

The overuse of pre-trial detention: causes and consequences

Martin Schönteich examines arbitrary and excessive pre-trial imprisonment

Pre-trial detainees are persons awaiting trial or the finalisation of their trial who have not been convicted of the charges against them. They are legally presumed innocent which is, of course, a key value of any criminal justice system based on the rule of law and individual liberty. International standards require that pre-trial detention be used only if there are reasonable grounds to believe that the person concerned has been involved in the commission of the alleged offence, and there is a demonstrable risk that the person concerned will abscond, interfere with the course of justice, or commit a serious offence. International standards also mandate the widest possible use of alternatives to pre-trial detention.

On an average day, one out of three prisoners, or some 3.2 million people, are in pre-trial detention worldwide. In parts of the globe, pre-trial detainees outnumber convicted prisoners. Collectively, the roughly 3.2 million detained today will spend 640 million days in pre-trial detention. Some will spend only a few days in detention, but many will languish weeks, months and even years before their trials are finalised or charges dismissed. Even among Council of Europe countries, whose criminal justice systems are relatively well resourced and efficient, the average length of pre-trial detention is almost half a year.

A surprising characteristic of many pre-trial detention populations is that they are primarily composed of persons accused of minor offences. For example, in England and Wales – a jurisdiction where pre-trial detention is used relatively

sparingly – over half of all pre-trial detainees are eventually given a non-custodial sentence because of the relatively trifling nature of the offences for which they are convicted.

Causes

The causes of the arbitrary and excessive use of pre-trial detention are many and often interrelated. Jurisdictions burdened by high levels of pre-trial detention frequently use detention in an arbitrary manner – detaining persons on whimsical grounds, and who are rarely convicted or convicted of relatively minor offences. In Bolivia or Liberia, for example, where between 80 and 90 per cent of all prisoners are pre-trial detainees, few end up in prison as convicted prisoners. Corruption, endemic to some criminal justice systems, also leads to arbitrary detention practices.

A near universal reason for the excessive use of pre-trial detention is a lack of coherence over how the presumption of innocence should be balanced against the need to protect the public. Even in places with a strong legislative and jurisprudential basis for protecting the presumption of innocence, it is more a principle than a reality. Often, there is little clarity as to what the concept means, or how it should be applied. This is aggravated by imprecise and restrictive laws in many places. Such laws are not produced in a vacuum; public pressure and populist politicians are often responsible for laws which limit the right to pre-trial release.

The vast majority of arrestees and defendants lack the education, knowledge or skills necessary to protect their right to be presumed

innocent. They typically cannot adequately mount an application for pre-trial release as they are ignorant of the (often vague) legal and factual criteria courts use in their pre-trial decision making process.

Notwithstanding that most defendants are too poor to afford a private lawyer, in most countries defendants are not provided with free legal assistance, especially at the pre-trial stage of the criminal process. In many less developed countries there are few, if any, lawyers available outside of major towns and cities, so that even defendants with some means are unable to procure private counsel. Unrepresented defendants have great difficulty preparing their criminal case. Those detained awaiting trial do not have the liberty that would enable them to trace and interview witnesses, scrutinise the evidence against them, study the relevant law, and prepare their defence (Open Society Justice Initiative, 2012).

Police and prosecutors often exert inordinate influence over judicial officers' pre-trial detention decisions. Such influence results in courts unduly erring on the side of pre-trial detention rather than release. Judicial officers who make bail decisions – usually under considerable time constraints in busy, often chaotic, courts – tend to be junior magistrates or judges. Courts typically devote little time or effort to consider the question of pre-trial release or detention. Consequently, little consideration is given to alternatives to pre-trial detention and defendants' personal circumstances, such as their character, mental state and financial situation. In many jurisdictions, once a decision is made to keep a person in pre-trial detention, there is no adequate review of that decision.

Other reasons for the excessive or arbitrary use of pre-trial detention are mundane – a lack of coordination between criminal justice agencies, or inadequate resourcing for criminal justice systems resulting in, inter alia, police agencies without the human and technical means to investigate crimes expeditiously.

Consequences

A decision to detain a person before being found guilty of a crime is a

particularly draconian ruling for a court to make. Pre-trial detainees may lose their jobs and homes; contract and spread disease; be asked to pay bribes to secure release or better conditions of detention; and suffer physical and psychological damage that lasts long after their detention ends. Pre-trial detainees are often held in police lockups for extended periods of time – facilities not designed for long-term occupancy and where conditions can be particularly crowded. Prison administrators regard their main mandate as the custody and rehabilitation of convicted prisoners and see pre-trial detainees as a group whose imprisonment is temporary and somewhat incidental to their work. As a result, pre-trial detainees are rarely provided with educational or vocational opportunities.

There is also an instrumental reason for the particularly bad treatment and poor conditions afforded pre-trial detainees. In numerous jurisdictions, police and prosecutors seek to use the pre-trial detention period as an opportunity to obtain confessions that will lead to a conviction. Many authorities condone deplorable pre-trial detention conditions precisely because these induce defendants to incriminate themselves and be convicted – to either receive a non-custodial sentence or be sent to a prison for convicted prisoners where conditions are better. In some places, pre-trial detainees are routinely assaulted and tortured to obtain confessions (Open Society Justice Initiative, 2011b).

Enforced idleness, the fact that pre-trial detainees are generally unable to engage in educational or vocational activities, the heightened risk of torture and abuse, and uncertainty about the outcome of their impending trials, all contribute to a high incidence of mental health problems among pre-trial detainees. According to the World Health Organization (WHO), suicide rates among pre-trial detainees are some three times higher than those of convicted prisoners (WHO, 2000).

Prisons serve as vectors in the spread of communicable diseases

and aggravate existing health problems, producing broader public health consequences as released prisoners spread disease to the general population. For example, the average tuberculosis incidence in prisons worldwide is estimated at more than twenty times higher than in the general population (Baussano et al., 2010). There is often a reluctance to start treatment for infectious diseases that requires a sustained period of therapy. Officials are often less concerned about ensuring continuity of care and support for people in pre-trial detention, whose custody is seen as temporary.

Corruption flourishes in the pre-trial phase because it receives less scrutiny and is subject to more discretion than subsequent stages of the justice process, and often involves the lower paid and most junior actors in the system. Unhindered by scrutiny or accountability, police, prosecutors, and judges are able to arrest, detain, and release individuals based on their ability to pay bribes. The justice system's credibility suffers when the innocent are arrested and detained because they cannot pay a bribe, and the guilty go free because they can. Moreover, by corrupting the administration of justice and undermining the rule of law, the irrational and excessive use of pre-trial detention weakens governance overall.

Pre-trial detention also critically undermines socio-economic development – and is especially harmful to the poor (Open Society Justice Initiative, 2011c). Pre-trial detention disproportionately affects individuals and families living in poverty: they are more likely to come into conflict with the criminal justice system, more likely to be detained awaiting trial, and less able to make bail or pay bribes for their release. For individuals, the excessive use of pre-trial detention means lost income and reduced employment opportunities; for their families, it means economic hardship and reduced educational outcomes; and for the state, it means increased costs, reduced revenue, and fewer

resources for social service programmes. When an income earner is detained, family members must adjust not only to the loss of that income but also to costs of supporting that family member in detention, including travel to visit the detainee, food and personal items for the detainee, legal fees, and, often, low-level bribes to guards.

One way of constructing interventions to improve a country's pre-trial detention regime, that are both politically acceptable and have the potential to encourage change, is to identify virtues in current or past practices. In most countries there are practices worth replicating. Even in systems with horrendous prison conditions, excessive detention, and lengthy processes, some cases are completed in a timely manner and some accused persons are treated fairly. Within the existing repertoire and capacity of states to administer criminal law, in other words, there is the potential for good justice. Identifying those practices as the norm, and converting them into a standard that the system can, at least in some cases achieve, will set realistic expectations about change that will have domestic champions and support. ■

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References

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