into account advanced military technology, a study should be undertaken by the United Nations on the adequacy of existing rules and regulations relating to military hostilities in general.

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