

# **Pre-trial Remands in Custody**

## **THE INCREASE IN PRE-TRIAL REMANDS — A CHALLENGE TO CRIMINAL LEGAL SYSTEMS**

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### **PRISON POPULATIONS**

Time and again studies have thrown doubt on the idea that the numbers in the prisons are necessarily related to the levels of crime in a society. Where there is little crime the propensity to imprison may be relatively high and there are countries with high rates of serious crime and relatively low rates of imprisonment. Thus, the Netherlands, with no less serious problems of crime than the rest of Europe, imprisons only about 30 to 40 persons per 100,000 of its total population whereas other European States are regularly imprisoning 80, 90 and sometimes over 100 per 100,000 of their people. In Bermuda in 1984, when crime fell by about 5 per cent, the prison population went up by 30 per cent. In Canada where, in the 1980's there seems to have been a levelling out of crime - and where violent crime has been 8 per cent and 10 per cent of total crime for the past quarter of a century, the incarceration rate is around 111 per 100,000 of the population - i.e. an increase of about 10 per cent in a decade. In England and Wales between 1973 and 1983, recorded crime nearly doubled whilst the average prison population went up by only about 17 per cent. It is not easy to maintain therefore that imprisonment is a simple function of changes in crime or in population.

### **REMAND POPULATIONS**

2. Correspondingly, the information available, makes it difficult to argue that the rate of remanding persons in custody can be related to the levels of crime or to changes in the populations. The Asian and Pacific Conference of Correctional Administrators has been issuing reports for the last six years dealing inter alia with a steady increase in the numbers of remands in custody in that region of the world.

3. The confirmation that increasing remands may well be a world phenomenon has been provided by a recent meeting of Commonwealth Correctional Administrators. Nearly everywhere in the Commonwealth the numbers of persons being remanded in custody has been growing without any demonstrable relationship with either population changes or crime rates in the particular countries.

4. In England and Wales it seems that the numbers have risen largely because since 1973 the average time spent on remand has doubled - from about 23 days to 47 days. Indeed between 1976 and 1983 the main growth in the prison population in England and Wales occurred in the numbers awaiting trial which, for instance, went up from 3,200 men in 1976 to 5,800 men in

1983. In Canada, 13 per cent of all prison inmates are persons being held on remand. The federal Correctional Service holds no remandees and the increase in the numbers of remandees in the provincial institutions led to a study in 1977-1979 which showed the inmate population in Ontario's jails and detention centres to be 40 per cent to 50 per cent remandees. This led to some drastic action to get out of the institutions those who were non-dangerous and non-violent. Bail verification, bail supervision, bail hostels were introduced and legislation limited the courts discretion to withhold bail unless there was a danger of the accused absconding, interfering with witnesses or being a danger to the public. Even so, the remand population in many provinces is still between 20 per cent and 30 per cent of the total inmate population.

5. In Australia, the rate of remand varies interestingly between the several States but has been rising. In February 1978 remandees in all the penal institutions across Australia accounted for 9.8 per cent of the inmate population. By October 1984 it had risen to 13.2 per cent and on 1st September 1985 it was 14.3 per cent. Expressed as a proportion of the total populations of the States, remandees were 6.2 per 100,000 Australians in February 1978, 7.9 in October 1984 and 10.3 at 1st September 1985.

6. In New South Wales, in the same period, the percentage of remandees in the total prison population went from 11.6 to 21.8 - and in South Australia from 17.3 to 19.3. Actually, Australia offers an interesting contrast in the use of remands. New South Wales and Victoria are the most populous States and being next to each other have very similar problems of crime - in quantity and quality. Yet whereas in February 1978 the New South Wales remandees were 8.4 per 100,000 of the State's general population, Victorian remandees were only 2.8 per 100,000 of that State's general population. Then on 1st September the New South Wales remand rate was 15.1 and the Victorian rate 5.3. The difference is striking but, as shown, the rise in the use of remand was common. In fact the Victorian rate had almost doubled.

7. So far the evidence has been drawn from countries with a Western-type culture: but rising remands can be found in other cultures, and in countries with dissimilar criminal justice systems. It has been a notorious feature of South American prisons that persons awaiting trial or sentence account for as high as 80% of the total inmates. In India the problem is with 'undertrial prisoners', who since 1980 have constituted 60 per cent of the total prison population in the country. In Sri Lanka the rise in the numbers of persons remanded in custody in recent years has meant that they now account for 62.4 per cent (1st July 1985) or more of the total inmate population. Lest it be thought that this is due to the emergency conditions in that island, it should be explained that, even before the emergency, the remand rate was already over 50 per cent of total inmates. To cope with this, the prison authorities in Sri Lanka have established new open institutions for remandees! And in Malaysia the numbers of unconvicted persons held by the prisons went up from 450 in 1970 to 2,362 in 1981. So, new remand prisons (with semi-open conditions) have been built at Alor Star and Pengkalan Chepa. New Zealand experienced a rise in the proportion of its remands - from 3.4 per cent of the total prison population in 1966 to 7.5 per cent in 1973. The total annual remand population declined by 4.4 per cent between 1977 and 1980, but had risen to 9.6 per cent by 1st July 1985.

8. It appears that conditions are not dissimilar outside the Commonwealth. Thailand remandees represent about 23 per cent of the total prison population, and this has been the position for a decade or more; but whereas in 1971 there were 8,279 persons remanded in custody this had risen to 16,260 by 1980. Over the years, Japan has had a fairly constant 15 per cent of its prison inmates on remand, but this had risen to 17 per cent in 1985.

9. This is far from suggesting that the remand problems of different countries are comparable. Obviously, in a civil law system with a public prosecutor's power to hold people for questioning, being held without trial means something different, even if the great bulk of remandees are held in situations not too different from those in common law systems. Even within the common law system, the courts in one area may have more legitimate reasons to remand in custody than do the courts in a different area. Even the character of the crimes themselves may account in no small measure for the differences in the use of custody before or during trial. However, what is curious is that despite all these legal, regional and behavioural or cultural differences, there is a prevalent similarity of experience with the rise of remands in custody.

10. This applies, too, to the United States although it is not possible here to deal with the vast complications of that vast country. Yet it is by now very well known that the local jails in the US have been so overcrowded with remandees and short sentence prisoners that some persons detained in these conditions have obtained their release - and also substantial compensation - for being held unconstitutionally in 'cruel and unusual' circumstances.

11. The situation in Europe varies. In its Prison Information Bulletin for June 1985, the Council of Europe gives the rates of remand per 100,000 inhabitants of the countries and shows that this is rising in Cyprus, France, Portugal and the United Kingdom, but falling in nine other countries. In Italy, Malta, Spain and Switzerland it is referred to as 'fluctuating'. However, this is the rate of remands. When remands are shown as proportions of the total prison populations, the percentages range from 6.2 (Cyprus, Ireland and Iceland) through 50+ (France and Spain) to 64.1 (Italy). Turkey looks high with 34.9 per cent of its total inmates persons unconvicted and remanded in custody, but the Netherlands has 35.9 per cent and Malta 33 per cent. Belgium follows close with 30.6 per cent of its total inmates on remand. Therefore, whatever the most recent changes it seems not unlikely that remands have risen steadily in most of the large countries of Europe over the past decade. If so this would be in line with global trends. And even if increases in remands are not typical of some countries in Europe there are obviously others in which the very high proportions of remandees amongst total inmates cannot be a matter of indifference.

12. Of course the question of whether a person should be remanded in custody or released on bail is answered by the courts according to the circumstances of the individual case. Figures do not show the factors which had to be taken into account in each particular case. Does, therefore, the increase in the number of remands mean that there is greater likelihood of the accused persons absconding, interfering with witnesses, committing further offences or having to be held for his own safety? If so, it is odd that this should be occurring in so many countries at the same time. Is it possible that there is an increasing tendency for the courts to remand in custody accused persons or those found guilty but not yet sentenced - in order to teach them a lesson? Studies of trends in serious crime reaching the courts in the past two or three decades hardly suggest that the rise in remands is a simple function of the rise in the amount of crime. As shown above, there are indications that remands are increasing in length rather than in the number of persons, that there is a pile-up as the periods on remands are protracted - due perhaps to the larger number of persons being legally represented, to the protraction of trials or to the improved levels of public education making for a greater awareness of rights and more pleas of not-guilty. To ensure that justice is done the courts may have to sit for longer on cases that would previously have been disposed of quickly - and inevitably the period of remand is lengthened. Whilst this may be true in the industrialised countries it is a less plausible explanation in the developing areas for the increase in remands.

13. Unfortunately, there have been very few studies of the cases which are remanded in custody in the various countries. This study in Canada to which reference has already been made showed that 22.7 per cent of persons remanded were subsequently released - but that this group accounted for 45.5 per cent of the remand days stay. Moreover, though only 15.6 per cent of the remands were for over 30 days, these accounted for 62.6 per cent of the total days stay.

14. A 1982 survey of the remandees in the Australian State of Victoria revealed that of the 176 held on the day of the review, over one-third had been on remand for less than one month and nearly 20 per cent had been in custody for more than six months. The average time spent on remand was 2.5 months though one person had been on remand for 18 months. A later study of the outcomes of remand in custody orders by John Walker of the Australian Institute of Criminology in September 1985 showed that in the States of Queensland, Western Australia, South Australia and the Northern Territory there was a tendency to use remands in custody where a non-custodial sentence was appropriate on conviction.

15. Clearly the numbers held in prison on remand, at any one time, will be decided by intake multiplied by period on remand; and, though both of these need attention as the figures rise, it seems that the period spent on remand may well be more important than the intake.

#### THE CHALLENGE

16. The obvious concern for the administration of criminal justice is that the rights of individuals before conviction might be getting less than sufficient attention. If only one person is held in custody for one day longer than is necessary whilst still unconvicted, this needs serious attention. If the extended remands are a symptom of accruing delays in the criminal justice system, then the system may be in need of serious overhaul. Then, more concerned with practice than principle, there is the task imposed on prison administrators by any steady increase in remands. Already the problem of adequate segregation of the various types of inmate is serious for most prison administrators. Segregation by sex, age, health, level of violence, sexual proclivities, danger from other inmates is difficult enough in most prison administrations given the limited physical accommodation provided and the complications of dividing up a limited staff. Similar segregation has to be provided in different conditions within the remand populations. Add to this the increasing problem of providing for AIDS and its prevention and the several menus which some of the Commonwealth Prison Administrators are obliged to serve and the complexity of the burden being imposed on the administrators can well be understood. Nor should it be overlooked that the expectations of all inmates are rising so that the details of these divisions and their relative merits can become contentious and promote conflict. Whatever can be done to relieve the prison administrators of tasks which may not only be burdensome but sometimes impossible cannot be delayed if explosions in the penal institutions are to be avoided.

#### POLICY IMPLICATIONS

17. It is possible that, paradoxically, this increase in remands across the world could be related to both the level of legal or criminal justice sophistication - and to the lack of it. In most of the industrialised countries, the entrenched formalities of legal procedure tend to slow down the flow of cases through the courts. The trend in the last four decades

has been to eliminate discretion wherever possible from the criminal justice system - which means a greater dependence on the letter of the law and on its various possible interpretations. All of this protracts legal proceedings. Where it means that the longer time taken ensures that more justice will be done, there can be no argument. No one wants to risk injustice by accelerating procedure. The increased time taken is however less defensible when it means that professional offenders who have 'learned the ropes' are able to defer conviction and extend the period which they can serve as innocent remandees rather than as ordinary prisoners. Since the remand period is generally taken into account when a sentence is passed there is obvious value in prolonging the special remand conditions. Nor is the extended hearing so defensible when it is due to shortages in the police forces leading to more time being needed to prepare the cases - or due to the adjournments being inserted to give more time to overload counsel or to accommodate court vacations. Moreover, in the industrialised nations, the legal profession has grown so that a great many more technical points of procedure can be raised. This means not only greater certainty that the accused will be able to present his case properly but also the need to delay hearings for the cases to be prepared. On the prosecution side it usually calls for more care to be taken than might have been necessary in the past to ensure a conviction. On the defence side it offers opportunities to delay proceedings until every possible avenue of exculpation or mitigation has been explored.

18. Contrasting with this - but equally encouraging the use of remands in custody - is the situation in the developing countries where the paucity of legally trained personnel might make it necessary to defer cases for qualified legal review or necessary to proceed with extra caution. Sometimes great distances and the lack of quick effective means of communication make it necessary to keep offenders in custody simply to avoid them absconding.

19. It is no accident that in the Walker study, already cited from Australia, the States making the greatest use of remands were those with the highest proportions of Aborigines appearing before the courts. The likelihood of them 'going bush' was mentioned in the study as one possible reason for the increased tendency to use remands in custody in these States. Certainly, the problems of identification, of the lack of immediate family controls (when the offender is apart from his family) and the risks of interfering with witnesses can be great where administration is spread thinly over vast distances.

20. Yet, allowing for all these possible reasons for the increased popularity of remands in custody, the rights of an innocent and as yet, unconvicted offender demand that authorities look very closely at what is happening. Remand in custody was never intended to provide a means by which the court could give an accused a taste of incarceration. Remands in custody were never intended to provide the prosecution with extra time to prepare its case - or to subordinate the rights to freedom of the individual to the convenience of judges, lawyers or even witnesses. Except in cases where the offence was grave, the offender was likely to abscond or interfere with witnesses, a remand in custody was not the normal or even regular way of dealing with an alleged offender during an adjournment.

21. To emphasise this, some governments have already legislated to make bail a right and to expect written explanations of why, in given cases, bail could not be granted. To cut down on the time being taken by the courts to dispose of cases, the government of the United Kingdom has moved to test what time limits might be imposed in criminal proceedings under the Prosecution of Offences Act 1985. From 25 November 1985 in selected Magistrates' Courts and from January 1986 in selected Crown Courts, time limits have been set. In the Magistrates' Courts, the test limits set in custody cases are 56 days from first appearance to summary trial, or 70 days to proceedings for committal for trial in the Crown Court. In the Crown

Court, the test limit in custody cases is 112 days from committal to arraignment. The Home Secretary has commented that these time limits are really longer than the government might wish to impose but that during the test period it was necessary to avoid being too stringent. This is a valuable move to cut down the periods being spent on remand even if this was only one of the objectives. It might recommend itself to other governments facing the rise in remands. The building of special prisons for remandees, as in Sri Lanka and Malaysia might well find favour with other prison administrations finding it difficult to maintain a realistic distinction between the unconvicted and the convicted.

22. Arrangements for a periodical review of remands in custody is obviously necessary to avoid undue delays. Research is required to determine the rationale for decision making by the courts. It is significant that some of the alternative sentences to imprisonment, probation, community service orders, suspended sentences and the like have frequently been applied not to keep offenders out of prison but to extend the obligations of many who might previously have escaped with a fine or a bind over.

23. Could it be that with the ultimate aim of keeping offenders out of prison, the remand in custody is being used as a deterrent? If so, then it needs always to be short because it does not take long for a new remandee to adjust to the system. And when this happens, prison does not nearly so frighten as it once did.

24. Perhaps the numbers and lengths of remands in custody are indices of the efficiency of a criminal justice system. They will certainly indicate the level of toleration in a system and the capacity of a system to handle offenders without undue incarceration.

25. Finally, it needs to be mentioned that remands in custody are expensive. When they are necessary, this expense is more than justified. When they are not necessary, the taxpayer is carrying a greater burden than he should.

#### REFERENCES

This report was compiled from the following publications:

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- (3) The Prison Information Bulletin: published by the Council of Europe twice yearly.

- (4) The Reporter: Quarterly publication of the Australian Institute of Criminology, Canberra, which carries prison statistics for Australia and the rates of imprisonment supplied by the member states of the Asian and Pacific Conference of Correctional Administrators. Especially Volume 6 No. 6 December 1985.
- (5) John Walker: 'The Outcomes of Remand in Custody Orders' Australian Institute of Criminology, Canberra: September 1985.