PART ONE

DELAY IN THE ADMINISTRATION OF CRIMINAL JUSTICE

I. The Consequences of Delay

Elucidating the effects which delay has on the criminal justice system is not as enlightening an exercise as it should be. There is an assumption that delay is an unmitigated evil that must be eliminated, but far too little effort has been devoted to actually documenting delay's consequences. As a result, literature in this area tends to be speculative or intuitive rather than empirically based. It is assumed, for example, that unnecessary delays cause undue suffering to those detained in custody pending trial and that pressures to dispose of cases quickly result in procedural corners being cut. These are serious allegations. It is beyond the scope of this report to establish scientifically whether delay does produce such consequences; instead, it must proceed on the basis that the effects discussed in the literature are a probable consequence of delays. In any event, so serious are these purported effects for the very principles on which criminal justice is based that the mere probability that these consequences are produced by delays in processing cases through the system should be sufficient to galvanise remedial action.

Delay is perceived to affect the very quality of justice dispensed by the courts. Justice in this sense refers not to substantive or "ideal" justice but to procedural justice or justice according to law.[1]

> If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties but rather must assure that such inequality will be minimized as much as human ingenuity can do so.[2]

The rules of criminal procedure are not perfect in that they are not guaranteed to produce the correct result in each instance, that is, the conviction of the guilty and the acquittal of the innocent. They represent what is thought to be the most acceptable compromise between the rights of an accused person and interests of society which will produce a just and fair result in most cases. Procedural justice then is the just disposition of cases according to the legal rules currently in effect in a society.

The timing of the administration of justice is critical to a fair hearing and a just outcome. "Justice delayed is justice denied" and "justice is sweetest when it is freshest"[3] are currently being recited so often that they are on the verge of becoming trite and meaningless. It is important that they do not. Once accused, a person has the right to be notified of the charge against him, to be brought as quickly as possible before a tribunal to hear the case against him, to be heard in his own defence and to a decision by an unbiased judge on the merits. In other words, the rules of natural justice apply.[4] Delaying the steps of this process has the effect of keeping an accused person under prolonged suspicion of guilt, unable to clear himself of the charges being made against him. In addition, it is possible that an extended period before trial may affect the quality of the evidence and the thoroughness of the eventual hearing. The longer it takes for a criminal charge to be determined, the less certain it becomes that a just and fair outcome will result.

On the other hand, justice will rarely result if the criminal process is too speedy. The audi alterem partem rule insists that notice of a criminal charge must be adequate in its terms, so that the accused knows the essence of the case he has to meet and can prepare his answer properly; and sufficient time must be given for representations to be made.[5] Time is needed for the emotions aroused by a criminal act to subside, thus enabling the accused to get an unbiased hearing; to allow both sides to prepare their case and to enable the court to come to a reasoned decision based on its knowledge of the facts, the law and the circumstances of the particular case. Caution is needed to ensure that an emphasis on dispatch does not mean that the meaningful formalities of the law are turned into hasty ceremonial symbols of a society's impatience with crime and its progeny. It is not delay per se which is objectionable, but excessive delay.

(i) Delay and the defendant

At the outset it must be stated that, for the defendant, the impact of delay may not always be negative. Arguably an accused may benefit from delays in two significant ways: by the postponement of the unpleasant consequences which follow an unfavourable outcome and by the improved chances of a better outcome because of the passage of time. This leads to manipulation of the system which demeans the administration of justice. Nevertheless, even in this respect, the effects of delay upon defendants vary considerably according to their pre-trial custody status. For the defendant awaiting trial in custody, any benefits of delay may be outweighed by very clear costs.

Conviction and punishment after a fair trial, while never pleasant, can generally be called just; punishment before conviction or after acquittal is never just. Delays in the administration of justice unfortunately increase the probability of these situations occurring.

The effects of a criminal charge do not commence with conviction; being under suspicion has its own stigma. The presumption of innocence exists in the courtroom by placing the onus of proof on the prosecution, but among society at large, it would be fair to say that being charged with a criminal offence often gives rise to a presumption of guilty which in many cases is not dispelled even on acquittal. There is a natural human tendency to think "he wouldn't be in that position if there were not some truth in the allegation". On being charged, even if he is not kept in custody, the accused may face suspension from employment, disruptions in his social relationships and suffer emotional anguish. The longer he has to wait for trial, the more severe these effects become; and they may be perceived as punishment of a kind, experienced before the trial itself:

> ...[W]ithout a trial, or threat of a trial, there can be no justice, only unproved accusations hanging over a defendant's head.[6]

The consequences of a lengthy delay before trial are undeniably severe for an accused who has to wait in custody; for that custody, whether it amounts to mere deprivation of liberty or something more, is punishment before conviction of someone who may never be convicted.[7] There is almost universal recognition of the impropriety of punishing someone who is only accused of a crime, but in certain circumstances, the interests of society override such reservations. A recent study of bail procedures in Western Australia found that the period spent in custody awaiting trial in the District Court or Supreme Court (which period according to a survey carried out at one prison appeared to be at least 62 days and in one case as much as 155 days) was likely to be disruptive to a defendant's life, his family, his employment and might place him at a disadvantage at his subsequent trial.[8] Courts are often reluctant to imprison a person where such a sentence would mean loss of employment; for the pre-trial detainee who has already lost his job, this barrier to a prison term does not exist. Prior loss of employment may therefore be an unfavourable factor affecting the severity of sentence. These punitive consequences of arrest and protracted detention are augmented by the generally poor conditions in detention facilities.

It is the exception rather than the rule for there to be special, separate facilities for holding pre-trial detainees. Usually, people remanded in custody spend the period before trial in a local jail or its equivalent alongside those serving short prison sentences. At its inception in England, the detention of untried prisoners was the primary function of the jail. Now it has to serve two often conflicting and possibly irreconcilable functions, achieving success in neither.

A survey of Canadian detention facilities in the late 1960s found that they varied considerably from province to province. Some have a separate jail system for those awaiting trial whereas in others the same institution serves both functions. Overall, many of the provincial institutions used to house those awaiting trial were old and poorly equipped. Sanitation and living conditions were primitive; segregation difficult to maintain, and the security provisions, designed to meet the requirements of the most difficult inmates, had to apply to all.[9] A more recent Australian study referred to the deplorable accommodation given to persons awaiting trial and detained in a pre-trial detention centre and to those in rural areas who continue to be held in police prisons and lock-ups.[10] In addition, there is generally little in the way of programmes and activities for the transient pre-trial prison population; the regime for them is one of depressing monotony.

Although public safety demands that some accused persons must be confined before trial, the effects of pre-trial punishment should be minimised. Although they often share the same facilities, the conditions of incarceration applicable to convicted prisoners and those merely accused of crime should attempt to differentiate between them. There should be parity, not between convicted and unconvicted prisoners, but between those released on bail and those remanded in custody. Regardless of whether arrested persons are detained for their risk of non-appearance or pre-trial recidivism, the only distinction between those detained and those on bail, for the purposes of treatment, is the presence or absence of a necessity for custody.[12] Acknowledging this reasoning, most jurisdictions make some concessions to the untried prisoner. It is generally provided that he be exempted from the work and treatment programmes of the institution;[12] that access to legal counsel be facilitated[13] and restrictions on mail and visits are relaxed.[14]

There are indications, however, that this differentiation between convicted and unconvicted prisoners may be more theoretical than real, given that many of these privileges are within the discretion of the prison superintendent or relevant government minister. One of the more recent studies of pre-trial detention found that while prison rules do distinguish the unconvicted from the sentenced prisoner in theory, this means very little in practice. Many of the special privileges attributed to the unconvicted can only be implemented given financial resources and outside contacts which most prisoners do not have. Indeed, the unconvicted can find themselves worse off than the sentenced prisoners if the general provision of facilities is seen as unnecessary in view of the detainee's theoretical rights.[15] The sheer weight of numbers often makes it impossible for prison personnel to administer these privileges to which untried prisoners are entitled.

Excessive delay exacerbates an already severe situation by placing additional burdens and pressures on detention facilities. The longer the period before trial and the more people who are detained, the less likely it is that there will be acceptable conditions in these holding centres. Time and weight of numbers also strains the order and security of these institutions, increasing the risk that an accused will be subjected to prison disciplinary measures. Although he may be entitled to a measure of mitigation of the pains of imprisonment, he is not exempted from the disciplinary regime of the institution.[16]

The amount of punishment suffered before trial is clearly not insignificant. It would be so even if trials were dispatched with reasonable speed, which makes any protraction of the period of detention indefensible. The Law Commission of India in its 78th Report stated that the problem of pre-trial prisoners in jails has assumed magnitude in India and in other jurisdictions. In response to this finding it underlined the basic need to reduce delays in processing cases, but more specifically recommended that cases in which the accused is incarcerated prior to trial should be given preference (in most jurisdictions this unwritten rule is adhered to) and that there should be a presumption in favour of bail.[17] One commentator on African law has suggested that delay itself should be a factor which should be taken into account at the bail hearing: how long will the accused be required to stay on remand if refused bail? When is the case going to be heard? If the case is set for hearing in seven days' time there is obviously less necessity for bail to be awarded than if it is set for hearing in 70 days' time.[18]

The liberalisation of bail laws has been a fairly widespread response to the exacerbation of pre-trial detention by excessive delays.[19] The aim of such reforms has been to reduce the numbers of those detained before trial by legislating a presumption in favour of bail for a defendant. Canadian bail legislation has gone a step further by providing a method for expediting the trial of an accused who has been detained in custody pending trial because bail was refused. Except in relation to murder and the other serious criminal offences, the case of a person detained pending trial and whose trial has not commenced must now be considered by a judge immediately after the accused has been detained for 90 days, where he is charged with an indictable offence, and within 30 days for a summary offence.[20] If the judge is not satisfied that the continued detention of the accused is justified, he must order that he be released, either upon giving an undertaking or upon entering into a recognizance. Whether or not he makes an order for the release of the accused, he may give such directions as he thinks necessary for getting the case to trial.

In Sri Lanka, where an accused is remanded in custody pending trial in the District Court or the High Court he shall, if not brought to trial within 45 days, be entitled to be admitted to bail, unless good cause has been shown to the contrary, or unless the trial was postponed at the request of the accused.[21]

A more radical approach to the problem was found to be necessary in Nigeria. Early in 1975 a Decree was enacted in that country which empowered the Chief Justice of each state to go to any prison and order the immediate release of any person found in that prison who had been detained for any period longer than he would have served had he been convicted of the offence for which he was arrested in the first place. This measure has proved very popular and the Decree has been invoked on several occasions.[22]

In a few other Commonwealth jurisdictions, measures exist on a continuing basis which prevent an accused being detained for too long pending a hearing. Fairly typical of protection based on the law of habeas corpus is section 608 of the Western Australian Criminal Code[23] which provides an accused with a "right to be heard". A person committed for trial for an indictable offence can, under this rule, make application in open court at any time during the first sittings of the Court held after his committal to be brought to his trial. If an indictment is not presented against him at some time during those sittings, the Court may, upon a motion made on his behalf on the last day of the sittings, admit him to bail. In fact, the Court is required to do so unless it appears on oath that some material evidence for the Crown could not be produced at those sittings. Further, any person committed as aforesaid who has made such application to be brought to trial and is not brought to trial at the second sittings, is entitled to be discharged.

Sierra Leone instituted a similar provision in 1965 which stipulated that where an accused person has been committed for trial, and for three consecutive sessions his case has not been disposed of, he could, on the last day of the third session, apply to the High Court for the case to be dismissed for lack of trial unless the prosecution could give good cause why the case had not been tried. Unfortunately, this provision has been found to be ineffective because the courts tend to accept the prosecution's reasons for the delay, and find it difficult to release accused persons when such applications are made.[24]

In Scotland, what is commonly known as the "110 day rule" has been in existence since the early 18th century. This rule sets up various time limits by which certain stages of the proceedings must be completed: a defendant detained in custody pending trial who has not been served with an indictment within 60 days of committal, is entitled to give notice to the Lord Advocate, who is in charge of all criminal prosecutions, that if he is not served with an indictment within 14 days, the prosecutor will be called upon in court to show cause why he should not be released from prison.[25] But, more importantly:

> Where the accused has been incarcerated for 80 days, and an indictment is served upon him, and he is detained in custody after the expiry of that period of 80 days, then, unless he is brought to trial within 110 days of the date of his being committed till liberated in due course of law, <u>he shall be forthwith set at liberty and declared for ever free from all question or process for the crime with which he was charged.</u>[26] <u>(Emphasis added)</u>

The extension of bail provisions and the discharge of remanded prisoners from custody are sound measures to restrict the deleterious impact of delay; but the fact remains that there are a core of accused persons who are not going to be affected by such provisions and who will remain in custody until trial. Delays will continue to affect these defendants adversely. In recognition of this, some jurisdictions allow the trial judge to take account of any period spent in custody prior to trial in determining the sentence. In South Australia this is merely the practice of the courts;[27] in Canada, the Criminal Code gives the judge a discretionary power to take this period into account.[28] Such sentencing practices will, of course, only benefit those detained in custody who are subsequently sentenced to a term of imprisonment. Not only are non-custodial sentences often imposed, but, not infrequently, an accused is acquitted after being detained prior to trial.[29] "Set-off" provisions do not provide these people with any benefit.[30]

Punishment before trial may not be the only injustice suffered by those remanded in custody. They may face considerable difficulties in adequately preparing their defence: they are unable to obtain statements, seek evidence or interview witnesses, and access to legal advisors depends on the cooperation of the prison authorities.[31] They can do little to further their own defence and must depend on others to act in their best interests. Faced with such obstacles, the accused may give up his defence, valid or not, and plead guilty to expedite the process and get on with the task of serving his sentence. Friedland, in his Toronto study Detention Before Trial, found a significant number of persons who pleaded guilty after one or more remands. Although it is not the only possible explanation for this change in plea, the accused may have desired to have the case disposed of to avoid further remands and delays.[32] A more recent New Zealand study has confirmed that this pattern exists.[33] The vast majority of those who change their plea may indeed be guilty, but the possibility exists that those who have a valid defence or who are innocent may also react to the demoralising effects of prolonged detention in this way.

Over the past two decades, several studies have purported to show that pre-trial detention has adverse effects on the outcome of a trial.[34] The report of the Bail Review Committee of the New South Wales Parliament indicated that people who have been held in custody between arrest and trial are:

(a) more likely to plead guilty;

(b) more likely to be convicted if they plead not guilty; and

(c) more likely to be sentenced to a term of imprisonment if convicted.[35]

The apparent correlation between pre-trial status and sentence may, however, be a result of the fact that the justice or magistrate, in granting bail, takes into consideration very similar factors to those which will be taken into account in the sentencing decision. Because other factors, such as the accused's offence history and general demeanour at the court hearing, may have an effect on the sentence decision, there can be no strict correspondence between custody status and trial outcome.

Detention before trial has inherent disadvantages for the accused; excessive trial delay exacerbates them. If the time before trial cannot be reduced to acceptable lengths, the right to bail may have to be extended further in order to reduce the number of accused persons who can be detained. This may have unfortunate consequences of its own in terms of increases in crime committed by defendants while on bail.[36]

(ii) Delay and the preservation of the evidence

In order to discharge the onus of proof, the prosecution in a criminal case must collect and preserve the evidence necessary to prove the facts alleged beyond a reasonable doubt. Likewise, the defence must accumulate evidence to refute the charges unless it is felt that there is no case to answer. For the most part, that evidence will consist of the oral testimony of witnesses; their accounts of the facts as they remember them. In view of the fragility of the human memory, it is essential that trial should follow within a reasonable period of the occurrence in question.[37] The longer the period before trial, the more likely it is that the witnesses' testimony will become less reliable. An accused could be wrongly convicted on unreliable evidence which would be manifestly unjust, but it could equally well work in his favour and assure his acquittal. Knowledge of this possibility may actually encourage the defendant or his counsel to delay the trial in the hope that the evidence will deteriorate.[38] As the period of time before trial expands, the likelihood increases of the individual becoming a "dropout" somewhere along the line. The slippage in the system is quite large and the most important reasons for the slippage are probably the fading of the evidence and the growing reluctance of witnesses to keep returning to court.

Criminal cases are rarely heard on the original trial date. Witnesses are forced to return to court again and again without ever testifying as the case is repeatedly postponed and often finally disposed of without a trial if the accused lodges a late plea of guilty. Witnesses who were actually the victims of the crimes at issue may find little solace or justice in this treatment. When a case is repeatedly postponed witnesses often give up and do not return for the next scheduled appearance. This may force the prosecutor to drop the charge because of a lack of evidence or to agree to reduce the charge or give some other consideration in return for a guilty plea. Once again, knowledgeable defendants, usually those who have been in court on several previous occasions, may try to take advantage of the system's delays and turn them to their advantage by out-waiting the witnesses. Recent Canadian studies have found that multiple adjournments were the major factor militating against witness cooperation.[39] Witnesses lose earnings and time with each trip to court, and it is unreasonable to expect that citizens will automatically keep subjecting themselves to personal loss and inconvenience in the name of justice.[40]

Fairness to victims and witnesses demands that they be subjected to a minimum of intrusions and interruptions of their daily routine. Justice is not purely a property of defendants; due consideration must also be given to the other participants in the criminal justice system, though, it must be emphasized, not by eroding the rights of the accused.

(iii) Delay and case disposition

The criminal courts of many jurisdictions are under extreme pressure due to mounting backlogs and ever-increasing caseloads. In the absence of any immediate effective solution to this problem, the courts and their personnel have come to depend to an increasing extent on the guilty plea to keep cases moving through the criminal justice system.[41] Guilty pleas are an established part of the administration of justice; they take significantly less time to process as there is no time-consuming fact finding or jury deliberation. In contrasting guilty pleas with confessions, the Lord Chief Justice of England had this to say:

> We are never squeamish, never have been squeamish about allowing a man to convict himself if he wants to. Every day when we sit as judges in the first instance at a criminal trial, the first thing that is put to the prisoner when he comes up into the dock is "Are you guilty or not guilty". If he says guilty, which is simply a confession of guilt, we do not say "Be quiet, do not say that, it is the wrong thing to do". On the contrary, we say, very well, and the Judge heaves a sigh of relief because that is one case out of his calendar and he can get on with something else. We are not in the least troubled about convicting a man on a voluntary confession, provided it is voluntary...."[42]

Currently, the focus is on plea negotiation as the key method for encouraging and facilitating guilty pleas.[43] This is not to say the plea negotiation is purely a product of delay. An extensive body of American literature has shown that plea bargaining has been in existence, in one form or another for many, many years, and that although the exact causes behind bargaining have not been isolated, caseload pressures are not the culprit. They are merely a convenient whipping boy.[44] However, the argument that case pressures can be removed and plea negotiation remain does not mean that case pressure is without any effect on the bargaining processes. When case volume increases and resources remain constant, changes in the negotiation process may become manifest;[45] the prosecutor may abandon the marginal case which he might have pursued earlier; he may offer to reduce more charges and recommend lighter sentences, or he may simply demand more severe sentences after trial.[46]

The ethics and practice of plea negotiation have been the subject of a heated and continuing debate, but the concern here is whether this manifestation of delay-induced pressures is adversely affecting the administration of justice. Guilty pleas are obnoxious if they are not completely voluntary and made in the full knowledge of all the facts and their legal implications.[47] The differential legal position of confessions and guilty pleas is curious, though not quite in the way Lord Widgery saw it: a confession, surrounded by various protections, requires knowledge of a factual situation; the guilty plea, however, implies a sophisticated knowledge of law in relation to the facts, which a defendant, even one guided by his counsel, often does not have. If the inducement is substantial, an accused faced with weeks or months until trial, may give up a valid defence, or plead guilty when his guilt is questionable. The longer the delay, the more attractive the guilty plea becomes.[48]

> Where years are likely to pass before the trial of charges there is a temptation for both the prosecution and the accused to endeavour to find some way out, and sometimes the easiest, but not the most equitable, way out is by bargaining as to plea.[49]

There is also the possibility that an innocent defendant may plead guilty because of a fear that he will be sentenced more harshly if he is convicted after trial. It must be acknowledged that because of the emotional potential of this problem, it is very easy to overstate. The truth is, that it is just not known how common such a situation is. The possibility exists that the percentage of innocent persons pleading guilty is no greater than the percentage of innocent persons found to be guilty through the adversary system.[50] Neither the trial nor plea bargaining are perfectly accurate procedures, but because the latter is largely hidden from the public eye, it is understandable that unease is felt about its consequences.

A connected concern is that plea bargaining may also be producing injustice by treating guilty defendants too leniently, by allowing court-wise defendants to manipulate the system and by penalising those ignorant of the plea bargaining system who plead guilty without any concomitant "reward" or who legitimately pursue their right to trial and are subsequently found guilty. Differential access to plea bargaining is unfair in its own way.

How can the accuracy and voluntariness of guilty pleas be established? At the moment, it goes little beyond asking the accused if the plea is voluntary, which is not very reliable. This is especially so for guilty pleas that are not the result of an agreement between defence and prosecution but of an implicit or tacit bargain in the form of a reasonable expectation of sentencing leniency on the part of the offender and an established practice by the court of showing differential leniency to defendants who plead guilty in contrast to those who demand trial. The inducement in these circumstances is much more metaphysical and the lack of voluntariness even more difficult to discern. Newman, an American commentator, has proposed that there be a more detailed examination by the court into the factual basis for guilty pleas.[51] While an examination of the evidence to establish the guilty plea would meet a great many of the reservations against plea negotiations, the guilty plea process would become more elaborate, perhaps little different from a full trial and hence would no longer fulfil its present function as a speedy processing mechanism.

Guilty pleas are quick precisely because they allow the system to be circumvented. The hearings which follow them are not hearings in the true sense of the word: a cursory establishment of the defendant's knowledge and the voluntariness of the plea; pleas in mitigation by the defence; in some jurisdictions a speaking to sentence by the prosecution and the actual sentence. The judge may adjourn the case to give consideration to the sentence, but the hearing of the case is truly summary. After waiting, often for a considerable period of time, for his case to come up before the court, especially if the guilty plea has not been lodged at his initial appearance, the defendant's case is given hasty consideration. It has been observed that the same objectives of conviction by trial are applicable to the guilty plea process, and the same basic concerns, such as the accuracy and fairness of the procedures, arise in both systems. Even the problem of the speed of justice occurs in both systems, but with reversed concerns: delay in the trial system and quick justice with guilty pleas.[52] The co-existence of these systems can result in the evils of both - a long wait until trial culminating in summary disposal, particularly in the lower courts where the vast proportion of cases are disposed of by guilty pleas - neither of which are designed to increase the probability of justice according to law. A study of guilty pleas in the lower courts of Victoria produced some interesting results: it was found that although between 1971-1976 the percentage of persons pleading guilty dropped substantially from 75.4 per cent to 61.8 percent, the acquittal rate remained fairly steady. As the authors of this report comment, one might have expected that as fewer and fewer persons pleaded guilty and chose instead to go to trial, the acquittal rate would have decreased markedly, which did not in fact happen. As there was no significant change in the substantive criminal law during the period under review, it would appear that statistically, a significant number of persons who previously had pleaded guilty in the past would have been acquitted if they had gone to trial.[53]

> It is essential for the proper administration of justice that the courts shall be able to try cases within a reasonable time from the date of the facts from which they arise. It is equally important that the courts shall not feel under pressure to get through trials quickly owing to the backlog of cases.[54]

Caseload pressures may well result in speedy processing becoming the ends of the system rather than the doing of justice.

(iv) Delay and the aims of the criminal justice system

Excessive delay dislocates the ends and the means of the administration of justice. After numerous delays waiting for a case to be heard, the trial becomes the end of the criminal justice system and the punishment of the offender is divorced from the original criminal act. The unpleasant consequences of a prolonged period before trial becomes the punishment for guilty and innocent alike and the legal penalty, when it is finally imposed, seems more like the gratuitous infliction of harm.

> It is then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage arising from crime should instantly awaken the attendant idea of punishment. Delaying the punishment serves only to separate these two ideas and thus affects the minds of the spectators rather as being a terrible sight than the horror of which should contribute to heighten the idea of punishment.[55]

Although ideas of general deterrence may not be widely espoused these days, the preservation of the connection between criminal act and punishment is necessary. No matter which theory is the cornerstone of punishment, each is at least partly dependent for its success upon getting to the offender without undue delay. Whether the emphasis is on protecting society, discouraging the offender or others from committing criminal acts or rehabilitating the offender, delays may reduce any efficacy they might have.[56]

Even if the present systems of criminal law and procedure in the Commonwealth were to be administered with near perfect timing, some measure of injustice and unfairness would still exist. Although the evidence is far from conclusive, it would appear that excessive delay in processing cases aggravates the imperfections of our present systems, such as imprisonment before trial, and creates anomalies of its own, not least of which is the stress on speedy hearings. Delays may prove injurious to the defendant, to the interests of society and even to the criminal justice system itself in that if citizens lose their respect for the system there is a danger they will take the law into their own hands. Incontrovertible proof is not necessary for it to be acknowledged that delay in the criminal justice process is a real cause for concern.

Footnotes

[1] Sir Carleton Kemp Allen, Aspects of Justice (London, 1958), p. 65.

[2] A.S. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure", (1959-60), 69 Yale Law Journal 1149 at p. 1192.

[3] Lord Bacon quoted in Kenny's Outlines of Criminal Law, (17th ed.) (London, 1958), para. 745.

[4] S.A. de Smith, Judicial Review of Administrative Action (London, 1968), pp. 135-36.

[5] Id. at pp. 171-89. For an interesting discussion of the embodiment of the right to adequate time and facilities for the preparation of a defence in the Nigerian Constitution and case-law on the subject see C.O. Olawoye, "The Problem of Delay in the Administration of Criminal Justice" in Second West African Conference on Comparative Criminology, Criminal Law and the Law Courts (Lagos, 1973), pp. 107-118.

[6] Lewis Katz et al., Justice is the Crime: Pretrial Delay in Felony Cases (Cleveland and London, 1972), pp. 59-60.

[7] C. Beccaria, (An Essay on Crimes and Punishments (1819) (Stanford, 1953)) emphasized the point that deprivation of liberty, being a punishment, ought to be inflicted before conviction for as short a time as possible (p. 75).

[8] Law Reform Commission of Western Australia, Working Paper (Project No. 64), Review of Bail Procedures (1978). See note in (1978), 4 Commonwealth Law Bulletin p. 342. See also Law Commission of India 78th Report, Congestion of Undertrial Prisoners in Jails, (1979).

[9] Canada, Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (Ottawa, 1969), pp. 101 and 288.

[10] South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), p. 61.

[11] Note: "Constitutional Limitations on the Conditions of Pre-Trial Detention", (1970), 79 Yale Law Journal 941 at p. 943.

[12] For example, The (English) Prison Rules 1964 S.I. No. 388, as amended.

[13] Id. rule 37.

[14] Id. rule 34(1).

[15] R.D. King and R. Morgan, A Taste of Prison (London, 1976).

[16] The English Prison Rules, supra footnote 12, rules 50 and 51 provide that the special privileges accorded the unconvicted prisoner may be forfeited for an offence against discipline.

[17] "Congestion of prisoners on remand in jails", (1979), 5 Commonwealth Law Bulletin 785.

[18] D. Brown, Criminal Procedure in Uganda and Kenya, (2nd ed.) (London, 1970), p. 53.

[19] For example, the Canadian Bail Reform Act, R.S.C. 1970, c.2 (2d Supp.); the English Bail Act, 1976; the Victorian Bail Act, 1977; and the Bail etc. (Scotland) Act, 1980.

[20] Bail Reform Act, R.S.C. 1970, c.2 (2d Supp.) which came into operation in 1972 and which now forms Part XIV of the Canadian Criminal Code, R.S.C. 1970, c. C-34 section 459.

[21] Sri Lanka, The Administration of Justice Law, No. 44 of 1973, sections 181(2) and 192(2).

[22] "Delays in the Administration of Justice" in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), p. 27.

[23] As reprinted, July 1974.

[24] "Delays in the Administration of Justice", supra footnote 22 at p. 28.

[25] Criminal Procedure (Scotland) Act, 1975, section 101(1).

[26] Id. section 101(3). This deadline may be waived by the judge in the event of the illness of the accused, judge or juror; the absence or illness of any necessary witness, or "any other sufficient cause" for which the prosecutor is not responsible - section 101(5).

[27] South Australia, Criminal Law and Penal Methods Reform Committee, supra footnote 10 at p. 61.

[28] Subsection 649(2.1) Canadian Criminal Code, supra footnote 20; inserted by R.S.C. 1970, c.2 (2d Supp), originally proclaimed in force January 3, 1972.

[29] New Zealand, Department of Justice, Study of Preliminary Hearing Procedure Before Committal for Trial (Wellington, 1978). This study found that in the New Zealand courts there was an 8.3 per cent acquittal rate among those detained in custody.

[30] The Law Reform Commission of Western Australia issued a Working Paper (Project No. 43) in 1977 which examined the issue of compensation for persons detained in custody who are ultimately acquitted; how other countries approach the problem and what approach should be taken in Western Australia. See note at (1977), 3 Commonwealth Law Bulletin 253.

[31] For a full discussion of the consequences of custody see S. Armstrong and E. Neumann, "Bail in New South Wales", (1976), University of New South Wales Law Journal 298 and M.L. Friedland, Detention Before Trial (Toronto, 1965).

[32] M.L. Friedland, id. at p. 89.

[33] New Zealand, Department of Justice, supra footnote 29 at p. 12.

[34] For example, M.L. Friedland, supra footnote 31; M. King, Bail or Custody (London, 1973); Home Office Research Unit, Time Spent Awaiting Trial (London, 1960), and P. Koza and A.N. Doob, "The Relationship of Pre-Trial Custody to the Outcome of the Trial", (1974-75), 17 Criminal Law Quarterly 391.

[35] Parliament of New South Wales, Report of the Bail Review Committee (1976), p. 48.

[36] T.W. Church et al., Pretrial Delay: A Review and Bibliography (Williamsburg, 1978), p. 11.

[37] Glanville Williams, "Proposals to Expedite Criminal Trials", [1959] Criminal Law Review 82 at pp. 82-85. In the Canadian case of Attorney-General for Saskatchewan v. McDougall [1972] 2 Western Weekly Reports 66 at p. 70, Batten, D.C.J. refused to allow an appeal by way of trial de novo on the grounds that the accused had had the charge hanging over his head for several months and because the memories of the witnesses had of necessity deteriorated to an appreciable extent, particularly in regard to the police witnesses who had had to deal with many other cases in the intervening period. See also F. Nwadialo, The Criminal Procedure of the Southern States of Nigeria (Benin City, 1976), p. 8.

[38] U.N.S.D.R.I., Delay in the Administration of Justice (India) (Rome, 1978), p. 1.

[39] J.L. Wilkins, The Prosecutor and the Courts (Toronto, 1979) and R.G. Hann, Project Omega: Provincial Criminal Court Administration (Edmonton) Report (Edmonton, 1977).

[40] For a graphic description of the hardships witnesses are often faced with see Bangladesh Ministry of Law and Parliamentary Affairs, The Report of the Law Committee 1976 (Dacca, 1978), pp. 8-10.

[41] For example, in England and Wales in 1977 85 percent of defendants in Magistrates' Courts pleaded guilty of all charges for which they were tried; at Crown Court the corresponding proportion was 50 percent - Great Britain Home Office, Criminal Statistics England and Wales 1977 (Cmnd. 7289) para. 4.4. An Australian survey shows similar results: guilty plea rates vary from approximately 50 per cent in the highest courts to between 60-75 per cent in the middle level courts and in excess of 80 per cent at the lowest and busiest level of the court hierarchy - P.A. Sallman, "Criminal Justice: A Systems Approach", (1978), 11 Australia and New Zealand Journal of Criminology 195 at p. 200.

[42] Rt. Hon. Lord Widgery, "The Balance of the Criminal Law Trial", [1972] New Zealand Law Journal 478 at p. 481.

[43] It is somewhat ironic that plea bargaining may be eroding the time advantage of guilty pleas as defendants hold out until the last moment before pleading guilty in the hope of getting a better "deal", and as defendants become aware of the existence of these negotiations, more defendants come to expect bargaining to take place whereas in the past a straightforward plea of guilty might have been entered - G.A. Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform", (1974), 52 Canadian Bar Review 497 at pp. 552-53.

[44] L. Friedman, "Plea Bargaining in Historical Perspective", (1979) 13 Law and Society Review 247; M.M. Feeley, "Perspectives on Plea Bargaining", (1979), 13 Law and Society Review 199 and P.F. Nardulli, "The Caseload Controversy and the Study of Criminal Courts", (1979), 70 Journal of Criminal Law and Criminology 89.

[45] A recent English study indicated that between 1965-74 when the workload of the Crown Court more than doubled, the ability of the system to cope with this increase was achieved only by an emergency court building programme and the appointment of many more judges. Thus, from 1972-75 the number of circuit judges increased by 27 per cent, Recorders by 45 per cent, courtrooms in use by 26 per cent and Crown Court sitting days by 16 per cent - J. Baldwin and M. McConville, "Conviction By Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England", (1978), 7 Anglo-American Law Review 271 at pp. 276-77. In times of increasing economic restraint it is improbable that such expansion can continue which may have an impact on the guilty plea process.

[46] M. Heumann, "A Note on Plea Bargaining and Case Pressure", (1975), 9 Law and Society Review 515 at p. 527.

[47] The Kenya Court of Criminal Appeal stressed this in Adan Inshair Hassan v. Republic (1974), 18 Journal of African Law 124. The Court went on to restate the appropriate procedure to be followed before a plea of guilty can be accepted: magistrates must explain to the accused person all the essential ingredients of the offence charged and should record what the accused person has said as nearly as possible in his own words.

[48]South Australia Criminal Law and Penal Methods Reform Committee, *supra* footnote 10 at p. 119.

[49]*Id.*

[50]United States. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C., 1967), p. 10.

[51]D.J. Newman, *Conviction: The Determination of Guilty or Innocence Without Trial* (Toronto, 1966), pp. 20-21.

[52]*Id.*

[53]J. Willis and P. Sallman, "Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities", (1977), 51 *Law Institute Journal* 498, 510 at pp. 507-508.

[54]JUSTICE Society, *Pre-Trial Criminal Procedure: Police Powers and the Prosecution Process* (London, 1979), para. 77.

[55]C. Beccaria, *supra* footnote 38 at p. 1 and L. Katz *et al.*, *supra* footnote 6 at p. 56.