THE RIGHT TO SPEEDY TRIAL: A COMPARATIVE ANALYSIS
OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN JAMAICA,
ENGLAND AND THE UNITED STATES OF AMERICA.

BY

DIANA THERESA HARRISON

OF

UNIVERSITY COLLEGE LONDON

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DEGREE OF DOCTOR OF PHILOSOPHY

Dated: May, 1993
IN MEMORY OF MY SISTER,

SONIA MAY LEWIS

MY GRANDMOTHER,

MADELINE THERESA HARRISON

AND MY GRANDFATHER,

ANTELMO A. HARRISON
ABSTRACT

The criminal justice system in Jamaica has sadly lagged in terms of reform measures. There is an urgent need to assess and evaluate the present administration of justice and explore new reforms so as to bring the administration of the criminal justice system and legal rules and procedure in line with modern methods.

The efficiency of our criminal justice system may be assessed and evaluated in terms of a principle dating back to Magna Carta: "To no one will we sell, to no one will we delay rights or justice." This principle, now commonly referred to as the "right to speedy trial" or "trial within a reasonable time", is affirmed by the European Convention of Human Rights in articles 5(3) and 6(1). It is also acknowledged in the Jamaica Constitution, section 20 (1) and (11). Indeed, it is a major provision in most legal systems of the western world.

The focus of this thesis is, therefore, on this principle as it is applied in the common law legal system. Particular emphasis is on the Jamaica criminal justice system, especially at the superior court level where inordinate delays and court congestion are major problems facing the criminal courts. In fact, the Gun Court Act of 1974 was passed in Jamaica as a method of diverting firearm related offences from the mainstream of the criminal justice system so as to effectuate speedy trials of such offences. The Act has, however, failed to achieve this purpose. This study will be the first empirical investigation of the scale and scope of the problem and of the factors causing the congestion of our criminal justice system in Jamaica. The questionnaire was conducted in 1989 when the bulk of this research was done. There has been no significant procedural or structural changes in the criminal justice system since that date.
This study will be conducted in a comparative framework so as to draw upon the speedy trial reforms of England and the United States of America in particular. The reform approaches which will be examined include pre-trial procedures, such as preliminary inquiry, plea bargaining and disclosure and the management and organization of the court, personnel and the processing of criminal cases. This will be done with a view to ascertaining in what respect, if any, reforms in these more advanced jurisdictions can be successfully implemented in Jamaica, taking into consideration the country's limited resources.
ACKNOWLEDGEMENT

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abstract</td>
<td>iii-iv</td>
</tr>
<tr>
<td>Acknowledgement</td>
<td>v</td>
</tr>
<tr>
<td>Table of contents</td>
<td>vi-vii</td>
</tr>
<tr>
<td>List of Tables</td>
<td>viii</td>
</tr>
<tr>
<td>Selected Table of Abbreviation</td>
<td>ix-xi</td>
</tr>
<tr>
<td>Selected table of Cases</td>
<td>xii-xiv</td>
</tr>
<tr>
<td><strong>Chapter</strong></td>
<td></td>
</tr>
<tr>
<td>I Introduction: The Right to Speedy Trial</td>
<td>1-41</td>
</tr>
<tr>
<td>and the Problems of Delay</td>
<td></td>
</tr>
<tr>
<td>II The Jamaica Criminal Justice System:</td>
<td>42-120</td>
</tr>
<tr>
<td>Problems of Delay</td>
<td></td>
</tr>
<tr>
<td>III The English Criminal Justice System:</td>
<td>121-203</td>
</tr>
<tr>
<td>Reform Measures</td>
<td></td>
</tr>
<tr>
<td>IV The United States of America Criminal</td>
<td>204-302</td>
</tr>
<tr>
<td>Justice System: Reform Measures</td>
<td></td>
</tr>
<tr>
<td>V Conclusions and Recommendations for Speedy</td>
<td>303-355</td>
</tr>
<tr>
<td>Trial Reforms In Jamaica</td>
<td></td>
</tr>
<tr>
<td>Appendices</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>A: Hierarchy of Courts: Jamaica</td>
<td>120</td>
</tr>
<tr>
<td>B: A Simple Representation Of The Court System: England</td>
<td>201</td>
</tr>
<tr>
<td>C: Hierarchy of the Criminal Courts: England</td>
<td>202</td>
</tr>
<tr>
<td>D: A Simple Representation of the Criminal Court System: United States of America</td>
<td>302</td>
</tr>
<tr>
<td>E: A Proposed Guide To Police Statement Taking</td>
<td>348-350</td>
</tr>
<tr>
<td>F: Extracts From Memorandum issued by the Director of Public Prosecutions (Ian X Forte, Q.C now Appellate Judge) July 29, 1982</td>
<td>351-352</td>
</tr>
<tr>
<td>G: Proposed Disclosure Rules</td>
<td>353-355</td>
</tr>
<tr>
<td>A: A Selected Bibliography</td>
<td>356-364</td>
</tr>
</tbody>
</table>
### TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Disposition of Gun Court Cases: Jamaica</td>
<td>62</td>
</tr>
<tr>
<td>II.</td>
<td>Disposition of Court of Appeal Cases: Jamaica</td>
<td>64</td>
</tr>
<tr>
<td>III.</td>
<td>List of Cases Disposed of for the Island of Jamaica 1963/73</td>
<td>97</td>
</tr>
<tr>
<td>IV.</td>
<td>List of Cases Disposed of for the Island of Jamaica 1974/91</td>
<td>98</td>
</tr>
<tr>
<td>V.</td>
<td>Clarendon: Waiting Times</td>
<td>99</td>
</tr>
<tr>
<td>VI.</td>
<td>Kingston and St. Andrew: Waiting Times</td>
<td>100</td>
</tr>
<tr>
<td>VII.</td>
<td>St. Catherine: Waiting Times</td>
<td>101</td>
</tr>
<tr>
<td>VIII.</td>
<td>Crown Court: Appeals</td>
<td>124</td>
</tr>
<tr>
<td>IX.</td>
<td>Time Limits: Levels of Compliance during the phase-in period (U.S.A.)</td>
<td>234</td>
</tr>
<tr>
<td>X.</td>
<td>Guilty Pleas for the Parish of Kingston and St. Andrew</td>
<td>333</td>
</tr>
<tr>
<td>XI.</td>
<td>Home Circuit Court: Acquittal Rate</td>
<td>335</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Name</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
<td></td>
</tr>
<tr>
<td>A.B.A.J.</td>
<td>American Bar Asocial Journal</td>
<td></td>
</tr>
<tr>
<td>ALL E.R.</td>
<td>ALL England Report</td>
<td></td>
</tr>
<tr>
<td>Anglo - Am. L. R.</td>
<td>Anglo - American Law Review</td>
<td></td>
</tr>
<tr>
<td>A.L.J.</td>
<td>Australian Law Journal</td>
<td></td>
</tr>
<tr>
<td>Brit. Y.B. Int. Law</td>
<td>British Year Book of International Law</td>
<td></td>
</tr>
<tr>
<td>C.C.C.</td>
<td>Canadian Criminal Cases</td>
<td></td>
</tr>
<tr>
<td>C. L.J.</td>
<td>Cambridge Law Journal</td>
<td></td>
</tr>
<tr>
<td>Calif. L. Rev.</td>
<td>California Law Review</td>
<td></td>
</tr>
<tr>
<td>Car.</td>
<td>Charles</td>
<td></td>
</tr>
<tr>
<td>Chic. B. Rec.</td>
<td>Chicago Bar Record</td>
<td></td>
</tr>
<tr>
<td>Cmnd.</td>
<td>Command Paper</td>
<td></td>
</tr>
<tr>
<td>Colum. L. Rev.</td>
<td>Columbia Law Review</td>
<td></td>
</tr>
<tr>
<td>Cornell L. Rev.</td>
<td>Cornell Law Review</td>
<td></td>
</tr>
<tr>
<td>Cowp.</td>
<td>Cowper’s King’s Bench</td>
<td></td>
</tr>
<tr>
<td>Cr. App. R.</td>
<td>Criminal App. Report</td>
<td></td>
</tr>
<tr>
<td>Crim. L. R.</td>
<td>Criminal Law Review</td>
<td></td>
</tr>
<tr>
<td>Drake L. Rev.</td>
<td>Drake Law Review</td>
<td></td>
</tr>
<tr>
<td>E. H. R. R.</td>
<td>European Human Rights Report</td>
<td></td>
</tr>
<tr>
<td>Eur. Comm. on Human Rights</td>
<td>European Commission on Human Rights</td>
<td></td>
</tr>
<tr>
<td>Abbr.</td>
<td>Full Name</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>F. 2d</td>
<td>Federal Reporter, second series</td>
<td></td>
</tr>
<tr>
<td>H. M. S. O.</td>
<td>Her Majesty’s Stationary Office</td>
<td></td>
</tr>
<tr>
<td>Harv. L. Rev.</td>
<td>Harvard Law Review</td>
<td></td>
</tr>
<tr>
<td>Hast. L. J.</td>
<td>Hastings Law Journal</td>
<td></td>
</tr>
<tr>
<td>J. Crim. L. and Criminology</td>
<td>Journal of Criminal Law and Criminology</td>
<td></td>
</tr>
<tr>
<td>J. Legal Studies</td>
<td>Journal of Legal Studies</td>
<td></td>
</tr>
<tr>
<td>Judge Advo. J.</td>
<td>The Judge Advocate Journal</td>
<td></td>
</tr>
<tr>
<td>Judge’s J.</td>
<td>Judge’s Journal</td>
<td></td>
</tr>
<tr>
<td>Justice System J.</td>
<td>Justice System Journal</td>
<td></td>
</tr>
<tr>
<td>L. ed.</td>
<td>Lawyer’s Edition, Supreme Court Report</td>
<td></td>
</tr>
<tr>
<td>Leg. Rep.</td>
<td>Legal Reporter</td>
<td></td>
</tr>
<tr>
<td>M</td>
<td>Miscellaneous</td>
<td></td>
</tr>
<tr>
<td>M &amp; W</td>
<td>Meeson and Welsby Report</td>
<td></td>
</tr>
<tr>
<td>Mercer L. Rev.</td>
<td>Mercer Law Review</td>
<td></td>
</tr>
<tr>
<td>N. E. 2d</td>
<td>North Eastern Reporter, second series</td>
<td></td>
</tr>
<tr>
<td>N. J.</td>
<td>New Jersey Supreme Court Report</td>
<td></td>
</tr>
<tr>
<td>N.L.J.</td>
<td>New Law Journal</td>
<td></td>
</tr>
<tr>
<td>Ont. Sup. Ct.</td>
<td>Ontario Supreme Court</td>
<td></td>
</tr>
</tbody>
</table>

x
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q.B.</td>
<td>Queen's Bench Reports</td>
</tr>
<tr>
<td>S.I.</td>
<td>Statutory Instrument</td>
</tr>
<tr>
<td>San Diego L. Rev.</td>
<td>San Diego Law Review</td>
</tr>
<tr>
<td>So. Calif. L. Rev.</td>
<td>Southern California Law Review</td>
</tr>
<tr>
<td>U.C.L.R.</td>
<td>University of Chicago Law Review</td>
</tr>
<tr>
<td>U. Tor. Fac. L.R</td>
<td>University of Toronto Faculty of Law Review</td>
</tr>
<tr>
<td>Vict.</td>
<td>Victoria</td>
</tr>
<tr>
<td>W.I.R.</td>
<td>West Indian Reports</td>
</tr>
<tr>
<td>W.L.R.</td>
<td>Weekly Law Reports</td>
</tr>
<tr>
<td>Case</td>
<td>Pages</td>
</tr>
<tr>
<td>-----------------------------------------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>Asher Sivan et al</td>
<td>336</td>
</tr>
<tr>
<td>Attorney General v. Briant</td>
<td>160</td>
</tr>
<tr>
<td>Barker v Wingo</td>
<td>17, 27, 29, 31, 211, 212, 213, 214, 217</td>
</tr>
<tr>
<td>Barton v The Queen</td>
<td>82</td>
</tr>
<tr>
<td>Bell v Director of Public Prosecutions (Jamaica) and Another</td>
<td>14, 31, 66, 68</td>
</tr>
<tr>
<td>Bissoon v Mungroo v. The Queen</td>
<td>26</td>
</tr>
<tr>
<td>Brady v Maryland</td>
<td>261, 269</td>
</tr>
<tr>
<td>Branch v United States</td>
<td>214</td>
</tr>
<tr>
<td>Campbell v Hall</td>
<td>12</td>
</tr>
<tr>
<td>Connelly v Director of Public Prosecutions</td>
<td>14, 159</td>
</tr>
<tr>
<td>D.P.P. (Jamaica) v. Peurtado</td>
<td>30</td>
</tr>
<tr>
<td>Dallison v Caffery</td>
<td>158</td>
</tr>
<tr>
<td>Dillingham v United States</td>
<td>26</td>
</tr>
<tr>
<td>Dean Robert Warth</td>
<td>334</td>
</tr>
<tr>
<td>Falkowski v Mayo</td>
<td>11</td>
</tr>
<tr>
<td>Grant v D.P.P.</td>
<td>26</td>
</tr>
<tr>
<td>Howell v Barker</td>
<td>211</td>
</tr>
<tr>
<td>Jackson v Indiana</td>
<td>220</td>
</tr>
<tr>
<td>Johnson v Beto</td>
<td>243</td>
</tr>
<tr>
<td>Koenig v Federal Republic of Germany</td>
<td>32</td>
</tr>
<tr>
<td>Klopfer v North Carolina</td>
<td>11, 223, 228</td>
</tr>
</tbody>
</table>

xii
Linton Berry v R  
Marks v Beyfus  
Mohammed Bāksh v R  
Polland v United States  
People v Holiday  
R v Bernard Harry Simmonds and others  
R v Boron  
R v Brixton Prison Governor Ex Parte  
R v Cain  
R v Central Criminal Court, Ex Parte  
R v Clarke  
R v Derby Crown Court ex P. Brooks  
R v Grays Justice, Ex parte Graham  
R v Howitt  
R v Hutchinson  
R v Lawson and Another  
R v Leroy Burke  
R v Lalonda  
R v Roberts  
R v Sullivan  
R v Tonner and R v Evans  

Pages

159, 167, 315
160
159
24
257
155
26
143
171
14, 15
159, 320
312
14
180
152
159, 160, 315
317, 318
162
79
163
153

xiii
<table>
<thead>
<tr>
<th>Case</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Turner</td>
<td>169, 170, 172, 334</td>
</tr>
<tr>
<td>Re Guanawardena, Harbutt and Banks</td>
<td>156</td>
</tr>
<tr>
<td>Re Roberts</td>
<td>143</td>
</tr>
<tr>
<td>Robinson v R</td>
<td>93</td>
</tr>
<tr>
<td>Roviaro v United States</td>
<td>266</td>
</tr>
<tr>
<td>Sandiford v DPP</td>
<td>29</td>
</tr>
<tr>
<td>Santobello v New York</td>
<td>244, 249, 252, 244, 257</td>
</tr>
<tr>
<td>Shepherd v United States</td>
<td>16</td>
</tr>
<tr>
<td>United States v Aqurs</td>
<td>161, 269</td>
</tr>
<tr>
<td>U.S. v Donald Caparella</td>
<td>220</td>
</tr>
<tr>
<td>U.S. v Geelan</td>
<td>229, 321</td>
</tr>
<tr>
<td>United States v Lavasco</td>
<td>27, 217</td>
</tr>
<tr>
<td>United States v Loud Hawks et al</td>
<td>209, 210, 213</td>
</tr>
<tr>
<td>United States v MacDonald</td>
<td>210</td>
</tr>
<tr>
<td>United States v Marion</td>
<td>208, 209, 210</td>
</tr>
<tr>
<td>United States v. Taylor</td>
<td>220</td>
</tr>
<tr>
<td>Wemhoff v The Federal Republic of Germany</td>
<td>32</td>
</tr>
<tr>
<td>Williams v Florida</td>
<td>267</td>
</tr>
</tbody>
</table>
CHAPTER I

THE RIGHT TO SPEEDY TRIAL AND THE PROBLEM OF DELAY

INTRODUCTION

Implicit in the right to a "fair trial" or to "due process of law" is the right to a speedy trial. It is a right that is also expressly enshrined in both English common law and statute law.

The right to speedy trial first found formal expression in chapter 29 of Magna Carta in the statement:

"Nulli vendemus, nulli negabimus aut differemus retum vel justiciam."

"To no one will we sell, to no one will we delay rights or justice."\(^1\)

According to academic writers, Magna Carta was the first constitutional document which registered the liberties of citizens by securing the supremacy of the law because it registered the objection of the barons, in particular, and other citizens against the arbitrary acts of King John.\(^2\) Max Radin, who like Lord Coke attributed "sacrosanctity" to Magna Carta, noted: "The Magna Carta was fundamental and went into the form of a social order." He further adopted the views of Henry III in the Inspeximus:

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\(^1\) C. 29 of Magna Carta is C. 40 of the Charter of 1215. The Charter of 1225 is translated and quoted in Coke, the second part of the Institutes of the Laws of England, p.45. The right to speedy trial, though ill-defined then, can be traced earlier to the Assize of Clarendon passed by Henry II in 1166. In fact, theoretical recognition of the right to speedy trial found expression in the Commission of Jail Delivery issued to the Justices of Assize.

"Neither we nor our heirs will determine anything by which the liberties contained in this chapter violated or weakened. And if anything is determined by anyone contrary to this, it shall be void and be held as null."

Magna Carta was, therefore, the first formal attempt to balance the rights of citizens against the interests of the state. The true significance of these rights then can only be appreciated when feudal social structure is considered. During the early middle ages redress had to be purchased from the King. It was the entitlement of the King to delay the hearing of a case or to withhold his writ until he had been paid for this privilege. Following the passage of Magna Carta in 1215, the view that the King's justice was a privilege for only a few was rejected and was seen rather as a right which the citizens claimed from King John. Indeed, the intention of chapter 29 was to prevent long imprisonment of an accused person without a determination of guilt or innocence. Thus, Lord Coke wrote:

"For his committing to prison is only to this end, that he may be forthcoming to be duly tried, according to the law and custom of the realm."

In the same manner that Magna Carta prevented prolonged imprisonment of an accused person, the prerogative Writ of Habeas Corpus protected an accused person from oppressive pre-trial incarceration. The Writ of Habeas Corpus could compel the release of one held too long without being arraigned. But, while both the Writ of Habeas Corpus and Magna Carta accomplished the same result, the Writ of Habeas Corpus could best be described as a "remedy" and not a "right".

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4 The Institutes, Part 11, vol. 1, 1797, p. 43.
The right to a speedy trial is linked to Magna Carta of 1215 and was thus part of the positive law. Since this notion of positive law was derived from natural law predated Magna Carta, it may properly be seen as the philosophical antecedent to those rights enshrined in Magna Carta. The right to speedy trial may be regarded as a fundamental human right based ultimately on conceptions of natural law.

Natural law philosophers couched legal theory in terms of "God", "Nature", "Intuition", or "Reason". Cicero, 106-43 B.C, one of the foremost exponent of natural law wrote:

"True Law is right reason in agreement with nature; it is a universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong doing by its commands, and averts from wrong doing by its prohibitions... We cannot be freed from its obligations by Senate or people, and we need not look outside ourselves for expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal or unchangeable law will be valid for all nations and for all times... God... is the author of this law, its promulgator, and its enforcing judge".5

The idea of justice underpins natural law philosophy. Thus Alf Ross observed:

"In the philosophy of natural law the idea of justice has always occupied a central place. Natural law insists that in our conscience lives a simple and evident idea, the idea of justice which is the highest principle of God as opposed to morality. Justice......is reflected in all positive laws.... As a principle of law, justice delimits and harmonises the conflicting desires, claims,

5 Cicero, De Re Publica, Book III, XXII, p.33. See also Introduction to Jurisprudence with selected text, Lloyd, Dennis, 2nd Ed., Lond., 1965, pp.70-71.
interests in the social life of people."\(^6\)

As justice prolonged is justice denied, inordinate delay cannot be a social good. The right to speedy trial would remove the harm that otherwise would be done by a delayed trial. Thus, society cannot but benefit from this right.

John Locke, an English philosopher of the enlightenment was also one of the leading exponents of the theory of natural rights, the idea that all men possess certain rights "by nature", irrespective of particular social, legal or political institutions and that these can be demonstrated by "reason". This theory became a powerful intellectual force since the seventeenth century. Locke describes the "state of nature" as:

"...a state of equality wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank promiscuously born to all the same faculties, should also be equal one amongst the other without subordination or subjugation.... The Law of Nature teaches all mankind who will but consult it, that being equal and independent, no one ought to harm another in his life, health, liberty and possessions."\(^7\)

\(^6\) Ross, Alf, On Law and Justice, 1957, p. 268. See also James W. Nickal, making Sense of Human Rights, 1987,p.268: "The test of a human right 'is' that it protects something of paramount importance".

\(^7\) Locke, John (1632-1704), Second Treatise of Civil Government, Chap. 11, pp. 118-119.
For Locke, the state of nature was already a social state governed by the law of nature from which natural rights derive. Locke used this Theory to justify the English Revolution of 1688.

In his comprehensive review of the subject of natural law d'Entreves had this to say:

"The modern theory of natural law was not, properly speaking, a theory of law at all. It was a theory of rights...... On the eve of the American and French Revolutions the theory of natural law had been turned into a theory of natural rights... it was the vindication of the natural rights of man which gave modern natural law its tremendous power and vigor."\(^8\)

The notion of natural law was transmogrified into a revolutionary "theory of rights". This was indeed the result of the marriage between liberalism and natural law from the seventeenth century onwards. It was the rise of liberalism that brought about the change. Both streams of idea converged and cross-fertilized each other. S.I. Benn and R. S. Peters, pointed to this:

"The idea that every man had his appointed status and function in a pre-established order was breaking down in the face of an advancing individualism expressing itself theologically in Protestantism, economically in Mercantile Capitalism, and politically and philosophically in the theory of natural rights and the social contract. The new theory was intended not as justification but as a criticism of the existing order; its tone was radical, and in its ultimate employment it was revolutionary".\(^9\)


The authors continued with this apt summation of the marriage.

"The theory of natural rights was a special theory of moral rights, conditioned by the peculiar features of an age preoccupied with the mathematical sciences, and anxious to assert the value of individual enterprise, opinion, and belief against traditional political and ecclesiastical authority. Associated with some forms of protestant theology, it stressed the autonomy of the individual conscience; springing from a nascent capitalism, it defended individual property against authoritarian interference; and as the ideology of radical and revolutionary movements, it insisted on free speech and representative institutions".\textsuperscript{10}

The "natural rights" philosophy required that governments, as well as private persons, should respect a proper sphere of personal autonomy. As John Stuart Mill's celebrated Essay on Liberty stated:

"The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control... The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign".\textsuperscript{11}

The rights enshrined in Magna Carta, therefore, received theoretical support in the philosophy of liberalism or libertarianism. The libertarian ideology represents a total commitment to the notion of individual rights.

\textsuperscript{10} Ibid, p. 99.

At the ideological level, Liberalism or Libertarianism hold that "all men have a certain set of rights which are indefensible, cannot be given up and may not be taken away in the interest of the collective." These rights go with him whenever he goes because they are "inalienable", imprescriptible" and "indefeasible".

The libertarian stresses the need for a written constitution and a bill of rights so that the rights of an individual will not be infringed. Therefore, notions of due process, the right to speedy trial and autonomy, reflect libertarian values of freedom from detention and fair treatment of officials. The libertarian solutions to excessive delays might include, in addition to dismissal of charges, an award of cost plus compensation for distress, detention and loss of income. The award of cost would be a kind of civil remedy to guarantee as far as possible the welfare of the individual.

The theory of natural rights has had a profound effect on legal theory and practice. The American Declaration of Independence (1776) reinforced the notion of the self-evident and natural rights of man:

"...we hold these truths to be self-evident, that all men are created equal, that they are endowed by the creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

The rights of life, liberty and property claimed by Locke, or to "the pursuit of happiness", claimed by the American Declaration of Independence were intended as protests against imprisonment at executive discretion, taxation without normal

12 Robertson, D. A., Dictionary of Modern Politics, 1985, p. 188.
legislative authorisation, interference with trade, and the quartering of troops. The bulk of the Declaration was taken up with enunciating the particular grievances of the American colonists.

The theory of natural rights found its way into the first ten amendments of the American Constitution providing criteria by which the Supreme Court could test the legal validity of statutes and executive actions. The fifth amendment reads: "no persons....shall be deprived of life, liberty, or property without due process of law."

This radical theory of natural law was also enshrined in the Declarations Of The Rights Of Man, 1789, which captured the spirit of the French Revolution. Its preamble stated:

"The representatives of the French people have resolved to lay down, in a solemn declaration, the natural inalienable and sacred rights of man, in order that this declaration being always before all the members of the social body, should constantly remind them of their rights and duties..."

The Preamble to the Charter of the United Nations reaffirms "faith in fundamental human rights.....and.....in the dignity and worth of the human person." Article 55 of its Charter declares:

"The U.N shall promote.....Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

In 1948, after long discussions in the Human Rights Commission of the United Nations, the General Assembly adopted, by forty-eight votes to nil, the Universal Declaration of Human Rights. The Preamble expressed the hope for:
"A common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance both among peoples of member states themselves and among the peoples under their jurisdiction."

In 1951, a similar set of human rights were incorporated into the European Convention of Human Rights under the auspices of the Council, comprising seventeen West European States. The purpose was to define more clearly the obligations of members concerning human rights so as to prevent a recurrence of conditions which Europe had experienced. It was the hope that the convention will serve as an alarm that will bring violations of human rights to the attention of the international community in time for it to take action to suppress them.

Britain signed this Convention on behalf of her then colonies, including Jamaica which was obliged to adopt this Convention upon attaining its independence in 1962. The European Convention for the Protection of Human Rights and Fundamental Freedoms imposes a legal duty on member states to ensure that their laws accord with this "collective guarantee" and to further ensure that there is a machinery for enforcing compliance. D. J. Harris had this to say about the practical value of embodying these rights in domestic constitutions:

"The practical value of the guarantee is that it set a limit below which contracting parties could not allow their legal systems to fall."

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THE RECEPTION AND AFFIRMATION OF THE RIGHT TO SPEEDY TRIAL IN THE UNITED STATES OF AMERICA

The right to speedy trial is deeply embedded in Anglo American criminal justice. The first colonial Bill of Rights which was drafted in Virginia embraced chapter 29 of Magna Carta. This Bill of Rights, the Virginia Declaration of Rights, was approved by the House of Delegates on June 12, 1776, Article VIII reads:

"that in all capital or criminal prosecution, a man hath a right to demand the cause and nature of his accusation....and to a Speedy Trial by an impartial jury of twelve men of vintage."\(^{14}\)

When the thirteen American Colonies achieved their independence, most of their independence constitutions embraced a Bill of Rights provision, following the example of the Virginia Declaration of Rights.\(^{15}\)

The right to speedy trial has been formalised in the Constitution of the United States of America and its statutory


According to Sir Ivor Jennings, the first Bill of Rights was not drafted in France but in Virginia. He noted: "The relevance of the Virginia Charter derives from its provision that the Colonists in this domain of the crown were to be regarded as Englishmen who shall have and enjoy all liberties, franchises and immunities, within any of our other dominions, to all intent and purposes, as if they had been abiding and born, within this of our realm of England, or any of our said dominions."

\(^{15}\) The Declaration of Independence of the 13 colonies is the first national independence document in world history adopted by the Second Continental Congress on July 4, 1776, the Declaration proclaimed the severing of the colonies from Great Britain.
provisions. The Sixth Amendment to the Constitution affirms and guarantees the right to Speedy Trial in federal prosecutions. The Sixth Amendment, speaks in these terms:

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation. To be confronted with the witnesses against him; to have compulsory process."

Under Federal Law, the Speedy Trial Guarantee does not apply to criminal prosecution under state law in state courts. The right is guaranteed by state constitutional or statutory provision. In fact, the right is embraced in the Constitution of virtually all of the states of the United States of America. However, in a 1967 decision Klopfer v North Carolina, the Supreme Court held that the right is applicable in state courts through the Fourteen Amendment of the Constitution. Indeed, this right finds more compelling expression in the Federal Speedy Trial Act.

**RECEPTION OF SPEEDY TRIAL IN JAMAICA**

The right to Speedy Trial in Jamaica is deeply rooted in the

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16 Falkowski v Mayo 173 F. 2d. 742.

17 Article 1, s. 10 of the Iowa Constitution States: "In all criminal prosecutions and cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial." See Anderson, Allen Arthur, "Justice Delayed - Justice Denied? - The Right to Speedy Trial in Iowa", vol. 26, Drake L. Rev., 159 (1976-77).


justice system, having been received in this country as part of its common law heritage from the United Kingdom.

One Governor of Jamaica, Sir Thomas Modyford, in answer to the enquiry of His Majesty’s Commissioners as to what laws were in force in Jamaica, stated:

"Right reason, which is the Common Law of England, together with the Magna Carta and the ancient statutes of England so far as practicable."\(^{20}\)

Prior to 1962, the Speedy Trial Guarantee applied through application of English Common Law. Jamaica, having been treated as a "settled colony" English Law became the basic law.\(^{21}\)

In fact, the notion of natural rights, fundamental rights and natural justice have become entrenched in the positive laws of the Jamaican written Constitution which is the Supreme Law. Because they are so entrenched in the Constitution, they become almost absolute in their claim. They do not, therefore, need any further moral theory to justify them: they have become legal rights. Their recognition as such means that they can rightly be impaired only for special reasons and the onus of proof rests heavily on whomsoever seeks to set them aside.

However, the right to speedy trial in the context of utilitarianism, as a moral theory, is an objective social

\(^{20}\) Calendar of State Papers, Colonial 704, America and West Indies (1669-1674).

\(^{21}\) Campbell v Hall 1 cowp. 204, Per Lord Mansfield: "In settled colonies, all English Laws applicable and necessary to its state and condition are immediately in force."
good. It would lead to the greatest satisfaction and welfare of everyone. The utilitarian would, therefore, regard speedy trial as a desirable factor in achieving justice, as it would increase the possibility of a conviction for the guilty and acquittal for the innocent.

Section 20 (1) of the Jamaica Constitution affirms the right to Speedy Trial or trial "within a reasonable time". The section reads:

"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." 22

Section 25 (1) of the Constitution provides for the protection of all these fundamental rights by providing that:

"If any person alleges that any of the provisions of Sections 14-24 (inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him... That person may apply to the Supreme Court for redress."

Commenting on this type of protection Benn and Peters remarked:

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22 Chapter 3, S.I. 1962, No. 1550 - Second Schedule. See also, Jamaica Gazette Supplement, August 11, 1962, No. 76.
"when the law of the Constitution empowers a court to review legislation in terms of a very general statement of rights, it is, in fact, endowing it with the sort of discretion usually reserved in democratic states for elected and responsible assemblies."

The Constitution, like Magna Carta, does not guarantee a remedy for denial of the right to speedy trial. However, the court will dismiss a charge for excessive delays or denial of the right to trial within a reasonable time. Additionally, the inherent discretionary or supervisory power of the court to control its own process can be invoked to stay criminal proceedings. The court would make an order permanently staying any proceeding against an accused person where, for instance, there is an unexplained or inordinate delay in bringing an accused person to trial.

Possible misconduct or bad faith by the crown might trigger the supervisory power of the court. This is so where the crown for deliberate or improper motives prevent an accused from being brought to trial. Negligence and lack of diligence on the part of the prosecution also falls within the ambit of this conduct. An application to stay on the basis that the proceedings are an abuse of process is based on the

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23 Benn, S. I. and Peters, R. S., Supra note 9, page 103.

24 Bell v Director of Public Prosecution of Jamaica and Another [1985] 2 ALL E.R. 585. This case dealt with the legal redress available to an accused who suffers delays, and what kind of delay qualifies for such redress.


principle of fairness and justice.\textsuperscript{27}

Although references are made to individual remedies, this thesis is not discussing the right of an individual to redress. It is addressing institutional responses to the problems of excessive delays.

**PRESENT ISSUES: THE THESIS PROBLEM**

The court system is a vital functional socio-legal institution and the right to Speedy Trial or trial within a reasonable time is a highly valued socio-legal goal.

What is the meaning of this constitutional guarantee of speedy trial? It is anything more than a cliche? Has this legal ideal become an operative norm in the Jamaican criminal legal system? What does speedy trial really mean? How can we operationise this right to a speedy trial? What can a legal system do to maximise this right? What has given rise to the great importance now being placed in all quarters on this right to a speedy trial?

These are some of the related issues which will be dealt with in this study in an exploratory fashion. A study and evaluation of Jamaica's legal process in terms of its efficacy in discharging its legal functions, in the optimum time possible is intended. As such, this is the first full-scale and systematic study of this legal right to a speedy trial ever done in the English speaking Caribbean.

The study of this phenomenon is chosen, not as a mere philosophic ideal but as an empirical reality which can be

studied objectively.

Methodologically, the concept of speedy trial cannot be studied in abstraction; it can only be studied in conjunction with the problem of "caseloads", "backlogs" and "delays" within a particular legal system.

Delays in the Administration of Justice conflict with the concept of fairness in Justice. The Common Law system operates on the premise that "Justice Delayed is Justice Denied". This particular was reiterated by Gardener J. in Shepherd v United States:

"the constitutional guarantee of a speedy trial is intended to prevent the oppression of a citizen by delaying criminal prosecution for an indefinite time and to prevent delays in the administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecution." 28

Empirical study of accused persons in the Sheffield courts in England carried out by Bottoms and McLean, revealed that accused persons may suffer acutely because of pre-trial delays.

Bottoms and McLean observed:

"from the point of view of the defendant, unless he himself is anxious to secure an adjournment, all waiting time is bad. Therefore, many defendants ask the question, 'how soon will it all be over'?" 29

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28 163 F. 2d pp. 974-995.
Moreover, accused persons in custody, in particular first time offenders may suffer most in the holding jail because of the overcrowded and dirty conditions, as well as having to face numerous court appearances in full public view, the uncertain outcome of the case and the fact of being confined with hardened criminals who are more likely to be aggressive. All these matters may considerably increase the accused person's anxiety.

The most serious prejudice to an accused person resulting from delays, identified by the Supreme Court in the locus classicus case of Barker v Wingo\textsuperscript{30} is that which affects the ability of the accused to defend himself. For example, witnesses for the accused may have died, left the jurisdiction or be unable to recall events with any degree of accuracy because of the passage of time. Society too, has an interest in the expeditious disposition of criminal cases. A prompt disposition is an integral part of a well ordered society. In "The Limits of Expeditious Justice", Professor Shetreet observed:

> If a system cannot exercise the organized sanction of society expeditiously and effectively against offenders, society will not be able to attain the goals of the criminal justice system: deterrence of potential offenders. A decline in deterrence may lead to an increase in crime which, in turn, increases congestion and delay."\textsuperscript{31}

\textsuperscript{30} 407 U.S. 514 (1972) at p. 656 Greene J. observed: "While recognising the prejudice to the accused person, loss of employment and public ridicule are factors to be considered; these were the normal effects of being accused of criminal charges. Before delay can be considered to cause personal prejudice, an accused person must demonstrate more than the normal anxiety, embarrassment and concern suffered by all persons awaiting trial."

\textsuperscript{31} Shetreet, Shimon, "The Limits Of Expeditious Justice", in "Expeditious Justice", Canadian Institute for the Administration of Justice, 1979, p. 10. See also Burger,
Where a potential accused is assured of expeditious resolution of a case, it will indeed enhance the deterring intent of the law. The idea of speedy punishment deterring crime has had a long standing tradition. However, delays associated with caseloads and backlogs enable an accused to negotiate more effectively for pleas of guilty to lesser charges and thus manipulate the system.\textsuperscript{32} Empirical study\textsuperscript{33} shows that central to the entire criminal justice process, are compromised convictions or sentences as a result of 'plea bargaining'. Thus, the object of deterring potential offenders from committing offences of a like kind to that for which the sentence was imposed is defeated as the sentence would not be proportionate to the accused culpability.

Delays also hinder rehabilitation. Accused persons, kept for lengthy pre-trial periods in holding jails which are not governed by institutional rules, for lengthy pretrial periods may be dehumanized by jail conditions, thus making rehabilitation difficult. Katz asserts:

"Rehabilitation is most effective when begun as close as possible to the criminal activity which necessitates the treatment. It is least effective when postponed so that the wrongdoer is scarcely able to relate the treatment to his wrongful

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\textsuperscript{33} Baldwin, A. and McConville, M, Negotiated Justice, 1977. See Feeley M.M, Court Reform on Trial, 1982, p. 183. Feeley observed: "Yet there is evidence to suggest that there is little, if any, correlation between length of time to disposition, or court room congestion."
Although it is to be noted that the high rate of recidivism may question the soundness of the rehabilitation theory. The high rate of recidivism may question the soundness of the rehabilitation theory. So too delays cause escape and further crimes. Accused persons released on bail during long periods of delays are likely to commit further offences or even abscond. A National Advisory Commission reported that a 1968 survey in the district of Columbia found: "there is an increased propensity to be rearrested when the release period extends more than 280 days."

Moreover, delays associated with caseloads and backlogs affect the quality of justice. Dr. Shimon Shetreet (now Professor Shetreet) pointed out:

"If a judge is acting under unreasonable pressure he may concentrate more on disposing of cases than in doing justice in each particular case. He may adopt a 'let's get on with it' approach becoming short-tempered and hasty in making decisions. The result is a lack of patience, attentiveness, dignity and considered deliberation."

Indeed, the lack of "patience", "attentiveness" and "deliberation" is forcibly demonstrated in the account of the

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37 "The Limits of Expeditious Justice" in "Expeditious Justice", Canadian Institute for the Administration of Justice, 1979 at p. 15.
hearing by the New York State Commission, into the conduct of Judge Friess. The learned judge determined the length of sentence in one case by the toss of a coin, and in respect of another case he requested persons present in court to vote as to which witness to believe. Judge Friess pleaded justification for his conduct, on the basis of a heavy caseload and the pressures on a judge to expeditiously dispose of cases. Surprisingly, two of his brother judges who gave evidence on his behalf described his conduct as "creative and innovative" in view of an overburdened judicial system.38

Indeed, judges are in a high stress profession and can be driven to extreme conduct because of the caseload explosion, especially in developed countries. As a consequence, the value of the Judicial System and the very independence of the judiciary is threatened.

But, while recognizing the negative consequence of heavy caseloads, it should be remembered that judges should operate within a framework of shared values, which serve to maintain the quality of justice. As Professor Judith Resnick pointed out:

"Among all of our official decision makers, judges alone are required to provide reasoned explanation for their decisions. Judges alone are supposed to rule without concern for the interest of particular constituencies. Judges alone are required to act with deliberation, a steady, slow, unhurried task."39


Finally, the cost of delay to the taxpayer is substantial. It also increases expenditure of police time. Task Force Report: The Courts 38, recorded that in 1962, housing, feeding and guarding a detained accused in New York City, cost between US$3.00 and US$9.00 per day. Projecting these figures on a current economic basis and taking the increasing crime rate into consideration, pre-trial detention expenses are bound to be substantial. In Jamaica, the cost of feeding a prisoner in 1985 was recorded at $7,025.00 for the year. In Canada, it costs $20,000.00 to maintain a prisoner per year.

Witnesses are also hampered by delays. Delays affect a witness's interest in the redress of wrongs in several ways. As the period between the offence and case disposition lengthens, a witness may die or leave the jurisdiction. So too, the passage of time may preclude the prosecutor from adequately discharging the burden of proof and thus, the reliability of the verdict is affected as a witness power to recollect accurately depends not only on the witness's power of observation and basic intelligence, but largely on the amount of time that elapses from the time of offence to trial.

In the likely event of multiple court appearances, witnesses may be put to hardship and expenses and may even lose several days wages. Indeed, the legal representative of the accused may at times actively seek to 'wear' out witnesses by frequent adjournments or continuances. Thus, they may refuse to attend court or become less co-operative.

Professor Shimon Shetreet in "The Limits Of Expeditious Justice" noted:

"Lawyers also use delay as a tactic, using frequent adjournments and pretrial motions to wear down the opposition, believing that they are thus serving
the best interest of their client."^40

THEORETICAL OVERVIEW

To undertake this particular study, some theoretical foundations must be laid at this point. Theory, in this context and at this point, refers minimally to the basic definitions, concepts and categories used in explaining the particular problem clearly. These must be spelled out and defined. Theory, refers also to arrangement of these concepts, or variables into an explanatory schema, whereby, these variables are put into determinate relationships.

One major aim of theory is to explain a particular problem so as to be able to understand it, to predict its manifestations and eventually control or eliminate the problem altogether.

An explanatory schema or theory may take any of these three major forms:

I  It may be "casual", that is, emphasis is placed on the major factors or variables that directly and indirectly create or impact on the problem. Max Weber's legal and social analyses, for instance, rely heavily on casual analysis.

II It may be "functionalist", that is, emphasis is placed upon analysing the functions and dysfunctions of a particular cultural trait, or any problem in terms of the needs of the larger system or of some system part. Emile Durkheim's whose study of Suicide, Religion, Crime and the Division of Labour, utilised "functionalist theory"; which

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^40 Supra note 31. Canadian Institute For The Administration Of Justice, 1979, p. 15.
The basic premise is that a social fact has to be understood in the context of its environing system of which it is part, because "the whole is greater than the sum of its parts."

III It may be "historical" that is, social facts and patterns are studied and seen as continuities from the past, or at least, the past is viewed as playing a significant part in shaping the present.

The bias or preference is for a causal theory of waiting time because this kind of analysis is more reform oriented, whereas, functionalist theories foster a more conservative attitude and ends up as a rationalisation of the status quo. The causal approach is supplemented by the historical.

The causal theory of waiting time or of delay will involve the following elements:

I A definition of the problem: a consideration and definition of what "undue delay", "excessive delay", "excessive caseload", and "unreasonable time" mean.

II Explanation of the problem of delay in terms of the causes or sources of the problem and an attempt to determine the relative causal weights of the various factors.

III Patterns of the problem in different jurisdictions and some comparisons.

IV Predicting, abating and controlling the problem.

It is to be emphasized, however, that the very nature of the
problem being analysed limits the kind of theoretical formulations that are possible. In fact, from the very outset, it can be stated that no unified theory of delay is possible because the problem of delay is, itself, multi-faceted. As Malcolm M. Feeley wrote:

"Delay is a blanket term covering a host of different problems caused by various factors all requiring different responses. Delay is not one problem, it is a variety of problem."

No mono-causal theory is possible in consequence. The approach is, therefore, multi-causal in its emphasis as some of the major causes of the problem will be identified. An attempt will also be made to give some indication of the causal importance of these factors.

THE PROBLEM OF DELAY

"Waiting time" is the amount of time from inception to disposition of a case.

Unreasonable delay is the antithesis of speedy trial or trial within a reasonable time. Delay is an integral part of the criminal justice system. A minimum amount of time is needed for preparation of a criminal case at different stages of the processing of a criminal case.

In Polland v United States the court observed that the right to speedy trial is consistent with delays. This is so because due process includes the right of an accused to legal representation, to make pre-trial motions for an adjournment

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41 Court Reform on Trial, 1982, p. 182.
if necessary, and the opportunity for the defence and the prosecution to present their cases fully. The time to prepare a case fully may vary considerably. Justice is, therefore, a timely and deliberate process. Speed per se is not the only objective; the judicial process has a series of procedures and concomitant safeguards to ensure procedural fairness.

Delay according to Chambers English Dictionary means to put off to another time", "to defer" or "retard".

Barry Mahoney and his colleague in a paper, "Addressing Problems of Delay in Limited Jurisdiction Courts: A Report on Research in Britain" observed:

"The British tend to avoid using the term delay with its pejorative overtones, preferring instead , the more neutral term waiting time to describe the time between two points in the case flow process, such as, the issue of process and disposition of the case."43

"Delay" or "waiting time" within the context of speedy trial would mean "excessive delay" or "excessive waiting time". The extent of delay must be weighed or measured within the social context of the particular jurisdiction.

There are a number of variables which are taken into account when determining excessive or unacceptable delays. Empirical evidence reveals that a large caseload is not sufficient in itself to produce long delay, nor a small one seems sufficient to eliminate long delays.44

43 Winberry, Phillip B., Church, Thomas W. Jr., The Justice System J., pp.44-71 at p. 48.

44 Levin, Martin A., "Delays In Five Criminal Courts", 4 J. of Legal Studies, pp. 83-131 (Jan. 1975). Levin did case studies on Delay in 5 courts: the Chicago Preliminary Hearing Court, the Chicago Criminal Division Court, the Pittsburgh Common Pleas Court, the District Court of the
In interpreting the speedy trial provision or measuring delay, the first factor the courts take into consideration is "time" or the age of the case. The judicial decisions vary as to when "time" ought to be attached to determine "speedy" or "reasonableness". Some authorities articulate the view that time is attached upon arrest. There are authorities which state that time is attached upon indictment, while there are judicial decisions which state that time begins to run prior to arrest. However, the weight of authorities suggest that the parameters of measuring delay extend from the time of arrest or charge until final disposition. Dillingham v United States a 1975 case, is authority for the proposition that the right becomes operative upon arrest or the bringing of a formal charge, whichever occurs earlier.

In the Canadian case of R v Boron, an appeal of a stated case, the court had to decide the relevance of precharge delay in determining whether the reasonable time guarantee in Section 11 (b) of the Charter of Rights and Freedoms, Constitution Act, 1982, Part I, had been infringed. Ewaschuk J. observed that a person becomes "charged" when an information is laid or an indictment is preferred. Further, that precharge delay was irrelevant in determining whether the reasonable trial guarantee was infringed. There is, however, the Privy Council decision, Grant v D.P.P., a case which originated in Jamaica, which is inconsistent with Boron's case and subscribes to the view that consideration of

District of Columbia and Minneapolis District Court.

45 423 U.S. 64.


48 Supra note 46.
precharge delay is relevant, if it is accepted that it affects to some extent the reasonableness of delay after charge. In fact, the Privy Council stated that delay must be measured from the time when the police received the complaint, "the events which gave rise to the charges". On the matter of precharge delay, the court in United States v Lavasco⁴⁹, a 1977 case, stated that while the speedy trial protection did not extend to the period prior to arrest or charge, precharge delay may be considered as a denial of due process.

Although some delay is necessary, the courts have not stated a specific period of how long is too long a time. The right to speedy trials is too vague and "Amorphous,"⁵⁰ when justice though deliberate is conceived to be speedy. It is the legislature or practice which fixes clear parameters of reasonable or unreasonable delays.

In Ontario, Canada, the reasonable period for an accused in custody charged with an indictable offence to be brought to trial is ninety days. For summary matters, the directory time limit is thirty days.⁵¹ The device used to encourage compliance with the ninety days and thirty days time limits is judicial review of custody. This means that the court backlog, at any given time, should be no more than the courts can process within ninety days as regards indictable offences. Thus, Miller and Barr observed:

"A court must have an inventory of cases with which

⁴⁹ 431 U.S. 763.
⁵¹ Canadian Criminal Code, s. 459.
to work; that is, it should have on hand the number of cases and only those which it can conveniently dispose of within a reasonable or tolerable period of time." 

In Scotland, the trial of an accused person must commence within 12 months of the accused first appearance. This is very soon after arrest. Where the accused is in custody, trial must take place within 110 days of an order for committal. The order for committal must be made within eight days of arrest. Unless the trial of an accused in custody is brought to a conclusion before the expiration of the 110th day of incarceration, he shall be set free forth with from the offence for which he was committed.

In the United States of America, the Federal Speedy Trial Act, 1974, prescribes time limits for bringing an accused person to trial after arrest. The sanctions for compelling compliance with time limit include dismissal with or without prejudice. These time limits will be detailed in chapter IV.

52 Judicial Administration in Canada, p. 196.
53 Criminal Justice (Scotland) Act, 1980. The period can only be extended by the court on cause shown.
54 The Police (Scotland) Act, 1967, s. 17 (1) (b). See Criminal Procedure (Scotland) Act, 1975, s. (19) (1) (2) (3).
55 Criminal Procedure (Scotland) Act, 1975, s. 101 (4). The High Court can extend the 110 days in situations, such as, illness of an accused, absence or illness of vital witnesses, illness of the judge or jury or any sufficient cause for which the prosecution is not responsible.
57 Supra note 19. The judiciary demanded that the period increase to 180 days. See the Resolution of the Federal Judicial conference, June 1977, 63 A.B.A.J., 1643.
Unreasonable delay can be defined as excessive delay from the
time of arrest to trial. The jurisprudence shows that
"reasonable time" or excessive delays can only be measured
within the context of the particular circumstances of each
case and cannot be measured in terms of a specific time
periods. The statutes, however, have often articulated speedy
or unreasonable trial in specific numerical terms. The United
States Supreme Court in Baker's Case\(^{58}\) distinguished between
neutral reasons for delays, valid reasons for delays and
deliberate delays. "Delay" has two components the justifiable
component and unjustifiable component.

The justifiable component, would be the practical and
necessary time that is needed by participants to get a case
ready for trial and any period after that, is the
unjustifiable component. In Sandford v D.P.P.,\(^{59}\) the court
reasoned that a part of the fourteen months' delay was capable
of reasonable explanation but a part was not. That part which
cannot be justified is "undue delay". Delay, therefore, is a
question of fact. There cannot be an optimum waiting time for
all jurisdictions. A waiting time of three years may be
acceptable in one jurisdiction, whilst a waiting time of six
months may not be tolerated in another jurisdiction.

Delay within the context of this thesis means excessive or
unjustifiable delay.

"SPEEDY TRIAL" OR "TRIAL WITHIN REASONABLE TIME"

It is really the jurisprudence that gives clarity and
definition to the "speedy trial" or "trial within a reasonable
time" provision. The courts have evolved guidelines in the

\(^{58}\) Supra note 30.

interpretation of these provisions.

In Jamaica, the case of *R v Shirley Chin See*\(^{60}\) Fox J. held that reasonable time cannot be considered in a vacuum but in light of the circumstances prevailing in the corporate area at the time with respect to:

a) the number of criminal cases for trial in relation to existing facilities and the personnel affecting trial;

b) the inordinately slow pace at which some trials do, in fact, proceed;

c) the indifferent standard of efficiency which it has been possible to achieve in making arrangements for bringing on cases for trial.

This approach to "reasonable time" was followed by the court in *Director of Public Prosecution for Jamaica v Feurtado*.\(^{61}\) In this case, twenty-two months elapsed between the respondent's arrest and his being indicted on charges of forgery. The respondent obtained a Declaration from the Supreme Court under S.25 of the Jamaican Constitution that he ought not to be tried and should be unconditionally discharged by reason of the gross, unconscionable and unreasonable delay in breach of section 20 (1) of the Constitution. Kerr, J. A. adopted the approach and proposition regarding "reasonable time" as enunciated by Fox J. in *R v Shirley Chin See*.\(^{62}\) The Court of Appeal held that what was reasonable time depended on the circumstances of each case, including the nature of the

\(^{60}\) Unreported Suit No. M. 178 of 1967.


\(^{62}\) Supra note 60.
case, the formalities of the pre-trial procedures, the facilities existing and the efforts made to conclude the proceedings.

However, in Bell v D.P.P. the Privy Council in England adopted a more liberal approach and applied a four-factor balancing test. In determining whether the accused had been deprived of a fair trial by reason of unreasonable delay, four factors must be considered:

I) the length of the delay;
II) the reasons given by the prosecution to justify the delay;
III) the efforts made by the accused to assert his rights;
IV) the prejudice to the accused.

The court went on to say that the assessment of these factors will necessarily vary from jurisdiction to jurisdiction and from case to case. In particular, the prevailing system of legal administration, economic, social and cultural conditions in Jamaica, must be taken into account.

The United States Supreme Court also applies this four-factor balancing test in Barker v Wingo. In determining whether the right to speedy trial has been denied, both federal and state courts in the United States of America traditionally applied the "demand doctrine", that is, if an accused person does not demand to be tried or object to any adjournment, then he is deemed to have waived his right to a speedy trial. The basis for this doctrine was that delay benefits the accused.

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64 407 U.S. 514, 656 (1972).
person by either delaying punishment or allowing time to prepare his defence. The Barker case will be discussed more fully in chapter IV.

Articles 5 (3) and 6 (1) of the European Convention for the Protection of Human Rights affirm the right of an individual to "trial within a reasonable time". The jurisprudence of the European Court has applied a similar approach as the municipal court in the definition of "reasonable time".

In Wemhoff v the Federal Republic of Germany, the accused was arrested on November 9, 1961, on charges for breach of trust and the investigations took three years. Wemhoff was convicted in 1965. Wemhoff contended that West Germany breached article 5 (3) and 6 (1) of the Convention. The court held that the exceptional length of the investigation and of the trial were justified by the exceptional complexity of the case and by further unavoidable factors; accordingly, the time period did not exceed reasonable time. The court further noted, that the reasonableness of a persons continued detention must be assessed in each case according to its special features, which may vary greatly.

In Koenig v Federal Republic of Germany the European Court stated that regard must be had to: the complexity of the case, the applicant's conduct, and the manner in which the matter was dealt with by the administration and judicial authorities.

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CAUSES OF THE PROBLEM OF DELAY

Several general factors are identified and emphasized as substantially causing or contributing to the problem of delay. It is the cumulative effects of these factors rather than any single factor that is responsible for delays.

1. Backlogs
A "backlog" exists when the number of cases are in excess of that which the court can handle in a given period. A backlog of cases invariably contributes to the problem of delay in the criminal justice system.

2. Poor Facilities and Poor Management
The lack of personnel, the inefficient management of cases, and inadequate court facilities have greatly restricted the courts in disposing of cases in a speedy manner. So too, is the practice of "judge shopping" by lawyers and career criminals whose cases must be heard before a particular judge.

3. The Inexperience and Cunning of Lawyers
The inexperience of lawyers, a "chronic" lack of preparedness, and the lack of a sense of urgency have been canvassed as sources of delay. In 1978, Chief Justice Evans of the High Court of Ontario wrote:

"Today, many cases, both civil and criminal, are more time consuming because the issues are more complex and not infrequently because counsel appearing are inexperience and unfortunately,

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occasionally ill-prepared.\textsuperscript{68}

Some writers feel that seasoned criminal lawyers were more likely to prolong trials and less experienced lawyers had shorter trials. Barry Mahoney and his colleague felt that less experienced lawyers had shorter trials.\textsuperscript{69}

4. Adjournment

Indeed, frequent adjournments are a key source of delay. A research on continuances done by Laura Banfield and C. David Anderson, as far back as 1966 into the Criminal Courts of Cook County, disclosed that thirty-eight per cent of cases dealt with by retained lawyers required more than eight court appearances to come to final disposition, whereas, only nine per cent of the public defender cases took as long.

The median length of cases involving retained lawyers was 7.2 court appearances, two months longer than the public defender’s median case which required 3.7 court appearances.\textsuperscript{70}

Martin A. Levin in "Delay in Five Criminal Courts", a study of


\textsuperscript{69} "Towards Better Management of Criminal Litigation", vol. 72 No. 1, Judicature, 35 (June - July 1988).

\textsuperscript{70} "Continuance In Cook County Criminal Courts", U.C.L.R., 259 (1968).
five criminal courts, observed: "Continuances have been strongly associated with the degree of delay." Earlier, in this article he stated.

"Requests for continuances are request for delays. They are associated with the increased age of cases rather than increased court time - each continuance contributes little to the case's court time since continuances are granted almost automatically and without the need for explanation."\(^71\)

In jurisdictions where speedy trial rules are in operation, continuances still exist. Malcolm M. Feeley stated: "Speedy trial rules do not necessarily provide incentive to reduce the number of continuances." He quoted one judge as remarking:

"Any defence attorney worth his salt will use whatever tactics within his means to further the interest of his client and if this means numerous continuances, he will waive the speedy trial provisions."\(^72\)

The reasons for adjournments or continuances are manifold. Adjournments may be sought by the defence in an attempt to settle fees. Others may abuse the legal aid scheme by seeking unnecessary adjournments with the hope of extracting higher fees. A Chicago Study revealed: "seventy per cent of continuances requested by privately retained lawyers appeared to be efforts to increase their fees."\(^73\) In fact, the Ontario Law Reform Commission made this observation:


\(^72\) Court Reform on Trial, 1982, p. 184.

\(^73\) Ibid.
"What may be faulted as contributing considerably to a problem of overcrowded court dockets, is the abuse of the principle of legal aid system by a few unscrupulous lawyers who encourage their clients to pursue the full provisions of the criminal and civil process purely for the purpose of extending their own experience for the opportunity of collecting higher fees." \(^{74}\)

In some instances when a case is adjourned, it may be necessary to postpone it several weeks ahead. This long postponement, may be due to the difficulty of finding a date convenient to all participants in the trial process. A further difficulty may be created because, even after such a lengthy postponement, the courts may not be in a position to deal with the case on the date fixed. The prosecutor may request an adjournment because of the absence of vital witnesses. The accused may on the date of trial discharge his legal representative because he/she might not be ad idem as regards matters. So too, jurors summoned to attend court, may find their civic duty a waste of time and in some instances they would rather pay the fine for non-attendance than attend court.

5. **Local Legal Culture**

The Local Legal Culture can also influence court delay. The term "Local Legal Culture" was first coined by the United States of America National Centre for State Courts. It means the attitude, customs, norms, informal practices and expectations of judges, lawyers, probation officers, among others in each community which influence the rate of litigation.

Thomas Church Jnr. and his colleagues attributed variations in

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\(^{74}\) Ont.L.R.C. Report 1973, page 149.
the speed of litigation to the Local Legal Culture. Based on interviews with lawyers in eight courts, Church and his colleagues came to the following conclusion:

"...both speed and backlog are determined in large part by the established expectations, practices and informal rules of behaviour of judges and attorneys...court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it...these expectations and practices, together with court and attorney backlog must be overcome in any successful attempt to increase the pace of litigation."\(^{76}\)

Church, in "Who Sets the Pace of Litigation in Urban Trial Courts"\(^{77}\), did another study of the Local Legal Culture Theory. The object of this other study was to "measure disposition-time norms more precisely"\(^{78}\) so as to confirm the findings of the previous study, which was that the speed of litigation of individual court systems was directly related to the particular local norms. Church posed certain attitudinal questions to judges, assistant district attorneys and defence attorneys in four cities. These were, Bronx County (New York), Detroit, Miami and Pittsburgh. He said:

"They were asked to assume a court system with adequate but not unlimited resources, one in which, prosecution, defence and the court have adequate resources to deal with their caseloads in a fair and expeditious manner. How would this case be dealt with in a properly operating and funded court system?"

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\(^{75}\) Church, Thomas Jnr., et al, Justice Delayed: The Pace Of Litigation In Urban Trial Courts, prepared by National Center for State Courts and National Conference of Metropolitan Courts, Williamsburg, Va., National Center for State Courts, 1978 at p. 54.

\(^{76}\) Ibid.


\(^{78}\) Ibid., p. 82.
The respondents gave the average number of days from arrest to trial that each group believe to be appropriate in serious and non serious cases. This study gave further empirical credence to the claim that the pace of litigation could be linked to local norms, which explained the "legendary" resistance of trial courts to speeding up the case disposition process. Thomas Church, in "Justice Delayed: the Pace of Litigation in Urban Trial Courts", forcefully put forward the view that both speed and backlog are fixed largely by "established expectations, practices and informal rules of behaviour of judges and attorneys." Indeed, for lack of a more suitable term, Church, who conducted the study as part of the National Centre for State Courts delay reduction initiative, called this "cluster of related factors", the "local and legal culture". The United States of America National Centre for State Courts, therefore, has introduced a new lexicon of words into the criminal justice system terminology. According to Church, courts systems become adjusted to a specific pace of litigation; "that pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys' offices." To speed up the pace of litigation, Church stated:

"These expectations and practices together with court and attorney backlog, must be overcome. Thus, most structural and caseload variables fail to explain inter-jurisdictional differences in the pace of litigation. In addition, we begin to understand the extraordinary resistance of court delay to remedies based on court resources or procedures." \(^{80}\)

Church further observed, that a common view evolving from interviews with lawyers and judges, was that the usual pace

\(^{79}\) Supra note 75.

\(^{80}\) Supra note 75 at p. 54.
was the appropriate one and that an increase or decrease in speed would create an injustice. Church, therefore, theorized that the existing pace of litigation in a court:

"was supported and influenced by shared local norms regarding how fast criminal cases ought to move. Efforts to alter that pace, run up against both the institution inertia common to any complex organization and, more importantly, the general belief among practitioners that change in the speed of case disposition is not simply inconvenient but improper and unfair as well."^81

Contrary to Church’s study, Joel B. Grossman and his colleagues in "Measuring the Pace of Civil Litigation in Federal and State Trial Courts", stated: "Local Legal Culture can only explain delay at a high level of abstraction."^82 Grossman, therefore, sees the concept of "Local Legal Culture" as existing only as a theory or idea. Paul B. Wice shares Church’s views concerning the effect of local legal culture on delay. In "The Speedy Trial Dilemma: A Handbook on Reform", Wice commented on how delay is influenced by practices and informal rules of behaviour shared in the legal process. Wice observed:

"The Local Legal Culture, it appears, can influence court delay in two broad areas. Local officials control the day to day operation of the criminal courts and can, therefore, directly affect whether court delay is allowed to progress to the point where it becomes a problem in need of resolution. It is entirely conceivable that a smooth-running criminal court may not even have a problem with court delay. However, once a jurisdiction discovers that its time from arrest to disposition has reached an acceptable level, it must ask, what role are the various members of the local legal community playing both in creating the delay and,

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81 Supra note 75 at p. 79.
even more important, in resolving the delay."\textsuperscript{83}

One practical instance of established informal rules or behaviour, finds expression in the conduct of some judges and lawyers. It can be stated that some judges are known to grant unnecessary adjournments and countenance dilatory practices in the criminal courts. In the United States of America, especially, judges demonstrate this tendency. As judges must regularly stand for election, there is a need for approbation form members of the Bar. Thus, lawyers come to expect this lenient attitude on the part of the judges. Judges and lawyers, therefore, operate the courts for their mutual convenience and so the interests of the legal profession depart from the interests of the legal system.

In Jamaica, the infrequency of guilty pleas is a notable aspect of this local culture which mitigates against speedy trials.

\textbf{TOWARDS A SOLUTION}

The primary purpose of this study is to provide information and analysis that may prove instrumental in making speedy trial more of a reality in Jamaica's criminal justice system.

Using data and observations from other comparable jurisdictions, an examination will be done of their various reform strategies and recommendations will be made from those which appear applicable to the Jamaican Local Culture.

Reforms to the criminal justice system will be discussed under two broad categories. Reforms which deal with the problem of judicial administration. This involves the management and organization of the court, personnel and the processing of

criminal cases. Secondly, reforms which deal with criminal procedure, and include pre-trial procedures, such as, preliminary inquiry, pre-trial conference, omnibus hearing, disclosure, plea bargaining, discovery and diversion. These strategies for dealing with the problem of delay will be regarded as the high point of this study, its raison d'être.
CHAPTER II
THE JAMAICAN CRIMINAL JUSTICE SYSTEM:
PROBLEM OF DELAY

INTRODUCTION
The central focus of this chapter is on the present structure of the criminal justice system in Jamaica and the current problems which hamper the expeditious disposition of cases.

The chapter traces briefly the historical development of the criminal justice system to show how events shaped the present administrative and procedural structure of the criminal courts.

Thereafter, an examination will be done of the scope and scale of the problem of delays, caseloads and backlogs; and whether the response, if any, to the problem of delay is adequate.

Finally, empirical investigations on waiting times and the information obtained from the questionnaire will be reported. The questionnaire will be utilized to verify and supplement the statistical data.

The Jamaican criminal justice system was modelled after the English system and, therefore, exhibits procedural and structural characteristics of that system. However, over the years the rules of practice and procedure have not changed significantly to deal with societal changes. The institutional structure of the courts has undergone changes and some of these changes, like the procedural changes, have affected the speedy disposition of cases. As the judicial system exists as a result of the need for substantive justice, the courts must operate at a high level of efficiency so that cases are disposed of within a reasonable time. The expressed need to dispose of cases in a timely manner can be traced back
in Jamaica as far as 1758\(^1\) by the Commission of Gaol Delivery
given to the Justice of Assize. The Justices of Assize were
empowered to try every prisoner in the gaol regardless of the
offence. Further, 5 Vic. C.48, Island Act 1842, was an Act to
prevent delay in the administration of justice in cases of
misdemeanour, which provided that persons held to bail twenty
days before session must plead and proceed to trial.

The ipsissima verba of section 1 of the Act states:

"Whereas great delays have occurred in cases of
persons prosecuted for misdemeanour by indictment
in the several courts of the island by reason that
the defendants in some of the said cases have
according to the present practice of such country
an opportunity of postponing their trials to a
distant period by means of imparlances in the said
court: for remedy whereof, Be it enacted, that
from and after the passing of this Act, when any
person shall be prosecuted for any misdemeanour by
indictment, at any general court or quarter
sessions of the Peace, or session of oyer and
terminer and gaol delivery having been committed to
custody, or held to bail to appear to answer for
such offence twenty days at least before the
session at which such indictment, shall be found,
he, she, or they shall plead to such indictment,
and trial shall proceed thereupon at such same
quarter sessions of the Peace or session of oyer
and terminator and gaol delivery respectively, unless
a writ of certiorari for removing such indictment
into the Supreme Court, shall be delivered at such
session before the jury shall be sworn for such trial."

The Habeas Corpus Act was another method of applying the

\(^1\) 31 Geo. 11 Island Act 1758. See also 21 James 1 C. 4
England statute; provided for the division of the Island
of Jamaica into three counties and the appointment of
Justices of Assize, Oyer and Terminer, in two of the said
counties.
speedy trial provision. By the writ of habeas corpus, persons committed for treason or felony had to be indicted in the next term or granted bail. Today, the Speedy Trial Provision can be found in section 20, subsections (1) and (2), of the Jamaica Constitution, 1962.

As historical events have played an important role in moulding the present procedural, administrative and structural state of the criminal courts, an outline of the historical background of the legal system will be done at the outset. Additionally, as delay has been a feature of the criminal justice system in Jamaica, it is important to briefly review the procedural and institutional development of the courts and comment on how some of these developments have effectuated speedy trials or contributed to delays. In respect of the historical perspective, reference will be made in particular to the court of Petty Sessions, the District Courts and the Supreme Court.

A BRIEF HISTORY OF THE LEGAL SYSTEM OF JAMAICA

The constitutional history of Jamaica began with the acquisition of the Island in 1655 by the British. The legal system of Jamaica, therefore, dates back three hundred and thirty-eight years. Naturally, as a colony, Governors were appointed by the Imperial Authorities as representatives of the crown. In 1661 Edward D'Oyley was commissioned as the first Civil Governor of Jamaica. By virtue of his Commission dated February 8, 1661, he was authorised to select a council of twelve "and by the advice of any five or more of them to

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2 The Habeas Corpus Act of 1679 was applied to the Island by virtue of the Declaratory Act. By the Declaratory Act, Laws in force in England, Statute and Common Law were applicable to the Island of Jamaica.

erect and constitute Civil Judicatures." In obedience to this Commission, on June 18, 1661, three Courts of Judicature were established; one at Port Morant, one at Point Caquay (Port Royal) and one at St. Jago de la Vega (now Spanish Town). Members of the council were appointed as Justices of the Peace and each empowered to choose three or more constables for his district.

On August 11, 1662, Lord Windsor Thomas succeeded General Edward D'Oyley. His commission and instructions consisted of twenty-two clauses. He was not only directed to set-up a council according to his commission and instruction but to arrange for the election of a House of Assembly, to appoint judges, sheriffs and justices, to erect Courts of Admiralty and to pass laws that were not repugnant to the laws of England. Lord Windsor brought with him the proclamation of Charles II dated December 14, 1661. This proclamation declared that children of natural born British subject born in Jamaica were to have the same privileges as the subjects of England.

Lord Windsor's administration was short lived; it lasted for ten weeks; however, his instructions formed the basis of good government. Colonel Mitchell, the brother-in-law of Lord Windsor, sat as the first judge of Admiralty in the year 1662.

Petty Sessions Courts were instituted. These were established


5 An historical account of the Constitution of Jamaica drawn up in M.DCC LXIV; for the information of His Majesty's Ministers, by His Excellency William Lyttleton, Esquire, Governor in Chief of Island, in Laws of Jamaica 32 Car. 2 and 33 Geo. 3, 1681 - 1759.
by Common Law and modified by 3 Vic. C. 14 and other local Acts.\(^6\) Justices of the Peace were appointed by the Governor under the great seal of the Island as conservators of the public peace for each parish. A Custos was elected, who exercised authority similar to that of the Custos Rotulorum in England. The justices' jurisdiction was limited to their parish. Thereafter, laws were passed which gave these justices jurisdiction over certain offences.\(^7\) Their jurisdiction included determining civil and criminal matters. They could not try, for instance, actions of trespass and actions in which the amount sought to be recovered exceeded six pounds. Pursuant to the local Act, 13. Vic. C.24 two Justices of the Peace could "take bail" in cases of felony, where the evidence against the party was weak. They were also required to take material evidence, in writing, on examination before them. The court had summary jurisdiction. Two or more Justices of the Peace constituted a court. The court sat weekly or once every two weeks in the court house of each parish.\(^8\) Justice was not speedy. There were not enough persons to perform the duties of Justices of the Peace. Moreover, the Justices of the Peace did not attend court when required to do so and so there was always a backlog of cases.\(^9\) In October 1662, Sir Charles Lyttleton who was then Chancellor of the Island succeeded Lord Windsor in the Government as Lieutenant Governor. In December 1663 by advice of his

\(^6\) Local Act, Law 2 of 1866.

\(^7\) 1 Vic. s. 38 Island Act 1838. See 1 Edw. 11 Statute 2, C. 16 England Statute 1327: Provided for the appointment of conservators of the peace. See also Local Act 13 Vic. C. 24.

\(^8\) 18 Vic. C. 31 s. 6.

council, he called the first Assembly which upon their meeting enacted a body of laws. The elected Assembly with the assent of the council referred the settlement of the Courts of Judicature to the new Governor, Sir Charles Lyttleton. He established a Scheme Court to have jurisdiction over all pleas and for the trial of treasons, murders and other offences. Three judges were appointed to the court and Lyttleton was Chief Justice. This court and the Court of Chancery sat at St. Jago de la Vega (Spanish Town). In 1664 the Assembly declared that the laws of England were in force in Jamaica.

It was not until 1690 that the first Grand Jury was empanelled although in 1664 provision was made in that regard. The jury sat at St. Jago de la Vega. Grand juries were abolished in Jamaica in 1871\(^1\) and the Attorney General was charged with preferring indictments. The Circuit Court or the Court of Assize was also established.

The Supreme Court of Judicature of Jamaica, which was established under the Royal Instructions during the reign of Charles II in 1661 was a Court of Common Law, but exercised various jurisdictions in bankruptcy, revenue, and several other matters. According to the Biennial Act of 1675, the duty of the Court was to comprehend:

"all pleas, criminal and civil ... like the King’s Bench, Common Pleas and Exchequer in England."

The criminal jurisdiction of the Supreme Court was similar to a great extent to that of the Court of Queen’s Bench in England. It dealt with serious offences, such as, murder, manslaughter, treason and grand larceny.

\(^1\) Grand Juries were abolished as of Sept. 1 by Law 21 of 1871. They were abolished in England in 1933, with the exception of London and Middlesex. They were finally abolished by the Criminal Justice Act, 1948, s. 31 (3).
The court sat three times each year in Spanish Town, on the first Monday in February, June and October. The Chief Justice and two assistant judges presided.

The sittings lasted for no longer than two to three weeks. Justice was slow in these courts. It took several years to disposed of a matter. In 1839 Chief Justice Joshua Rowe expressed dissatisfaction with the backlog of business in these courts. Justice was not speedy in the Supreme Courts.\textsuperscript{11}

The Supreme Court was overburdened with work because a great number of the slave courts were then defunct. Further, the Chief Justice and the two assistant judges were often not qualified lawyers. It was incumbent on the Chief Justice to preside at each sitting, a task which proved very burdensome.

In the interest of speed and the economical and better administration of justice, Acts were passed to improve the judicial administration of the Island.\textsuperscript{12}

Following the abolition of slavery on October 22, 1839 with Sir Charles Metcalfe as Governor, the Assembly passed a Bill to establish a new judicial system. Thus in 1840 the Act 3 Vic. C.65, "An Act to make provisions for the improvement of the administration of Justice in the several Courts of the Island and for other purposes," was passed. This Act, coupled with 19 Vic. C 10 (1856) entitled "The Judicial Amendment Act", effected changes in the court system. Under the 19 Vic. C. 10 statute, the Island was divided into four circuits, Kingston, St. Catherine, Cornwall and Surrey. The circuits


\textsuperscript{12} 19 Vic. C. 10 (1856), 3 Vic. C. 65 (1840).
were to sit de diem in diem, from day to day. There were now three assistant judges and they all had to be qualified barristers with at least three years experience at the bar. The Chief Justice had to be a barrister with at least five years experience at the bar. The Chief Justice presided in the Kingston Circuit Court while the three assistants manned the other three courts.

Provision was made under 3 Vic. C. 65 (1840) for the Island to be divided into nine districts and the appointment of a legally trained chairman to each district. This was done to ease the backlog in the Supreme Court and the Court of Assize and also to relieve the Chief Justice of some of his duties.

By the 1879 Judicature Law, the Supreme Court underwent reorganisation and had consolidated with it the Court of Ordinary, the Incumbered Estate Court, the Court of Divorce and Matrimonial Causes, the Chief Court of Bankruptcy and the Circuit Courts and the High Court of Chancery. The Supreme Court consisted of the Chief Justice and two Puisne Judges and was also the Court of Appeal. On November 30, 1882, it became also the Appellate Court from the Supreme Court of British Honduras. By the warrant of the Lord Commissioners of the Admiralty, the Supreme Court exercised jurisdiction as a prize court.\(^{13}\)

Up to 1932 the Supreme Court was composed of the Court of Appeal and the High Court and the Judges were the Chief Justices, a Senior Puisne Judge and other Puisne Judges, about four, all holding office until they retired or reached the age of 65; the Governor, in his discretion, could permit any judge to continue in office until he was 67.

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\(^{13}\) Jamaica Gazette, dated December 7, 1905.
By Commission dated November 1664, Sir Thomas Modyford was made Governor of Jamaica. He was empowered to:

"Erect judicatures, to call assemblies and (with their consent) make, ordain, and constitute all manner of laws, statutes, and ordinances and upon imminent occasions, to levy money for the good and safety of the public, which laws were to be, as nearly as might be suitable with and agreeable to, the laws of England."\(^{14}\)

He was also empowered to create Courts of Admiralty, according to such authority as he should receive from the Lord High Admiral. The Court of Admiralty was first established under the Governorship of Edward D'Oyley assisted by his successor, Lord Windsor, who styled himself Vice Admirallus in Mari Americano; but it was under Sir Thomas Modyford that Admiralty jurisdiction achieved unmatched competence.

The Court of Admiralty derived its jurisdiction from Island Act 33 Car. II C. 8, section 2. In its role as a Court of Maritime Causes, its jurisdiction entailed the enforcement of the Acts of trade and navigation. Thus, it dealt with illicit trade and smuggled goods. In fact, it had concurrent jurisdiction with the Supreme Court as regards criminal offences committed on the high seas.

The Emancipation Law was passed by the British Government on October 18, 1833. In early 1834 the Marquis of Sligo arrived as Governor with a number of English Stipendiary Magistrates to administer the Act. Slavery was provisionally abolished on August 1, 1834 and, after an apprenticeship of four years, was finally ended on August 1, 1838.

In 1867, under the Governorship of Sir John Peter Grant, District Courts were established in each parish.\textsuperscript{15} These Courts were similar to the English County Courts. The Courts' jurisdiction was summary and, therefore, trials were expected to be speedier. Their jurisdiction extended to trying civil and criminal matters.\textsuperscript{16} Some of the offences the courts could try were forgery, robbery with aggravation and unlawful wounding; the courts did not sit on a regular basis. The number of such courts was reduced from eight to seven in 1867. The West Indies Committee observed that trials were not speedy in these courts.\textsuperscript{17} On April 2, 1888, District Courts ceased to exist and the Resident Magistrates' Courts were established.\textsuperscript{18} A Resident Magistrate had almost the same jurisdiction as the District Court Judge.

A Resident Magistrate's jurisdiction is similar to the combined jurisdictions of a judge of an English County Court and a Recorder. A special court was created to transact the civil jurisdiction of the Resident Magistrates' Court for the parishes of Kingston and St. Andrew.\textsuperscript{19}

Prior to November 1935, Jamaica had no court of criminal appeal. There were appeals from Petty Sessions to a single judge of the Supreme Court and from the Resident Magistrates' Courts.

\textsuperscript{15} Law 35 of 1867, s. 3.

\textsuperscript{16} Law 39 of 1867, s. 3 gave the court jurisdiction to determine offences under 27 V. C. 32.

\textsuperscript{17} Supra note 11, p. 382.

\textsuperscript{18} Law 43 of 1887, and its amending laws have been consolidated by the Judicature (Resident Magistrate's) Law Cap. 179 and the Revised Laws of Jamaica, 1953.

\textsuperscript{19} Law 36 of 1909; on January 1, 1910 the late Jasper Cargill was appointed under letters patent the first judge of the court.
Courts to the Full Court, which was three judges of the Supreme Court sitting, for example, in the Circuit Courts. In 1935 the Court of Appeal was created. The court consisted of the Chief Justice and a Justice of Appeal; neither exercised separate jurisdiction in the High Court. When there was disagreement in the court, the appeal was dismissed. This situation was unsatisfactory. Consequently, on January 1, 1940 all the judges of the Supreme Court exercised jurisdiction in both the Court of Appeal and the High Court. It must be noted, however, that appeals were infrequent.

After 1940 the Court of Appeal was constituted of three Judges of the Supreme Court. In any appeal, civil or criminal, the judge who presided at the trial did not sit on the appeal. Appeals from the Court of Appeal were made to the Judicial Committee of the Privy Council in England. Between 1958 and early 1962, however, appeals lay in the first instance to the Federal Supreme Court of the West Indies.

The Grand Jury being abolished, Crown Prosecutors were appointed to assist the Attorney General. Judges of the Supreme Court were authorised to admit solicitors of seven years standing to practise as advocates in the Supreme Court. At that time there was not more than six barristers

20 Law 9 of 1932 which came into force on November 6, 1935.
21 Law 29 of 1939.
22 By order of King Edward VII in Council, made in pursuance of the provisions of an Imperial Statute and 8 Vic. C. 69, it was ordered that any person may appeal to His Majesty, his heirs and successors, in His Privy Council.
23 Prior to 1972, lawyers were trained in Great Britain, but solicitors were also trained locally. Persons who were qualified to practise as barristers or solicitors abroad were admitted to practise locally without any further
qualified to appear in the superior courts and the number was thought inadequate for the efficient functioning of the judicial process.

WHAT IS THE PRESENT LEGAL SYSTEM?

The Present Machinery of Justice:

Division of the Courts

The trial courts in Jamaica are bifurcated into lower and superior courts. The lower courts are the Petty Sessions Courts and the Resident Magistrates' Courts. The superior courts are the Supreme Court and the Court of Appeal. All appeals from the latter Court lie to the Privy Council in England. The hierarchy of courts is represented at Appendix A.

As the workings of the lower courts are peripheral to this work, it is enough to deal briefly with them. How does the present structure of these courts contribute to speedy trials?

The Petty Sessions Courts

The procedure in the court of Petty Sessions is regulated by the Justices of the Peace Jurisdiction Act.\(^{24}\) A Petty Sessions Court consist of at least two lay Justices of the Peace, but where only one Justice of the Peace is available, the parties may consent to being tried by a single Justice of the Peace. Justices of the Peace are appointed to each parish by the Governor General, as custodian of the peace by Commission under the great seal of the Island. The

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training or experience, as barristers and solicitors; but solicitors normally had no right of audience in the Supreme Court. The legal profession was fused in 1972. Persons now need only be enrolled as lawyers in Jamaica to practise as advocates in all the courts.

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\(^{24}\) Revised Laws of Jamaica, 1953, s. 72
jurisdiction of a Petty Session Court is not as wide as that of its ancient predecessor, the Court of Justices in Petty Sessions. Unlike its predecessor, its jurisdiction does not extend to civil cases. It is a court of summary jurisdiction and tries only minor offences that attract a maximum fine of one hundred dollars and a maximum imprisonment of six months. Offences triable by Justices of the Peace include prostitution under the Vagrancy Act, disorderly conduct under the Towns and Communities Act, and assaulting a police officer and resisting arrest under the Constabulary Force Act.

Unlike the former courts of Justices in Petty Sessions, Petty Sessions Courts sit on a regular basis. In Kingston and St. Andrew, for instance, the courts sit five days per week, Monday to Friday. There are no shortages of Justices of the Peace. Trials are on the whole speedy in these Courts. The practice is not to try a case on the day the summons is returned because the parties are unlikely either to have witnesses at court or their attorneys present, so that on the return day a date for trial is set convenient to the parties.

Where the summons is served but the offender does not appear, but the complainant appears, the Justices of the Peace may either:

a) order a warrant for disobedience of summons; or
b) take the case ex parte, in accordance with Sections 12 and 3 of the Justices of the Peace Jurisdiction Act.

Justices of the Peace in practice do not often impose imprisonment, therefore, offenders often plead guilty. Although justice is brisk in these courts there are times when the waiting period might extend over two months. Under Section 13 of the Justices of the Peace Jurisdiction Act, neither side is entitled to address upon the facts as distinct
from submissions in law. The court, however, may permit or invite addresses.

The law provides a time limit within which proceedings should be instituted in these courts. Section 10 of the Justices of the Peace Jurisdiction Act states that proceedings should commence six calendar months from the time the offence is committed unless a particular Act states to the contrary.

Under Section 31 of the Towns and Communities Act, proceedings should be instituted within three months.

**The Resident Magistrates' Courts**

The Resident Magistrates' Court is a statutory court of first instance. The judge of the court is a professionally qualified lawyer, who sits alone, except when hearing applications under the Spirit Licence Act. In fact, the court is an intermediate court between the Petty Sessions Court and the Supreme Court. The Judicature (Resident Magistrates) Act regulates the Resident Magistrates' Courts.

There is, at least, one Resident Magistrate who sits in the capital town in each of the 14 parishes of Jamaica, with outstations in the smaller towns in the parishes as may from time to time be fixed by the Governor General. The Resident Magistrates' criminal jurisdiction is prescribed by statute. They sit in the capacity of two Justices of the Peace. Resident Magistrates will be relieved of this responsibility shortly and Justices of the Peace will preside at the Spirit Licence Session instead.

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25 Here the Resident Magistrate sits with two Justices of the Peace. Resident Magistrates will be relieved of this responsibility shortly and Justices of the Peace will preside at the Spirit Licence Session instead.

26 See s. 268 of the Judicature (Resident Magistrates) Act for offences triable at this level. Resident Magistrates do not have jurisdiction to try serious offences such as manslaughter, rape and burglary. Up to 1973 they had no jurisdiction to impose sentences of more than two years.
Peace when conducting preliminary examinations. Clerks of the courts are principally in charge of prosecutions and are entrusted to take informations on oath and to issue summonses, warrants and subpoena in criminal and quasi criminal cases. Proceedings under the Landlord and Tenant Act and Maintenance and Affiliation Acts are also heard in these courts.

Ninety per cent of criminals cases entering the criminal justice system go to the Resident Magistrates’ Courts. These courts do play a pivotal role in the administration of justice. The jurisdiction of these courts extend to hearing and determining civil as well as criminal cases. The jurisdiction to try criminal cases is not as wide as that of the former District Courts. Wounding with intent, for instance, is not tried in the Resident Magistrate’s Court.

The court sits without a jury; its trials are, therefore, intended to be speedy. In the interest of speed, Section 67 of the Judicature (Resident Magistrates) Act provides:

"It shall be lawful for any Magistrate to sit in chambers and make an order as to mode of trial of persons brought before him charged with an indictable offence, to hear and determine any application for change of venue.... for any stay of execution, for a writ of habeas corpus.... any application that may be properly made ex parte and without notice to the other side."

However, delays exist in the courts. Unlike the District Courts, delay in the Resident Magistrates’ Courts do not exist because the Resident Magistrates do not attend court. Presently, appeals from these courts are three months in arrears. There are not enough typists, therefore, the Court

imprisonment for any offence.

27 Justices of the Peace Jurisdiction Act s. 34.
of Appeal does not receive transcripts on time. Additionally, the courts are plagued by frequent adjournments due to the absence of witnesses or attorneys-at-law.

The Supreme Court of Judicature of Jamaica
This court is a superior court of Record and exercises jurisdiction formerly possessed by the Supreme Court of Judicature, the High Court of Chancery, the Incumbered Estates Court, the Court of Ordinary, the Court for Divorce and Matrimonial causes, the Chief Court of Bankruptcy, the Circuit Courts, or any of the judges of these courts or the Governor as Chancellor acting in any judicial capacity and all ministerial powers, duties and authorities relating to any part of such jurisdiction, power and authority.

By the Jamaica Constitution (Order in Council) 1962 the Supreme Court, which formerly consisted of the Court of Appeal and the High Court of Justice now exists as a distinct entity. The judges of the Supreme Court are, the Chief Justice who is head of the Judiciary, a Senior Puisne Judge and twenty-one Puisne Judges. The sittings of the Supreme Court are regulated by Rules made under the Judicature (Supreme Court) Act.29

The Circuit Courts are a part of the Supreme Court of Judicature and are presided over by judges of the Supreme Court, who sit with a jury. The movement of judges between Kingston and the rural areas provides: "a high and uniform standard of justice" and takes justice to the people. In


29 See Proclamations, Rules and Regulations Supplement of the Jamaica Gazette November 2, 1945.
fact, taking justice to the people minimises waiting time, speeds up the trial process and cuts down costs to the litigants. The visits from time to time by the "Red Judge", is a "reassurance to the righteous and a deterrent to the wrongdoers."\textsuperscript{30}

**The Gun Court**

The Gun Court was established as a specialised branch of the Supreme Court. It was established by the Gun Court Act of 1974 to try firearm offences, namely, the illegal possession of firearms or ammunitions or any other offences involving the use of a firearm in which the offender's possession is illegal. The court may sit "in such number of divisions as may be convenient". The Resident Magistrate's Division (one Resident Magistrate sits) and a High Court Division. A judge of the High Court sits in this latter division without a jury.\textsuperscript{31}

**The Court of Appeal**

The jurisdiction of this court is laid down in the Judicature (Court of Appeal) Act.\textsuperscript{32} This court has a President and six Judges of Appeal. All appeals, with the exception of Petty Sessions matters and matters from the Registrar, are now heard by the Court of Appeal. Persons convicted at the Circuit Courts have a right to appeal to the Court of Appeal on questions of law and by leave on questions of fact or sentence. The sittings of the Court of Appeal for each term are fixed by the President.

\textsuperscript{30} The Judges are usually dressed in red robes on these occasions. See Great Britain: Report, Royal Commission on Assizes and Quarter Sessions (1966-69) Chairman: the Lord Beching, Cmnd. 4153.

\textsuperscript{31} Gun Court Act, 1974, s. 3.

\textsuperscript{32} Now re-enacted in the Revised Laws of Jamaica, 1953 ed.
THE SCOPE AND SCALE OF THE PROBLEM OF DELAY AND COURT CONGESTION IN THE SUPERIOR COURTS

Since 1655 not much has been done to relinquish ancient practices and procedure. In 1993 there is no computerisation of court records, there is inadequate court room, and not enough judges. Additionally, the increase in crime, the increase in legislation and the lack of adequate resources and response within the law enforcement process, the police force have led to inordinate pressure on the criminal courts. This pressure is further reinforced by the lack of resources within the criminal justice administrative system to deal with the caseloads, thus, delays and backlogs ensue.

The delays within the system are further aggravated by other factors. Recently, the Jamaica Bench and Bar Consultative Committee identified the following factors as the causes for delays: the mobility of witnesses, failure to serve process on the part of certain agencies, poor ethical standards at the bar, the inexperience of crown counsel and failure on the part of the police to monitor witnesses.\(^{33}\) The statistics relating to crime indicate that crime is a growing industry. The unofficial statistics relating to waiting times and backlogs indicate the need for seeking ways of relieving the pressure on the courts. Therefore, the scale and scope of the problem will be discussed as an introduction to solutions which will be proposed at a later stage.

The increasing pressure of criminal cases in the Supreme Court has led to long waiting time, especially in the parishes of Kingston and St. Andrew. Although a great many of untried persons have waited for lengthy periods from committal to

\(^{33}\) Information obtained in an interview with Mr. Justice Boyd Carey (Judge of the Court Appeal) who is a member of the Jamaica Bench and Bar Consultative Committee.
sentence, the period from charge or detention to committal can be even longer. The length of time from committal to sentence varies throughout the parishes. In some instances, the waiting time can be for a period of over three years. Some Gun Court trials involve delays of two years and over. In the Court of Appeal the waiting time can be lengthy too. So also is the waiting time in the execution of sentence in murder cases. The time taken in court to deal with a case depends largely on whether the case is simple or complex. Several factors will, therefore, influence the length of a trial, for example, the number and availability of witnesses, the number of accused persons, whether the accused is unrepresented or represented and the number of charges. A simple case with one witness may take five to six hours, that is, one court day, while a complex case may take from three court days to three weeks and over. A case in the High Court division of the Gun Court with one witness may take one court day. The problem may be looked at and illustrated by a brief review of the problem in the different courts.

The Gun Court
The Gun Court legislation was designed to ensure speedy trials within seven days of the first appearance before the court. This legislation has had the opposite effect and is, in fact, a major factor in the monumental arrears in the criminal justice system. During 1983, 1,966 cases were brought before the High Court division of the Gun Court. Only a mere 455 cases were disposed of by the court. At the end of the year there was a backlog of 1,511 cases in that division of the Gun Court.34 During 1985 there were 2,104 cases before the Gun Court. Four hundred and seventy-five new cases were filed in that year and 1,629 cases were traversed from the last year.

Of the 2,104 cases, only a mere 537 cases were tried.\textsuperscript{35} In 1986 a mere 473 cases were disposed of in the High Court division.\textsuperscript{36} As far back as February 1981, the late Puisne Judge, Mr. Justice Uriah Parnell remarked that the "massive escalation" of gun crimes had overwhelmed the court and it was impossible to follow the direction in section 8, subsection (1) of the Gun Court Act, which requires that trial of an accused should begin within seven days.\textsuperscript{37}

The figures reveal that there is always a backlog of cases. What, therefore, is the criminal justice response to this excessive caseload? Since 1985 through 1986 there has been some response to the problem. The two Puisne Judges who sit in the High Court division of the Gun Court sit for a full term in order to monitor cases. Efforts have been made to start court at 10:00 a.m. Further, a frequent practice of disposing of cases is for the prosecutor to apply to have cases dismissed for want of prosecution, if the witnesses for the prosecution do not attend court after five or more trial dates. A case may also be adjourned sine die for the same reason. It must be noted that not all Gun Court cases are tried at the Gun Court in Kingston. The judges on circuit in the several parishes try cases which originate in those parishes. Notwithstanding these efforts, the disposal rate has not changed significantly, as the table below will


\textsuperscript{37} Supra note 35. Arrangements are afoot for the sittings of the Gun Court to be held at the Supreme Court building, Kingston. The objective is to allow for the transfer of cases from one court to the next in the event that more than one case is ready for trial in a particular court.
indicate.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CASES BEFORE COURT</th>
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<td>1992</td>
<td>1164 (to September)</td>
<td>347 (to September 1992)</td>
</tr>
<tr>
<td>1990</td>
<td>1967</td>
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<tr>
<td>1988</td>
<td>1445</td>
<td>408</td>
</tr>
</tbody>
</table>

*Data obtained from a senior clerk at the Gun Court.

THE COURT OF APPEAL

Although the appellate court is not a trial court, but a tribunal affording the opportunity of three legal minds to review the decisions of the courts below it, the problem of delay in this court will be dealt with. This is because the accused is still involved in the criminal process and his right to a speedy trial is still at stake. The Court of Appeal has the power to order a retrial, which means the liberty of an accused person is still an issue.

The Court of Appeal has its share of delays and backlogs despite the size of its workload and the fact that the statistics relating to the number of criminal appeals filed each year are not progressively upward.

The number of appeals filed in this court during the year 1984 decreased by 16.5 per cent to 355; 82 per cent being criminal matters. Some 374 cases were disposed of with criminal cases
accounting for 64 per cent. A total of 498 or 46 per cent more cases than in 1986 were filed in the appellate court in 1987. This was principally due to a strengthening of staff and improvement of facilities. Of these cases, 71 per cent originated from the Supreme Court and the remainder from the Resident Magistrates' Courts. The number determined was 377. At the end of the year three hundred and fifty one cases were pending, seventy per cent of these dealing with criminal matters.

Overall, cases in the Court of Appeal are not speedy in coming to a conclusion. As regards cases originating in the Supreme Court, the court has to wait on court reporters for transcripts and this can take from eight weeks to a year as the reporters are 41.2 per cent short staffed. Of a complement of thirty-four court reporters, there is, at present, only twenty. Notwithstanding the infrequent compliance with section 299 of the Judicature (Resident Magistrates) Act, cases coming from the Resident Magistrates' Courts are dealt with more speedily because those courts submit records more quickly than the Supreme Court; sometimes records are received within three months of the filing of an appeal. The Judicature (Resident Magistrates) Act, Section 299 states:

"The Clerk of Courts shall, not later than 14 days after the receipt of the notice of appeal forward to the Registrar of the Court of Appeal......all documents which have been received as evidence....."

The Table below shows the disposition rate in the Court of Appeal which sits in two divisions.

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38 Supra note 34.

* Data obtained from a senior clerk at the Gun Court.

39 Information obtained from the Deputy Registrar of the Court of Appeal. See 1990-1991 Jamaica Budget.
**TABLE 11***

<table>
<thead>
<tr>
<th>COURT</th>
<th>YEAR</th>
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<th>DETERMINED</th>
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<th>BROUGHT FORWARD</th>
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<th>DETERMINED</th>
<th>PENDING (Jan-Mar)</th>
</tr>
</thead>
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<td>20 (Jan-Mar)</td>
<td>18</td>
<td>18 (Jan-Mar)</td>
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<td>1985</td>
<td>8</td>
<td>148</td>
<td>129</td>
<td>27</td>
</tr>
</tbody>
</table>

*See Table 21.55, 1987 Social and Economical Survey, National Planning Unit, for cases disposed of in the Court of Appeal.
The Court of Appeal hears and determines criminal and civil appeals from the Supreme Court, Circuit Courts, Gun Court, Resident Magistrates' Courts, (Traffic Court and Revenue Court and hears application for leave to appeal to the Privy Council (England).  

THE SUPREME COURT (CIRCUIT COURTS)

The workload of these courts has increased since 1962 despite the increase in the jurisdiction of the Resident Magistrates' Courts and the increase in the number of Supreme Court Judges. Moreover, some of the cases are more complex as crime becomes more sophisticated. Over the years the disposition rate has not increased significantly although workload has increased. The statistics relating to case disposition lend credence to this point. In 1980 the circuit courts disposed of a mere 451 cases. Of the 880 cases before the circuit courts in 1983 only 472 cases were concluded. Only 421 of the 897 cases before the courts were disposed of in 1986. In the year 1987, the circuit courts disposed of 509 cases; this was 15.3 per cent more than the previous year. In the year 1988 the courts disposed of only 505 cases. A breakdown of the statistics relating to disposition of cases for the fourteen parishes since 1963 appears in Tables 111 and IV.

It is not uncommon for newspapers in Jamaica to highlight from 1983-1987. Cases carried forward omitted from that Table

40 See 1990-1991 Jamaica Budget (Appendix) for projected caseloads.

cases which have been long in coming to a conclusion. In 1972 a newspaper carried the following caption: "In Custody Eleven Months Man Gets Deposition On Day Of Trial ..... Administration Of Justice Falling Down, Says Judge." The writer of the article was reporting Mr. Justice Melville’s strong responses when an accused person informed the court that he had been in custody for eleven months and it was only on the day of the trial he received the deposition. The accused, Roy Reid, was before the Circuit Court charged on an indictment with several counts of housebreaking and larceny. After the jurors were empanelled, he sought an adjournment. It was those circumstances that evoked the judge’s comment. The court on that occasion adjourned at 2:00 p.m. This case not only demonstrates the delay in the judicial system but the wasting of judicial time which, at times, is a feature of the trial process.

The criminal courts experience delays at various stages of the trial process. The waiting time in some instances can be quite long as borne out by Herbert Bell v Director of Public Prosecutions (Jamaica) and the unreported case of Regina v Victor Scott & Horace Dawkins. In the Bell case, Bell contended, among other things, that he was not granted a fair trial within a reasonable time. The history of the case indicates that the appellant was arrested on May 18, 1977 and convicted and sentenced in the Gun Court for the offences of illegal possession of firearm and other related offences. He appealed against conviction and on March 7, 1979 the Court of Appeal ordered a retrial. The notice of the order of the

44 No. 14/85 (2).
45 Supra note 43.
Court of Appeal issued by the Registrar of that court, due to an oversight, was delayed in the Court of Appeal Registry and was only received by the clerk of the Gun Court on December 19, 1979. On January 28, 1980 Bell was once again before the Gun Court and, thereafter, made three subsequent appearances due to the absence of the investigating officer, who was then on suspension, and the loss of the original statements. On November 10, 1981, the prosecution offered no evidence and the accused was discharged. On February 12, 1982, Bell was re-arrested and brought before the court and a trial date was fixed for May 11, 1982. Following this, he brought a motion before the Supreme Court seeking a declaration that his arrest contravened the fundamental rights and freedom guaranteed by the Constitution. He also contended that he was not afforded a fair trial within a reasonable time. The Supreme Court found no merit in the motion. Bell appealed the decision of the Supreme Court. The Court of Appeal in May 1983 upheld the Supreme Court’s decision and dismissed the appeal. Thereafter, he appealed to the Privy Council in England.

The Privy Council accepted that in Jamaica a delay of thirty-two months in bringing an accused to trial did not in itself constitute an infringement of the appellant’s right to a speedy trial, but held that the failure of the court to recognise in the particular case that some urgency was needed in respect of the retrial and the discharge by the judge could only be construed as recognition of the need to ensure a fair trial within a reasonable time "flawed (the Court of Appeal) decision."  \footnote{Supra note 43.}

The Privy Council also stated that in the case of a retrial, the delay, for the purposes of the trial within a reasonable time provision, should be calculated from the time when the
person responsible "should have ensured that the order for retrial was obeyed without avoidable delay, that is, from the date of the order of retrial."

The real importance of Bell’s case lies in the fact that it dealt with the redress available to an accused who suffers delays and the type of delay that qualifies for such redress.

In Regina v Victor Scott et al, Scott and Horace Dawkins were arrested and charged on December 22, 1978 with uttering forged documents and obtaining money by virtue of forged documents, between November 10, 1978 and December 8, 1978. Thereafter, Scott was charged on an indictment with several counts of uttering forged documents and obtaining money by virtue of the said documents. The accused, Horace Dawkins, was charged on the same indictment with two counts of uttering forged documents. After several appearances, due to adjournments at the request of the prosecution and defence, on April 25, 1984 they were tried in the Home Circuit Court and convicted. Both appealed against conviction and sentence, following which, the Court of Appeal ordered a retrial. On June 17, 1985 they were brought before the Supreme Court once more. They were tried and convicted. On July 4, 1985, both filed applications for leave to appeal against conviction and sentence. On May 7, 1986, Dawkins’ appeal was allowed. At the request of Scott’s attorney, the matter was taken out of the list. Finally, on September 23, 1986 Scott’s appeal was dismissed.

The ostensible reason for the lengthy delay in this matter was that several adjournments were granted. On two occasions adjournments had been necessitated by the disappearance of the exhibits from the Registry of the Supreme Court. Shortly

47 Supre note 44.
thereafter, the exhibits were located but further adjournments were granted because the defence lawyers were absent and the crown was unable to secure all the vital witnesses, one of the witnesses being on leave. On three occasions thereafter, when the crown had secured all its witnesses, the defence team was not in a position to proceed.

This case demonstrates that the granting of multiple adjournments is a feature of the trial process and suggests that there is no urgency to have a matter started even if it extends over a period of eight years. Therefore, one needs not wonder why the constitutional provision of the right to a trial within a reasonable time (speedy trial) is hardly invoked in our courts.

CAUSE OF THE PROBLEM

(1) LACK OF "GUilty PLEAS"

It has been observed that in some jurisdictions between 70 per cent and 90 per cent of criminal cases are resolved by guilty pleas. The disposition of cases in this way has, in fact, been seen as a method of solving the caseload problem in these jurisdictions.

In Jamaica, the adjudication of the guilt of an accused person by a "guilty plea" is not a common feature in the administration of criminal justice. In fact, 90 per cent of the cases are resolved by the trial process except in the Traffic Court, where ninety per cent of accused persons plead guilty. Sources connected with the criminal courts have observed that accused persons in Jamaica do not, as a rule, plead guilty.

G.N.G. Rose in the 'Royal Commission on Assizes and Quarter Sessions' stated that "not guilty" pleas in the criminal

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courts in England increased substantially during the '60s. He based this on the supposition that the acquittal rate is related to the proportion of persons pleading not guilty. Rose drew the inference that "not guilty" pleas have increased in the higher courts. He pointed out that there was a marked increase in the acquittal rate. The acquittal rate was defined as "the percentage of all persons for trial who were acquitted or for any reason not tried."

The statistics marginally illustrate this point. The data do not include the accused persons who plead not guilty and were found guilty by the court.

During the period 1981-82 of the 25,790 cases brought before the criminal courts (superior and inferior) in Jamaica, 2,717 were acquittals (10.53 per cent). For the year 1982-83 the total number of cases was 31,244 with 3,865 acquittals. For 1984 the total was 25,476. In 3,761 nolle prosequis were entered and 4,063 were acquittals (15.95 per cent). For 1985 the total was 25,968. In 3,807 nolle prosequis were entered and 4,427 were acquittals (17.04 per cent). For 1986, of the 26,509 cases, 3,945 had nolle prosequi entered and 4,560 were acquittals (17.3 per cent). For 1987, of the 48,957 cases reported, 36,857 were brought before the

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49 Jamaica: Statistical Abstract 1984
50 Ibid.
51 Supra note 34. Offences before the court included offences against the person, offences against property, miscellaneous (fraud, illegal possession etc.).
courts and 4,668 acquittals (12.66 per cent). Finally, for 1989, of the 33,702 cases which were brought before the criminal courts, 13,649 were acquittals (40.49 per cent). There are no official statistical data in respect of guilty pleas in Jamaica. However, the limited data collected on cases in the Home Circuit Court lend some credence to the observation that a significant number of accused persons plead not guilty.

G.N.G. Rose also stated that increased legal aid in Great Britain in the 1960s had encouraged a greater proportion of accused persons to plead "not guilty". He singled out the year 1964 in England when fifty-nine per cent of accused persons were granted legal aid and there was a maximum increase in "not guilty" pleas. However, in Jamaica, legal aid does not contribute to the "not guilty" pleas.

Indeed, legal aid has not increased because the fees which are payable under the provision of the Poor Prisoners' Defence Act, Act 7 of 1961, do not accord with present economic reality. It seems that the attitude of most accused persons

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54 Data obtained from the C.I.B. Bureau of Statistics Division.


56 Some unofficial data in respect of guilty pleas have been recently extracted from the court calendars. Extracts of these will be presented in Chapter V. The calendars included different cases, for instance, rape, carnal abuse, causing grievous bodily harm, larceny of postal articles, perjury, arson, incest, buggery and causing death by dangerous driving.

57 Supra note 48.

58 Supra note 49
represented or unrepresented, is: "you (the crown) brought me before the court, prove your case". Most criminal cases in the Superior Courts in Jamaica are, therefore, resolved by litigation.

(2) CRIME AND CLEAR-UP RATE
Although a fall in the clear-up rate of crimes would be expected to have a reverse effect on the court's caseload, this is not so. The clear-up rate is important because potential wrong-doers are still at large and at some stage will be brought before the court. This means the criminal justice system will always be burdened with cases.

The burden on the criminal courts is reflected in the statistics on crime. There is no doubt that the incidence of crime has increased steadily since the early 1970s, notwithstanding the Suppression of Crime (Special Provisions) Act which came into effect in March 1974; the 180-day period of extension of the Suppression of Crime (Special Provisions) (Special Act),59 the formation of a 'Crime' Monitoring Committee; the "Neighbourhood Watch" and the "Authorised Persons" programme.60 The growth of crimes, especially of

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59 The 180 day period extension of the Suppression of Crime (Special Provisions) (Special Act) sanctioned by the House of Representatives on December 9, 1986 came into effect on Sunday, January 4, 1987. It ended on July 2, 1987. Under the Act, the Jamaica Defence Force was empowered to assist the police force in its fight against crime. The order also empowered the security forces to search without a warrant.

60 "Neighbourhood Watch" programme was introduced in areas where there is a high incidence of crime. The programme is aimed at getting citizens to co-operate in an effort to prevent crimes, such as, burglary, rape and robbery in their communities. In order to control praedial larceny, the "Authorised Persons" programme was formed. These are persons who have been trained and charged with the
crimes of violence or offences against the persons, has further contributed to the caseload of the higher courts.

Despite the fall in the clear-up rate, the criminal courts are overwhelmed by the caseloads. The Fraser Committee on Capital Punishment and Penal Reform established by the Ministry of Justice in June 1979, recorded:

"......there had been a progressive decline in the percentage of all cases cleared-up or prosecuted, although the number of reported killings of all types has increased greatly over the period covered. For example, the clearance rate has dropped from 90 per cent in 1962/1966 to 60 per cent in 1973/1978, whereas the number of killings had risen from 341 cases in the earliest period to 1,845 in 1973/1978. The prosecution rate had also dropped from 71.6 per cent (1964/1968) to 32.2 per cent (1974/1978)."

Indeed, the statistics recorded by the Planning Institute of Jamaica and the Statistical Institute of Jamaica highlighted the growth in crime and the fact that a significant number of offenders were brought before the criminal courts despite the decrease in the clear-up rate.

Compared with the year 1983, in 1984 the number of crimes reported to the police increased by 5.3 per cent to 52,088 while the proportion clear-up was some 58 per cent or about the same as in 1983. While crimes against the person rose by 1.7 per cent, serious crimes of violence, that is murder, robbery, shooting with intent and rape increased by 20 per cent. Overall, there was an increase of 8.6 per cent in responsibility of assisting in the control of praedial larceny.

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reported crimes against property but burglary and housebreaking showed a 1.5 per cent decrease. The number of reported homicide increased by 14 per cent to 484 with 291 or 60 per cent associated with the use of firearms.\textsuperscript{62}

In the year 1985, of the 434 murder cases reported, only 238 cases were cleared up (54.84 per cent); of the 858 cases of rape and carnal abuse reported, only 481 cases were cleared up; of the 4,989 robbery reported only 1,624 cases were cleared up (32.55 per cent).\textsuperscript{63}

In 1986 of the 449 murders reported, only 264 were cleared up (58.80 per cent); of the 1,050 shooting cases reports, only 446 were cleared up (42.47 per cent); of the 910 rape and carnal abuse cases reported, only 421 were cleared up; of the 4,721 robbery reported, only 1,501 cases were cleared up (31.79 per cent).\textsuperscript{64}

In 1987 the incidence of serious reported crimes increased by 5 per cent, but murder decreased by 1.6 per cent which is the equivalent of 2 per 10,000 in the population and robbery involving the use firearms decreased by 7.1 per cent. In fact, there was a 4.2 per cent decrease in gun crimes due to the fact that more than 200 firearms were recovered and a large quantity of ammunition seized. Overall, crimes reported to the police decreased by 554 (1.13 per cent) but maintained a staggering figure of 48,987.\textsuperscript{65}

\textsuperscript{62} Planning Institute of Jamaica, Economic and Social Survey of Jamaica, 1985.

\textsuperscript{63} The Statistical Institute of Jamaica, Statistical Year Book of Jamaica, 1987, p. 181.

\textsuperscript{64} Ibid.

Although the statistics relating to certain offences at times revealed a downward trend, this trend never continues. This would suggest that the response to crime is not adequate.

(3) **THE JURY LIST**

The principal effect of section 7 of the Jury Act of Jamaica is to make the electoral list the official list from which the jury list is prepared. Under the old system of preparing the list from the tax roll, the list was inadequate and this caused grave inconvenience to the courts as trials had to be temporarily abandoned because there were insufficient jurors. Additionally, in small parishes, for example, Hanover, the same jurors were summoned to serve repeatedly and this placed a tremendous burden on those jurors. Under the old system, in some instances, it took more than a day to empanel a jury.⁶⁶

A brief description of the procedure for preparation of the jury list will provide a framework for analysis at a later stage. The procedure briefly is that the Electoral Office sends the Chief Officer of Police in each parish printed copies of the list containing the names of persons whose names appear on the current official list of electors in that parish. The Chief Officer of Police then sends a copy of the list to the Resident Magistrate in each parish. Following this, the Custos of each parish selects a number of justices in the parish to constitute a special panel for the purpose of settling the jury list of that parish. The Resident Magistrate sits with the justices to settle the list. Section 13 of the Jury Act requires the justices after finally settling the jury list to certify it, and "their decision as to the qualifications of the persons in the list shall, as

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respect that list, be final." Under section 14, persons whose names appear in the certified list for each parish "shall" be the "jurors qualified and liable to serve on the jury for such parish for the ensuing year and until the formation of the new jury list." After the settling of the jury list in accordance with sections 9 and 12 of the Jury Act, one of the copies of the list is sent to the Registrar of the Supreme Court. The Registrar, (Jury Clerk) makes up such number of panels of jurors as he considers necessary for the trial of cases at the sitting of each circuit court. These jurors are taken from the jury list for the parish in which the court is to be held. 67 Every panel of jurors for a circuit court shall contain not less than seventy or more than one hundred names, as the Registrar of the Supreme Court considers necessary. In practice, the jury clerk selects panels of jurors who will serve for a period of three weeks.

A total of 600 jurors are usually selected for the panels for each session of the Home Circuit Court (parishes of Kingston and St. Andrew), 350 for each court in St. Catherine, Clarendon and St. James and 250 for each of the other parishes. The list is sent by the Registrar to the Superintendent of Police in charge of detention and courts and his office prepares and serves summonses on the jurors. 68

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67 Section 17 (2) of the Jury Act consolidated by the 1953 Revised Laws of Jamaica.

68 Section 16 (2) of the Jury Act states: "At least 60 days before the day on which the jurors forming a panel are required to attend a circuit court, the Registrar shall seal and issue to the Commissioner of Police a writ of venire facias for that circuit court in the form of Schedule 'B' containing the names of the jurors forming that panel for such court."

In practice the list is sent to the Superintendent in charge of Detention and Courts.
the unlikely event of all 600 jurors appearing for jury service in the Home Circuit Court, 200 is sent to each of the three divisions of the court. Where all 600 jurors do not appear for jury service, the jurors present are divided equally and sent to the three divisions.

In the likely event that one division of the court runs out of jurors it has to wait on another division and use the unempanelled jurors from that division. Where there are insufficient jurors, the matter is adjourned for the following day for a supplementary panel of one hundred jurors to be selected from jurors who have already served. This list takes one hour to prepare. In practice, the process section of the police department would be responsible for summoning these jurors.

The problem lies in the fact that a significant number of jurors request exemption from jury service. As regards Kingston and St. Andrew 13 percent (70-80) of the jurors would tender medical certificates and others would submit letters from their employers. Many jurors consider doing this civic duty a waste of precious time and would not attend court. Furthermore, although the Chief Justice or the circuit judge would excuse these jurors as they see fit, many jurors

Section 19 (1) states:

"Upon the receipt of the venire facias, the Commissioner of Police shall cause to be served on each of the jurors whose names are contained in the panel annexed thereto twenty-one days, at least, before the day on which such juror is required to attend, a summons in the form provided in Schedule 'C',"

69 Jury Act, section 21, in Revised Laws of Jamaica, 1953.

70 Information concerning the practice in respect of the selection of potential jurors was obtained from the jury clerk, Mr. Shaw, in an interview.
are, in fact, excused. Moreover, the preparation of a supplementary panel at the stage where there are not sufficient jurors has proven unsatisfactory as it is not convenient to take jurors from their place of abode or workplace at such short notice although sometimes these jurors co-operate. It is, therefore, not uncommon for trials to be temporarily abandoned or postponed because of the lack of sufficient jurors.

Finally, under section 4 of the Jury Act, persons who cannot read or write English shall not be qualified to serve as jurors. Jurors on several occasions have been challenged because of their inability to read English (read the Oath or Affirmation) or understand English. On what basis, therefore, are these jurors certified as qualified and liable to serve?

(4) LENGTHY DETENTION: FITNESS TO PLEAD

Section 25 subsection (1) of the Criminal Justice (Administration) Act of Jamaica, provides for detention at the Governor General’s pleasure for accused persons found unfit to plead.\(^71\)

The Jamaica Constitution states that "everyone" is entitled to a speedy trial, "trial within a reasonable time". It follows, therefore, that the accused person found by a jury to be unfit to plead should benefit from the right to a speedy trial. The court has power under the Criminal Justice (Administration) Act to determine whether an offender is fit to plead. It is the psychiatrist who usually certifies to the court that the accused person is suffering from some mental disorder and would not be able to give instructions to his lawyers or understand the proceedings and, therefore, unfit to take his trial. The result of a finding that an accused person is

\(^{71}\) Revised Laws of Jamaica, 1953.
unfit to plead is that he is detained indefinitely ("strict custody"). Detaining an accused persons for an indefinite period might work grave hardship on him especially where the accused is innocent. In *R. v Roberts*, Devlin J said:

"To insist on the issue of fitness to plead being tried might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed in the eyes of the police and of the authorities to have been a person responsible for a crime whether he was or was not and investigations which might have led to the apprehension of the true criminal would not have taken place."^72

Additionally, the Jamaican Criminal Justice Act is silent as to when the Governor General’s pleasure should cease. Neither does the Act state upon whom it devolves to monitor or review the fitness of an accused person to plead and make known to the court when he is fit to take his trial. There is no time limit in respect of an accused who is found unfit to plead and is detained. Such a finding does not vitiate the charge; the charge remains for as long as the accused remains unfit to plead. Even before the court finds the accused unfit to plead, he may be kept in custody for a lengthy period. For instance, Ehud O’Brien has spent twenty-three years at the General Penitentiary awaiting trial. He was charged with murder in 1969.^73 In the unreported murder case of *R v Alexander Bryce*,^74 the accused was kept in custody for eleven months before he was found unfit to plead on January 18, 1988. Moreover, there was no endorsement on the records to indicate

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\(^{72}\) [1954] 2 Q. B. 239.


\(^{74}\) C. 13/66 (1).
that his fitness to plead was being monitored. Similarly, in the unreported murder case of **R v Walter Blackstock**, the accused was in custody for eleven months before he was detained at the Governor General’s pleasure. In the unreported case of **Regina v Hubert Prince**, the accused, who was examined by a psychiatrist and found to be suffering from temporal lobe epilepsy, a type of psychosis, and, therefore, was unfit to plead, waited for ten years before he was tried and convicted in the Home Circuit Court on December 11, 1987. He was charged with killing Kenneth Davis on May 19, 1977. Although there are no official statistics as to how many accused persons are detained each year at the Governor General’s pleasure, only a small number are so detained.

Keeping an accused person in custody at the Governor General’s pleasure is, in fact, incarceration for an indefinite period without the favour of a prompt trial, thus, the accused person might not benefit from the speedy trial provision. Some attempt at reform in this direction ought to be made.

(5) **PRELIMINARY EXAMINATION/PRELIMINARY INQUIRY: AN ANACHRONISM?**

Historically, the purpose of taking depositions at a preliminary inquiry, according to Maitland’s Constitutional History of England, was not to establish a prima facie case but to give the justices inquisitorial powers to construct a case against an accused person. Preliminary inquiry,

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75 C. 14/88 (1).
76 K. 20/87 (3).
77 1931, p. 232. A statute of 1554 enacted that a prisoner arrested for felony should not be released on bail except by two justices in open sessions and directed the justices to take examination of the said prisoner and information of them that bring him "and to put into writing the material evidence before releasing him on
therefore, began as a discovery device. In fact, in 1823 the Grand Jury was told:

"When a Magistrate was conducting this preliminary examination he was acting inquisitorially and not judicially; that such proceedings might and ought to be conducted in secret, and that information so ascertained might be communicated to the prosecutor and not to the party accused."\(^8\)

Today a preliminary inquiry is an impartial inquiry into the allegations of a criminal charge with a view to establishing a prima facie case. Although the 'investigative' role of the examining justices has changed, for decades preliminary examination has played a significant role in criminal justice systems.

In Jamaica an accused person charged with a serious offence ought to have his charge brought promptly before a Resident Magistrate to ascertain whether there should be further prosecution.\(^9\) The magistrate is the only arbiter as to whether or not there is a prima facie case and the proceedings are conducted in an adversarial fashion. However, under section 2 subsection (2) of the Criminal Justice (Administration) Act, power is conferred on the Director of Public Prosecutions to prefer an indictment ex officio, without the necessity for any previous preliminary inquiry.

The major value of the procedure is that it is a means of disclosure of the prosecution's case, allows the defence to

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\(^{78}\) Holdsworth's History of English Law, 7th edition, vol.1, p.296

\(^{79}\) Justices of the Peace Jurisdiction Act, section 34, Revised Laws of Jamaica, 1953.
judge the strength or weakness of the case and, so, is a safeguard against spurious prosecution. Moreover, the depositions assist the prosecutor in the framing of charges in the indictment.

Despite the advantages of a preliminary inquiry, there are, in fact, strong disadvantages. In Barton v The Queen, Murphy J dissenting, said:

"The desirability of committal proceedings in modern times is doubtful, at least in certain kinds of cases. A trend has developed in New South Wales in which conspiracy, fraud and various corporate charges become delayed because of committal proceedings which go on for months or years. These are often interrupted with excursion into the Supreme Court for rulings on points of law or procedure. This not only tends to improperly frustrate prosecutions but can also result in embarrassment and oppression to defendants...., such committal proceedings have become a disgrace to the administration of criminal justice in New South Wales."\(^{80}\)

There are, however, statistics relating to the United States of America which suggest that delay with a preliminary inquiry is not unreasonably greater than without one.\(^{81}\)

There are rarely any 'excursions' from the Resident Magistrate's Court to the Supreme Court in Jamaica, but the delay from charge to preliminary examination or preliminary inquiry can be quite long. In the unreported case of John Campbell, Campbell was detained on December 2, 1980 and was committed on May 30, 1983. Moreover, preliminary inquiry


\(^{81}\) Katz. L, Justice is the Crime, 1972, pp 46-51.

\(^{82}\) C. A. C2/83.
can involve long and repetitive cross-examination and can assume the form of an actual trial where the defence engages in a lengthy address. The procedure not only puts witnesses to grave inconvenience but puts the public to great expense. There is a need to reduce the waiting time from charge to committal. The late Mr. Justice Parnell, then Acting Senior Puisne Judge, suggested certain reforms in the administration of the criminal law in division 1 of the Home Circuit Court in April 1979. He prefaced his suggestions for reforms with these words:

"Progressive thinking must be employed to tackle the problems and urgent issues which face all persons and agencies engaged in the administration of the criminal law in Jamaica today."

As regards the preliminary inquiry, he stated:

"There is a pressing need for some expedition in the holding of preliminary examinations where an accused is in custody."

Although there are statistical data on waiting time as regards preliminary inquiries in other jurisdictions, there are no such data in Jamaica. The problem cannot be adequately measured in statistical terms. However, from the courts records the average waiting time for preliminary inquiries for the parishes of Kingston and St. Andrew was computed in 1990 at 12.06 months.

However, in dealing with the problem of delay in the criminal justice system, the character of the traditional entitlement of full oral inquizy needs to be reviewed without removing the true value of the proceedings.

SCREENING BY THE PROSECUTOR/RESIDENT MAGISTRATE

Screening is a process similar to preliminary inquiry in its function. Screening, among other things, is the process by which a case is removed from the criminal justice system prior to plea or trial, for example, by nolle prosequi or withdrawal. Secondly, screening contemplates to charge less than the facts might otherwise support. One of the objects of screening is to stop proceedings against accused persons when further action might be futile because of the insufficiency of admissible evidence to support a charge. Processing such a case is a waste of resources and valuable court time. To prevent this, screening for the lack of, or insufficient evidence should be done early.

Screening is an extension of the prosecutor’s discretionary powers and his/her charging responsibility. On the question of discretion, Kenneth Culp Davis stated:

"A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." 84

The Office of the Director of Public Prosecutions usually gets cases which are to be tried in the circuit courts only after preliminary inquiries are concluded. On receiving these files, every effort is made to eliminate cases where the evidence does not support a criminal charge or to fill in the missing elements in a case by obtaining further statements from the police. However, the heavy workload and the low staffing level preclude that office from removing some cases from the criminal justice system early.

Of course, screening first occurs in the Resident Magistrates’

84 Discretionary Justice, 1969, p. 4.
Courts at the preliminary inquiry. Where 'weak' cases are not eliminated from the system at that stage, it is pushed further along the criminal justice process. Similarly, if a 'weak' case is not withdrawn early by the Director of Public Prosecution's Office, it is prolonged in the process. It might be on the day of trial or just before trial that the prosecutor realises that the case ought to have been withdrawn. Therefore, the interest of justice would not have been served as the accused should have been freed at an early stage from involvement in the criminal process. Moreover, it causes grave hardship to the witnesses and a waste of resources and court time.

(7) **ADMINISTRATIVE PROBLEMS:**  
**MANPOWER, COURT ROOMS, JUDGES, WITNESSES**

(a) **Manpower**

The judiciary and the courts are burdened with an increasing caseload while faced with the problem of being understaffed. The courts are understaffed because the Public Service Commission is unable to obtain urgently needed court personnel as the Civil Service cannot compete, in terms of salary, with private enterprise. Additionally, the system of administering justice does not generate profit and, therefore, the criminal justice system operates on a very small budget.

There is a shortage of staff in the courts offices throughout Jamaica. The office of the Director of Public Prosecutions and the Attorney General's Department are also understaffed. The Attorney General's Department is forty per cent short staffed and the office of the Director of Public Prosecutions is 33.3 per cent short staffed. The office of the Director of Public Prosecution needs a staff of twenty-seven prosecutors but there are only eighteen lawyers presently. The shortage of staff in these offices is caused by the rapid rate of resignations due to low remuneration and the difficulty in recruiting experienced personnel. Recently, there have been
increases in salaries in these departments.

The shortage of Crown Prosecutors in the Office of the Director of Public Prosecutions has sometimes led to the closure of a division of the Home Circuit Court. To address this problem, the Director of Public Prosecutions has an arrangement with members of the private Bar to conduct criminal prosecutions on behalf of the crown. This arrangement has not always solved the manpower shortage as on trial dates members of the private Bar, so retained, may inform the Office of the Director of Public Prosecutions of their inability to attend court. Additionally, the system of recruiting Resident Magistrates from the Office of the Director of Public Prosecutions and the Attorney General's Department has placed a severe drain on these departments. Of course, the private Bar is not excluded from being recruited, but the private bar is not taking up the offer as they regard the salary as economically unrealistic. Low staffing level in these offices leads to one person doing the work of several. As stated, the lack of personnel sometimes adversely affects the operation of the courts. In July of 1982 a division of the Home Circuit Court ceased operation following a request from the then Director of Public Prosecutions, Mr. Ian Forte, Q.C., (now Judge of the Court of Appeal) to the Chief Justice, the Honourable Kenneth Smith, O. D. There was no qualified personnel from his office to operate that court. In early February 1989, the Manchester Circuit Court had to be adjourned because the prosecutor assigned to that court was ill.\(^5\) Exodus from these offices is not a recent phenomenon; in the early '60s there was a mass exodus from the office of the Director of Public Prosecutions due to low remuneration.

The lack of support staff, for example, typists, in the courts

offices has affected the speedy dispatch of court records for example, depositions. The court reporters are 41.2 per cent short staffed; consequently, appeals from the circuit courts take some time to be concluded as the court has to wait on the transcripts.

(b) The physical structure of the courts
Most of the court houses in Jamaica are basic, especially in rural parishes where the Resident Magistrates’ Court buildings are used for Circuit Court sittings. There are no waiting rooms for jurors, no rooms for lawyers to robe or to sit and discuss a case with their clients. In fact, the areas for remand prisoners are in some cases so small that in some instances the prisoners and police are thrown together in too close a proximity. At times jurors, witnesses and prisoners rub shoulders in the crowded corridors of the court houses.

So too, the air-condition units in the Home Circuit Court rarely work, which makes working for any length of time with any degree of efficiency in the court rooms quite difficult and uncomfortable. The unsatisfactory condition of the buildings causes delays and with increases in population, crime and caseloads, it is clear that the physical structure of the courts have ceased to be functional.86

86 While writing this paper court houses in Kingston, St. Andrew, St. Catherine, Westmoreland, Clarendon and St. Mary are refurbished. The Supreme Court in Kingston is also being refurbished over a 3-year period which commenced in 1987 by the U.S.A.I.D. GOJ Caribbean Justice Improvement project with a total funding of $16,468,648. This project is designed to provide: (a) commodities and technical assistance; (b) training for judges and court personnel; (c) renovation of the Supreme Court and Resident Magistrates’ Courts islandwide; (d) books and periodicals for the Supreme Court as well as the Resident Magistrates’ Courts throughout Jamaica.
(c) Judges

In citing the reasons for the backlog of untried cases in 1987, the former Director of Public Prosecutions commented:

"That the backlog of cases was causing a serious embarrassment to his office and the delay in the trying of these cases can be attributed to the shortages of judges."^{87}

Judges are usually recruited from the Civil Service after service perhaps as a Resident Magistrate or a Senior Crown Counsel. The private Bar is by no means excluded, but the private Bar might not be enticed by the remuneration offered. Further, there is at present a shortage of Resident Magistrates.

In 1970, the full complement of judges in the Supreme Court was: a Chief Justice and ten Puisne Judges. In the Court of Appeal, the full complement was a president and six judges. While the number of judges has doubled in the Supreme Court, the number of judges in the Court of Appeal remains the same.^{88} Despite the increase in the number of judges in the Supreme Court, there is still a need for more judges. The consequence of the shortage of judges is an over-burdened judiciary.

(d) Witnesses

Witnesses are central to the administration of justice. Many times cases are terminated without being tried because of the absence of witnesses. The improper practice, by parties who have an interest to serve, of paying witnesses not to attend


^{88} In 1988 the number of judges (of the Supreme Court increased from 18 to 21.
court, a witness being 'worn out' by repeatedly attending court and the case not being tried, witnesses being threatened are factors which cause the non-attendance of witnesses.

A Supreme Court judge sitting in division 1 of the Home Circuit Court commented that there was a trend where witnesses are afraid to attend court; the criminal, therefore, could regard the system as favouring the commission of crime. The comment arose from what took place in court that day. A witness was giving evidence in the matter of Regina v Delroy Graham. The accused was charged with murder. The witness told the court that she did not want to die and related several incidents of threats against her life. Unable to obtain any evidence from her, the judge directed the jury to return a formal verdict of 'not guilty'. The judge stated: "this case brings into sharp focus the need to protect witnesses."90

The non-attendance of witnesses due to threats is a problem of some antiquity in Jamaica. However, it is only recently that the problem is taken seriously. As there are no available statistics as to how many witnesses in previous years have been threatened or feared reprisal, or showing the frequency of the problem, the scope of the problem cannot be measured in statistical terms. However, it is a fact that the problem is very serious and the criminal justice system has not responded adequately to it. This is because threatening a witness is an offence which, when reported, is difficult to prove. Moreover, the threatened witness out of sheer fear sometimes disappears and the court at some stage is told, usually by the investigating officer, that he was informed that threats were

90 Ibid.
issued to the witness and the witness has removed from her place of abode and cannot be traced.

The nature of the problem has ranged from a witness being killed, verbal and physical confrontation, a witness being shot at and their property being damaged or destroyed. Where witnesses live in the same district or neighbourhood, threats are issued through the accused person’s family or friends. Where the witness did not know the accused before the offence, threats are usually issued by persons unknown to the witness. Witnesses sometimes treat these threats as idle and only take it seriously when they are beaten or their property destroyed.

Threats usually occur in the crowded corridors of the courts, or in the precincts of the court, at the witness’ home, on the streets and, at the witness’ workplace. In fact, one witness was killed in her car, while on her way to work. She was not warned prior to the killing. Another witness was killed in a minibus, while on his way to court. Although the killing of witnesses is infrequently done, witnesses are becoming more fearful of reprisals.

The problem is no doubt a distressing one. What, therefore, is the criminal justice system’s answer to the problem to date? Members of the police force have on occasions removed witnesses from their homes and provided accommodation for them elsewhere. So too, the police usually make a record of threats which are reported; however, the threats are never usually monitored or investigated. Further, a stern reprove by the judge when a report of threat is made in court by a witness, is of little avail, as it is usually someone unknown to the witness who issued the threats. Also, the police sometimes escort a witness to and from court.

Is the response adequate? The response is far from being
adequate as witnesses are still persistently threatened. The attendance of vital witnesses, especially in murder trials, can be described as poor. In addition, the amount paid to witnesses for court attendance does not accord with present economic realities.

(e) Legal Aid

The problem has more to do with the insufficient numbers of attorneys willing to take legal aid assignments. When an accused person is committed for trial in a circuit court for a specific or scheduled offence, and if the court is of the view that legal aid should be granted, then the court must issue a legal aid certificate. Similarly, at committal proceedings, or preliminary inquiry, if the court is satisfied that the accused should be represented and that he has insufficient means, then the court must grant legal aid.

Section 3, subsection (1) of the Poor Prisoner’s Defence Act, Act 7 of 1961 states:

"Where it appears to a certifying authority (Judge or Resident Magistrate) that the means of a person charged with or as the case may be convicted of a scheduled offence are insufficient to enable that person to obtain legal aid, the certifying authority shall grant in respect of that person a legal aid certificate which shall entitle him to full legal aid in the preparation and conduct of his defence in the appropriate proceedings as may be specified in the legal aid certificate and to have counsel or solicitor assigned to him for that purpose in the prescribed manner."

The offences in relation to which legal aid may be granted include murder, rape, burglary and offences triable in the Gun Court.

One of the reasons for delay in the criminal justice system is
the unwillingness of some members of the private bar to accept legal aid assignments. There is, therefore, a problem of finding lawyers to represent accused persons in criminal matters. Moreover, the number of accused persons are increasing. Although there is a list of legal aid lawyers from which to draw, this list is inadequate and cannot satisfy the demands placed upon it. The practice as regards the Supreme Court is that the list is compiled by the Registrar, (Legal Aid Clerk), from the names of lawyers who indicate their willingness to accept legal aid assignments. As there are only a few lawyers who accept legal aid assignments, a tremendous strain is placed upon the criminal justice system as the hearing of cases are protracted.

(8) ADJOURNMENTS
This is a factor worth considering as a separate contributor to the problem of delays. The power of the court to grant adjournments in a circuit court is embodied in the Criminal Justice (Administration) Act of Jamaica. Section 6 of that Act mandates:

"No person prosecuted shall be entitled to traverse or postpone the trial of any indictment presented against him in a Circuit Court: Provided always, that if the court upon the application of the person so indicted, or otherwise, shall be of the opinion that he ought to be allowed further time, either to prepare his defence or otherwise, such court may adjourn the trial of such person...."

Although the proviso to this section is applied with great frequency in Jamaica, because there are no statistical data, it cannot be stated in numerical terms the frequency with which adjournments are granted.

One of the reasons given for frequent adjournments in this jurisdiction is that some lawyers assigned to legal aid cases
prolong these cases with the hope of exacting higher fees. However, the reasons given for applications for adjournments are many. In the Privy Council decision of Robinson v R Lord Roskill, quoted the late Justice Parnell as saying:

"In recent times and when I say 'recent' I am speaking, at least, of the last 8 to 10 years, there has been a practice that has been developing, particularly among junior counsel whereby at the last minute, having been retained by an accused man charged in the Circuit Court, he asks for an adjournment on the ground that he has not got proper instructions; and that generally means that the client, or those who are assisting the client have not satisfied the agreement made towards representation; in other words, not fully paid. That practice, as I said has blossomed over the last eight years with the result that judges who are minded to grant these applications find that they are really clogging the case."\[92\]

Robinson's case was mentioned on 19 occasions in the Circuit Court, on six of which trial dates had been fixed. In March of 1981, the judge refused to grant an adjournment on the basis that the defence lawyers were not fully paid. Thereafter, they sought permission to withdraw from the case. The judge refused permission for the lawyers withdrawing and asked the counsel who had made the application to withdraw if he would accept a legal aid assignment, which he refused. The judge continued the trial in the absence of both Counsel.

What is the criminal justice system response to adjournments? The justice system has not responded adequately to this problem. As attitudes with regard to requests for adjournments vary among judges, adjournments continue to be a feature of the criminal process. Indeed, it has become a main

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feature of our "local legal culture."

EMPIRICAL INVESTIGATION OF WAITING-TIME
IN JAMAICA CRIMINAL COURTS

The object of the investigation
The object of the investigation is to obtain information on waiting time, or the time from committal to trial. Particular concern is with the factors that cause delay and congestion in the higher courts of Jamaica, including the factor of a "local legal culture", and the ways of eliminating the problems associated with excessive caseloads and backlogs.

Methodology
Two basic techniques of empirical investigation were employed:

1) Firstly, secondary data consisting of court records were examined to ascertain:
   a) the total number of cases disposed of during the years 1963 to 1991 for all the parishes.
   b) an average waiting time for a selected number of parishes.

2) Secondly, survey research, consisting of a questionnaire was constructed and administered to participants in the criminal process, such as lawyers at the private Bar, judges, Resident Magistrates, two clerks in the criminal registry at the Supreme Court and prosecutors. By virtue of their location and role in the criminal process, these individuals would have experienced the problem at first hand; it is this first hand knowledge which this questionnaire was constructed to tap.

One hundred questionnaires were sent to these persons in the legal profession or persons associated with the criminal
courts. Thirty-six questions were asked. The majority of these questions were "open-ended", that is to say, they were designed so not to "lead" the respondents by suggesting the categories or answers to them. Thirty per cent of the questionnaires were returned completed. This number constitutes an adequate base for analyses as the thirty respondents comprised four judges, a number of prosecutors and senior lawyers at the private Bar. The group was, therefore, a reasonable representative sample and bias was thereby minimised.

The questionnaires were mailed on January 11, 1989. The deadline for return of the questionnaires was March 20, 1989. The secondary data will be examined first.

(1) Courts Records
From the court records a macro-view of the situation will be given. From these records the following were computed:

(a) the total number of cases disposed of between 1963 and 1991; and

(b) the average waiting time in a number of parishes.

(a) Disposal of Cases: 1963/1991
As regards the cases disposed of in the Circuit Courts, adequate records were obtained from the Office of the Director of Public Prosecutions and the Supreme Court in Kingston. Regarding the Gun Court, adequate records were obtained from the Gun Court of cases concluded in the years 1988 to 1991 in that court. Concerning the Court of Appeal, adequate files were obtained from the Registry of the Court of Appeal of cases concluded in the years 1987, 1988 and 1990.

The sample used in respect of each parish was a representation of the different types of cases. The number of cases used as sample varied from parish to parish as the caseloads differ.
The cases were a reasonable mix of all types of cases tried on indictment. In respect of the sample taken from the Circuit Courts, the charges included murder, rape, manslaughter, arson, burglary and larceny, possession of cocaine and wounding with intent.

Regarding the sample taken from the Gun Court, the charges included illegal possession of firearm, rape, robbery with aggravation, assault, shooting with intent and kidnapping. Concerning the sample taken in respect of the Court of Appeal (appeals originating in the Supreme Court) the cases included murder, rape, burglary and larceny. The samples varied from one accused person to several. Some samples included a significant number of relatively serious offences.

The number of cases disposed of for the period 1963/1991, with the exception of the year 1979, is listed below in Tables 111 and IV according to the parishes. These figures provide basic data on the number and distribution of cases concluded in Jamaica’s Circuit Courts over a 27-year period. Per se, the figures are enlightening and constitute useful data which can serve as background for further analysis. However, by themselves, and without reference to figures for the total number of cases pending, they provide only a limited indication of the problem of backlog and congestion in our courts.

(b) Waiting Time
To assess the average waiting time, a simple method was adopted. The date the case was filed (Court of Appeal matters) and the date of committal were extracted from the records. Then the length of time it took each case to be disposed of was calculated. Following this, an average waiting time was arrived at.
The samples targeted for examination were cases completed in the Supreme Court in four parishes. The Island, as a whole, is divided into 13 such parishes. The parishes sampled were Kingston and St. Andrew, St. Catherine, Clarendon and Hanover

**LIST OF CIRCUIT COURT CASES DISPOSED OF FOR THE ISLAND OF JAMAICA - 1976/73**

**TABLE III**

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<td>485</td>
<td>543</td>
<td>496</td>
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<td>505</td>
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<td>Per centum disposed of</td>
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</table>
Hanover is the smallest parish with a population of 65,000. Kingston was chosen because it is the capital city and the criminal courts are usually burdened with cases originating in that parish and St. Andrew. Kingston and St. Andrew have a population of 644,000. The other parishes are rural parishes and were chosen because of their size. The parishes of St. Catherine and Clarendon are both large parishes which have a sizeable criminal workload. St. Catherine has a population of 353,600 and Clarendon a population of 214,000.

**TABLE V**

I. **Findings in four parishes: Waiting Times**

(a) **Clarendon**

<table>
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<tr>
<th>Year</th>
<th>Number of cases (sample)</th>
<th>Types of cases</th>
<th>Average waiting time</th>
<th>Longest case</th>
<th>Shortest case</th>
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<tr>
<td>1990</td>
<td>38 simple &amp; complex</td>
<td>5.4 mths</td>
<td>13 mths</td>
<td>7 days</td>
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<tr>
<td>1989</td>
<td>23 &quot;</td>
<td>5 mths</td>
<td>14 mths</td>
<td>19 days</td>
<td>9 days</td>
</tr>
<tr>
<td>1988</td>
<td>41 &quot;</td>
<td>4 mths</td>
<td>13 mths</td>
<td>1 mth</td>
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<tr>
<td>1987</td>
<td>25 &quot;</td>
<td>4.6 mths</td>
<td>12 mths</td>
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</tr>
<tr>
<td>1986</td>
<td>25 &quot;</td>
<td>5.8 mths</td>
<td>24 mths</td>
<td>24 days</td>
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</tr>
<tr>
<td>1985</td>
<td>37 &quot;</td>
<td>5.4 mths</td>
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<td>1984</td>
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<td>3.6 mths</td>
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<td>3 mths</td>
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<tr>
<td>1983</td>
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<td>33 mths</td>
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<td>1982</td>
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</table>
(b) **Kingston & St. Andrew**

The targeted years were 1979 - 1991 in respect of Kingston and St. Andrew. The findings for Kingston and St. Andrew are summarised below in Table VI.

**TABLE VI**

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<tr>
<th>Year</th>
<th>Number of cases (sample)</th>
<th>Types of cases</th>
<th>Average waiting time</th>
<th>Longest case</th>
<th>Shortest case</th>
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<td>10 days</td>
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<td>1990</td>
<td>33 &quot;</td>
<td>13 mths</td>
<td>88 mths (7 yrs)</td>
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<td>10 days</td>
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<td>30 mths</td>
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<td>1980</td>
<td>50 &quot;</td>
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</tr>
<tr>
<td>1979</td>
<td>30 &quot;</td>
<td>7.7 mths</td>
<td>28 mths</td>
<td>1 mth</td>
<td></td>
</tr>
</tbody>
</table>

(c) **St. Catherine**

The period selected for this parish was the years 1983-1991. The findings appear below in Table VII.

*Kingston and St. Andrew treated as one parish.*

100
TABLE VII
St. Catherine: Waiting Times

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of cases (sample)</th>
<th>Types of cases</th>
<th>Average waiting time</th>
<th>Longest case</th>
<th>Shortest case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>30</td>
<td>simplex &amp; complex</td>
<td>4.6 mths</td>
<td>31 mths</td>
<td>2 mth</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>20 days</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>29</td>
<td>&quot;</td>
<td>3.67 mths</td>
<td>11 mths</td>
<td>1 mth</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>14 days</td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>29</td>
<td>&quot;</td>
<td>5.23 mths</td>
<td>12 mths</td>
<td>1 mth</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7 days</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>83</td>
<td>&quot;</td>
<td>5.39 mths</td>
<td>11 mths</td>
<td>2 mths</td>
</tr>
<tr>
<td>1987</td>
<td>38</td>
<td>&quot;</td>
<td>5.13 mths</td>
<td>18 mths</td>
<td>1 mth</td>
</tr>
<tr>
<td>1986</td>
<td>25</td>
<td>&quot;</td>
<td>8.4 mths</td>
<td>17 mths</td>
<td>2 mths</td>
</tr>
<tr>
<td>1985</td>
<td>25</td>
<td>&quot;</td>
<td>5.96 mths</td>
<td>16 mths</td>
<td>1 mth</td>
</tr>
<tr>
<td>1984</td>
<td>39</td>
<td>&quot;</td>
<td>3.23 mths</td>
<td>11 mths</td>
<td>1 mth</td>
</tr>
<tr>
<td>1983</td>
<td>25</td>
<td>&quot;</td>
<td>5.7 mths</td>
<td>36 mths</td>
<td>1 mth</td>
</tr>
</tbody>
</table>

(d) Hanover
This being our smallest parish, statistics were collected for this study only in the years 1988 and 1989. For this period 20 cases were selected. The average waiting time was 6.8 months. The disposition time of the cases selected ranged from one month to twenty-three months. For the year 1989, six cases were selected. The average waiting time was 2.3 months. The disposition time of the cases selected ranged from one month to seven months.

(e) Gun Court
The first period selected was the year 1988. A random sample of fifty-eight cases was selected. The average waiting time
was found to be six months and the disposition time varied from one month to eleven months.

For the year 1989, a random sample of thirty cases was selected, fourteen of which were adjourned sine die and seven in which no evidence was offered. The average waiting time was found to be 7.5 months. The disposition time varied from fourteen days to twenty-four months thirteen days.

A random sample of thirty cases was obtained for the year 1990. Of this sample, three of the cases were adjourned sine die and four cases were dismissed for want of prosecution. The disposition time varied from twenty-two days to twenty months seventeen days. The average waiting time was 5.5 months.

For the year 1991, a random sample of thirty cases was selected; of these cases four were adjourned sine die and no evidence was offered in three. The disposition time varied from five days to eight months. The average waiting time was found to be 4.3 months.

(f) The Court of Appeal
The targeted years for these cases were 1987, 1988 and 1990. For 1987 a sample of one hundred and ninety-six cases was selected and the average waiting time was 8.6 months. The disposition time of the selected cases ranged from three months to twenty-eight months.

For the year 1988, a sample of eighty-six cases was selected. The average waiting time was 6.6 months and the disposition time of the cases selected range from two months to eighteen months.

A sample of thirty cases for the year 1990 was selected. The average waiting time was 11.2 months. The disposition time of
the selected cases ranged from four days to sixteen months.

II. **Survey Research Findings**

The question and replies from the respondents are presented below. The full range of questions in the questionnaire* is presented.

1. What in your opinion are the most serious problems facing the criminal courts?

**Results:**

76.6 per cent respondents replied that court congestion was the most serious problem facing the criminal courts. 13.3 per cent did not see court congestion as one of the most serious problems, but saw the following as the most serious:

(a) The unwillingness of witnesses to give evidence because they were afraid to do so.

(b) The unwillingness of counsel to accept legal aid assignments.

(c) The lack of experienced counsel to undertake prosecutions.

(d) Inadequate personnel.

(e) The lack of qualified court staff.

(f) The lack of adequate facilities and amenities.

Thirty per cent of the respondents who saw court congestion as a serious problem saw, in addition, to this problem, the following:

(a) Frequent adjournments.

(b) The lack of proper court facilities.

(c) The unwillingness of counsel to accept legal aid assignment.

(d) Inefficient scheduling of matters or crowding of the

* Some of the attitudinal questions were adapted from Thomas Church (Jnr.) et al, Justice Delayed: the Pace of Litigation in Urban Trial Courts, prepared by National Centre for State Courts, Virginia, 1978.
trial list without the possibility of completing a significant portion at a sitting.

(e) Inadequate jurors.
(f) Antiquated regulations.

(g) Preliminary inquiry which is time consuming.
(h) The lack of co-operation from defence counsel in getting cases started.
(i) Corruption among court staff and police.

2. What pressures are placed on your performance as a participant in the criminal process?

Results:
(a) Work hours? 5 (16.6%)
(b) Court room activity? 5 (16.6%)
(c) Disposition? 24 (80%)
(d) Others? A shortage of prosecutors and too many cases and, therefore, less time to explore possible weaknesses in cases.

3. Is there a policy emphasis in moving older cases?

Results:
Yes: 29 (96.6%)
No: 1 (3.3%)

4. What is an old case?

Results:
13 (43.3%) said 1 year and over.
3 (10%) said 3 months.
1 (3.3%) said 2 years old.
8 (26.6%) said 6 months and over.
4 (13.3%) said 9 months and over.
1 (3.3%) said 3 or more trial dates.

5. The respondents were also asked: What
circumstances hinder the flow of cases in the criminal courts?

Results:
(a) The absence of witnesses.
(b) Frequent and frivolous adjournments by prosecutors and defence.
(c) The lack of court personnel.
(d) Defence counsel not being fully retained.
(e) Lack of a permanent branch of the high court outside of the corporate area.
(f) Shortage of judges.
(g) Over scheduling of trial matters.
(h) Incomplete investigation.
(i) Poor working conditions.
(j) Waste of time by the court in trying to admonish the staff and police from the bench: in some courts this takes 25 percent of the court’s time.
(k) The court hours are too short.
(l) The lack of modern technology.
(m) Inadequate jurors.
(n) Unavailability of counsel to undertake legal aid assignments.
(o) Late arrivals of prisoners.
(p) The absence of lawyers.

Twenty-four (80%) respondents cited the absence of witnesses as high on the list of circumstances that hinder the flow of cases. One (3.3%) respondent stated that the absence of witnesses was peculiar to the Home Circuit Court and Gun Court. Ten (33.3%) respondents cited adjournments also.

6. What improvement(s) could be made to deal with this/these problem(s)?

Results:
(a) Protection of witnesses and an efficient system of contacting witnesses.
(b) Better organisation of cases; shorter matters set for special days.
(c) Increased remuneration for judges and court personnel.
(d) Permanent high court division for the county of Cornwall.
(e) Experienced court personnel.
(f) Greater firmness in dealing with applications for adjournments.
(g) Increased fees paid to attorneys assigned to legal aid matters.
(h) Resident Magistrates should hold regular meeting with court staff and police advising them of what is expected in court.
(i) Appointment of more Resident Magistrates, Judges and Crown Prosecutors.
(j) Speedy completion of police investigations.
(k) Formal rules relating to plea bargaining.
(l) Abolish preliminary inquiry.
(m) Training for court and police personnel.
(n) Sensitize community to criminal justice issues.
(o) More money for the administration of the criminal justice system.
(p) Increase the amount of money paid to jurors.
(q) Firmer judges.

Thirteen (43.3%) respondents cited the protection of witnesses as a method of dealing with the problem.

Two (6.6%) respondents advocated plea bargaining as a way of coping with the problem.

7. Has the criminal courts made any important changes in speeding up the trial process in the last ten
years?

Results:
Yes: 19 (63.3%)
No: 8 (26.6%)
Expressing no views: 2 (6.6%)

The important changes cited by the eight respondents were:
(a) Additional judges and court rooms.
(b) Greater emphasis on the part of judges to start cases, even in the absence of defence attorneys.
(c) Since early 1989, one judge sits for the entire term, in each division of the Home Circuit Court, so as to monitor cases.
(d) Increased jurisdiction of the Resident Magistrate.
(e) An increase in the number of High Court Judges and Resident Magistrates.
(f) A reduction in the granting of adjournments.

8. Should there be a formal process for monitoring the flow or progress of criminal cases?

Results:
Yes: 19 (63.3%)
No: 5 (16.6%)
Expressed no views: 6 (20%)
Reason: Ready information concerning the history of a case would be available so cases, especially older cases, can be dealt with one way or another.

9. What, in your view, is the judge's attitude when both attorneys want to move a case slowly?

Results:
(a) "Let's get on with it" "attitude?"
Yes: 17 (56.6%)
No: -
(b) Neutral?
Yes: 8 (26.6%)
No:  -
1 (3.3%) said it depended on the case.
3 (10%) expressed no views.
1 (3.3%) said sometimes.

10. Should there be a sifting process that allows different types of cases to be treated differently?

Results:
(a) Complex cases (eg. fraud cases)?
Yes: 22 (73.3%)
No: 4 (13.3%)
Expressed no views: 4 (13.3%)

(b) Short cases?
Yes: 16 (53.3%)
No: 5 (16.6%)
Expressed no views: 9 (30%)

11. In your view, are most postponements granted too frequently?

Results:
Yes: 22 (73.3%)
No: 7 (23.3%)
Expressed no views: 1

One of the respondents who said ‘no’ said trial dates were set prematurely.

12. Do you think the Bar should have a say in initiating or modifying court policies with a view to speeding up the criminal trial process?

Results:
Yes: 29 (96.6%)
No: 1 (3.3%)
13. Is the Bar practice in the criminal court, in your opinion:

**Results:**
(a) Based on request for adjournments?
Yes: 19 (63.3%)
No: 7 (23.3%)
Expressed no views: 4 (13.3%)
(b) Based on wanting to dispose of cases speedily?
Yes: 9 (30%)
No: 10 (33.3%)
Expressed no views: 11 (36.6%)

14. Do you foresee any problems if the court began to move cases significantly faster than at present?

**Results:**
Yes: 9 (30%)
No: 21 (70%)
If yes, give reasons.
(a) This would cause injustice as defence counsel would not have sufficient time to prepare his case.
(b) Unless proper scheduling is done and there is improved back-up service, grave injustice would follow from any considerable stepping up of the pace of trials.

15. Do you think the Director of Public Prosecution’s Office and the Resident Magistrates do an effective job of screening cases before they enter the Supreme Court?

**Results:**
Yes: 12 (40%)
No.: 17 (56.6%)
Expressed no views: 1 (3.3%)

16. Do you think there should be formal rules relating to ‘plea negotiations’?
Results:
Yes: 23 (76.6%)
No: 7 (23.3%)

17. Do you think there ought to be a ‘Speedy Trial’ legislation?
Results:
Yes: 16 (53.3%)
No: 14 (46.6%)

18. What period would you consider appropriate for the ultimate disposal of a case from the time of committal?
Results:
(a) 110 days as in Scotland?
   Yes: 14 (46.6%)
   No: 3 (10%)
   Expressed no views: 13 (43.3%)
(b) One year?
   Yes: 13 (43.3%)
   No: 8 (26.6%)
   Expressed no views: 9 (30%)
Two (6.6%) respondents who said ‘no’ to (a) and (b) suggested 6 months.

19. How would you describe the relationship between the participants in the criminal process?
Results:
12 (40%) felt that the relationship was cordial and speeded up the trial process.
1 (3.3%) felt that although the relationship was cordial, some judges did not treat the Bar with respect.
3 (10%) felt that it was the particular participants who determined whether relationships speeded up the trial process.
7 (23.3%) felt that there is a need for greater co-operation between the participants in the criminal process. One of the respondents added that this should be supported by honesty and fair play. 1 (3.3%) of the respondents described the relationship as 'hostile'. 2 (6.6%) described the relationship as 'antagonistic'. Expressed no views: 7 (23.3%)

20. Do you think the trial judge plays a significant role in speeding up trials?

**Results:**
Yes: 27 (90%)
No: 3 (10%)

21. Should trial judges assume a more managerial role?

**Results:**
Yes: 16 (53.3%)
No: 13 (43.3%)
Expressed no views: 1 (3.3%)

22. How would you view a judge if he deviates from court rules and policies in order to speed up trials where it does not cause any prejudice?

**Results:**
21 (70%) respondents felt that such an action was innovative and practical and should be applauded. 9 (30%) felt it was a dangerous precedent because it might lead to prejudice, especially where an accused person is unrepresented. In fact, one senior counsel stated: "Rules were made to be observed, the question admits of a virulent paradox."

23. Do you think a system of pre-trial hearings should be instituted to determine, in advance of the trial issues which do not concern the jury?
Results:
Yes: 12 (40%)
No: 17 (56.6%)
Expressed no views: 1 (3.3%)

24. Do you think that a system of obtaining additional jurors should be used to ensure that very long criminal trials are not temporarily abandoned for want of sufficient jurors?

Results:
Yes: 20 (66.6%)
No: 8 (26%)
Expressed no views: 2 (6.6%)
(a) What system would you recommend?

Results:
3 (10%) respondents felt the present system should remain. 11 (36.6%) respondents felt that persons who are willing to serve should be asked to so indicate and a list of such persons be compiled. One of the respondents stated there ought to be a stand by list. 1 (3.3%) expressed the view that the public should be educated as regards the role of jurors. 16 (53.3%) expressed no views.
(b) Do you think that prospective jurors should be subjected to a test of education, intelligence or literacy?

Results:
Yes: 15 (50%)
No: 15 (50%)
One (3.3%) respondent who answered in the affirmative felt ‘literacy’ only.

25. Do you think that full committal proceedings should be dispensed with?

Results:
Wholly? 8 (26.6%)
In part? 15 (50%)
6 (20%) respondents stated that it ought not to be dispensed with.
1 (3.3%) expressed no views.

(a) Replaced partially by paper committal?
   Yes: 11 (36.6%)
   No: 4 (13.3%)

(b) Replaced completely by paper committal?
   Yes: 6 (20%)
   No: 2 (6.6%)

26. Does full oral inquiry serve any useful purpose?

Results:
Yes: 20 (66.6%)
No: 7 (23.3%)
3 (10%) respondents expressed no views.

27. In your opinion should there be disclosure by the defence where the defence is in the form of an alibi.

Results:
Yes: 17 (56.6%)
No: 12 (40%)
1 (3.3%) respondents expressed no views.

28. If there were a pre-trial diversion programme, what cases would you consider appropriate for removal from the criminal justice system?

Results:
3 (10%) respondents said none would be appropriate for removal from the criminal justice.
5 (16.6%) said trivial offences (road traffic offences, quasi criminal offences; price control).
14. (46.6%) expressed no views.
8. (26.6%) expressed the following views:
(a) Fraud cases because of their complexity.
(b) Matters which reflect that the issues would be better disposed of by civil proceedings, for example, motor manslaughter or assault.

29. is the present quality of case preparation satisfactory?

Results:
Yes: 7 (23.3%)
No: 23 (76.6%)

30. In your view, are both speed and backlog fixed largely by established expectations, practices and informal rules of behaviour of judges and lawyers and so the court has adjusted a specific pace of litigation? (Thomas Church, Jnr.)

Results:
Yes: 22 (73.3%)
No: 8 (26.6%)

31. Assuming that court systems was adequate, that is, one in which the system had adequate resources to deal with the caseloads in a fair and expeditious manner, do you anticipate that a case would proceed speedily? (Thomas Church, Jnr.)

Results:
Yes: 23 (76.6%)
No: 5 (16.6%)
2 (6.6%) expressed no views.

If no, why not?

Result:
(1) Defence lawyers would still request adjournments.
(2) Witnesses would continue to be absent from court.
(3) Lawyers would still refuse to accept legal aid assignments.
32. What, in your view, are the key factors that cause delays in the criminal justice system?

Result:
(a) Manpower - 25 (83.3%).
(b) Lack of available court rooms - 15 (50%) respondents.
(c) Judge shopping - 3 (10%) respondents
(d) Case shopping - 2 (6.6%)
(e) Others (Please specify):
1 (3.3%) cited case shopping by attorneys who will not accept legal aid assignment of case if there is a likelihood of conviction.
1 (3.3%) Delaying tactics by members of the Bar.
1 (3.3%) Frequent adjournments.
7 (23.3%) The absence of witnesses.

33. What, in your opinion, are the main causes of adjournments in the criminal court?

Result:
1. 19 (63.3%) - respondents cited the unavailability of witnesses.
2. 1 (3.3%) - respondent stated insufficient preparation.
3. 1 (3.3%) - deliberate dilatoriness.
4. 2 (6.6%) - attorneys at the Bar not properly retained.
5. 3 (10%) - the lack of adequate staff.
6. 7 (23.3%) - frequent and frivolous adjournments.
7. 3 (10%) - incomplete case files.
8. 1 (3.3%) - felt too many cases were set for a particular week.
9. 1 (3.3%) - absence of defence attorneys.
10. 2 (6.6%) - a caseload that is too large.
11. 3 (10%) - judges’ attitude: indulgent and a lack of a sense of urgency.

34. In your view, should an unsworn statement of an accused be dispensed with?
**Result:**
Yes: 10 (33.3%)
No: 17 (56.6%)
3 (10%) expressed no views.

35. In your opinion, should the judges’ sitting hours be increased?

**Result:**
Yes: 8 (26.6%)
No: 20 (66.6%)
Expressed no views: 2 (6.6%)

36. What would you consider excessive delays?

**Result:**
(a) A case in the system for eight weeks?
Yes: -
No: 27 (90%)
3 (10%) expressed no views
(b) A case in the system for over one year?
Yes: 27 (90%)
No: -
Expressed no views: 3 (10%)
(c) Other? (give reason(s)
    No reasons were advanced.
CONCLUSION

The statistical data and the opinions expressed in this survey throw considerable light on the causes of the problem of delay in Jamaica and the possible reforms necessary to deal with the problems. The problem of delay itself is identified and highlighted as a real problem that may clog the wheels of justice. There was general consensus by most respondents that there is a need for speedy trials in the circuit courts throughout Jamaica, especially in Kingston and St. Andrew, and the need for adequate response to the problem of delay.

Additionally, the pattern for disposal has remained fairly steady throughout. In the result, the backlog has remained constant. The overall disposal of criminal cases is less than the filing of criminal cases.

It is interesting to note that 90 percent of the respondents define as "excessive delay" a case in the system for over a year. But what is interesting about the statistics on waiting times is the fact that the problem could be worse than it is as all of the parishes sampled have averages below what is regarded as "excessive delay". Of the four parishes, the average waiting time was highest for Kingston and St. Andrew followed by Clarendon and Hanover. But the average waiting time in all four parishes over the entire period studied has not been above one year, according to figures presented in Tables 5, 6 & 7.

In the case of the Gun Court, the data on average waiting time seems to give a better impression in terms of determination of cases than the reality of the situation. Perhaps it is not good enough to meet average tests. One of the disadvantages of the average or arithmetic mean is that it is strongly affected by extreme values, and may, therefore, be far from representative of the sample. If the median was used as a
measure of average, it would not be affected by extreme values and, therefore, a more accurate picture would be obtained.

The responses to questions 8 and 10 show that people are ready for an assault on the problem. As much as 63.3 per cent believe that there should be a formal process for monitoring the flow on progress of criminal cases.

Particular questions were designed to highlight the causes of the problem. The fifteen causes suggested by the answers to question 5 show the true multi-dimensional nature of the problem. The answers to question 30 reflect the existence of a "local legal culture" which must be viewed as one of the re-enforcing causes of the problem. About 73.3 per cent respondents believed that both speed and backlog are primarily determined by established practices and informal rules of behaviour by judges and lawyers and so the courts have conformed to this customary pace of litigation. It is also as part of this "local legal culture" that the responses to question 11 and 13 take significance: 63.3 per cent of the respondents believe that the criminal process is "based on request for adjournments" rather than being based on "wanting to dispose of cases speedily"; 73.3 per cent believed that postponements are granted too frequently.

The solutions to the problems were also highlighted by the answers given to the questions asked. Question 6 was specifically designed "open-endedly" so as to get at the actual proposals of the respondents without actually "leading" them in the answers they give. The seventeen proposals made are wide ranging but they cover administrative, institutional and procedural reforms. They emphasize the need for adequate resources. The particular areas of reform most strongly emphasized are:
(i) The need for an efficient system of contacting and protecting witnesses.
(ii) The need for more judges.
(iii) The need for proper court facilities.
(iv) The need for adequate personnel.
(v) The need for a permanent branch of the Supreme Court outside of Kingston and St. Andrew.

It must, however, be emphasized that when the above proposals are applied in a piece-meal fashion they are less likely to succeed in arresting the problem. In fact, over 63 per cent of the respondents to question 7 indicate that important changes have indeed taken place in speeding up the process over the last ten years. Yet, unfortunately, the problem remains. Hence, a consolidated assault has to be made on the problem by seriously applying all of these measures. This latter approach is more likely to succeed in considerably reducing delays in the criminal courts.
HIERARCHY OF COURTS
(the arrows indicate where appeals lie)

- PRIVY COUNCIL IN ENGLAND
  - COURT OF APPEAL
    - SUPREME COURT
      - JUDGE IN CHAMBERS OF THE SUPREME COURT
        - RESIDENT MAGISTRATES' COURT
          - PETTY SESSIONS COURT
CHAPTER III

THE ENGLISH CRIMINAL JUSTICE SYSTEM: REFORM MEASURES

INTRODUCTION
This chapter seeks to review reform measures within the context of the administration of the criminal justice system in England. It also analyses the effectiveness of these reform measures in dealing with caseloads, backlogs and delays or waiting times and the related problems, as well as the manner in which those problems within the system have been tackled. With this broad objective, it will also consider measures at different periods and examine the perceptions that led to the strategies that were advocated and employed.

The time lapse, from the charging of an accused person to when his case is summarily dealt with in the magistrates’ court, or is committed to the Crown Court and then finally tried, can be excessive and unjustified. This also applies to waiting times between the Crown Courts and the Appellate Courts.¹ A key factor which contributes to unjustifiable delay or excessive waiting time is the continuing increase in the judicial workload and the inability of the criminal justice system to contain this workload at varying stages.

¹ Diagrams of hierarchy of the criminal courts have been prepared as research is intended for use in Jamaica.
The statistics reflect a steady rise in recorded crime since the 1950s to the present time. For instance, the average increase in crime from 1960 to 1985 has been between six per cent and seven per cent.\(^2\) For the period 1985 through 1989 the yearly average increase of offences recorded was five per cent. Between the period June 1989 and June 1990, 4.2 million offences were recorded which was 466,000 or thirteen per cent more than the previous year.\(^3\) The 1991 figures for commission of offences and the clear-up rate showed increases.\(^4\)

This increase in crime has obviously led to a rise in the receipts of Crown Court cases. During the period 1986 to 1991 committals only increased from 87,573 to 102,9540.\(^5\) However, the number of cases received in the Crown Court in the year 1988 showed a marked decrease when compared with those of 1989. This was due to a reclassification of certain either-way offences as triable summarily, by virtue of the Criminal Justice Act 1988, Chapter 33. In 1990, as compared with 1989, there was a four per cent increase in cases for trial in the Crown Court.\(^6\) Notwithstanding, disposal increased at the same rate.

\(^2\) H. C. (Hansard) (Nov. 7, 1985) vol. 86, c.131.
\(^3\) H. L. (Hansard) (1990-1991) m.523, 28.
\(^5\) Court Service Annual Report, Lord Chancellor’s Department (April 1990 - March 1991) para. 6.3.
The disposal rate in the Crown Court showed an increase from an average of 0.85 cases per day in the year 1979 to 1.40 cases in the year 1988.7 Disposals during the period 1990 to 1991 increased by 1.2 per cent, although ‘cracked’ trials adversely affected the throughput of cases.8 ‘Cracked’ trials led to an underutilisation of court time because of the late change of plea from not guilty to guilty which prevented the introduction of a new trial matter. It is interesting to note that the guilty plea rate decreased from 64.7 per cent in the year 1989 to 63.2 per cent in 1991. This should have affected the disposal rate but due to a reduction in the average length of trials, there was an increase in the disposal rate.

The average waiting time between charge and committal to the Crown Court has also increased. As regards paper committals, the average waiting time rose from seventy-three days in 1985 to ninety-one days in 1988. It increased from one hundred and ten days in 1985 to one hundred and forty-one days in 1988, for full oral inquiry.9

For the year 1988, the overall average waiting time from committal to trial for accused persons remanded in custody was 9.9 weeks. During that year, the average waiting time in London for accused persons remanded in custody was 16.6 weeks.10 However, during the period 1990 to 1991 the waiting time for custody cases in London was reduced to 13.2 weeks, "the lowest for over fourteen years."11 For the period 1990

7 Supra note 4.
8 Supra note 5, para. 6.13.
9 Supra note 4.
10 Supra note 4.
11 Supra note 5, para. 6.13.
to 1991, the national average waiting time for accused persons remanded in custody was 10 weeks. It was 12.8 weeks for accused persons remanded on bail. National average waiting time was held at the same level during the period 1989 to 1990.\textsuperscript{12}

In some instances, the number of appeals has also increased. In 1988, about 1.5 million accused persons were sentenced by magistrates and the rate of appeal in the same year against the sentence of magistrates was estimated at 0.6 per cent. In that year also the Crown Court disposed of some nine thousand three hundred appeals against sentence imposed by magistrates.\textsuperscript{13}

For comparative statistics of Crown Court, receipts of appeals for period 1988 to 1991, see Table VIII below.\textsuperscript{14}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Receipts & Disposals & Pending  \\
\hline
1988-89 & 17,000 & 16,000 & 3,000  \\
1989-90 & 17,500 & 16,500 & 3,500  \\
1990-91 & 17,750 & 17,500 & 4,000  \\
\hline
\end{tabular}
\caption{Crown Court - Appeals}
\end{table}

*The above figures are approximations.*

\textsuperscript{12} Supra note 5, para., 6.12. See also Judicial Statistics Annual Report 1990, Lord Chancellor’s Department, cm.1573. (HMSO) p.58, para. 19.

\textsuperscript{13} Criminal Statistics, England and Wales, 1988, cm.847 (HMSO).

\textsuperscript{14} Supra note 5.
For the year 1988, a total of ninety eight thousand accused persons were sentenced by the Crown Court. The rate of appeal against the Crown Court sentences in that year was about six per cent. The number of appeals decided by the Court of Appeal, for the period, being appeals against sentences imposed by the Crown Court was about five thousand six hundred.\(^\text{15}\)

For the year 1989, a total of 7,076 applications and substantive appeals were registered in the criminal division. Compared to 1989, the number of applications for leave to appeal and substantive appeals registered in the criminal division in 1990 was 6,307, a drop of 769 cases.\(^\text{16}\) Although the disposal rate fell in recent years, in 1990 it rose by four per cent.\(^\text{17}\)

As far back as 1967, the average waiting time for appellants was twenty-one weeks.\(^\text{18}\) In recent times, the average waiting time has decreased. The average waiting time for appellants within the year 1990 was higher than 1989. The average increased from 0.4 weeks to 8.8 weeks.\(^\text{19}\) The year 1991 saw no change in the overall waiting time. However, the overall workload continues to increase. Michael Beckman and Charles Taylor stated that an appeal to the Court of Appeal Criminal Division can take a minimum of two days before it is heard. However, "A gap of almost a year between trial and appeal is

\(^{15}\) Supra note 13.

\(^{16}\) Supra note 6, p.58, para. 11.

\(^{17}\) Ibid., p.58, para. 15.


\(^{19}\) Supra note 6, p.58, para. 20. See also Annual Abstract of Statistics, Central Statistical Office, 1992, no. 128.
not unheard of."\textsuperscript{20}

The year 1992, up to the present time saw further growth in the criminal workload.

Delays in the criminal courts in England is not a recent phenomenon. However, in the recent past delays or waiting times, in the Crown Court are excessive in view of the Crown Court eight weeks rule and targets set by the Lord Chancellor's Department concerning waiting time. The statistical profile so far indicates an increase in the criminal business of the courts. Although the waiting time has decreased in some instances, the increase in receipts of committals for trials and appellate cases has caused a backlog of cases. This is so, notwithstanding an increase in the disposal rate during certain periods.

Committees, commissions, working parties and other bodies have been appointed over the years to investigate the problem relating to caseloads and waiting times and recommend ways of expediting the trial process. Some of these recommendations have since been given legal recognition.

Efforts are always being made to keep waiting time at a minimum and to seek new methods of increasing the disposal rate and reducing late change of plea. For instance, some courts adopt a method of 'floating cases', by which means cases are listed but not assigned to a particular court. Also, to deal more effectively with the problems which have militated against the speedy disposition of cases,

'trilateralism' is now perceived as a goal.\textsuperscript{21}

Compared with other jurisdictions, the average waiting time in England does not seem unduly long. Some jurisdictions are experiencing waiting times of considerably longer periods. The reform approaches which have been implemented in England have in some instances given rise to speedier trials. Eight of these methods will be discussed.

**SOME ENGLISH REFORM MEASURES**

**EITHER-WAY TRIALS**

The creation of a category of intermediate offences which could be tried in the Crown Court or magistrates' court was one method of redistributing cases between the superior and lower criminal courts and dealing with an overburdened Crown Court.

Increasing the types of offences triable in the magistrates' courts should ensure that cases are disposed of more speedily, as jury trials are longer than non-jury trials. The report on "The Redistribution of Criminal Business Memorandum of Evidence to Lord Justice James Committee" observed:

"It is clear that the two most obvious and effective means of bringing about a re-allocation of work in favour of magistrates' courts are to remove the right to trial by jury in certain classes of cases and to widen the range of offences

\footnote{\textsuperscript{21} Supra note 5, para. 6.12. The aim of 'trilateralism': "is to develop closer links, better understanding of a more unified approach to shared problems experienced by the three major Government Departments involved in the criminal justice system, namely LCD, the Home Office and the Crown Prosecution Service".}
triable summarily with the consent of the accused."^{22}

The primary purpose of that committee was to consider ways and means of reducing the congestion of business in the Crown Court.

A study conducted by the Vera Institute confirmed that cases are dealt with more speedily in the magistrates' courts. This study revealed that most cases which reached the magistrates' courts were concluded at the accused persons' first "schedule court appearance". Sentencing took place on the same day as adjudication in over ninety per cent of the summons cases and at least seventy-five per cent of the arrest cases.^{23}

**BACKGROUND TO EITHER-WAY TRIALS**

By 1975 the Crown Court was so overburdened with criminal cases that the problem became a matter of grave concern. To find a solution, the "Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates’ Courts" was appointed.^{24} Its terms of reference was to consider the redistribution of criminal business between the Crown Courts and magistrates' courts.

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^{22} Chairman: The Lewis Hanser, Q.C., 1974. See also the report of the Interdepartmental Committee on the Business of the Criminal Courts, Chairman: The Justice Streatfield, cmnd.1289, embraced the same view.


^{24} Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates’ Courts, chairman: The Rt. Hon. Lord Justice James, 1975, cmnd.6323.
Following the recommendation of a tripartite classification of offences, one of which was the creation of a category of intermediate offences which could be tried either in the Crown Court or magistrates' courts, the committee then considered the procedure which was applicable to that category of offence.25

The committee's recommendations included the choice of forum, in that, an accused person could elect whether to opt for a jury trial. It also recommended that summary trials could only occur with the consent of the court, the accused and the Director of Public Prosecutions. Advanced disclosure of the prosecution's case and a pre-trial procedure, "summons for directions" were recommended. The committee further recommended that the Crown Court in sentencing on an indictable or intermediate offence, should have power to sentence the accused person for any summary offence to which he pleaded guilty.

After the committee's report, the Criminal Law Act 1977, Chapter 45, was passed. The Act repealed the provisions dealing with classification of offences under the Magistrates' Courts Act 1952 and introduced the tripartite classification, either-way trials. Moreover, the Act adopted most of the recommendations of the committee. Section 64 defines "offence triable either-way" as "an offence which, if committed by an adult, is triable on indictment or summarily."26

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25 The classification of offences was based largely on the Magistrates' Court Act, 1952 (15 and 16 Geo. 6 and 1 Eliz. 2, c.55).

26 Amended by the Interpretation Act, 1978 c.30 schedules.
Christopher J. Emmins described offences which are triable either-way, thus:

"Those which, although serious enough to be indictable, are never even at worse very grave, eg., reckless driving or making off without payment contrary to section 3 of the Theft Act 1978, and those which vary in gravity depending on the facts of the particular case, eg., criminal damage or theft."\(^{27}\)

Under the Criminal Law Act 1977, some offences, for instance, criminal damage involving the amount of Two Hundred Pounds was removed from the jurisdiction of the Crown Court. Further, section 48 of the 1977 Act dealt with advanced disclosure. It conferred the power to make rules as to the furnishing of information by the prosecutor in criminal proceedings.\(^{28}\) The Magistrates’ Court (Advance Information) Rules 1985, therefore, sought to prevent the defence from using committal proceedings as a means of disclosing the strength or weakness of the prosecution’s case. This was done with a view to scaling down the number of committals for trial.

**PROCEDURE FOR EITHER-WAY TRIALS**

The procedure for offences triable either-way is embodied in sections 18-21 of the Magistrates’ Courts Act, 1980, Chapter 43, which is, in part, a re-enactment of the Criminal Law Act, 1977.

\(^{27}\) A Practical Approach to Criminal Procedure, 1983.

\(^{28}\) The Magistrates’ Courts Act, 1980, c. 43, s. 144 confers the power to make rules.
The charge is read to the accused. Thereafter, representations are made by both the prosecutor and defence as to whether the matter ought to be dealt with in the magistrates' Court or the Crown Court. Venue or mode of trial is decided by the following criteria: (1) the nature of the case; (2) whether the circumstances of the offence make it one of serious character; (3) whether the Magistrates' sentencing powers are adequate, and (4) any other circumstances making it more advisable for the offence to be tried in the Crown Court rather than the magistrates' court.

If a Crown Court trial is decided upon, the accused is committed to the court. If the court decides that the mode of trial is summary, the accused is put to his election, whether he consents to be tried in the magistrates' court or Crown Court. If the accused person consents to summary trial, he is so tried. If he does not consent, the court will enquire into the information as examining justices.

The court must be satisfied, however, that the accused is aware of the prosecutor's duty to furnish details under the Magistrates' Court (Advanced Information) Rules, 1985.

How effective is either-way trial as a reform strategy?

AN ANALYSES OF EITHER-WAY TRIALS
The Criminal Law Act, 1977 which came into force on July 17, 1978, had some measure of success in reducing the workloads in the Crown Court. Professor I. R. Scott in an article, "Crown Court Productivity," observed that although the number of cases committed to the Crown Court increased each year, since they came into existence on January 1, 1972, the number of cases committed to the Crown Court fell slightly in 1978 and dropped significantly in 1979. The percentage decrease between 1978 and 1979 in cases committed for trial was 11.3
per cent. Professor Scott cited the arrangements for the distribution of indictable cases between the Crown Court and magistrates' court as introduced by Part III of the Criminal Law Act, 1977 as the main reason for the decrease in cases to the Crown Court.  

However, sometime in the years 1979 through 1985, the volume of cases committed to the Crown Courts rose to such an extent that the courts were once again confronted with the same problem. During that period, the number of adult accused persons committed for either-way offences increased from 55,000 to 81,000. This represented an increase from fifteen per cent to twenty-one per cent of all accused persons proceeded against for either-way offences. The waiting time went far beyond the limitation of the eight weeks rule stipulated by the Crown Court Rules which states that the trial of a person committed by a magistrates' courts:

"Shall, unless the Crown Court has otherwise ordered, begin not later than the expiration of eight weeks beginning with the date of his committal." 

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29 [1980] Crim. L. R. 293. See also A Case for Summary Trial: Proposal for a Redistribution of Criminal Business, 1982. Relief was then estimated to be 10 per cent of workload.


31 Crown Court Rules, 1971, Rule 19, Crown Court Act, 1971, s.7(4). See also H. C. (Hansard) (1987-1988) vol. 118, c.14. The then waiting time was reduced from 17 weeks to 14 weeks.
Thereupon, in 1986 the Home Office prepared a consultative report, "The distribution of business between the Crown Court and Magistrates’ Courts". Included in the consideration of that report was a further reclassification of offences triable either-way. The report took the view that offences of assault were not fully assimilated into the tripartite structure introduced in 1977.\(^{32}\) It contemplated a further restriction on offences which offered a choice of venue. The report suggested that driving while disqualified, common assault and taking a motor vehicle without the owner’s consent be made summary offences with maximum penalties of six months imprisonment and, or TWO THOUSAND POUNDS.\(^{33}\)

David Riley and Julie Vennard in a research study suggested a likely five per cent reduction in the number of cases committed for trial to the Crown Court.\(^{34}\) This was a reasonable estimate. Following that consultative document, there was a further reclassification of offences which were triable either-way as triable summarily only. The Criminal Justice Act, 1988, Chapter 33, adopted the reclassification of the offences identified by the Government in that report.\(^{35}\)

\(^{32}\) Para. 15.

\(^{33}\) Para. 17.

\(^{34}\) Supra note 30. It was estimated that 4-5,000 cases would be removed from the Crown Court. See also Court Service Annual Report, Lord Chancellor’s Department, (April 1990–March 1991) para. 53.

\(^{35}\) Sections 37, 38, 39 (taking a motor vehicle without the owner’s consent, driving whilst disqualified, common assault). The Act came into force on October 12, 1988.
Criminal damage where the damage does not exceed TWO THOUSAND POUNDS was also made triable summarily only. In 1989, following that reclassification, the number of either-way cases received were fewer (10.2 per cent) compared with 1988. The Crown Prosecution Service Annual Report 1988 to 1989 described the decrease in the number of cases reaching the Crown Court in 1989 as marginal. There was, at that time, unanimity within the criminal justice system that there was a yearly increase of five or six per cent in the workload of the Crown Court.

The Criminal Justice Act, 1988 seems to create a fourth classification of offences; summary offences which are triable on indictment. Sections 37, 38 and 39 of the Act made certain either-way offences triable summarily only. However, these offences are triable in the Crown Court subject to section 40 of the said Act. Under section 40 of the 1988 Act, summary offences can be included in the indictment subsequent to an accused person’s committal to the Crown Court. Section 40, therefore, seems to modify the restrictive effect of sections 37, 38 and 39.

Notwithstanding the drop in the Crown Court’s workload during the periods 1978 to 1979 and 1989, the year 1990 showed an increase. It can be seen, therefore, that the effect of the reclassification has been undermined by increasing caseloads. Although either-way trial is designed to speed up the trial process, problems are apparent in the application of this method as a reform approach.

36 Supra note 6, p.56, para. 7.
37 Supra note 30, Triable Either-Way Cases, p.9.
38 Sections 40 and 41.
39 Supra note 6, para. 8.
David Riley and Julie Vennard conducted empirical research on the factors which influenced accused persons and magistrates in their decision as to the choice of venue in either-way cases and how those factors affected caseloads. An important finding which emerged from the study was that a large proportion of either-way cases were committed to the Crown Court, as the magistrates in the exercise of their discretion decided not to accept jurisdiction.\footnote{Triable Either-Way Cases: Crown Court or Magistrates’ Court? Home Office Research Study 98, 1988, p.21. The research was concluded in March 1988 prior to the Criminal Justice Act, 1988. Additionally, the targeted sample was taken of cases concluded in 1986.}

The targeted sample for the study was one thousand either-way cases concluded in the following eight selected courts: the Leicester Crown Court; Leicester magistrates’ court; Northampton Crown Court; Northampton magistrates’ court; New Castle Crown Court; New Castle magistrates’ court; Durham Crown Court and Sunderland magistrates’ court. Interviews were also conducted with prosecutors and defence solicitors.

The study found differences in four Crown Courts in respect of accused persons in either-way cases who were committed to the Crown Court for trial. The reason for the difference in these courts was that the magistrates did not always accept jurisdiction. In Leicester, the difference was sixty-four per cent and Durham twenty-one per cent.\footnote{Ibid., p.9.}

The study also revealed that prosecutors influenced the bench’s choice of venue. In an overwhelming majority of the sample taken, ninety-six per cent of the magistrates’ decision concerning mode of trial accorded with that of the prosecution’s.
The reasons advanced for the preference for Crown Court trial by accused persons who intended to plead 'not guilty' were:

a) magistrates' courts were inclined to support the prosecution;

b) a greater chance of an acquittal and a fairer hearing.\(^{42}\)

Therefore, forty-five per cent of accused persons with previous convictions elected for jury trial, compared with twenty-six per cent who did not have any criminal record.\(^{43}\) This was so despite the sentencing power of the Crown Court being greater.\(^{44}\) Interestingly, the criminal statistics for England reveal:

"More than half of those convicted at the Crown Court in either-way cases received a sentence within the sentencing powers of the magistrates' courts."\(^{45}\)

Sixty-six per cent of all accused persons who were tried at the Crown Court were acquitted.\(^{46}\) Statistically, the Crown Court or jury trial affords an accused person a greater chance of acquittal and, therefore, most accused persons tend to opt for a jury trial. Consequently, the trend will be towards narrowing the range of offences triable in the Crown Court by making some offences triable summarily only. Thus the increase in the jurisdiction of the magistrates is one way of relieving the Crown Court of its workload.

\(^{42}\) Supra note 40, p.16.

\(^{43}\) Supra note 40, p.17.

\(^{44}\) Supra note 40, p.18.

\(^{45}\) Supra note 40, p.21.

\(^{46}\) Supra note 40, p.22.
Presently, either-way cases form the largest portion of the Crown Court's workload. What clearly emerged from the Riley and Vennard study was that the 'local legal culture', for instance, the attitude of magistrates in the exercise of their discretion must be changed to make this reform approach work. The ipsissima verba of the approach which Riley and Vennard suggested is:

"For defendants wishing to contest their case and for some who intend to plead guilty, the incentives to acceptance of summary trials are few. A more promising approach may, therefore, be to encourage magistrates to accept jurisdiction in a higher proportion of either-way cases." 

It may be that magistrates have not been sensitized to the administrative approach of accepting jurisdiction in a greater number of either-way cases. Hence, the reason for either-way cases being a significant portion of the Crown Court's workload.

Does widening the range of offences triable by magistrates remove the problem of caseloads from one arena to the next? The magistrates' court is the most cost effective system of administering justice. A. E. Bottoms and J. D McLean state that widening the range of offences triable in the magistrates' courts is to shift, but not solve the problem of burdening the magistrates' courts with more cases.

The reasons recorded by the Home Office for the increase in

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47 Supra note 5. p.21.
48 Supra note 40, p.23.
50 Defendants in the Criminal Process, 1976.

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waiting times in the magistrates' courts were: increase in the average number of adjournments, the shortage of qualified courts clerks and the twenty per cent vacancy rate which led to the cancellation of court hearings in many parts of England. However, widening the range of offences triable in the magistrates' courts was not cited as being associated with the increase in waiting times.

**COMMITTAL PROCEEDINGS**

The introduction of 'paper committal' in England pursuant to section 1 of the Criminal Justice Act, 1967, Chapter 80, was another method of reducing caseloads and waiting times.

Prior to the Act, full committal proceedings were required for cases triable on indictment. Full oral inquiry was seen, however, as a cause of excessive waiting times and caseloads.

The Bryne Committee which was established in 1948 to inquire into the then current practice of taking depositions, advocated that the taking of depositions should be maintained as an important function of the magistrates, notwithstanding the delay.

A proponent for dispensation with the taking of depositions was Glanville Williams, Q.C. He observed that the police or private prosecutor seldom charged an accused person unless there was a prima facie case. The police and the prosecutor acted, therefore, as a filter or screening mechanism. He further added that preliminary inquiry was a routine procedure

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as the accused person:

"Rarely makes a serious effort to resist a committal, except perhaps by cross-examining the witness for the prosecution. He reserves his own defence, partly because if he produced it at this stage the effect would be to protract the proceedings."^53

The real advantage of preliminary inquiry cited by Glanville Williams, Q.C., was that the written statements of a witness who died, fell ill or left the jurisdiction would be admissible at the trial.

The report of the "Departmental Committee on Proceedings before Examining Magistrates" reported that only three to four per cent of offenders were dismissed by magistrates.^54 This would indicate that the effective value of the process of preliminary inquiry as a filter mechanism was only marginal.

Historically, in the sixteenth century, preliminary inquiry was of an inquisitorial nature designed to extract a confession from an accused person. By the early nineteenth century, the main function of the justices was to hear witnesses for the prosecution and having heard them, to warn the accused person that he was not obliged to say anything. If the evidence established a "strong or probable presumption of guilt" the accused was committed or bailed for trial.^55 With time, this procedure became perfunctory.


55 The Administration of Justice (No. 1) Act 1884.
As preliminary inquiry was considered counter-productive, steps were taken to dispense with it partially. Introducing the second reading debate on the Criminal Justice Bill, 1967, the then Secretary of State for the Home Department, Mr. Roy Jenkins observed, that in 1965 there were nearly 30,000 committal proceedings and all the prosecution witnesses gave evidence orally. He continued by stating, that in nearly 29,000 of these cases, the justices decided that there was a prima facie case. He noted that in certain cases full oral inquiry was a real advantage and he would not "sweep away committal proceedings completely."

The average waiting time between committal and trial at December 31, 1966 was quoted as 7.5 weeks. It was felt, that the proof of facts by written statements would shorten court procedure. Therefore, by January 1, 1968, an accused person could be committed on the written statements of witnesses other than by full oral inquiry.

Section 1 of the Criminal Justice Act, 1967, provides:

"A magistrates' court inquiring into an offence as examining justices (a) may, if satisfied that all the evidence before the court (whether for the prosecution or the defence) consists of written statements tendered to the court under the next following section with or without exhibits, commit the defendant for trial for the offence without consideration of the contents of those statements (b), unless:


57 Ibid.

a) the defendant or one of the defendants is not represented by counsel or solicitor;

b) counsel or solicitor for the defendant or one of the defendants, as the case may be, has requested the court to consider a submission that the statements disclose insufficient evidence to put that defendant on trial by jury for the offence;

c) section 7 (1) of the Magistrates' Court Act, 1952 (committal for trial on consideration of the evidence) shall not apply to a committal for trial under this section."

There are two types of committal proceedings in England, full oral inquiry by virtue of section 7 of the Magistrates' Courts Act, 1952 (in accordance with section 4 of the Magistrates' Courts Rules, 1968) and 'paper committal' pursuant to section 1 of the Criminal Justice Act, 1967. Full oral inquiry and 'paper committal' are re-enacted in the Magistrates' Courts Act, 1980, Chapter 43, under section 6 (1) and 6 (2) respectively.

THE EFFECT OF THE CRIMINAL JUSTICE ACT, 1967

Empirical studies disclosed that 'paper committals' expedited the trial process. Peter Jones and his colleagues stated that analyses of 'paper committal' proceedings revealed that the average time for full committal was 15.3 weeks, compared with 8.4 weeks for 'paper committal'. Bottoms and McLean found that of a Sheffield sample of three hundred and fifty-six accused persons, only one accused was dealt with by full oral

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committal procedure.  

Although 'old style' committal was rarely used and 'paper committal' was frequently used, it was discovered that a number of weak cases reached the Crown Court by way of 'paper committals'. The Royal Commission on Criminal Procedure, in dealing with the effectiveness of "Criminal Proceedings In Preventing Inadequately Prepared And Selected Cases Going To The Crown Court" observed, that the statistics revealed in 1978 that more than 84,000 accused persons were committed to the Crown Court and over 2,000, or just over two per cent, were discharged because of the insufficiency of evidence. The commission further stated that ordered and directed acquittals in the year 1978 was over forty per cent nationally and as high as fifty-four per cent in one area. Whether there was a need to continue with committal proceedings was also canvassed.  

A similar observation was made by the Justices' Clerks Society. The society stated that defence lawyers accepted 'paper committals' procedure because it was expeditious and not because they had read the evidence and come to a considered conclusion that there was a prima facie case. The society felt that this weakness was not a criticism of the system but of the 'local legal culture', be they prosecutors,  

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60 Bottoms, A. E. and McLean, J. D., Defendants In The Criminal Process, 1976. See also "The Effectiveness Of Committal Proceedings As A Filter In The Criminal Justice System", Peter Jones, et al, found that of 309 cases, 256 reached the Crown Court by "paper committal", p.92.


magistrates or clerks. They emphasized that the court must be satisfied that there is a prima facie case because that is the test required by the jurisprudence.\textsuperscript{63}

The total dispensation with committal proceedings has been advocated in some quarters, as also its modification. The Justices' Clerk Society, for instance, called for the abolition of committal proceedings, and instead, for a sifting process to be undertaken at the Crown Court during a pre-trial inquiry.\textsuperscript{64} The society also took the view that justice would not be prejudiced by substituting 'paper committals' for a requirement that a defence solicitor certify that he had read the prosecution statements and was of the view that a full committal procedure was not required. The fact of certification would not fix the defence solicitor with responsibility for the state of preparation of the prosecution's case nor imply that the case was "fit for committal".\textsuperscript{65}

The Bar Association felt that 'old style committal' and 'paper committal' should be administrative and involve no court appearance.\textsuperscript{66}

The Royal Commission on Criminal Procedure stated that committal proceedings had "fallen into disuse" and should be modified. The commission, therefore, made proposals for disclosure. On the matter of disclosure, the commission was of the view that disclosure in all cases would afford the


\textsuperscript{64} Supra note 62.

\textsuperscript{65} Supra note 62, p.11.

\textsuperscript{66} Supra note 62, p.10.
defence the opportunity to assess and challenge the sufficiency of the evidence to commit an accused person. Where the defence challenged the sufficiency of the evidence, there would be the choice of a hearing before a magistrate at which a 'no case submission' would be made. This procedure would be called "application for discharge". A discharge under this procedure would have the same effect as a discharge under the current committal procedure. The commission also called for the establishment of an inspectorate and a system of monitoring performance of the courts. This, it was felt, would enable delays to be identified and corrective measures taken.

Save for a system of inspectorate and of monitoring performance in the magistrates' courts, no action has been taken on these proposals.

The study by Jones and his colleagues suggests that 'paper committal' reduces waiting time as the repetition of the prosecution's case was now curtailed. However, a flaw of this procedure is that a significant amount of weak cases reached the Crown Court. Nevertheless, 'paper committals' culled out some of the weak cases from the system.

Peter Jones and his colleagues made this finding:

"Two hundred and twenty-one cases were removed at the committal stage while three hundred and weak cases got through. Therefore, committal proceedings did prevent two hundred and twenty-one out of five hundred and thirty (forty-two per cent) from reaching the Crown Court."[68]

67 Supra note 61, paras. 8.27-8.32.
With the introduction of the Crown Prosecution Service in England and Wales in October 1986, there has been a more careful scrutiny of cases; thus, a greater flow of weak cases are screened out of the system. The test applied by the Crown Prosecution Service is not a "bare prima facie" case but "a realistic prospect of conviction". Moreover, disclosure relating to either-way cases must have enhanced the screening process.

The effectiveness of committal proceedings is questioned, hence, the reason for calls before and after the Criminal Justice Act, 1967 for its discontinuance. However, it has withstood two and a half decades and during that period its efficiency has increased.

**PRE-TRIAL REVIEW: SUMMONS FOR DIRECTIONS PROCEDURE**

The "summons for directions" procedure which represents Court Practice Rules of an experimental nature was introduced on October 1, 1974 at the central criminal court. These rules, in essence, created a system of pre-trial review. The rules have one objective. The aim was to expedite the trial process, particularly when the case is complex or the trial is likely to be prolonged. The pre-trial review simplifies administrative and procedural matter. John Baldwin defines it thus:

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"A forum in which prosecuting and defence lawyers can meet and examine the issues in a case in a spirit of cooperation and understanding." 72

THE PROCEDURE
In the Central Criminal Court, the procedure commences with an application from either the prosecution or defence, if the case is arranged for a hearing. "At least 14 days notice of hearing shall be given, unless the parties agree to shorter notice." 73

At the hearing, counsel will be expected to inform the court, inter alia:

a) of pleas;
b) the witnesses for the prosecution who are expected to attend trial;
c) admission of facts in accordance with section 10 (2)(b) of the Criminal Justice Act, 1967;
d) any point of law which may arise or question regarding the admissibility of evidence;
e) the designations of witnesses on whom the prosecution does not wish to rely;
f) any alibi not already disclosed in conformity with the Criminal Justice Act, 1967 and any other significant matter which affect the proper and convenient trial of the case. 74


73 Practice Rule, Rule 3. See also Rule 4, Hearings For Practice Directions under Rule 5 may be dealt with in chambers before any judge, but hearings for directions and orders under Rule 6 and the making of order under rule 7 should be held and made in open court by the judge allocated to try the case.

74 Practice Direction, Rule 4 (a).
BACKGROUND TO "SUMMONS FOR DIRECTIONS" PROCEDURE

The "Summons for Directions" procedure came into being as a consequence of an initiative by the Criminal Bar Association. At first, the procedure was applied to complicated fraud cases so as to shorten the length of those trials. It was the "Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates Courts" which proposed and advocated the widening of the scope of this procedure. The committee observed:

"Another proposal which bears on the question of obtaining advance notice of the plea, although it is not primarily directed to that end, is that there should be a step in the proceedings between committal and trial at which counsel on both sides would appear before a judge for the purpose of eliciting the live issues, settling various preliminary matters and getting them out of the way before the trial started. This procedure is commonly referred to as a 'summons for directions', a term borrowed from civil procedure."

Thereafter, the semi-formal rules which were confined to fraud trials as they were expected to be protracted, were extended to other cases. Pre-trial review was adopted in several forms by the Crown Court in each circuit. Practice notes were issued by several circuits regarding the particular procedure to be adopted.


76 The Interdepartmental Committee On The Distribution Of Criminal Business Between The Crown Court And Magistrates' Court, Chairman: The Rt. Hon. Lord Justice James, 1975, (cmnd.6323), para. 226.
The North Eastern Circuit, for instance, has a dual procedure; a 'plea day' scheme which operates in conjunction with its pre-trial review procedure.

In the case of the 'plea-day' scheme, cases in which the court has been notified that the accused person intends to enter a guilty plea and cases where the likely plea is not known, are generally listed in the fifth week after committal for the plea to be taken. Where a plea of not guilty is entered, the pre-trial review procedure commences.

The several Practice Rules are still being evaluated. In 1977, the procedure was revised to deal with a greater number of cases with a wider range of problems.

The Criminal Justice Act, 1987, Chapter 38, now provides formal pre-trial review in serious and complex fraud cases. When a complex fraud case is transferred to the Crown Court by section 4 of the Criminal Justice Act, 1987, a preparatory hearing may be held. Section 7 of the Act tabulates the purpose for the hearing as:

a) identifying issues which are likely to be material to the verdict; or
b) assisting comprehension of any such issues;
c) expediting the proceedings before the jury; or
d) assisting the judge's management of the trial.

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77 Ibid. See also the Royal Commission On Criminal Procedure, Law And Procedure, (Cmnd.8092-1), Appendix 17, p.218.

78 Practice Rule, 1977.
To date, there is no consensus on the best form of procedure to be adopted regarding pre-trial review. In all these proceedings, however, both defence and the prosecution appear before a judge after committal for the purpose of narrowing the issues or settling preliminary issues prior to trial so as to reduce waste of time.79 Does the practical working of the system reflect an expedition of the trial process?

ANALYSES OF PRETRIAL REVIEWS
A. Ashworth observed that there has been no "qualitative or quantitative" research into the effects of pre-trial reviews in the Crown Courts.80

John Baldwin conducted a study into the effects of pre-trial reviews in the magistrates' courts. On the issue of its effects, Baldwin observed:

"The effect of pre-trial review, is to provide disclosure to the defence and that case settlement is subsidiary to this. All the talk of 'collapse' and 'folded' cases, the 'narrowing' of the issues, and the 'de warning' of witnesses relate to the benefits of the court administration not to the accused on trial. These are the natural by-products of a system of disclosure which is oral and which obliges the defence to reciprocate. Yet, there can be little doubt that for some of the participants, the by-products of pre-trial review have become its very raison d'etre."81

79 Central Criminal Court Practice Rule, Archbold's Pleading, Evidence And Practice In Criminal Courts, Thirty-Ninth edition, 1976, para. 3613. See also Hampson, Criminal Procedure, 1977.


81 Pre-Trial Justice: A Study Of Case Settlement In Magistrates' Courts, 1985, p.51.
He went further to state:

"The pre-trial review is an arena in which the lawyers' definition of justice assumes pre-eminence. It is the lawyers who 'shape' the case before it reaches court...........where the prosecution decides, for example, that no evidence will be offered against a defendant or that a plea of guilty to a reduced charge will be acceptable, it is the lawyers, not the court, who have in practice resolved the really critical questions at issues. In this, the lawyers are not usurping the function of the court (since almost all of the cases discussed at pre-trial review eventually reach the court) and the magistrates have the final word."82

Baldwin found that of a sample of four hundred and two cases which were observed at pre-trial reviews in the Nottingham Magistrates' Courts, most of the cases being either-way cases, 48 per cent of the offenders either pleaded not guilty or the prosecution offered no evidence. He concluded by stating that pre-trial reviews encouraged case settlement and "reduce the number of contested trials."83

On the issue of whether pre-trial reviews saved cost, Chief Inspector Colin Sheppard of the Nottinghamshire Constabulary conducted an empirical study. He asserted that pre-trial reviews can save cost and time. This is especially so, "where it incorporates early notification of decisions to the court."84

Although there is a paucity of material on the success of pre-trial reviews or 'summons for directions' in the Crown Courts,

82 Ibid.
83 Supra note 80, p.36 and 55.
84 Supra note 80, p.83.
this matter was addressed by the report of the "Interdepartmental Committee on the Distribution of Criminal Business between the crown court and magistrates' courts". The committee observed that the 'summons for directions' procedure had been used in about twenty cases in the first six months of an experimental scheme and was successful in reducing the length of trial. The report continued to state that the success of the scheme depended on the "co-operation of lawyers on both sides."\textsuperscript{85} However, whereas the indications are that pre-trial reviews are successful, there are criticisms of the existing procedure of 'summons for directions'.

A report by Justice criticized the present procedure relating to pre-trial reviews and made recommendations as to how the existing procedure could be made more effective. Some of those criticisms were:

1. they took place prior to prosecuting counsel supplying his/her opening;
2. they were not necessarily attended by counsel briefed for the trial;
3. judges were not au fait with the details of the cases; and
4. the directions given at the review were not monitored.\textsuperscript{86}

In fact, the report adopted the criticism of Lord Justice

\textsuperscript{85} Supra note 75, para. 267. The Fraud Trials Committee Report (The Roskill Committee) (op. cit.) stated that the committee was seized of evidence which suggested that pre-trial review operated "effectively and sensibly" in a significant number of cases. The committee found that in a small amount of fraud cases, "pre-trial reviews were not assisting the just expedition and economical disposal of proceedings."

\textsuperscript{86} Fraud Trials, Chairman: Beryl Cooper, Q.C., 1984.
Watkins’ Working Party on the Criminal Trial Report. The working party was formed to discuss and recommend improvements in the preparation of cases for trial in the Crown Court with a view to reducing the cost and time of proceedings. The working party’s report stated:

“We regard these reviews, which are expensive and difficult to list, as a last resort, to be used only if matters cannot be resolved or issues sufficiently defined on paper.”

As the working party thought it essential that the parties should know in advance what matters they will have to address at the hearing, a standard notice was prepared as ‘Annex D’ of the report.

Since there were no sanctions for non-compliance with the procedure and pre-trial review does not have the force of law, the working party’s report went on to assert that pre-trial procedure "lacks teeth". The case law tends to suggest this.

In R v Hutchinson, the court held that admissions made by either the prosecution or the defence in the course of a pre-trial review, should not be used evidentially at the subsequent trial without the consent of the party affected by it. Lord Justice Watkins, Mr. Justice Ewbank and Sir Ralph

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88 Ibid.
89 Justice, Annual Members Conference, held in the Lord Chief Justice Court, March 24, 1984, p.3. The suggestions of Lord Justice Watkins Working Party on pre-trial procedure were tested in two circuits.
90 Supra note 87, para. 10.

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Kilner Brown so held on July 1, 1985 in dismissing an appeal by Arthur Hutchinson against his conviction for aggravated burglary and other offences at the Durham Crown Court. Lord Justice Watkins delivering the judgment of the court observed:

" Whilst the pre-trial review is in its present toothless form, it is in our judgement undesirable and wrong that anything said or done in the course of it should be used for evidential purposes in the course of the trial, unless the party affected consents to its being admissible."^91

Some of the demerits of pre-trial as they related to fraud cases were highlighted in the Fraud Trials Committee Report (The Roskill Committee). This committee cited several factors as leading to ineffective pre-trial review in a small amount of fraud cases.^92

Among the factors listed by the Roskill Committee as leading to ineffective pre-trial review were:

1. disclosure of facts in a pre-trial review cannot be used for evidential purposes unless the party affected consented;
2. the judge allocated to try the case was not always the judge who conducted the pre-trial review;
3. lack of proper preparation on the part of prosecution and defence;
4. the timing of the pre-trial review.


^92 Supra note 75, para. 6.11.
On the matter of timing of the pre-trial review, the committee observed that if the pre-trial review is held too far in advance of trial, neither side may have done all the necessary preparatory work. If held shortly before the trial, there would not be enough time to give effect to any directions by the judge or agreements by the parties. Recommendations were, therefore, made for its improvement.

The committee recommended, inter alia, that pre-trial review should cease to be an informal procedure and be treated as part of the trial with the appropriate sanctions. As stated earlier, the Criminal Justice Act, 1987, formalized this pre-trial procedure in so far as it relates to fraud cases.

The report by Justice also suggested ways of making the pre-trial review procedure more effective. It suggested the following:

1. pre-trial review should be conducted by the trial judge;
2. the leading counsel, even if a Queen's Counsel, retained to represent the parties at the trial should attend the pre-trial review; and
3. the review should not be a single hearing held just prior to trial, but a series of two or more hearings on set dates after committal.

93 Supra note 86, p.16.
Justice felt that a pre-trial review in two or more stages, presided over by the trial judge, would give everyone less excuse for not having served particulars, tidied-up schedules, agreed jury bundles or made admissions. If the trial judge is in charge of the case from the beginning, he will be in a position to persuade both sides to agree to certain facts.

It was also suggested that the prosecution, possibly before committal or before the pre-trial review, should serve the defence with a list of the likely facts the defence should be able to admit pursuant to section 10 of the Criminal Justice Act, 1967.

The jurisprudence tends to favour the view that the prosecutor should serve relevant papers on the judge well in advance of trial. In the case of R v Harry Landy and others, the Court of Appeal echoed the sentiments expressed in R v Bernard Harry Simmonds and others. The following statements appears in the headnote of the latter case:

"where there is a pre-trial review, the judge trying the case should take the initiative and ensure that all unnecessary detail is omitted. The judge should receive the relevant papers well before the review hearing to give him time to read and analyse them, otherwise he has a discretion to postpone the review."95

This was a case of conspiracy to defraud and conspiracy to utter forged documents. The trial lasted ninety days, seventy-three of which were consumed with prosecuting counsel’s opening speech, submissions and evidence; eleven days of counsel’s speeches and six days of summing-up.

The practice of pre-trial is now an integral part of the criminal procedure. Legislative sanction in the form of preparatory hearings is now given to pre-trial reviews in respect of complex fraud cases. By virtue of the Criminal Justice Act, 1987, section 8, at the start of a preparatory hearing, arraignment also takes effect and the trial beings. However in re Guanawardena, Harbutt and Banks the court, per Watkins L. J., observed:

"Care must be taken to avoid confusion between a preparatory hearing under the Act and the informal pre-trial review." 96

According to the Roskill Committee, pre-trial reviews, as they related to fraud trials, operated "efficiently" in a significant number of cases. Since the Criminal Justice Act, 1987 has removed the factors "which were not assisting the just expedition and economical disposal of proceedings",97 in a small amount of fraud cases, the court must have achieved its objective.

Pre-trial review as it relates to serious and complex cases is informal: participation in the procedure depends on the parties, and a judge cannot compel the attendance of counsel. However, there is evidence that effective pre-trial reviews lead to shorter trials and lower costs. Further, empirical findings regarding magistrates' courts revealed that pre-trial reviews assisted in identifying difficult issues.98

97 Supra note 75, p.82, para. 6.11.
Another method of speeding up the trial process is by disclosure. Criminal disclosure is the exchange of information between the prosecution and defence. This exchange should assist the parties in effectively answering the opposing counsel. While disclosure is acceptable in civil procedure and plays an important role therein, in criminal procedure it is permissible in a limited sense. It is more so in the case of disclosure by the accused. This is so as the adversarial system is based upon liberal ideology which places the burden of proof on the prosecution. There are laws in England which allow for pre-trial disclosure by the prosecution and to a limited extent, by the defence. There are also informal rules governing disclosure. Why this movement towards disclosure in criminal cases in England?

The report of the "Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates’ Courts" advanced the possible reason for disclosure in these terms:

"While we cannot claim that a greater measure of disclosure would have a dramatic effect on the distribution of business, we believe that it would make a significant contribution towards preventing cases being committed for trial unnecessarily. The extent of that contribution we are unable to forecast. Whatever it may prove to be, it is, in our view, most desirable in the interest of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve." 99

99 Supra note 76, para. 212.
Preliminary inquiry is the most redoubtable discovery device available to the defence. An accused person committed to the Crown Court for trial under section 1 of the Criminal Justice Act, 1967 is entitled, prior to committal, to copies of the prosecution witnesses' statements. Also, any such accused person committed under section 7 of the Magistrates' Courts Act, 1952, is also entitled on committal, to copies of the depositions and statements adduced by virtue of section 2 of the Criminal Justice Act, 1967.

Section 48 of the Criminal Law Act, 1977 and the Magistrates' Courts (Advanced Information) Rules, 1985, entitle the defence to disclosure on request in all either-way cases. The extent of the prosecution disclosure includes: prosecution witnesses' statements; accused persons' statements; medical or forensic evidence. The prosecution may also disclose exhibits, the criminal records of any material witness and any evidence which exculpates an accused persons.

The jurisprudence provides for limited disclosure Dallison v Caffery is authority for the proposition that where the prosecution does not intend to call a witness from whom they have taken material evidence, they are to supply the name and address of the witness and a copy of the witness' statement to the defence.

Lord Denning (minority judgement) in Dallison's case observed that the prosecution is obliged to furnish the name, address and a copy of the statement of a the witness. However, Lord Diplock held that the duty of the prosecution was confined to

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100 Magistrates' Courts Act, s.6 (1).
101 Ibid., s.6 (2).
making the witness available, that is, supplying the names and addresses only of witnesses.\textsuperscript{103} The court in \textit{R v Lawson and another}, a recent decision, approved the dictum of Lord Denning that a copy of a witness' statement should be furnished where that witness can give material evidence that will assist the defence.\textsuperscript{104}

Further, \textit{R v Clarke} asserted that the prosecution is obliged to show the defence a previous statement which conflicts with evidence given by a prosecution witness, so that defence counsel can cross-examine on it.\textsuperscript{105} This dictum was approved in \textit{Mohammed Baksh v R}.\textsuperscript{106}

Lord Devlin in \textit{Connelly v DPP}\textsuperscript{107} observed that the prosecution should disclose convictions which would affect the credibility of crown witnesses. In fact, where a witness for the prosecution is of bad character or has convictions which affects his credibility, the prosecution is obliged to disclose that fact.

The Canadian decision \textit{R v Bohozuk} suggested that the prosecution has a duty to advise the defence of evidence not adduced at a preliminary inquiry.\textsuperscript{108} The Attorney General's Guidelines in England and Wales, deal with the disclosure of unused material in cases which are due to be committed for

\textsuperscript{103} Ibid.
\textsuperscript{108} (1947 Ont.) 87 C.C.C. (ann.) 125.
Concerning disclosure of an informant a witness cannot be asked questions that will disclose an informer, "if he be a third person". However, if the disclosure of the identity of the informant is necessary to the proof of the accused person’s innocence, then such disclosure should be made.

What are the consequences of non-disclosure?

Failure, within the context of the case law, to discharge these obligations may be regarded as a denial of natural justice or a material irregularity. In R v Lawson and another the appellant, a solicitor appealed against conviction on two counts of conspiracy to handle the proceeds of stolen bearer bonds and other securities. The prosecution had obtained a statement under caution from the mistress of Kay, a co-accused, that on the way to the appellant’s office Kay asked her to introduce him to the appellant under a different name for domestic reasons. She, the mistress, either introduced Kay to the appellant by the name Jackson or allowed him to introduce himself by that name.

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110 Attorney General v Briant (1846) 15 M.W.R., 169, 185.


113 Supra note 104.
During the course of the trial, the statement became known to the defence and the defence asked the prosecution to disclose it, but the prosecution refused. Certain material facts, however, were unknown to the defence. The defence did not know that the statement was made under caution and that Cindy Abbey was no longer Kay's mistress.

The Court of Appeal allowed the appeal and quashed the convictions on the basis of a material irregularity. The court was of the view that failure by the prosecution to supply Kay's mistress' statement to the defence could cause injustice. The court did not accept that this was a matter for the exercise of the prosecution's discretion. In fact, the failure of the prosecution to disclose Cindy Abbey's statement or inform the defence of the fact that she was no longer Kay's mistress, was an instance of such injustice.

Lawson's case\textsuperscript{114} may be distinguished from United States v Agurs.\textsuperscript{115} In that case the court observed that where the prosecutor was asked for certain identifiable evidence and had suppressed it, or when the prosecutor has knowingly used perjured testimony, courts are likely to quash any conviction caused by the prosecution's misconduct. But where the defence has not made a specific request for exculpatory evidence or made a general request and, thereafter, discovers that exculpatory evidence was suppressed or concealed, the defence must bear a heavy burden of showing that the evidence was vital or material to the defence and had it been disclosed, a different verdict would have been obtained.

\textsuperscript{114} Supra note 104.

\textsuperscript{115} 427 U.S. 97 (1976); 49 L.E. 2d 342.
Notwithstanding the case law, there is no procedure to enforce the duty to disclose. Moreover, the discretion of the prosecutor is central to the duty to disclose and what is "material" might be a subjective determination.

In the United States and Canada, when disclosure is refused by the prosecutor, there is a heavy onus on the defence to show that exercise of the discretion of the prosecution was wrong. The English jurisprudence does not suggest such a duty. Disclosure rules are formulated in England to remove some of the uncertainties regarding disclosure.

What is the extent of the defence disclosure?
The Criminal Law Revision Committee Ninth Report on Evidence recommended the disclosure of alibi by the defence. Thereafter, the Criminal Justice Act, 1967, section 11, provided that where the defence is an alibi, the accused must notify the prosecution within seven days where he claims to have been at the material time and the names and addresses of witnesses he plans to rely upon. If he fails to notify the prosecution, he loses his defence.

On the matter of the prescribed period, the Law Society was of the view that there ought to be a discretion in the court to determine whether or not notice of alibi had been given within sufficient time to enable the prosecution to investigate the alibi.

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116  R v Lalonda (Ont. High Court 1971) 5 C.C.C. (2d) 168.
117  [1982] 1 ALL E.R. 134; Practice Direction -
R v Sullivan\textsuperscript{120} (Salmon L. J.) is authority for the proposition that the mere failure to give notice of particulars of an alibi within the prescribed period does not, as a general rule, constitute grounds for the court to refuse leave under S. 11(1) of the Criminal Justice Act, 1967 for the alibi evidence to be called.

There have been calls for reciprocal disclosure. The Indepartmental Committee on the Distribution of Criminal Business between the Crown Courts and Magistrates' Courts, stated that it has been suggested that if the prosecution evidence is to be disclosed, the defence should also disclose its case, but the committee observed that the suggestion was wrong in principle as the accused is presumed innocent and such a change might prove unacceptable.\textsuperscript{121}

The Royal Commission on Criminal Procedure stated that under the present law the accused is required to give advance information to the prosecution as regards alibi. The commission suggested that this principle should be extended to other defences which might take the prosecution by surprise, for example, medical evidence or expert forensic scientific evidence which the defence intends to rely on.\textsuperscript{122} This suggestion was adopted by the Crown Court (Advance Notice of Expert Evidence) Rules, 1987.\textsuperscript{123}

\textsuperscript{121} Supra note 71, para. 229, p.102.
\textsuperscript{122} Supra note 71, para. 8.22.
Prior to the 1985 Magistrates' Court (Advance Information) Rules, the defence had to rely on the willingness of the prosecution to divulge information on what the prosecution was alleging. Disclosure by inspection, for example, was the commonest method of obtaining information. The prosecutor allowed the defence to examine his file prior to trial. In addition, other informal procedures of disclosure have been adopted for years in the courts. By virtue of the Magistrates' Courts (Advance Information) Rules, 1985, the prosecution may offer the defence the full prosecution file or a summary of the allegations.

**ANALYSES OF DISCLOSURE**

In England, the rules relating to disclosure are not complex. In fact, informal disclosure is of much greater scope than formal rules relating to disclosure. However, since _R v Judith Ward_ there have been demands for "guidelines on disclosure of evidence to be given statutory force." The defence has far greater access to information from the prosecutor than the prosecutor from the defence; allowable disclosure by the defence is minimal.

The purpose of disclosure is to lend efficiency and fairness to the trial process. The Royal Commission on Criminal Procedure advanced the removal of the element of surprise as the reason for notification of alibi. Advance notice of an alibi safeguards against delay caused by any adjournment as

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125 "The Times", June 5, 1992. Judith Ward's conviction for bombing and other attacks was quashed by the Court of Appeal due to the non-disclosure of certain material evidence. The Court of Appeal ruled that the failure to disclose evidence was a material irregularity.
the prosecutor would be in a position to make the necessary investigation. Disclosure also assists the defence in assessing the strength of the prosecution's case. Full oral inquiry or 'paper committal', as a discovery device, alerts the defence to the likelihood of success or failure of the prosecution's case. Generally, the direct advantage of disclosure should be the expedition of the trial process.

Empirical studies in the magistrates' courts show that disclosure may attract an element of delay and inaccurate disclosures are valueless. Research was conducted by Baldwin and Mulvaney into advance disclosure in the magistrates' courts prior to the mode of trial in either-way cases. The study disclosed that prosecutors found it difficult to provide solicitors with adequate summaries and almost impossible to provide full statements in each case without incurring delays.

Another investigation into the adequacy and usefulness of prosecution summaries was conducted by Baldwin and his colleague. They examined a sample of one hundred cases in which both summary and full files were prepared in the year 1987. These files were made available to them by the prosecuting authority of Coventry and Leeds. They found

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126 Supra note 71, para. 8.22.
that fifty per cent of the prosecution's summaries were inadequate and in one-third of the cases, the summaries were inaccurate or misleading.

As the effectiveness of the Criminal Law Act, 1977, section 48 depended on the quality of the summaries, improvement in this area was imperative. Baldwin and Mulvaney in an article, "Advance Disclosure in Magistrates' Courts the Working of Section 48", observed that efforts to raise the standard of summaries have been successful.\textsuperscript{130} A two-tier system of disclosure has evolved in several areas. Disclosure by means of summaries was being supplemented in appropriate cases by detailed information. In addition, prosecutors were amenable to clearing-up ambiguities.\textsuperscript{131}

Notwithstanding the flaws in the system, disclosure has a positive effect on guilty pleas. Study was done in this regard in respect of either-way cases and the establishment of a pilot scheme was recommended by the Working Party in their report on the Disclosure of Information on Trials on Indictment.\textsuperscript{132} Hence, the Newcastle Scheme was established to test the practicability of disclosure by use of summaries, between November 1, 1982 and October 31, 1983. The disposition of either-way cases during the first five months of the scheme was compared with that of a period of four months before implementation of the scheme. This revealed that guilty pleas in the magistrates' courts for either-way

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Crim. L.R. pp.315-323.
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\textsuperscript{130} Supra note 128, p.409.

\textsuperscript{131} Supra note 128, p.322.

cases increased from fifty-two to fifty-seven per cent.  

Disclosure does enable an accused person to make a more informed plea. The number of guilty pleas increased nationally from 56.8 per cent of committed cases in 1983 to 65.3 per cent in 1988. However, it cannot be stated with any certainty that disclosure was the prime reason for this increase. Newcastle Scheme study was silent as to how disclosure affected waiting time.

The existing practice by the court concerning pre-trial disclosure of evidence whether by way of depositions, written statements, practice laid down by the jurisprudence, pre-trial hearings or the Attorney General’s guidelines in cases to be tried on indictment is based on the objective of achieving speed and fairness. For example, serving the defence with a copy of the statement of a witness whose evidence differs materially from the statement, is done in the interest of a fair trial. Failure to reveal exculpatory or material evidence is considered by the court a material irregularity; therefore, non-disclosure by the prosecutor may militate against a speedy trial in view of consequences such as a retrial. However, non-disclosure of material evidence is not a frequent occurrence. Disclosure seems to have little, if any, unfavourable effect on the trial process.


134 Supra note 4.

PLEA BARGAINING

Plea bargaining is the procedure whereby an accused person forgoes his right to be tried in a criminal case in exchange for a reduction in the severity of the charge or sentence or both or for some other concession: for example, where the prosecution drops the charge against an accused person in exchange for his testimony against another accused person. The situation where an accused person pleads guilty simply 'to get over' with a case or pleads guilty because he is, in fact, guilty ought to be distinguished from plea bargaining. In that type of situation there is no inducement. Plea bargaining may be implicit or expressed. Implicit bargaining occurs where the accused pleads guilty because he expects to be treated more leniently.

On the matter of plea bargaining, the Royal Commission on criminal procedure observed:

"In the sense that the accused might be given a promise by the court that he would receive a less severe sentence if he were to plead guilty is forbidden. Any conviction obtained in this way will be quashed by the Court of Appeal......, however, the expression 'plea bargaining' is sometimes used in broader terms to refer to the practice whereby defendants plead guilty to at least one charge in exchange for the withdrawal of one or more other charges, or where the plea of guilty is encouraged by the hope that it will result in a lighter sentence."^{136}

The commission noted that concern was expressed as regards this practice, for instance, undue pressure on an accused person to plead guilty. However, the commission felt that speedy disposition of cases was more important than the delay involved in contested cases.

^{136} Supra note 171 (cmnd.8092) para. 8.36.
Although plea bargaining is at its most highly developed in the United States of America, it is 'ill developed' in England. What really exist in England can best be described as charge bargaining.

A. E. Bottoms and J. D. McLean observed, that plea bargaining is highly developed in the United States of America because the American criminal justice system has certain characteristics which foster plea bargaining. Bottoms and his colleague cited the following as the features in the American criminal justice system which nurture plea bargaining:

i) an overcrowded court list;
ii) established prosecution agencies and public defenders which allowed easier communications;
iii) minimum sentences are common;
iv) the prosecution can make recommendations as regards sentence.

Items (ii) to (iv) Bottoms contends are absent from the English system and, therefore, the system is not developed there.\[^{137}\] There is, in fact, an established prosecution agency in England, the Crown Prosecution Service, since 1986, created through the Prosecution of Offences Act, 1985. The English case law shows a bias against plea bargaining, although \[^{138}\] R v Turner laid down guidelines that should be observed by counsel in their approach to plea bargaining.


In the Turner case, the Court of Appeal laid down certain rules as regards plea bargaining. In this case, the accused was charged with theft. During the course of the trial he was induced to change his plea after his counsel advised him that if he pleaded guilty he would receive a non-custodial sentence, while if he persisted in his plea, he would receive a custodial sentence. The accused was so advised after his counsel had returned from a conference with the trial judge in chambers. On appeal it was held that the accused did not have a free choice in the matter and so the conviction was a nullity and a retrial was ordered. Lord Parker, C. J., formulated the following rules:

1. Counsel must be free to give his client the best advice he can, which may include strongly persuading him to plead guilty, emphasizing that he must not do so if he has not committed the acts constituting the offence charged.

11. The accused must have complete freedom of choice as to his plea.

111. There must be freedom of access between counsel and judge, but any discussion must take place with counsel for the prosecution present. On the other hand, justice should take place in open court, so circumstances justifying private discussions must necessarily be limited; it could be proper, for instance, where the accused is willing to plead guilty to a lesser offence.

IV. The judge should never indicate the sentence which he is minded to impose if there is any suggestion whatever, explicit or implicit, that it would be different if the accused pleaded guilty or not
guilty as the case may be.

The Council of the Law Society in "A Review of Criminal Procedure" observed, that the restriction placed upon the process of consultation between the judge, prosecutor, and the defence does not lead to a speedy disposition of cases. The Council felt that plea bargaining with the proper safeguards is useful in the administration of justice. The Council adopted the Criminal Bar Association’s comments in its third discussion paper as follows:

"An approach to the judge in chambers to discover the nature of the sentence he was going to impose used to be a great time saver in a proper case...."\(^{139}\)

The Court of Appeal again expressed objection to a certain type of plea bargaining in \textit{R v Cain}.\(^{140}\) In Cain, the accused was charged with several offences of violence against young boys. The trial judge sent for both the prosecution and defence counsel and informed them that the accused had no defence. He further informed them that if the accused continued in his not guilty pleas, he would get a very severe sentence; however, a guilty plea would make a considerable difference. The Court of Appeal held that the judge’s intervention embarrassed the defence and he felt obliged to tell the accused. The accused, therefore, did not have a free choice in the matter.


In the case of *R v Abraham*,\(^{141}\) in the presence of the shorthand writer and the absence of the accused, the trial judge stated that if the accused entered a plea of not guilty, she might well be placed on probation, but if she showed no contrition, she might be in danger. The Court of Appeal held that this was indeed contrary to the rule in *R v Turner*\(^{142}\) and the conviction was quashed.

Lord Scarman in *R v Atkinson*\(^{143}\) said plea bargaining had no place in English criminal law. Notwithstanding this bias, in England there are several forms of plea bargaining practices. Charges may be withdrawn by the prosecutor in return for a guilty plea. Further, the prosecution may withhold certain facts unfavourable to the accused in return for a guilty plea. It is felt in some quarters that informal plea bargaining does, in fact, exist. Thus, Michael McConville and John Baldwin stated:

"In some instances, however, informal practices are inconsistent with, and not directly sanctioned by, the formal rules, yet they continue unabated."\(^{144}\)

"The Times", in an article under the caption "Secret Deal in Rape Trial", stated that a secret bargain between judge and lawyers was behind the Ipswich rape trial. Judge Bertrand Richards fined the accused who had pleaded guilty, and commented that the victim was guilty of contributory negligence. The article continued:


\(^{142}\) Supra note 138.

\(^{143}\) [1978] 2 ALL E.R.460. See also Court, Prosecution and Conviction, 1981, p.204.

\(^{144}\) Courts, Prosecution and Conviction, 1981, p. 204.
"But senior police officers and magistrates in London have told us that in some cases prosecuting and defending barristers plan the outcome of a case in their own chambers before it goes to court, then ask the court to rubber stamp their decision."\textsuperscript{145}

"The Times" in another article quoted Judge James Pickles of Sheffield Crown Court, telling the Royal Commission on Criminal Procedure in 1979 how such bargains were made in these terms:

"Some judges send for counsel before the case starts and virtually give directions for 'carving it up'.... some judges negotiate more subtly by sending and receiving messages through their clerks... How tempting to sit down and sort it out sensibly, wigs off. The tension of open court has gone. The short hand writer is absent. No press or public even the accused.....is not there. In this easy atmosphere the formal rules can be overlooked in a genuine effort to find a sensible shortcut, off the record."\textsuperscript{146}

\textbf{ANALYSES OF PLEA BARGAINING}

There are no statistics as to how judges will, in fact, see counsel and intimate the type of sentence after a plea of guilty or in anticipation of one. However, in 1978 the Court of Appeal was made aware of several cases of intimation of the type of sentence by the judge following a guilty plea. Twenty-five judges who were interviewed in the Oxford pilot study on sentencing in the Crown Court canvassed various opinions as to what a judge ought to say or do.\textsuperscript{147} It is, however, a policy of the court that accused persons who plead

\textsuperscript{145} July 11, 1982, p.1.


guilty are afforded a less severe sentence than they would otherwise have received had they not pleaded guilty.

Plea bargaining is not central to the criminal justice system in England nor is it of an organised character, although there are manifestations of the practice in that system. In fact, J. L. Herberling stated that "the fraternal nature of the English Bar creates an atmosphere conducive to plea negotiation." 148 Indeed, Baldwin and his colleague observed:

"Although it may be true to say that there is a lower incidence of plea bargaining in England than in the U.S., it is not correct to say that bargaining does not exist in England to any significant degree. We found evidence in twenty-two cases of an explicit bargain being struck and in a further sixteen cases of a bargain of a tacit nature." 149

A guilty plea obviates the need for a full blown trial and, therefore, speeds up the trial process. Is there any empirical basis to support a conclusion that plea bargaining speeds up the trial process? If so, what percentage of cases are resolved by plea bargaining or guilty pleas?

S. McCabe and R. Purves in 1972 did a study of plea negotiation. The study consisted of 90 cases, concerning 112 accused persons who were due for trial on a plea of 'not guilty' and changed their plea at a late stage. Forty-eight (42.8 per cent) of the 112 accused persons pleaded guilty to all the charges while the remainder, 64, "had an arrangement of pleas accepted by the court". In these cases "plea

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149 Baldwin, J. and McConville, Michael, Negotiated Justice: Pressure to Plead Guilty, 1977, p.35.
followed after good advice from counsel"; plea bargaining also had taken place with the prosecutor, usually in the presence of the judge.150

McCabe and her colleague stated that a plea of guilty will not in all cases lead to the saving of court's time and public fund. The McCabe and Purves study revealed that in 6.6 percent of the ninety cases there was waste of time. It was observed:

"As late as the day on which the courts published their order of business these defendants were officially listed as pleas of not guilty, and the subsequent changes of plea invariably caused adjustment to the whole time-table and generally no little disturbance in the office of the clerk of courts, without whose efforts and ingenuity the waste and cost would be even greater."151

A. E. Bottoms and J. D. McLean in 1976 also conducted a study of plea bargaining. That study included interviews with seventeen accused persons who elected trial in the Crown Court. While twelve accused persons had later changed their pleas, five intended to plead guilty. To the twelve were added eleven who were tried at the Crown Court without electing and who later changed their pleas. Legal advice or inducement to plead guilty was the main reason for the change of pleas.152

151  Ibid., p.30.
152  Supra note 137, pp.79, 128.
The number of accused persons who pleaded guilty differed among the Crown Court Circuits. The rate of guilty pleas between 1972-1981 was sixty per cent. In 1981, it was eighty per cent in the North Eastern Circuit and forty per cent in London. Several reasons were advanced for accused persons pleading guilty. Among the reasons canvassed were changes in the distribution of business between the Crown Court and Magistrates’ Court. J. Baldwin and his colleagues stated that the sentencing discount explained the low rate of not guilty pleas in their sample. However, Andrew Ashworth observed that further research is needed concerning the effect of the sentencing discount on pleading guilty.

Judicial acknowledgement has been given to charge bargaining. However, plea bargaining involving negotiation between counsel and the judge, whereby promise of a definite leniency in sentence ensues, is considered inimical to the English criminal justice system. Notwithstanding, the media seem to suggest that the "local legal culture" might, in some instances, permit ‘sub rosa deals’.

Implicit bargaining or charge bargaining, for example, where an accused person pleads guilty to a lesser included charge or he pleads guilty to some charges while others are withdrawn should have the practical benefit of the avoidance of delay and the expense of a trial.

154 Ibid., p.68.
155 Supra note 149, pp.76-80.
156 Supra note 153, p.81.
THE APPELLATE COURT

The reasons for appeals are threefold:

1. "to ensure that justice is done in a case, that is, to ensure that the accused person gets a fair trial and that no error occurs which prejudices the case of the accused;

2. to provide a mechanism for the continuous development of criminal law; and

3. to provide for an impartial administration of criminal justice".\textsuperscript{157}

D. A. Thomas observed that the main function of criminal appeal is to:

"Ensure that innocent persons do not suffer the consequences of conviction for offences of which they are not guilty, and the guilty persons do not receive inappropriate sentence."\textsuperscript{158}

If the main purpose is that the innocent accused person does not suffer prolonged incarceration, then it is important that he obtains a speedy review of his case.

SPEEDING UP THE APPELLATE PROCESS

A method used by the court to expedite the appellate process is the single judge system. Under this procedure application is made to a single judge of the Queen’s Bench Division, who either grants or refuses leave. In the event that leave is


refused, the applicant can re-apply to the full court. The 1907 Criminal Appeal Act provided that application for leave to appeal may be made to a single judge. By the single judge procedure 'hopeless' cases would be filtered out of the appellate system. Daniel Meador described the single judge leave granting process as "an effective, high volume screening mechanism." 159

However, the inordinate delays caused by the large number of meritless appeals which came before the court saw the need for a practice direction in 1970 by the Chief Justice, Lord Parker, regarding the loss of time, whenever an application for leave to appeal is refused. 160

After the Lord Chief Justice (Lord Parker) announced from the bench on March 8, 1970, that the court would not hesitate to direct that time served in regard to meritless appeals would not be counted and to this end, the Registrar's Office would issue a Form AA. The applicant had to sign a statement that he had read the said form. Part of the form stated:

"Your application may go first to a single judge who might refuse it and direct that part of the time in custody after putting in the notice of application shall not count towards your sentence. If you then abandoned the application that time would be lost, but only that time. If, however, you renewed the application to a court of three judges, they might direct that you lose more time. The result in either case is a later date of release." 161

159 Supra note 157, p.56.
161 Supra note 159, p.64.
Daniel J. Meador observed:

"To understand the effect of this device, it is necessary to realise that few convicted defendants in England are at liberty pending appeal."\textsuperscript{162}

A Guide to Proceedings in the Court of Appeal Criminal Division stated:

"bail may be granted (a) by the CADC (Court of Appeal Criminal Division) or (b) by the judge before whom he was sentenced but only where a certificate is issued that the case is fit for appeal."\textsuperscript{163}

This power was rarely exercised by the single judge.

As delays caused by the number of meritless appeals continued, the court, per Lord Widgery, C. J., saw the need for a reminder. At the sitting of the Court of Appeal, Criminal Division, February 14, 1980, Lord Widgery, C. J., stated:

"In 1970 the then Lord Chief Justice, Lord Parker, C.J., found it necessary to issue a reminder of the power, both of the full court and of the single judge, when refusing an application for leave to appeal, to direct that part of the time, during which a person was in custody after lodging his application should not count towards sentence."\textsuperscript{164}

\textsuperscript{162} Supra note 159, p.62.
\textsuperscript{163} 1983, para. 15.1.
Therefore, single judges, as of April 15, 1980 would "give special direction for loss of time, whenever an application for leave to appeal is refused." In fact, steps were taken to ensure that the practice note was brought to the attention of prisoners who intended to file appeals.

The frequent exercise of this discretion by the single judge or the full court to direct that time served by the prisoner is lost, is a device to screen meritless appeals out of the criminal justice system and to speed up the appellate process in respect of meritorious appeals.\(^{165}\)

The Criminal Justice Act, 1988 also provides for the dismissal of "frivolous or vexations" appeals or application for leave to appeal. Section 157 states:

"If it appears to the Registrar that a notice of appeal or application for leave to appeal does not show any substantial ground of appeal, he may refer the appeal or application for leave to the court for summary determination; and where the case is so referred the court may, if they consider that the appeal or application for leave is frivolous or vexatious, and can be determined without adjourning it for a full hearing, dismiss the appeal or application for leave summarily without calling on anyone to attend the hearing or to appear for the Crown thereon."

Concern has been expressed about the delays caused from waiting for transcripts. Concerning this matter, the "Interdepartmental Committee on the Court of Criminal Appeal", stated:

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"In recent times complaints have been made that the delay in supplying transcripts of shorthand notes to the court was delaying the hearing of appeals."\textsuperscript{166}

Additionally, if a shorthand writer died or left the jurisdiction before the transcript was produced, the possibility existed that nobody might be able to read the transcript.

To address this problem, a committee was appointed under the chairmanship of the Honourable Mr. Justice Baker to investigate the possibilities of mechanical recording of the proceedings. The precise terms of reference of this committee were:

"To consider and advise on schemes for mechanical recording of court proceedings; for transcription of material so recorded, and all matters incidental thereto."\textsuperscript{167}

The committee examined several methods of mechanical recording in other countries. In many of those countries this type of equipment was used as an aid to the shorthand writer rather than as a replacement, as somebody has to monitor the mechanism.


ANALYSES OF PROCEDURE TO EXPEDITE THE APPELLATE TRIAL PROCESS

The single judge procedure is highly effective, as the figures will show. In 1968, in respect of applications for leave to appeal against sentence, eighty-five per cent were not granted leave to appeal by the single judge. These applicants did not reapply to the full court. Concerning applications for leave against conviction, seventy per cent of those not granted leave were not renewed.\textsuperscript{168} In 1970, of 7,013 applications, 5,175 (seventy-three per cent) were refused leave; 1,100 of the 5,175 renewed their applications.\textsuperscript{169} During 1990, of the 17,559 appellants processed by the Crown Court, 4,018 (twenty-three per cent) were abandoned.\textsuperscript{170}

The 1970 direction and the 1980 reminder, in respect of loss of time regarding meritless appeals were effective. On the matter of the 1970 direction Daniel Meador, observed:

"Though these directions are made selectively, the deterrent effect is apparently strong. The drop in criminal appeals volume after March 1970, appears from all evidence to be due solely to the Lord Chief Justice's announcement and the court's follow-up in beginning to exercise the power."\textsuperscript{171}

One of the criticisms of the single judge's and the full court's power to order loss of time served, is that legal advice might not be sought in respect of some applicants. Consequently, it might be unfair to these applicants as they might not know whether there are arguable grounds of appeal.

\textsuperscript{168} Lord Parker of Waddington, "The Criminal Division of the Court of Appeal", (1969-70) 12 C.L.Q. 313.

\textsuperscript{169} Supra note 159, pp.28-29.

\textsuperscript{170} Supra note 7, para. 16.

\textsuperscript{171} Supra note 159, pp.28-29.
Legal advice for all appellants would, therefore, be advisable.

Concerning transcripts, in 1949 through 1958, a number of experiments were undertaken to test the practicability of using mechanical recording devices, more particularly in the Court of Appeal. As the results of these experiments were not encouraging, the scheme was not implemented.\(^\text{172}\)

In 1960, however, the Organisation and Method Division of Her Majesty’s Treasury conducted further experiments and made proposals for the use of mechanical recording in the courts. The experiments were successful, consequently, tape recording apparatus were installed, at first, in six courts. On the judge’s bench was a "cut out" device with a microphone which was so placed; it enabled the judge to speak to court personnel without being recorded.\(^\text{173}\)

In the interest of efficiency, guidelines were established. "A Guide to Proceedings in the Court of Appeal Criminal Division" states:

"Where counsel requests transcript in respect of parts of proceedings which may not be readily identifiable, eg., parts of evidence or submissions and rulings he should always provide a note of

\(^{172}\) Supra note 166.

\(^{173}\) The committee, under the chairmanship of Mr. Justice Baker, recommended that the 'in-court' tapes should be kept for the period required for an appeal from the particular court. Should a transcript be needed during that period, the tape would be sent for transcription, along with a log of proceedings which was kept by a court official. Should there be a demand for a transcription after the required period the material passages would be recorded from the multi-channel tape and sent to the transcribers.
names, dates and times for the assistance of the shorthand writer.\textsuperscript{174}

Paragraph 3.3. of the Guide also states that transcript ought not to be requested unless it is essential for the "proper conduct" of the case. In some cases, counsel may agree to a note of evidence in lieu of transcript. However, the Registrar ought to be consulted where this course is adopted.\textsuperscript{175}

Additionally, when a transcript is obtained, the Registrar can, in fact, invite counsel to perfect his grounds on the basis of the transcript. This is especially so where the application is for leave to appeal against conviction. One of the purposes of perfecting the grounds of appeal is "to save valuable judicial time by enabling the judge or court to identify at once the relevant parts of the transcripts."\textsuperscript{176}

It is obvious that efficiency in the appellate process is an essential imperative, since a retrial, for instance, avails little unless there is a speedy disposition of an appeal. Although the statistics reveal that the average waiting times relating to appeals have increased, these figures might not be a true representation of the situation for the reason that an appeal may be heard in a matter of days while another in a

\textsuperscript{174} Criminal Appeal Office, 1983, para. 3.2.

\textsuperscript{175} A Guide to Proceedings in the Court of Appeal Criminal Division, Criminal Appeal Office, 1983, para. 3.4.

\textsuperscript{176} Ibid., paras. 4.1, 4.2. As regards time limits for filing of appeals, see Practice Direction, [1989] 88 Cr. App. R 105; Criminal Appeal Act 1966, s.10(1) re-enacted in the Criminal Appeal Act, 1968, ss. 18(2), 31(2)(6); Administration of Justice Act, 1960, s.2; Criminal Appeal Act, 1960, s.34.
matter of months.177

CUSTODY TIME LIMITS

There are time limits in England to speed up the trial process. Under the Indictment (Procedure) Amendment Rules, 1983, an indictment ought to be prepared within 28 days of committal. Rule 5 (1) directs:

"Subject to the provisions of this rule, where a defendant has been committed for trial, a bill of indictment shall be preferred within a period of 28 days commencing with the date of committal."

Rule 5 also provides that the period may be extended before or after it expires, by a judge of the Crown Court. Under the Crown Court Rules 1982, trial ought to begin no later than eight weeks following committal. Rule 24 states:

"The periods prescribed for the purpose of paragraphs (a) and (b) of section 77 (2) of the Supreme Court Act 1981 shall be fourteen days and eight weeks respectively and accordingly the trial of a person committed by a Magistrates's Court: (a) shall not begin until the expiration of fourteen days beginning with the date of his committal, except with his consent and the consent of the prosecution and (b) shall, unless the Crown Court has otherwise ordered, begin not later than the expiration of eight weeks beginning with the date of his committal."178


178 Rule 24, S.I. 1982, No. 1109.
The time limits have been exceeded. Moreover, the 28 days is usually extended by the Crown Court whenever the prosecutor makes an application.\(^{179}\)

Consequently, on the April 1, 1987, custody time limits were introduced in four counties to speed up the disposition of custody cases so as to reduce the length of time an accused spends in custody. The Prosecution of Offences (Custody Time Limits) Regulations, 1987, were made in accordance with section 22 of the Prosecution of Offences Act, 1985.\(^{180}\)

The Regulations fixed the following time limits. A limit of seventys day prior to committal in Avon, Somerset and Kent; ninety-eight days in West Midlands. Where the court decides upon summary trial, there would be a limit of fifty-six days. In the event that it is impracticable for the court to decide in fifty-six days, then seventy days would apply. There is a limit of one hundred and twelve days from committal to arraignment in the Crown Court. Custody cases consist of twenty one per cent of the business of the Crown Court.\(^{181}\)

Under section 22 of the Prosecution of Offences Act, 1985, an application may be made by the prosecution for the extension of a particular time limit provided that the time limit has not expired. If the time limit expires, the accused must be released on bail in accordance with the 1976 Bail Act to await summary trial, committal proceedings or arraignment. Of course, the accused may appeal against a decision to extend


\(^{180}\) S.I. 1987, No. 299.

and the prosecution has a similar right of appeal against a decision not to extend.

The fourth report of the Home Affairs Committee 1980-81 and the House of Commons Home Affairs Select Committee 1984 recommended custody time limits. The House of Commons Home Affairs Select Committee Reports on Remands in Custody, 1984, found that the amount of time spent in custody is largely determined by the speed with which a case can be brought to trial. The committee examined time limits in jurisdictions where they were in force, for example, Scotland and United States of America. The Committee on this issue observed:

"Statutory time limits harness the energy of all concerned to reduce delays. Such a measure rested on the need to safeguard individual remand prisoners against inordinate delays in being brought to trial."

Are there any empirical bases in England to support this finding?

**ANALYSES OF CUSTODY TIME LIMITS**

Research concerning custody time limits was undertaken by Mesdames Claire Corbett and Yvonne Korn. Emerging from this research, it was found that ninety-two per cent of all custody cases of a sample of forty cases, would have exceeded either pre-committal or post-committal time limits and almost half

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184 Ibid., para. 15.
would have exceeded both limits.  

Corbett and her colleague also found that although the sample was small, it had wider implications for custody cases as the indications were that the time limit of seventy days might lead to regular applications for extensions in more complex cases. They also found that speedy receipt of full police files was important for the timely preparation of committal papers.  

Similarly, in "Pre-trial Delay: The Implications of Time Limits", Morgan and her colleague observed:

"The preparation of the prosecution case accounted for the greatest proportion of the time requested by the prosecution; 80 per cent in custody and 70 per cent in bail cases." 

In fact, waiting time included the preparation of committal papers, police delays and the unavailability of forensic evidence. Morgan and her colleague found that the longest waiting times were in Birmingham where one-third of accused persons waited longer than the seventy-days limit.

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185 Supra note 179. A sample of 40 cases of 54 accused persons was taken from the fraud division, the Director of Public Prosecutions Divisions at the Central Criminal Court and the county division. Eleven per cent fraud related cases; 60 per cent were murder and manslaughter and offences against the person and 11 per cent consisted of miscellaneous charges.

186 Supra note 179.


Despite the picture which emerged from these findings, the House of Commons Home Affairs Committee Session painted a more positive one. The committee observed:

"Experience with custody time limits in the four counties was encouraging. The same high rates of compliance that had been achieved in the field trials were maintained in the first phase of statutory operation with fewer than 5 per cent of cases exceeding the limits to committal, trial or arraignment."\(^{189}\)

By virtue of the Prosecution of Offences Act, 1985, these time limits may be extended. Section 22 (3) directs as follows:

"The appropriate court may, at any time before the expiry of a time limit imposed by the [Prosecution of Offences (Custody Time Limits) Regulations 1987]...extend, or further extend, that limit if it is satisfied - (a) that there is good and sufficient cause for doing so; and (b) that the prosecution has acted with all due expedition."

Extension of time limits by the courts can only be justified on the bases of "good and sufficient cause" and "the prosecution has acted with all due expedition".

The jurisprudence shows that the courts adopt a strict approach in their interpretation of this statutory provision. For instance, "chronic staff shortages" is not an excuse for the lack of "due expedition". The court, per Lloyd L. J., in \(\text{R v Governor of Winchester Prison Ex Parte Roddie and Another}\), observed:

\(^{189}\) H. C. Home Affairs Committee Session (1988-1989) fourth Report 314, p.17, para. 38. On June 1, 1989, time limits were extended to 21 counties.
"The purpose of laying down specific time limits for custody at each successive stage of the proceedings was to prompt the prosecution to move with expedition, and to avoid the accused being kept in custody for an excessive period at any stage. Parliament, having willed that very desirable end must also, as it seems to me, will the means." 190

Also, in R v Governor of Armley Prison, Ex parte Ward, the court stated that an order extending custody time limits had to be made clearly and unambiguously and could not be inferred from other orders made at the hearing. 191

Perhaps there should be guidelines relating to the concepts of "due expedition" and "good and sufficient cause" by the prosecutor. The case law has not established any clear guidelines. One advantage of a strict interpretation, however, is that prosecutors would be compelled to proceed with expedition.

As alternatives to remand in custody, the Home Office intends to make more effective use of remand bail hostels, bail information schemes, electronic monitoring and field trials.

Where a trial was delayed because a prisoner was not brought for trial, an experiment was introduced under the Criminal justice Act, 1988, section 155, that is, 28 days remand was granted after the first remand appearance.

Custody time limits provide definitive periods during which accused persons are kept in custody in order to reduce excessive delays and the anxiety caused by prolonged incarceration. The degree of compliance with time limits

varies. Findings showed that the limits in some instances were exceeded. As a response to this, alternative methods are being implemented, for instance, electronic monitoring. However, the overall success of custody time limits has led to the further extension of these limits in England and Wales.

**SOME ADMINISTRATIVE PROCEDURE**

(A) **MANPOWER AND COURT ROOMS**

In the last ten years, the increase in available court rooms and judges have led to an increase in sitting days and greater efficiency in the criminal justice system.

On April 1, 1989, there were 409 Circuit Judges, 697 Recorders and 426 Assistant Recorders. By early 1991, there were 426 Circuit Court Judges, 740 Recorders and 451 Assistant Recorders. The sitting days figures for 1988 were 75,055 days. This was twenty-nine per cent more than 1979 which was 58,259 days. In London, sitting days increased by thirty-four per cent.

An extensive court building programme which began in the 1970s, resulted in a net increase of about 150 courts since its inception. Provision was made for another 138 court rooms. That programme has been concentrated in the South East where delays are greater.

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192 Supra note 189.


194 Supra note 189.

195 Supra note 189.
(B) COURT MANAGEMENT

The introduction of computers into the court administration assists in the expedition of the trial process. "One special merit of such a comprehensive system is the facility that it provides for the management of the court business in an orderly and predictable way."\(^{196}\) Computers were first introduced in a number of summary courts in England prior to its introduction into other criminal courts. The courts at Nottingham, for example, have a system in place. All the courts' business are fed into a single system, so projection regarding the need for staff can be made and the history of cases can be readily obtained. Many courts have been computerised and the Home Office has been urging courts to make use of the management information system.\(^{197}\) Under this system, performance is quantified or measured in terms of time taken to conclude cases and cost per case.

(C) CROWN PROSECUTION SERVICE

The Prosecution of Offences Act, 1985, part I, established a Crown Prosecution Service for England and Wales. One of the objectives of the introduction of the Crown Prosecution Service was to reduce delays.\(^{198}\)

Prior to 1986, the majority of criminal cases in England were investigated and prosecuted by the police or by solicitors acting on behalf of the police.

\(^{196}\) Editorial: [1979] 3 C.L.J. p. 48

\(^{197}\) Supra note 189, para. 50.

With the creation of the Independent Prosecution Service, criminal proceedings instituted by the police or other persons are conducted by the Crown Prosecution Service, save for minor offences. Once the police institute criminal proceedings, the Crown Prosecution Service has the duty to review the evidence and see whether the case should proceed either in the magistrates' court or the Crown Court.

As regards the evidential sufficiency criteria, the Code for Crown Prosecutors states:

"4. When considering the institution or continuation of criminal proceedings, the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the Crown Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to law has been committed by an identifiable person. The crown prosecution does not suppozt the proposition that a bare prima facie case is enough, but rather will apply the test of whether there is a realistic prospect of a conviction. When reaching this decision, the Crown Prosecutor, as a first step, will wish to satisfy himself that there is no realistic expectation of an ordered acquittal or a successful submission in the magistrates' court of no case to answer. He should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which, in his view, would affect the likelihood or otherwise of a conviction."

These strict criteria should facilitate a greater screening of weak cases. Of course, in evaluating evidence, the Crown Prosecutor takes into consideration also the Police and Criminal Evidence Act, 1984 and Codes of Practice. Code 5 deals with other factors which the Crown Prosecutor should take into account in reviewing evidence.
Some of the objectives of the Crown Prosecution Service are:

a) to continue prosecutions only in the public interest;
b) to ensure that case preparation and decision making are of a high quality;
c) to prosecute cases effectively, efficiently and economically; and
d) to improve the performance level of the criminal justice system.\textsuperscript{199}

The Crown Prosecution Service has one thousand five hundred lawyers and a support staff. There are branches of the Crown Prosecution Service in thirty-one areas throughout England. Each area is headed by a Chief Crown Prosecutor who reports to the Director of Public Prosecutions. The Director works under the supervision of the Attorney General or the ministerial responsibility of the Attorney General.

Barristers and solicitors who work in the Crown Prosecution Service receive on-the-job training and spend a good deal of time prosecuting cases in the magistrates' courts.

Cases are received by Crown Prosecutors under the guidance of senior lawyers in the office. The Senior Crown Prosecutors are responsible for the work of a small group of Crown Prosecutors whom they supervise. Although Senior Crown Prosecutors attend court, they do not attend as often as the Crown Prosecutors. Lawyers with the Crown Prosecution Service can specialise in particular fields, for instance, fraud and juvenile cases.

\textsuperscript{199} Ibid., p.13. See also Crown Prosecution Service Fact Sheet.
Since the service came into being, the average processing delays between 1987-88 was over 2.5 months in magistrates courts and about five months in the Crown Court. Thus, the Home Affairs Committee stated:

"Since the introduction of CPS there has been a significant increase in the average length of time taken to process cases through magistrates' courts. Example, between October 1985 to June 1988 the average interval between charge or summons and completion for indictable offences rose from sixty-three days to seventy-six days."\(^{200}\)

The fall in clear up rate since 1986, is attributed not only to the implementation of the Police and Criminal Evidence Act, but also to the reviewing of cases by the Independent Crown Prosecution Service.\(^{201}\)

**ALTERNATIVES TO CRIMINAL COURTS**

Forms of non-judicial settlement such as diversion, decriminalisation, depenalisation, reparation, conciliation and mediation will not be considered, as all these procedures remove only minor cases out of the mainstream of the criminal justice system or out of the justice system into some administrative system, for example, detoxification centres.\(^{202}\) However, for completeness, two of the alternatives will be briefly examined.

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\(^{200}\) Supra note 189, p.13 para. 3.22. The C.P.S. Performance Indicators were introduced October 1986. See also note 191 para. 3.3; Sanders, Andrew, "Arrest, Charge, Prosecution", [1985] J. Legal Studies, 257.

\(^{201}\) Criminal Statistics, England and Wales, Home Office H.M.S.O,1989 (cmnd.1322) p.29, paras. 2.4, 2.25, 2.26. "The clear-up rate is the ratio of offences cleared up (person has been charged, summoned or cautioned) in a year to offences recorded in the year".

An experimental programme of detoxification centres, that is, treatment centres to which the police may take offenders, particularly habitual drunken offenders, as an alternative to prosecution, began in May 1976, with the opening of the first centre for males in the West Yorkshire Police Force Area. In the period May to December 1976, there were 462 admissions to this centre involving 197 offenders. The average length of stay was about five days.

Section 34 (1) of the Criminal Justice Act, 1972, empowers the police in appropriate cases to take offenders to treatment centres. The section directs:

"In any case in which a constable has power to arrest a person under any of the provisions mentioned in subsection (3) of this section the constable may, if he thinks fit, take him to any place approved for the purposes of this section by the Secretary of State as a medical treatment centre for alcoholics and while a person is being so taken he shall be deemed to be in lawful custody."\(^{204}\)

Decriminalisation or the removal of certain minor offences out of the mainstream of the criminal justice system is one method of reducing the courts' caseload. For instance, homosexual conduct between consenting males has lost its criminality. A form of de facto decriminalisation is cautioning by the police.\(^{205}\) In 1988, the one hundred and forty-one thousand offenders who were cautioned for indictable offences fell in

\(^{203}\) Supra note 189, p. 9, para. 3.3. See also Sanders, Andrew, "Arrest, Charge, Prosecution", [1985] J. Legal Studies, 157.

\(^{204}\) C. 71.

\(^{205}\) Criminal Statistics, England and Wales, 1988, (cmnd.847), para. 5.3.
only two of the offence groups: burglary by six per cent and theft and handling stolen goods by thirteen per cent. About a quarter of the offenders cautioned in 1988, were females and almost sixty per cent were under seventeen. The cautioning rate for indictable offences dropped from the 1987 peak, thirty per cent, and returned to the 1986 level of twenty-eight per cent.

**SUMMARY**

Several measures have been implemented in England to stem caseloads, backlogs and excessive waiting times. Among the several measures are the reform approaches which have been discussed. In some instances, these measures have reduced waiting times and backlogs to a tolerable level.

Pre-trial review which started as an experimental scheme in October 1974, has considerably reduced waiting times. However, the present pre-trial review schemes are still being evaluated. Although pre-trial review was initially confined to complex fraud cases, it has been extended to other cases. Indeed, the Home Office observed that these reviews are economical only in cases which are likely to consume over two days.

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206 Ibid.
207 Supra note 205, para. 5.4.
There has been no research into the effects of pre-trial reviews in the Crown Court. However, there is evidence to suggest that it has operated efficiently and has led to shorter trials and lower cost.

As regards committal proceedings, the overall effect has been an acceleration of the trial process despite the fact that weak cases reach the Crown Court by way of paper committals. Nevertheless, it is felt by some academic writers that instead of a partial dispensation, committal proceedings ought to be abolished.

One of the key effects of disclosure is that it has increased the number of guilty pleas nationally and decreased the number of full blown trials. The rules of disclosure have widened somewhat. For instance, the Crown Court (Advance Notice of Expert Evidence) Rules 1987, which came into force on July 15, 1987, provide for mutual disclosure of expert evidence between the parties to criminal proceedings in the Crown Court. The overall effect of disclosure had led to the narrowing of issues and lessened the number of cases which go to trial.

Plea bargaining in the form of charge bargaining exists in England. This form of bargaining has speeded up the trial process. However, further research is needed concerning the effect of the sentencing discount for guilty pleas. The law society feels that with proper safeguards plea bargaining could be useful in the administration of justice.

The distribution of criminal business between the higher and lower criminal courts follows the tripartite classification recommended in the report of the Interdepartmental Committee on the distribution of criminal business\textsuperscript{210} and implemented in the Criminal Law Act, 1977. The most serious offences are triable only on indictment before a judge and jury and the least serious only summarily before magistrates. Cases of intermediate gravity are triable either-way; magistrates being able to commit them for trial on indictment if it appears they are too serious to be dealt with within their powers. Accused persons may insist on jury trial. The distribution of criminal business has removed pressure from the Crown Court. In fact, the 1988 Criminal Justice Act has further relieved the Crown Court of a significant number of cases as it further narrowed the range of offences triable in the Crown Court. This has removed the pressure from the Crown Court to the magistrates' courts.

However, the problem of delays in the magistrates' courts is being addressed.\textsuperscript{211} Indeed, the key factors which caused delays in the magistrates' courts such as, adjournments, shortages of court clerks, and the collapse of contested cases have been identified and solutions for the expeditious disposition of cases are being implemented.

Time limits are an important measure in the criminal justice system and is a spur to the police in making available the statement of witnesses and other important paper work. Time

\begin{footnotes}

\item[211] Supra note 209.
\end{footnotes}
limits also guarantee that the prosecution and defence act within time standards.

The Crown Court Rules made under the Supreme Court Act, 1981, which prescribe, inter alia, that a trial shall not begin later than eight weeks from the date of committal together with the Rules relating to Custody Time Limits have had some degree of compliance.

Procedures implemented to speed up the appellate process have been extremely effective. The most effective procedure is that which deals with the disposal of groundless or meritless appeals.\textsuperscript{212}

For greater efficiency, guidelines relating to transcripts, were established. Steps taken in respect of administrative reforms, namely; increased court rooms and the number of judges have led to an increase in sitting days in the last ten years, thereby, increasing the disposition of cases.

The range of reform measures are tailored to the types of problems identified. It is not true to say that any one response by itself or in conjunction with another would solve the problem of caseload or delay. Although some measures are more effective or successful than others, it is the sum total of the reform measures which have contributed to controlling waiting times and congestion in the criminal justice system. Indeed, there is no one remedy or panacea for the problems.

\textsuperscript{212} Supra note 164. See also the Criminal Justice Act, 1988, s. 157 which deals with "frivolous or vexatious" appeal or application for leave to appeal.
The English experience shows that the key ingredient to successfully controlling excessive waiting times and court congestion is a commitment to deal with reforms in this area as an ongoing process.
A SIMPLE REPRESENTATION OF THE COURT SYSTEM:

ENGLAND

Appendix B

HOUSE OF LORDS

COURT OF APPEAL (CRIMINAL DIVISION)

COURT OF APPEAL (CIVIL DIVISION)

THE HIGH COURT OF JUSTICE (QUEEN'S BENCH, FAMILY AND CHANCERY)

THE CROWN COURT

COUNTY COURTS

MAGISTRATES' COURTS
### Hierarchy of Criminal Courts

The arrows indicate where appeal lies.

**Appeal with leave and a certificate on a point of law of general public importance. Appeal under S. 1 of the Administration of Justice Act, 1940. Q.B.D. must certify a point of law of general public importance and Q.B.D. or House of Lords gives leave.**

**HOUSE OF LORDS**

- **S. 36 of the 1988 Criminal Justice Act** provides that when the Court of Appeal has reviewed a case, a further referral on a point of law may, with leave, be made to the House of Lords.

**DIVISIONAL COURT OF THE QUEENS BENCH DIVISION**

- **a) Appeal by stated case on a point of law (S. 111 of N.C.A. 1980).**

**COURT OF APPEAL (Criminal Division)**

- **a) Appeal against conviction and/or sentence.**
- **b) By S.38 (1) of the C.J.A., the Attorney General may refer to the C.A. on a point of law for their opinion if accused has been acquitted.**
- **c) The 1988 Criminal Justice Act - S.I. 1988/1408 S.36 allows the Attorney General to refer, with leave, an unduly lenient sentence which is wrong in law imposed by the Crown Court to the Court of Appeal. The Court of Appeal is empowered to review the sentence and substitute a new sentence.**
  1. Appeal by rehearing, conviction and sentence (S.108 Magistrate’s Court Act)
  2. Committal for sentence
  3. Committal for trial.
  4. Trial on indictment (with jury).
  5. Committal proceedings and summary trials (no jury).

**CROWN COURT**

- **Magistrate’s Court**

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203
CHAPTER IV
THE UNITED STATES OF AMERICA CRIMINAL JUSTICE SYSTEM: REFORM MEASURES

INTRODUCTION:
This Chapter seeks to examine the criminal justice system of the United States of America within the context of their reforms which have been implemented to deal with the problems of delays and caseloads in that system.

THE SCALE AND SCOPE OF THE PROBLEM OF DELAY
The caseload situation in the United States of America far surpasses the caseload situation in most countries. Interestingly though, they have nearly managed to contain the problem as this chapter intends to show.

According to the National Centre for State Courts, "Demographic variables have long been used as surrogate measures of courts caseloads."¹ This is so because population growth directly affects crime rate. In 1983 the total number of crimes was 12,107 in every 100,000 of the population. Compared with 1988, the total was 13,923 for every 100,000 of the population.² For the year 1989, the total rose to 14,251 for every 100,000 of the population. The figures for 1983 through 1989 show that crime is on the increase. Crime varies from state to state. For instance, for the period 1988, the

¹ NCSC - The Business of State Trial Courts, National Centre for State Courts and the Conference of State Court Administration, Flango, Victor; Roper, Robert T and Elsner, Mary E, p. 65, 1983.

The total number of crimes per 100,000 of the population in Atlanta was 20,000. Compared with San Jose, California, the total number of crimes per 100,000 of the population was 5,137.³

The caseload statistics indicate that in 1981 the 50 states and the District of Columbia reported over 82 million cases filed in the trial courts.⁴ Since then, criminal cases have been increasing one and a half times the rate of civil cases filed.⁵ The projection is that this trend will continue and by the year 2000, the criminal court level of activities may double.

The workload of the Appellate Court has also increased. Alex S. Ellerson in an article, "The Right to Appeal and the Appellate Procedure Reform", observed:

"The imperatives of appellate justice have eroded because of the breathtaking rate at which appellate dockets have grown. Between 1973 and 1983 this rate far outstripped increases in the nation's population (ten times faster)......the number of appellate judgeships (three times faster)."⁶

³ Ibid., p. 177.
⁴ United States: 1977-1981 State Caseload Statistics, Bureau of Justice Statistics Special Reports, Feb., 1983. According to the NCSC - The Business of State Trial Courts and the Conference of State Court Administration: "This is a benchmark from which future changes to caseload can be measured and any future litigation explosion documented".
⁵ The Statistical Abstract of the U.S.A., 1991 reveals that in 1988, 483,757 civil cases were before the United States District Courts.
In 1970 the number of appeals filed with the Federal Courts of Appeal was 11,662. For the year 1987, the number of appeals increased to 35,000, an increase of 300 per cent. In state Appellate Courts workload increases by 305 per cent have been recorded. With such staggering workloads what, therefore, is the waiting times of criminal cases?

Waiting times or case processing times differ from state to state. The case processing time represents the calendar time from arrest to final court disposition. A study conducted in 1986 by the Bureau of Justice, in twelve states including New York and California, indicated that almost half of all felony arrests for which charges were filed in court had disposal or processing time that was three months or less. In respect of cases indicted and bound for trial, the Bureau of Justice had this to say:

"The case processing time was just under five months. Cases resulting in trials took twice as long to dispose of (slightly over seven months) as those resulting in guilty pleas or dismissal. Generally, the more serious the charge, the longer the case processing time. For all felony arrests for which charges were filed in court, case processing time ranged from a low of 3.2 months for larceny and burglary to a high of 6.2 months for homicide."  

The waiting times for cases fixed for trial with respect to this category of offence, felony arrests, fall outside the waiting times established by the National Prosecution

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7 Ibid. Alaska recorded an increase of 305 per cent.

8 United States: Felony Cases: processing time, Bureau of Justice Statistical Special Report, August 1986. See also Boland, Barbara; Logan, Wayne; Stones, Roland, The Prosecution of Felony Arrests, 1982.
Standards and the Speedy Trial Act. However, those resulting in guilty pleas seems to fall within the acceptable time limits.

In relation to criminal trials as a whole, the extent of the problem of delay in relation to caseload statistics can be summed up in the words of Cleon H. Foust and D. Robert Webster who remarked that the complaint often heard about American criminal court is "they are long in coming and lengthy in meeting."10

The National Advisory Commission on Standards and Goals observed that it was not uncommon for ten to twelve months to elapse between the apprehension of an alleged offender and trial. One state alone, New Jersey, registered an average court delay of one year but delays in several states exceeded this. Essex County, for instance, averaged delays of more than 400 days from arrest to trial in 1980.11

Criminal jury trial time also varies throughout the several states. Empirical study of nine courts, conducted by the National Centre for State Courts on criminal jury trial time revealed that New Jersey had the shortest median time, 6.20 hours for criminal jury trials. However, of the nine courts, New Jersey was found to have had the longest criminal trial; three hundred and nineteen hours were recorded for an accused person on a murder charge. California had the longest median

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time, 23.16 hours.\textsuperscript{12} Jury trial time is calculated from trial to verdict, excluding jury deliberation time.

The main reason for delays in this jurisdiction is the many motions and continuances or adjournments. A national assessment survey in 1983 revealed that the most significant reason for delay is the "excessive number of continuances".\textsuperscript{13} The existing trend, although just a synopsis indicates to some extent the problem of delay and caseload in this jurisdiction.

A number of criminal justice reforms have been implemented over time and some of these will be examined. The constitutional mandate for speedy trials, its sanctions and Rule 50 (b) of the "Federal Rules of Criminal Procedure" being fundamental and necessary steps in relieving the accused of any prolonged detention while awaiting trial, will be examined.

**REFORM STRATEGIES**

The constitutional right to speedy trial is enshrined in the Sixth Amendment. It is the jurisprudence surrounding this constitutional provision that gives some clarity and definition to it. In *United States v. Marion*, the Supreme Court held that the Sixth Amendments Speedy Trial guarantee attaches only after a person has been "accused" of a crime and


not from the time the crime was committed.\textsuperscript{14} The constitutional provision, therefore, does not afford any protection to those persons not yet "accused" and very little to appellants.

Mr. Justice White for the Court in \textit{United States v. Marion} stated:

"It is apparent also that very little support for appellee's position emerges from a consideration of the purpose of the Sixth Amendment's speedy trial provision, a guarantee which this court has termed an important safeguard to prevent undue and oppressive incarceration prior to trial...."\textsuperscript{15}

The appellants' position is, therefore, at variance with judicial interpretation of the right to speedy trial.

In \textit{United States v Loud Hawk et al}, the court had to decide: a) whether the speedy trial clause of the Sixth Amendment applied to the time during which the accused persons were not indicted nor subjected to any official restraint; or b) whether certain delays occasioned by interlocutory appeals were properly weighed in assessing the accused persons' right to a speedy trial.\textsuperscript{16} The court, per Powell J., took the view that the time that no indictment was outstanding against the accused should not affect the accused persons' speedy trial claims. The court also found that the delay which was attributed to the interlocutory appeals by the Government and the accused persons did not establish a violation of the speedy trial clause. The majority of the court, in holding that the speedy trial clause of the Sixth Amendment does not

\textsuperscript{14} 404 U.S. 307 (1972)
\textsuperscript{15} Ibid.
apply to a Government appeal from a district court’s dismissal of an indictment, unless the accused is incarcerated or under restraint during the appeal, applied United States v. MacDonald.\(^{17}\)

The MacDonald case, in a nutshell, is that military charges of murder were dropped against MacDonald. Some four years thereafter, he was indicted by a grand jury for the said murders. The court reasoned that after the charges were dropped MacDonald was no longer an "accused" any more than the accused person in Marion’s case before his arrest.

Mr. Justice Marshall, with whom Justices Messrs. Brennan, Blackmun and Stevens joined dissenting, disagreed with the application of the MacDonald’s principle to United States v Loud Hawk et al. The dissenting judges observed:

"We have never conditioned Sixth Amendment rights solely on the presence of an outstanding indictment. Those rights attached to anyone who is "accused", and we have until now recognised that one may stand publicly accused without being under indictment. The majority offered two reasons for concluding that respondents did not enjoy the right to a speedy trial during the Government’s appeals. First respondents were suffering only public suspicion and not a formal accusation. Second, they were not subject to actual restraints on their liberty. Both of these rationales are seriously flawed."\(^{18}\)

The rationale is flawed because while the appeals were pending the respondents were "accused". The dissenting judges were also of the view that the respondents in Loud Hawk et al were not afforded the protection of the Statute of Limitation while

\(^{17}\) 456 U.S. 1 (1982).

\(^{18}\) Supra note 16, p. 313.
the Government was dealing with its appeals. MacDonald was afforded that protection after the charges were dropped.

Delay prior to indictment or at the commission of a crime is assessed on the basis of the due process clause. In assessing pre-indictment delay, the court takes into consideration the cause for the delay, whether the prosecution obtained an advantage from the delay, whether the defence was prejudiced by the delay. In Howell v. Barker, the accused was prejudiced by a pre-indictment delay of twenty-seven months between issuance and execution of a warrant of arrest. The Fourth Circuit rejected the state’s argument that the accused also had to show improper prosecutorial motive in order to establish due process violation. Once the accused showed prejudice, that prejudice must be balanced against the state’s justification for the delay. The court further stated that where a due process violation existed, a retrial is the remedy rather than a dismissal of the indictment.

The Sixth Amendment provides no standards by which an accused person can judge the denial of his right to a speedy trial. Prior to the case of Barker v. Wingo, there were no standards, each case was decided according to its circumstances. In Barker’s case, the court formulated a four-factor balancing test referred to in chapter 1.

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19 904 F. 2d 889 (4th Cir. 1990). See also United States v. Parades 751 F. Supp. (N.D. 111. 1990): Accused claim that his due process right to a speedy trial had been violated when an original indictment was dismissed by the government, and a subsequent indictment was not returned until shortly before expiration of the limitation period, was rejected.


21 Ibid.
The facts in Barker v. Wingo are that on July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders, allegedly by Silas Manning and Willie Barker. Both Silas Manning and Willie Barker were arrested shortly thereafter. The grand jury indicted them on September 15, 1958 and Barker’s trial was set for October 21, 1958. The State had a stronger case against Manning and it was believed that Barker could not be convicted unless Manning testified against him. Barker’s trial was postponed so that the State could obtain a conviction of Manning, and Mannings testimony used without violating his constitutional right against self-incrimination.

The State met with difficulty in its prosecution of Manning. The prosecution, therefore, obtained some sixteen continuances of Barker’s trial during Manning’s trial. The final trial date was fixed for October 9, 1963. On that date Barker moved to dismiss the indictment by invoking violations of his right to a speedy trial. The motion was denied and the trial begun. He was convicted, and given a life sentence. Barker appealed the conviction, relying, in part, on the speedy trial claim. The Kentucky Court of Appeal affirmed the decision. Barker petitioned for habeas corpus. This was denied and the denial affirmed on appeal by the Sixth Circuit.

The Federal Supreme Court held that notwithstanding a five-year pre-trial delay, there was no violation of Barker’s constitutional right to a speedy trial. The court further stated that the right to speedy trial cannot "be quantified into a specific number of days or months as circumstances differed in each case". Therefore, the functional balancing test was adopted.

\[22\] Ibid.
Although failure to demand trial may be considered in assessing violation of the right to speedy trial, a failure to demand trial does not, by itself, mean a waiver. Barker's case rejected the demand waiver rule.23

The court, per Powell, J., in Barker's case, observed:

"The approach we accept is a balancing test in which the conduct of both the prosecutor and the defendant are weighed."24

How did the Supreme Court approach the four factors in assessing violation of the right to speedy trial?

The four factors are balanced on an ad hoc basis. If the length of the delay is "presumptively prejudicial" then the court may not consider it necessary to examine the other three factors.

Before the court considers the other factors, the court takes into account the type of case, that is, whether the case is simple or complex.

With respect to "the reason for the delay", the court must consider the conduct of the prosecution and the defence. The more serious the reason, the greater the weight that is attached. A "neutral" reason, for instance, an overcrowded court calendar carries less weight.

Much weight is attached to the "defendant's assertion of his right to a speedy trial." Where an accused person fails to assert his right to a speedy trial, the court will regard it

23 Ibid.
24 Ibid., p.530

213
difficult for him to prove his right was violated.

Prejudice to the accused person is considered within the context of the three interests which the right to speedy trial protects. The death of a witness, for example, may impair an accused person's defence and this is given much weight.

Since the decision in Barker v. Wingo, flaws in the judicial decision have been apparent. The inconsistencies in the judicial decisions demonstrate that it is impracticable to apply Barker's balancing test to every factual situation.\(^{25}\) Allen Arthur Anderson in an article, "Justice Delayed – Justice Denied? The Right to a Speedy Trial in Iowa", observed:

> "The balancing test established by Barker had the advantage of providing for flexibility, but the disadvantage of producing the uncertainty inherent in any case by case factual determination."\(^{26}\)

Judicial decisions of the District of Columbia Appellate Court, for instance, reveal that flaws in the Barker approach. In Branch v. United States, a case which was delayed for sixteen months before coming to a hearing, the District of Columbia Court of Appeals while applying Barker's test, place the burden of justifying delays on the prosecution.\(^{27}\) In subsequent cases, the Court of Appeals failed to place the burden of justifying delays on the prosecution.\(^{28}\) The courts have often found also implied waivers of the accused person's

\(^{25}\) Ibid.


\(^{27}\) 372 A. 2d 998 (D.C. 1977).

right to a speedy trial. Thus J. J. Cranmore observed:

"If the speedy trial right is to be meaningful, there must be a degree of predictability in the resolution of speedy trial claims. Since decision turns on the balancing of the particular circumstances of each case, it is important that the courts weigh the individual elements of the balance consistently."

The constitution itself does not articulate a remedy for breach of the right to speedy trial. Moreover, when speedy trial claims are evaluated by the courts, under the Barkers four-factor standard, they generally prove to be unsuccessful. Additionally, the courts in interpreting the right, have failed to quantify it. Rule 50 (b) of the Federal Rules of Criminal Procedures was an attempt to address some of these inadequacies.

**RULE 50 (b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

Rule 50(b), Chapter 208 of Titles 18, United States Code directs as follows:

"To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States Magistrates of the

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31 The Administrative Office of the United States Court prescribed a model plan to guide district courts. The plan provided time limits for trial. See Feeley, Malcolm, Court Reform on Trial, 1982, p. 160.
district and shall prepare plans for prompt disposition of criminal cases."

This initiative was to encourage district court planning for delay reduction and established reporting procedures for monitoring compliance, among other things. However, it did not direct specific activities for delay reduction. In fact, Rule 50 (b) was not strictly followed. It was also inadequate as no sanctions were provided to deal with non-compliance. Malcolm Feeley observed:

"Although Rule 50 (b) directed each district to draw up its own plans for the prompt disposition of criminal cases neither the rule nor the Administrative Office set any criteria by which delay could be gauged. Nor did they provide for any penalties in the event guidelines were not met. Most telling, a great many courts undertook no planning process and simply resubmitted the model plan as their own."32

The constitutional Sixth Amendment and Rule 50 (b) provided no standards by which an accused person's right to a speedy trial could be judged. In 1974, therefore, the Federal Speedy Trial Act was passed in an effort to arrest the problem of delay.

TIME LIMITS:
a) THE SPEEDY TRIAL ACT
It is the Statute of Limitation which determines the period between the commission of an offence and the prosecution of that offence. Under Title 18 of the United States Code, an indictment or information must be filed within a 5-year period

32 Court Reform on Trial, 1982, p.160

216
of the commission of a non-capital offence.\textsuperscript{33} However, pre-indictment delay of less than five years may not only violate the Federal Constitutional Sixth Amendment right to speedy trial but also the Speedy Act.\textsuperscript{34}

The Speedy Trial Act stipulates specific time limits. The Act imposes a 30-day time limit from arrest to indictment, and 70 days from indictment to trial.\textsuperscript{35} Title 18 of the United States Code, section 3161 (b) provides:

"Any information or indictment charging an individual with the commission of an offence shall be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges."

Section 3161 (c) provides:

"In any case in which a plea of not guilty is entered, the trial of the defendant charged on an information or indictment with the commission of an offense shall commence within seventy days from the filing date.....of the information or indictment or from the date the defendant has appeared before a judicial officer of the court......whichever date last occurs."

There are provisions under the Speedy Trial Act which deal with time limits after the dismissal of an indictment or

\begin{footnotes}
\footnote{33}{S. 3282}
\footnote{34}{But violation of the constitutional right may not be easy to establish. In \textit{U.S. v. Lovasco}, 431 U.S. 783 (1977) the Supreme Court held that a 18-month pre-indictment delay in which the accused was prejudiced by the loss of witnesses did not violate the right to a speedy trial.}
\footnote{35}{Title 17 - 19 U.S.C. (1982 ed.), 18 U.S.C. ss.3161 (b) and 3161 (c) respectively (Speedy Trial Act Amendments Acts 1979).}
\end{footnotes}
information at the request of either the prosecution or the defence.\textsuperscript{36} Section 3161 (d) provides that when an indictment or information is dismissed, consequent on a motion by the defence and is reinstated based upon the same offence and allegations, the time limits of section 3161 (b) and (c) are applicable. The Act requires a retrial within sixty days after a mistrial and within one hundred and eight days if the court grants it after a successful collateral attack.\textsuperscript{37}

\textbf{THE STATUTORY RIGHT AND ITS SANCTIONS}

The Statutory right to speedy trial deals with the period from arrest to final disposition of the matter. Although both statutory and constitutional rights may be invoked, where there is a statutory breach of the right to speedy trial there is no need to determine the constitutional denial of the right to speedy trial. The Speedy Trial Act attaches different sanctions for violation of the Act.

When an accused is not brought to trial within the statutory time limits dictated by the Act, the charge may be dismissed with or without prejudice. The dismissal may also be due to delay in filing an indictment or information.\textsuperscript{38} When considering whether to dismiss a case with or without prejudice, the court considers, among other factors, the seriousness of the offence, the facts and circumstances of the dismissal and the impact of reprosecution on the administration of justice. The Appellate Courts have not laid down any standard formula by which a decision to dismiss with or without prejudice might be made.

\textsuperscript{36} 18 U.S.C. ss. 3161 (d) and 3161 (h) (b), (1976).

\textsuperscript{37} 18 U.S.C. ss. 3161 (e) (1976).

\textsuperscript{38} 18 U.S.C. ss. 3161 (a) 2 (1976).
There are also sanctions for violation of time period governing speedy trial if a case is not concluded within the allowable time period. In respect of the constitutional right to speedy trial, the most common sanction is dismissal of the charge against the accused. Failure to file within the specified time limits require the complaint to be dismissed unless the time limit under section 3161 (b) for instance, has been extended by section 3161 (h). Whether dismissal is with or without prejudice is within the discretion of the court.

Section 3162 of the Federal Speedy Trial Act, which became effective July 1, 1979 states that if the accused is not brought to trial within the time limit, the indictment shall be dismissed on the motion of the accused. Section 3126 (c) provides that where the accused does not move for a dismissal prior to trial or an entry of a plea of guilty or nolo contendere it shall constitute a waiver of the right to dismissal under section 3162. Where the dismissal is "with prejudice", it precludes further prosecution. Where it is "without prejudice", the charge may be reinstated. On these occasions it is usually with the approval of the court. Misdemeanor charges are usually dismissed without prejudice. 18 U.S.C., section 3162 (a) (1) instructs:

"If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161 (b), as extended by section 3161 (h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among other things, each of the following factors: the seriousness of the case which led to

39 18 U.S.C. ss. 3162 (a) (1).
the dismissal; the facts and circumstances of the case which led to the dismissal and the impact of a reprosecution on the administration of this chapter and on the administration of justice."

In United States v. Taylor, Justice Blackmun, delivering the opinion of the court, observed that the language of the statute suggests that courts are not at liberty to "exercise their equitable powers in fashioning an appropriate remedy but in order to proceed under the Act, must consider, at least, the three specified factors." In Taylor's case, the court had to consider the limits of a district court's discretion to dismiss a case with or without prejudice as a remedy for violation of the Speedy Trial Act of 1974.

In United States of America v. Donald Caparella, the Magistrate concluded that dismissal of the complaint would be without prejudice. In Caparella's case, the accused was arrested on June 10, 1981 for felony of theft of mail matter and the misdemeanor of opening mail without authority, contrary to 18 United States Code section 1709, 1976. The Assistant United States Attorney did not file an information or indictment against the accused, Caparella, prior to July 10, the 30th day after the arrest as required by the Act, 18. United States Code, Section 3161 (b), 1976. Fifty one days after the accused's arrest on July 31 the government made an ex parte motion for dismissal which the Magistrate granted. The Magistrate concluded that dismissal of complaint would be without prejudice.

Thereafter, the Government filed a one misdemeanor information

42 716. 2d 976 (1983).
charging the accused with violation of section 1703 (b). After arraignment on this charge, the accused sought a dismissal for violation of this Act. The Magistrate denied the motion and held that the earlier dismissal had been without prejudice. The accused was tried and found guilty.

An appeal from the District Court on the Magistrate’s findings led to the conviction being reversed and the complaint dismissed with prejudice. The Court of Appeal held:

a) The statute mandating dismissal of a complaint if no indictment or information is filed within thirty days does not create a presumption that dismissal will be with prejudice; and

b) Dismissal of the criminal complaint against the defendant fifty-one days after his arrest should have been with prejudice to reprosecution where the defendant’s conduct did not constitute a ‘serious’ crime, the prosecutor’s negligence was the sole cause of the failure to comply with the Speedy Trial Act’s time requirements, the sanction of dismissal for violation of any one of the three time limits in the Speedy Trial Act was to apply regardless of whether the other time limitations were ultimately satisfied and the administration of justice would be served by dismissing the prosecution with prejudice.

Quite apart from the sanction of dismissed, the Speedy Trial Act penalizes persons who directly involve in the criminal process for delays. For instance, the court has a discretionary power under the Speedy Trial Act to fine, suspend, or report an attorney for delaying tactics in respect of a case. These penalties prevent an attorney from inter alia:

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\begin{align*}
43 & \quad 18 \text{ U.S.C s. 3162 (b) (1) (1976)}.
44 & \quad 18 \text{ U.S.C s. 3161 (b) (1) (1976).}
\end{align*}
\]
(1) knowingly making a false statement that is material to the granting of a continuance;

(2) knowingly allowing a date for trial to be fixed without communicating the fact that a vital witness would not be available.

The Act serves to heighten prosecutorial accountability. There is no empirical study as to the frequency with which these sanctions are imposed.

Section 3161 (h) excludes from the Federal Speedy Trial Act’s time limits certain types of delays. These delays are excluded in computing the time within which an information or an indictment must be filed or in computing the time within which the trial of any such offence must commence. Some of these protected delays which are called "excludable time" are:

a) Delay resulting from an examination of the accused person on hearing of his mental competency or physical incapacity;

b) Delay resulting from trials with respect to other charges against the accused;

c) Delay resulting from hearings on pre-trial motions;

d) Any period of delay resulting from the absence or unavailability of the accused or an essential witness.

However, the excludable time which is of some moment is that which requires the court to record the reason for the granting of a continuance. Section 3161 (h) (8) (A) states:

"Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the government if the
judge granted such continuance on the basis of his findings that the ends of justice served by taking such action out-weigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court.........shall be excludable........unless the courts set forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served.........out-weigh the best interest of the public and the defendant in a speedy trial."

Section 3131 (h) (8) (B) mandates the factors which the judges shall take into consideration in granting a continuance or adjournment under (A).

Some of the state courts excuse delay where there is "insufficient time". Texas, for instance, excuses delay for "insufficient time".45

NON-FEDERAL SPEEDY TRIAL RIGHT AND STATE SANCTIONS

Non-Federal speedy trial violation may be determined under the Sixth Amendment Federal Constitutional Right to Speedy Trial in accordance with the decision in Klopfer v. North Carolina.46 As this was a landmark decision, the underlying facts are worthy of some consideration.

The petitioner, a Professor of Zoology at Duke University, on February 24, 1964 was indicted by the grand jury of Orange for criminal trespass, a misdemeanor. The indictment stated that he entered a restaurant on January 3, 1964 and, although ordered to leave the said premises, wilfully and unlawfully refused to do so knowing or having reason to know that he had no licence therefor. In March 1964, he was tried at a special criminal session of the Supreme Court of Orange County. When

45 Texas Code Crim. Proc. 29.01 (B) 1966 and 1980 - 81 Supp.
the jury failed to arrive at a verdict, the trial judge declared a mistrial.

Thereafter, the case was postponed to two terms. The petitioner filed a motion in which he petitioned the court to ascertain when the state intended to bring him to trial. While the motion was being considered, the state prosecutor moved for permission to take a nolle prosequi with leave.

By this device an accused person would be discharge from custody, but he would be subjected to prosecution at any time in the future at the discretion of the prosecutor. The consent required to reinstate the prosecution is implied in the order and without a further order, the trial may be restored. The petitioner opposed the entry of such an order. He urged that the trespass charge was abated by the Civil Rights Act of 1964 and that the entry of a nolle prosequi with leave would violate his federal right to a speedy trial. The trial court indicated that it would approve entry of a nolle prosequi with leave, if requested to do so by the prosecutor, but the state prosecutor declined to make a motion for a nolle prosequi with leave. Instead, the state prosecutor filed a motion with the court to continue the case for yet another term and that motion was granted.

As the case was not listed for the August 1965 criminal session, to discover the status of the case, the petitioner filed a motion stating his wish to have the case finally determined. He note that pendency of the indictment greatly interfered with his professional activities and with his travel at home and abroad. When the motion was being considered, the state prosecutor moved the court that the state be permitted to take a nolle prosequi with leave. Notwithstanding the petitioner’s objection, and although no justification for the proposed entry was offered by the state,
the court granted the state's motion. The petitioner appealed.

On appeal to the Supreme Court of North Carolina, the petitioner contended that the entry of the nolle prosequi, with leave, deprived him of his right to a speedy trial as required by the Fourteenth Amendment to the United States Constitution.

The court held that by indefinitely postponing prosecution on the indictment over petitioner's objection and without stated justification, the state had denied the petitioner the right to a speedy trial granted to him by the Sixth Amendment of the federal constitution.

Mr. Justice Harlan, while concurring in the result stated:

"I am unable to subscribe to the constitutional premises upon which the result is based - quite evidently the viewpoint that the Fourteenth Amendment 'incorporates' or 'absorbs' as such all or some of the specific provisions of the Bill of Rights. I do not believe that is sound constitutional doctrine.....I would rest decision of this case not on the 'Speedy Trial' provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure......put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the due process clause of the Fourteenth Amendment."

The question involved in this case was whether a state could indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody.

Most states now have Statutes which stipulate case processing times and many dismiss a case for delay or non compliance with
time limits.

The Corpus Juris Secundum states:

"Statutes providing for discharge of the accused unless trial had within a stated time after indictment or commitment have been enacted for the purpose of enforcing the constitutional right to be speedy trial, and they constitute a legislative construction or definition of the Constitutional Provision."\(^{47}\)

However, there are judicial decisions which hold that the provision for discharge of the accused due to violation of time limits under the statute is not co-extensive with the accused person's constitutional right to speedy trial. Therefore, a statute is not final, in respect of the constitutional provision with respect to speedy trial, but is an enactment pursuant to the constitutional provision.\(^{48}\)

Some state statutes which provide for dismissal if time limits are not compiled with are construed to be mandatory. Others are either discretionary or leave it to the discretion of the court to determine whether a discharge should be granted. The statutory mandate does, in fact, limit the jurisdiction of the court.

In Iowa, for instance, the criminal code fixes time periods for the filing of an indictment and time periods from indictment to trial. If these time limits have been violated, then the accused person would be discharged. Rule 27 (2)(a) of the Iowa Criminal Code states:

\(^{47}\) 22A C.J.S. para. 467 (4) p. 28.


226
"When a person is arrested for the commission of a public offense and an indictment is not found against him within forty-five days, the court must order the prosecution to be dismissed unless a good cause to the contrary is shown or the defendant waives his right thereto."

Rule 27 (2)(b) of the Iowa Criminal Code provides a ninety days time limit from indictment to trial. 49

The Texas Speedy Trial Act vests the court with power to grant a motion to set aside an indictment, information or complaint, if the state does not comply with the time periods for trial. The Texas Speedy Trial Act provides:

"A court shall grant a motion to set aside an indictment, information or complaint if the state is not ready for a trial within (1) one hundred and twenty days of the commencement of a criminal action if the defendant is accused of a felony; (2) ninety days of the commencement of a criminal action if the defendant is accused of a misdemeanor punishable by a sentence of imprisonment for more than one hundred and eighty days."

In California, the time from arrest to indictment in felony cases is fifteen days and sixty days from indictment to trial. Instead of specifying time period, some states merely require that cases are processed with "no unnecessary or unreasonable delay." 51 Therefore, non-compliance with time limits can

49 Iowa Criminal Law S. F. 85, Ch. 2.S. 1301.


only be justified on the basis of "good cause" or "reasonableness".

Notwithstanding the sanctions for violation of the right to speedy trial provided by the Federal Constitutional Sixth Amendment, Rule 48(b) of the Federal Rules of Criminal Procedure, the Federal Speedy Trial Act and the states' time limits statutes, the provisions of the American Bar Association incorporate the sanction of dismissal with prejudice for breach of the time limitations created for speedy prosecutions.

**THE AMERICAN BAR ASSOCIATION**

In the 1960s the Advisory Committee on Criminal Trial of the American Bar Association's Project on Minimum Standards for Criminal Justice established standards for speedy trial.

The American Bar Association standards do not specify a speedy trial limit, rather they recommend that each state sets specific speedy trial limits in its state law. However, according to Williams H. Erickson:

"Formulation of the standards was deemed especially necessary in light of the recent application of the Sixth Amendment to the states (Klopfer v. North Carolina) and the considerable variety and uncertainty in state statutes dealing with the right to speedy trial."\(^{52}\)

As state statutes lacked specificity, the Bar Association Standards, therefore, represented a model effort to ensure protection of the speedy trial right by removing the

uncertainty surrounding the right to determine how the interest of the accused person and the public in respect of speedy trial, should be defined and achieved.

J. W. Poulos and J. P. Coleman observed that the standards relating to the speedy trial had a significant impact on twenty-eight per cent of the state and federal court system.53

The American Bar Association standards regarding speedy trials, record non-decisional procedures to determine what is a speedy trial. An accused alone can move the court to dismiss a case if it is not tried within the specified time limits. A judge can dismiss a case with or without prejudice but dismissal of the former precludes reprosecution. If the charges are dismissed without prejudice, the accused is subject to rearrest and reindictment.

**TIME LIMITS AND THE INCOMPETENT OFFENDER**

Sections 3161 (h) (1) (A) (3) of the United States Code states that delays resulting from mental or physical incapacity to stand trial, although considered excludable time, is not a bar to the defence that the statute of limitation has run its course or to preclude trial where the period of incompetency is substantial.54

Automatic commitment was the practice where an accused person was found incompetent to stand trial. However, this period could be indefinite. Indefinite commitment of an accused

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person solely on account of his lack of capacity to stand trial violates due process. The court took that view in *Jackson v. Indiana.* In that case Theo Jackson, a mentally defective deaf mute who could not read, write or otherwise communicate was charged with separate robberies of two women. After Jackson pleaded not guilty, the trial court placed in motion the Indiana procedure for determining his competency to stand trial (Indiana Code 35-5-3-2, 1971). Pursuant to that provision, two doctors testified that Jackson was incompetent to stand trial, because his intelligence was not sufficient to enable him to develop the necessary communication skills. A school for the deaf interpreter, testified that the state had no facilities which could help the petitioner learn minimal communication skills. On the basis of the evidence, the court came to the conclusion that Jackson did not have sufficient comprehension "to make his defence". In the result, Jackson was committed to the Indiana Department of Mental Health, until such time as the Health Department could certify his sanity to the court.

Jackson, through his lawyer, filed a motion for a new trial contending that there was no evidence that he was "insane" or that he will ever be able to be competent to stand trial. Counsel argued that Jackson's commitment amounted to a "life sentence" without his having been convicted of a crime. He later argued that the commitment deprived Jackson of his Fourteenth Amendment Right to due process and equal protection; it also constituted cruel and unusual punishment under the Eight Amendment made applicable through the Fourteenth Amendment. The trial court denied the motion. On appeal, the Supreme Court held that the period of automatic commitment ought not to exceed:

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55 406 U.S. 715 at pp. 735 - 736.

230
"A reasonable period of time necessary to determine where there is a substantial probability that he will attain the capacity in the foreseeable future."

According to the Supreme Court, the state must show 'progress' in the restoration of competency. Where an accused cannot be made competent, he must be released forthwith or committed indefinitely by civil commitment proceedings.

Indeed, there are Federal decisions which state that the committing court has a duty to monitor, at intervals, the accused's competence to stand trial.\textsuperscript{56}

There are states which have fixed the period of automatic commitment. The California Penal Code, for instance, provides for a confinement of up to three years or a period not exceeding the maximum sentence for the offence charged, whichever is shorter.\textsuperscript{57}

\textbf{EXAMINATION OF THE TIME LIMITS}

Do time limits reduce delays? Do sanctions encourage compliance with time limits?

The need for the Speedy Trial Act of 1974 came from many sources, including the apparent weakness of Rule 50 (b) of the Federal Rules of Criminal Procedure which mandated that district courts make affirmative plans for the speedy disposition of criminal cases.

To facilitate a smooth passage from the date of the enactment to the date when the time limits and sanctions were to become

\textsuperscript{56} Johnson v. Settle 184 F. Supp. 103 (W.D. mo. 1960) at p. 106.

\textsuperscript{57} S.1370 (c) (1) 1981 Supp.
effective, the United States Congress incorporated into the Act a 4-year 'phase-in' period. The 'phase-in' period would coincide with the calendar used by the Administrative Office of the United States Courts for the collection and compilation of year-end criminal case disposition data.

Sections 3165-70 of the Speedy Trial Act mandated that each district convened a planning group whose function was to prepare and "submit to the Administrative Office plans for the implementation of the interim and final limits." Remarking on the relative importance of the planning-implementation stage of the Act, the Report of the House Committee said:

"The heart of the Speedy Trial concept embodied in the Act is the planning process. The provisions recognise the fact that the Congress by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system - is making a hollow promise out of the Sixth Amendment. The primary purpose of the planning process is to monitor the ability of the courts to meet the time limits of the bill and to supply the Congress with information concerning the effects of criminal justice administration of the time limits and sanctions including the effects on the prosecution, the defence, the courts and the correctional process and the need for additional rule changes and statutes which would operate to make Speedy Trial a reality."  

The first phase of the Speedy Trial Act was from July 1, 1975 and ended June 30, 1976. The second phase was from July 1, 1976 to June 30, 1977. The third phase began July 1, 1977 to June 30, 1978. The final phase was from July 1, 1978 to June 30, 1979.

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Before the effective date of the permanent time limits and sanctions, 18 U.S.C section 3161 (f) (Supp. IV 1974) and 3161 (g) provided:

a) For the period 1976-1977 the time limit was sixty days between arrest and indictment and the trial limit was one hundred and eighty days from arraignment to trial.

b) During the period 1977-1978, the indictment period, was forty-five days and the trial time limit was one hundred and twenty days.

c) For the period 1978-1979, the indictment period, was thirty-five days and the time limit period was eighty days.

Section 3164 provided an interim time limit of ninety days in relation to pre-trial detainees and "high-risk" accused persons. This trial time limit was during the period September 29, 1975 and June 30, 1979. During the period no sanctions were imposed for failure on the part of any district to comply with any of the time period except in the case of pre-trial detainees and high-risk accused.

The sanctions of the Speedy Trial Act were to be fully effective on July 1, 1979. The amendment to the Speedy Trial Act pushed the implementation of the dismissal sanctions from July 1, 1979 to July 1, 1980. The sanctions imposed in the case of high-risk accused persons were pre-trial release and as regards detainees, an automatic review of release conditions. These sanctions terminated June 30, 1979 in keeping with the terms of the Act.

Empirical studies conducted and statistics gathered during the phase-in period of the Speedy Trial Act showed a high level of compliance with the Act.

Statistics presented at hearings before the Senate Committee on the Judiciary showed levels of compliance during the phase-in period. The level of compliance within the interval time limits during the period July 1, 1976 to June 30, 1978 is illustrated by Table IX.\(^{60}\)

### Table IX

<table>
<thead>
<tr>
<th>Year</th>
<th>Time Limits</th>
<th>Total accused processed from 94 districts</th>
<th>Percentage Compliance</th>
<th>Percentage Non-Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ending</td>
<td>30 (arrest-I)</td>
<td>18,849</td>
<td>78.7%</td>
<td>21.2%</td>
</tr>
<tr>
<td>Ending</td>
<td>30</td>
<td>9,169</td>
<td>82.5%</td>
<td>17.5%</td>
</tr>
<tr>
<td>Ending</td>
<td>10 (I-Arraignment)</td>
<td>44,859</td>
<td>87.2%</td>
<td>12.8%</td>
</tr>
<tr>
<td>Ending</td>
<td>10</td>
<td>26,966</td>
<td>90.4%</td>
<td>9.60%</td>
</tr>
<tr>
<td>Ending</td>
<td>60 (Arraignment trial)</td>
<td>45,815</td>
<td>75.1%</td>
<td>24.9%</td>
</tr>
<tr>
<td>Ending</td>
<td>60</td>
<td>29,400</td>
<td>81.4%</td>
<td>18.6%</td>
</tr>
</tbody>
</table>

Apropos of the discussion on compliance, mention must also be made that statistics furnished by the Administrative Office of the United States Court revealed, that for the period July 1, to December 31, 1978, ninety-six per cent of the cases concluded during that period were indicted within the existing

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thirty-five days limit, ninety-two per cent were indicted within the existing thirty days permanent time limit that went into effect July 1, 1979. In fact, 96.8 per cent were tried within the permanent sixty days limit. Prior to the permanent limits being put into effect, compliance was over ninety per cent in relation to those limits.

The Administrative Office of the United States Courts also reported that between July 1, 1979 and June 30, 1980, the district courts altogether had a compliance level of 94.4 per cent for accused persons who entered the arraignment to trial time frame.\(^\text{61}\)

The General Accounting Office study examined a significant number of cases that excluded the permanent time limits, and the study revealed that nearly a quarter of those cases complied with the limit. However, excludable time was not recorded. Another quarter, as stated by court personnel, failed to comply with the permanent limits, simply because those limits were not yet in force.\(^\text{62}\)

Notwithstanding the optimistic picture, it is difficult to assess whether these figures accurately represented or reflected the compliance level during the phase-in period. In resolving the question of accuracy, regard must be had to conditions which allowed the extension of the time limits and other factors which affected the compliance level. For instance, for the year ending June 30, 1978, there was a 13.5 per cent reduction in the criminal backlog.\(^\text{63}\) Malcolm M.


\(^{63}\) Supra note 60, p. 105.
Feeley stated that the courts' workload was reduced by a half during the period 1972 to 1981. This was attributed to criminal justice reforms. Additionally, the use of excludable time "ends of Justice" provision, section 3161 (h) (8) which specified periods of delay that may be excluded in computing the time from arrest to trial, had an impact on compliance levels.

G. S. Bridges observed that increase in compliance with the Act was inextricably bound up with increased applications of the excludable time provision, although there was a high level of compliance during the phase-in period. Indeed, only slight improvements had occurred in the time that elapsed in the processing of cases. Bridges conducted empirical study which relied on data provided by the administrative office of the United states courts.

However, N. L. Ames and his colleagues observed, that many prosecutors failed to rely on the excludable time provision to obtain compliance with the arrest to indictment limit. Indeed, prosecutorial policies and practices underlay the urgency of the Act.

One writer observed:

"During the phase-in period, the courts relied on limited data and subjective judgement of court
officials, judges and United States Attorneys rather than systematic evaluation of empirical time frames."

In fact, the General Accounting Office found that the district courts did not have adequate date to identify the reasons for any implementation problem.

A study of State Courts governed by speedy trials standards revealed that there were various levels of non-compliance. Thomas Church (Jnr.) in 1978, studied the pace of litigation in twenty states, nineteen of which had speedy trial standards. Church discovered that over half of the cases in these courts exceeded the time limits. Among the state courts studied were Fort Lauderdale, Florida (17th Judicial Circuit Court), Detroit, Miami (3rd Judicial Circuit Court), Newark, New Jersey (Essex County Supreme Court), and Bronx County, New York (Bronx County Supreme Court). The median case processing time in Essex County Superior Court was two hundred and thirty-six days, four hundred and seventy-six days in Bronx County Supreme and one hundred and sixty-six days in the 17th Judicial Circuit Court. Church observed, that over half of the cases in the courts studied exceeded the time limits. In Miami, Florida, a significant proportion of the cases exceeded the one hundred and eighty-days limit.

Interestingly, two of the states which had the nastest disposition time were Portland and New Orleans (Orleans Parish Criminal and Civil District Courts). These courts did not have stringent time limits. Portland had a "reasonable time" standard and New Orleans, Los Angeles, had a speedy trial time

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68 Church, Thomas et al, Justice Delayed - the Pace of Litigation in Urban Trial Courts, 1978, pp. 94-95.

237
limit of two years. The median disposition time in New Orleans Criminal Court was ninety-one days.

Church, therefore, asserted that the case processing time or the pace of litigation bore almost no relationship or resemblance to the speedy trial time limits. However, he observed that speedy trial standards could be effective when they are strict and cannot be readily waived by an accused person or easily subjected to continuance. Of course, the attitude of the "local legal culture" impacts on the effectiveness of speedy trial standards as demonstrated in Church's study of Pittsburgh Criminal Court. He stated:

"The Pennsylvania speedy trial rule is effective in maintaining a rapid pace of dispositions in Pittsburgh in a large part because the court and the prosecution are concerned that their supreme court will overturn the defendant waivers of speedy trial requirements. Defense attorneys indicated in interviews that the court attempts to dispose of criminal cases within one hundred and eighty days regardless of whether the requirement has been waived by the defendant."^69

Empirical studies conducted during the post phase-in-period also disclose a high level of compliance. Two district court judges told the hearing before the United States House of Representatives Sub-committee on crime, in October 1981, that the courts had achieved full compliance with the Speedy Trial Act requiring seventy days trial period. It was also reported that a judge from New York district court had only one dismissal for non-compliance with the seventy days trial period.70

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69 Ibid, p. 78.
The Special Assistant to the Department of Justice Associate Attorney General, told the hearing that the Speedy Trial Act was working well and that only 17 of the 30,000 cases filed by the Department of Justice between September 1980 and August 1981 were dismissed under the Act.\(^71\)

Another study was based on data from a telephone survey of seventeen United States Attorney Offices; interviews with ninety criminal justice personnel in six Federal Jurisdictions; an examination of five hundred and forty-six cases; analysis of the Federal Bureau of Investigation data on seven hundred robberies and embezzlement cases; a mail survey conducted in all ninety-four U.S. Attorney Offices and in respect of published court statistics. This study revealed that a total of ninety-seven per cent of cases complied with the thirty days limit for the year ending June 30, 1983. A study group from six jurisdictions: New Jersey, Colorado, Northern California, Southern Florida, Southern New York and Northern Illinois was used.\(^72\)

What was the effect of the Speedy Trial Act on court management during the phase-in and post phase-in periods?

The Speedy Trial Act compelled innovative court management and encouraged courts to review their case management policies and procedures so as to improve efficiency. New Jersey, for instance, instituted projects which tested management techniques, early review of the screening of criminal cases

\(^71\) Ibid.

and early judicial controls. Creative court management techniques are necessary to remove the pressures created by the strict time limits.

Concerning sanctions as they relate to prosecutors created by the Speedy Trial Act, the 96th Congress stated:

"The statute with its sanctions serve as a monitor rather than a policeman."^74

By imposing these sanctions the prosecution must account for delays in dealing with cases. The resultant advantage was increased efficiency in the handling of cases and a stricter approach in the screening of cases. Interestingly, the most significant source of delays recorded by observers of the Act was the time spent considering plea offers.

The effect of the Speedy Trial Legislation was to compel courts to conform and comply with time limits. However, the relative success of the courts in complying with the speedy trial limits cannot be evaluated with stated certainty, especially during the phase-in period as the courts relied on limited data. Additionally, the backlog of criminal cases in the federal courts decreased significantly due to reforms in the criminal justice system generally.

Further, the sections which deal with excludable time specify certain kinds of delays which are justified. These delays are excluded from the Speedy Trial calculations. As a result, cases that exceeded the time limits of the Act could be

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74 Supra note 60, p. 101.
treated as complying with the Act by virtue of provisions already in the law which took into account circumstances which justified the granting of additional time for processing cases through the federal criminal justice system. Malcolm M. Feeley stated that of the nine sample districts evaluated by the Department of Justice in 1979 all relied upon one of the exceptions quite often. Feeley observed that "excludable time is complied with in an almost whimsical manner." Notwithstanding, the Federal Speedy Trial Act is working and has in some cases encouraged the efficient use of court time.

PLEA BARGAINING
Plea bargaining is another method of easing the caseload and speeding up the judicial process. This process is highly institutionalised in the United States and has obtained the constitutional sanction and approval of the Supreme Court. Plea bargaining may take the following forms:

I. Withdrawal of a charge or charges against an accused in exchange for a plea of guilty to the charge or other charges.

II. Reducing a more serious charge to a lesser charge in exchange for a guilty plea to the lesser charge, for example, murder to manslaughter.

III. The non-disclosure technique, which is non-disclosure by the prosecution of unfavourable allegations in exchange for a guilty plea.

IV. The exchange of a recommendation of leniency of sentence for a guilty plea.

The fifty states have a variety of plea bargaining choices. Added to the standard forms of charge bargaining and sentence bargaining can be promises not to prosecute a co-defendant; promises to arrange for the defendant or co-defendant to be

75 Court Reform on Trial, 1982.
incarcerated in a certain prison. Whatever form plea bargaining takes, to a prosecutor it means speedy trial and to an accused person leniency.

It is to be noted that there is a distinctive or alternative plea of nolo contendere or non vult contendere or non vult in the federal system or some of the state courts. By virtue of this plea the accused person may assert his lack of desire to contest the issue of guilt or innocence. In short, the accused person is asserting his innocence, but also his desire to proceed on the basis as if he were guilty. The plea is entered only with the consent of the trial judge and not as of right. The plea is usually made with the agreement of the prosecutor.

Rule 11 of the Federal Rules of Criminal Procedure states that before a plea of nolo contendere is accepted, the court must advise the accused, among other things, of the nature of the charge, the minimum and maximum penalty, his right to counsel and to confront and cross-examine witnesses against him. The court is required to address the accused in open court to determine that the plea is voluntary. The court must also determine that there is a factual basis for a plea of guilty or nolo contendere.

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. Indeed, the American Bar Association Standard, 1968, 1.7 states that the court should make a verbatim record of the proceedings when accused person enters a plea of guilty or nolo contendere. The court advice, for instance, should be recorded.

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PROCEDURAL SAFEGUARDS RULE 11, 32

Plea bargaining is so ingrained in the United States that it will not be easily dislodged. Thus, the court in Johnson v Beto observed:

"Plea bargaining is an accepted folk way of criminal jurisprudence into which some, but not all, contract criteria have been superimposed."  

Because plea bargaining is highly developed in the United States of America, a formalized system of procedural rules and safeguards are entrenched in the criminal justice system.

Regarding plea agreement procedure, Rule 11 of the Federal Rules of Criminal Procedure states:

1. In general, the attorney for the Government and the attorney for the defendant or the defendant when acting per se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charge, offense or to a lesser or related offence, the attorney for the government will do any of the following:

   a) move for a dismissal of another charges; or
   b) make recommendations or agree not to oppose the defendants’ request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
   c) agree that a specific sentence is appropriate to the disposition of the case."

The American Bar Association’s standards for Criminal Justice observed:

"The trial judge should not participate in plea discussions."  

Rule 11 of the Federal Rules of Criminal Procedure now allows an accused to withdraw his guilty plea whenever a judge decides not to impose the sentence which both the prosecution and the defence have agreed. However, most states courts have refused to permit accused persons to withdraw their guilty pleas on the basis that the trial judge did not accept the prosecution's recommendation.

Rule 32 (d) states that a motion to withdraw a plea of guilty or of nolo contendere may be made, not only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice the court, (after sentence, may set aside the judgement or conviction and permit the defendant to withdraw his plea.

A guilty plea is not necessarily a bar to an appeal. Some states have enacted provisions which allow an accused person who pleaded guilty to appeal on the basis of rulings on pre-trial matters. New York Criminal Procedure Law, section 710.70 (2), provides:

"An order finally denying a motion to suppress evidence may be reviewed upon appeal from an ensuing judgement of conviction notwithstanding the fact that such judgement is entered upon a plea of

78 ABA Project on Standard for Criminal Justice Standards relating to pleas of guilty, s. 33(a) 1968; see also ABA Project on Standards for Criminal Justice, Standards relating to the function of the trial judge, S.4.1, (a) (1972). In Santobello v. New York, 404 U.S. 257 (1971) the court stated that there is no absolute right to have a guilty plea accepted, a judge may refuse a plea in exercise of sound judicial discretion. See also MacDonald, William F., "The Prosecutor", Vol. 11 Sage Crim. Justice System Annuals, p. 159 (1979).
The purpose of the rules and procedural guidelines is to reduce or remove any pressure or suggestion of pressure on the accused to plead guilty.

EVALUATION OF PLEA BARGAINING

Empirical research discloses that a key factor which has led to plea bargaining, is caseload pressure and that plea bargaining disposes of cases speedily. Therefore, the attendant consideration for such guilty pleas has become more substantial over the years. Albert W. Alshuler stated:

"A few of the surveys noted that the increased volume of guilty pleas in the early 1920's had been accompanied by an intensification in the concessions offered to guilty plea defendants. In 1971, a defendant in Virginia who pleaded guilty was 2.3 times more likely to receive a suspended sentence than a defendant convicted at trial, but in 1927 his chances for a suspended sentence was 6.3 times greater than that of a defendant convicted at a trial."

In the United States of America a prosecutor's worth is measured, like a judge's worth, in terms of the number of cases he/she is able to dispose of and that is why plea bargaining has taken on so much importance in that jurisdiction.

In fact, the strength of a case may also affect the decision to bargain. The weaker the case, the more favourable plea bargaining is to the accused. The prosecution offers the more favourable bargain when it has no case at all.

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Empirical research conducted by McDonald and his colleagues disclosed that of twenty-four prosecutors, twenty-one responded that they offered the best deals in the weakest cases. Of course, the attorneys' reputations and the relationship between the opposing attorneys can influence both decision to plea, or the terms or conditions of bargaining.

Robin C. A. White observed that despite the criticisms of plea bargaining, it is very much a necessary aspect of the United States criminal justice system. He further observed that the existence of mandatory penalties for specific offences and the fact that the prosecution can recommend particular sentences have nurtured plea bargaining. The accused persons, therefore, benefit from being able to bargain as they are able to plead to a less serious offence which relieves them of the severe mandatory penalty.

Attitudes towards plea bargaining vary. The National Advisory Commission Justice Standards and Goals in 1973 lobbied to put an end to plea bargaining. In 1975 Alaska answered to the call to dispense with plea bargaining. Currently, there is still a de jure prohibition on plea bargaining in Alaska. Writers often hold that plea bargaining is indispensable despite its unseemliness. However, the Alaska experience has disproved this. The ban on plea bargaining affected the conviction and dismissal rate. Prior to August 1975, the conviction rate was sixty-three per cent but it was seventy-four per cent after the ban on plea bargaining.

81  The Administration of Justice, 1985, p. 73.
Additionally, Alaska’s plea bargaining prohibition, while leading to a thirty per cent increase in the number of trials, also greatly reduced court delay. This was so because of the decrease in dilatory strategy caused by plea bargaining.

Michael L. Rubinstein and his colleague observed:

"The rate of guilty pleas did not diminish appreciably despite the curtailment of plea bargaining. Moreover these guilty pleas could be obtained without additional delay, without any promise to defence counsel, without specific recommendation to the court and thus without responsibility for the defendant’s fate. In short, prosecutors learned that they could achieve the same results under the Attorney General’s new system, but with less time spent on routine cases and with less responsibility for the outcome."

The ban on plea bargaining also compelled more stringent screening of cases by prosecutors, hence more dismissals. After the ban, dismissal took place earlier in the process. Post arrest screening of cases was more frequent. According to Rubinstein, Clarke and White:

"The increase did not generally take the form of culling out cases with weak evidence but rather of rejecting more drug and moral cases as a group."

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84 Supra note 82, p. 221.

85 Supra note 82, p. 230.
The high dismissal rate may be partly due to delayed screening. Evaluation of this reform by the Alaska Judicial Council revealed that plea bargaining was discontinued without being replaced by any implicit form of bargaining. However, the sentencing practices of trial judges could not be controlled by the Attorney General. Therefore, some categories of crime attracted implicit bargaining.

Three of the reasons advanced by the Attorney General, Avrum Gross for banning the Alaskan prosecutors from plea bargaining after August 15, 1975 were:

1) "return the sentencing function to the judges." Prosecutors, he stated, sometimes obtained "negotiated settlement" for "illegitimate" reasons, that is, the desire not to work;

2) defence attorneys judges and police use plea bargaining as a means of shunning trial preparations, expediting the court calendar; and

3) concealing insufficient investigation: "you cover up all the deficiencies in the system by the device of plea bargaining."86

Indeed, the prohibition did achieve that which the Attorney General desired. Sentencing was restored to the judges. The sentences for minor offences became longer. The ban compelled more thorough preparation by prosecutors and weak cases were screened out of the system early.

Abraham Blumberg observed:

"The system of justice by negotiation, without trial, probably tends to serve better the interests and requirements of the guilty. As compensation for his acquiescence and participation, having observed the prescriptive etiquette in compliance with what is expected of the defendant, he is rewarded."\(^{87}\)

Blumberg observed that in jurisdictions where plea bargaining is removed, the bargaining is prior to the trial as to what the charge shall be.\(^{88}\)

Notwithstanding efforts to bar reform or limit plea bargaining in some states of the United States of America, plea bargaining continues to be an integral part of the criminal justice system. In fact, it is sanctioned by the courts. Chief Justice Burger observed:

"The disposition of criminal charges by agreement between the prosecutor and the accused sometimes loosely called "plea bargaining" is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge was subjected to a full-scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities."\(^{89}\)

In North Carolina v. Alford, the Supreme Court was of the view that in certain circumstances a trial judge constitutionally

\(^{87}\) Criminal Justice issues and Ironies, 2nd. ed. 1979, p. 170.

\(^{88}\) Ibid., p. 172, California passage of "The victim's Bill of Rights" initiative in 1982, prohibited plea bargaining at the felony trial court level. See California Penal Code s.1192.7.

may accept a guilty plea by an accused person who stated that he is innocent. The view that plea bargaining is a necessity, claims support from the significant number of cases that are disposed of by guilty plea.

The court also observed in Robert v. United States, that the process was sanctioned because there was a relative equality of bargaining power between the accused person and the prosecutor which precluded plea bargaining process from being basically unfair.

Even where an accused was charged with kidnapping had to make a choice between a legislated mandated death sentence, if he pleaded "not guilty" and a jury returning a verdict of guilty, and a maximum sentence of life imprisonment if he pleaded guilty, the plea was held to be voluntary. Brady v. United States, illustrates this point. Mr. Justice White delivering the opinion of the court stated:

"A plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty and here the petitioner's plea met the standard of voluntariness as it was made by one fully aware of the consequences of that plea."

In fact, the American Bar Association Standards make the process "visible and subject to systematic control". Proper guidelines relating to the conduct of proceedings are provided by the American Bar Association Standards. Every constitutional requirement is merged into the entering of a plea of guilty. The accused must have the benefit of a

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counsel and be advised of his/her rights and the consequences of a guilty plea so as to ensure its voluntariness.

A verbatim record of the reviewing court should be able to determine whether the accused persons' rights have been infringed.93

Plea bargaining results in sentence disparities between those who plea guilty and those who go to trial. This disparity was addressed by the American Bar Association's Standards for Criminal Justice. Standard 1.8 (b) (1979 amended version) states:

"The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere."

Notwithstanding this standard there will always be disparity between a guilty and not guilty plea. For example, an accused person arrested and charged for an offence which carries a mandatory minimum prison term, would demonstrate a willingness to plead guilty to a lesser charge to avoid the mandatory sentence. Additionally, an accused person may not only bargain for a charge reduction but obtain a pre-plea undertaking from the prosecutor that a non-custodial sentence will be recommended.

Prosecutors are usually willing to grant attractive concessions in exchange for guilty pleas in order to reduce the staggering workload. Moreover, a prosecutor offers the

best bargains when cases are weak and this has led to great disparity in the sentencing of persons who have committed a similar offence. Eighty-five per cent of prosecutors from several states listed the strength of the state’s case as a key factor that influenced their bargaining decision. John Kaplan and Jerome Skolnick observed:

"The practice of responding to a weak case by offering extraordinary concessions....represent at best, a dangerous allocation of institutional responsibility."  

As the prosecutor has a discretion to apply whatever bargaining policy he deems appropriate, there is bound to be disparity in the sentencing of offenders.

What is the consequence of a failure to honour a bargain? In Santobello v. New York, Chief Justice Burger stated:

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

In Santobello’s case, the court had to determine whether the state’s failure to keep a commitment concerning the sentence recommendation on a guilty plea required a new trial. The

95 Ibid., p. 461.
96 404 U.S. 257; See also United States v. Benchimol 85 L. Ed. 2d 462 (1985). This case can be distinguished from Santobello. Once the prosecutor has fulfilled his pre-plea promise then it is not necessary for him to explain to the court the reason for recommending a lenient sentence.
State of New York indicted the petitioner in 1969, on two felony counts, promoting gambling in the first degree and possession of gambling records in the first degree. Petitioner first entered a plea of not guilty to both counts. After negotiations, the Assistant District Attorney in charge of prosecution of the case agreed to permit the petitioner to plead guilty to a lesser offence, possession of gambling records.

Conviction of this offence would carry a maximum prison sentence of one year. The prosecutor agreed to make no recommendation regarding sentence. On June 16, 1969, the petitioner withdraw his plea of not guilty and entered a plea of guilty to the lesser charge. The petitioner informed the court that the plea was voluntary and that the facts, as outlined by the Assistant District Attorney, were true. The plea was accepted by the court and a date was fixed for sentence.

On the date fixed for sentencing, the prosecutor, who had negotiated the plea was replaced by another prosecutor. That prosecutor recommended the maximum sentence and presentel the petitioner’s record. The maximum one year sentence was imposed. The petitioner applied for and was granted certiorari. In the result, the judgement was vacated and the case remanded for reconsideration.

Mr. Justice Marshall, with whom Mr. Justice Brennan and Mr. Justice Stewart joined, concurring in part and dissenting in part, stated that the petitioner must be permitted to withdraw his guilty plea. As the undertaking that the prosecutor would not make a recommendation regarding sentence was not fulfilled, the petitioner should be entitled to withdraw his plea and perhaps negotiate again.
No statistical estimate of the effects of plea bargaining on waiting times have been obtainable. However, seventy per cent to ninety per cent of offences are disposed of by guilty pleas in the United States of America. John Kaplan and Jerome H. Skolnick observed that ninety per cent of all accused convicted of a crime in a state and federal courts pleaded guilty rather than opt for trial. It is without doubt that a reduction in guilty pleas would adversely affect waiting times.

DISCOVERY/DISCLOSURE, OMNIBUS HEARING
PRE-TRIAL CONFERENCE - PRE-TRIAL PROCEDURE
(a) DISCOVERY/DISCLOSURE

Discovery is the procedure whereby one side is enabled to make disclosure of information to the other side. There are rules and procedure which govern disclosure and on this issue, Chief Justice Traynor observed:

"There is great variation in the local development of pre-trial discovery in criminal cases. One can generalize, however, that many state courts follow discovery procedures akin to those in the federal courts which are in the main restrictive. One can also generalize that though the trend is towards liberalizing discovery, few states have moved so far in this direction as California."

The courts in California, for instance, feel that discovery is a two-way process. The state does not deny the accused person access to all evidence that can assist or advance his/her


case, barring governmental requirement of confidentiality. In the same way the accused has no valid reason in denying the state/prosecution access to evidence that would assist their case, barring the privilege against self-incrimination or other privileges provided by law.

Why discovery? Discovery is encouraged because it enhances fair and speedy administration of the criminal justice system by affording the accused the opportunity to make an informed decision in respect of plea. The prosecution is also better able to make an informed decision as regards charges and the relative strength of its case. Some of the rules relating to discovery will be treated.

Rule 16 of the Federal Rules of Criminal Procedure deals with pre-trial discovery by the state/prosecutor and the accused person. The Rule prescribes the limits of discovery to which both sides are entitled. The provisions of Rule 16 do not limit a judge's discretion to order wider discovery in cases where it is necessary. Although the Rule is predicated upon the principle of equity, the accused person under it does not have as much discovery rights as the state. The state has discovery devices such as grand jury subpoena in respect of disclosure of evidence. The accused is, however, protected from discovery by the state/prosecutor by the Fifth Amendment. Upon request, an accused person is allowed discovery of his statement, criminal record, documents and tangible objects, for instance, photographs, books, papers, buildings, reports of examinations and tests which can assist the defence or are to "be used by the government as evidence-in-chief at the trial." 99

99 Rule 16(a) (1) (A), (a) (1) (B), (a) (1) (C), (a) (1) (D), Title 18 of the U.S.C. Federal Rules of Criminal Procedure.
Disclosure of evidence by an accused, pursuant to Rule 16 (b) (1) (A) is based on the principle of reciprocity.

If an accused person requests disclosure under sub-division (a) (1) (C) (Tangible Objects) or (D) (Reporting Examinations and Tests) and the state/prosecutor complies with that request, upon request by the government, the accused shall allow the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in respect of the case, or copies thereof, within the possession or control of the accused, which the accused intends to introduce as evidence-in-chief at the trial.

The notice of alibi or the written notice of the accused person's intention to offer a defence of alibi in accordance with Rule 12.1 Title 18 of the U.S.C. Federal Rules of Criminal Procedure, prevents unfair surprise to the prosecution.

Rule 12.1 (a) states:

"Upon written demand of the attorney for the government stating the time, date and place at which the alleged offense was committed, the defendant shall serve within 10 days or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi."

Within ten days, thereafter, the state/prosecutor must disclose the name and address of the witness it will rely on to disprove the alibi, "unless the court otherwise directs."\(^{100}\)

\(^{100}\) Rule 12.1 (b) Title 18 of the U.S.C. Rules of Criminal Procedure.
Where either party fails to comply with the requirements of Rule 12.1, the evidence of any undisclosed witness may be excluded by the court.\footnote{Rule 12.1 (d) Title 18 of the U.S.C. Rules of Criminal Procedure.}

Rule 12.2 (a) of the U.S.C. Federal Rules of Criminal Procedure requires an accused person to notify the prosecution before trial if he intends to rely upon a defence of either insanity or mental disease or any defect which is inconsistent with the mental element required for the offence charged. Where accused persons fail to give notice in accordance with Rule 12.2, he can be prohibited from relying on this defence, or the testimony of an expert witness on the accused person’s mental state can be excluded.\footnote{Rule 12.2 (a) Title 18 of the U.S.C. Rules of Criminal Procedure.}

However, Rule 12 (c) directs that evidence of intention to rely upon an alibi defence, which is later withdrawn or any statement made in connection with such intention is not in any criminal proceedings, admissible against the person who have notice of the intention.

It is to be noted that in People v. Holiday,\footnote{47 Ill. 2d p. 300; 265 N. E. 2d 634 (1970).} the Supreme Court upheld an Illinois statute which required an accused to give notice of his alibi, notwithstanding the fact that the prosecution was not required to disclose its alibi rebuttal witness.

Upon a sufficient showing, the court may at any time that discovery or inspection be denied, restricted, or deferred, or
make such other as is appropriate.  

If at any time during the course of proceedings it is brought to the attention of the court that a party has not complied with a request for disclosure, the court may order such party to permit the discovery or inspection, grant a continuance or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection, and may prescribe such forms and conditions as are just.

The American Bar Association Standards have liberalised discovery practices even further. These practices are liberalised on the basis that wide disclosure procedure expedite the trial process. The standards require the prosecution to take steps in furnishing defence counsel with lists of witnesses and their statements, statements of accused persons, the grand jury minutes, report of experts and real evidence. The defence is also required to make certain disclosures, for instance, experts' reports which are not constitutionally protected and non-testimonial disclosure. Both the state and defence have a continuing duty to disclose when discoverable information come into being.

There is a growing use of pre-trial procedure in federal

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104 Rule 16 (d) (1) Title 18 of the U.S.C. Rules of Criminal Procedure.
105 Rule 16 (d) (2) Title 18 of the U.S.C. Rules of Criminal Procedure.
106 ABA Project on Standards for Criminal Justice, Standards relating to discovery and procedure before trial (1970). These Standards are supplemental to the standards and goals of the National Advisory Commission of Criminal Justice.
courts throughout the United States of America. Pre-trial procedures are very effective as a procedural discovery tool.

The number of pre-trial hearing by each judge is reported by the clerks and furnished to the pre-trial committee of the Judicial Conference. These figures are not published because of the lack of a standard definition of "pre-trial procedure". However, the available data indicate increases in Rule 16 pre-trial procedure.

A novel feature introduced by the American Bar Association in 1967 and approved by the American Bar Association in 1970 is the Omnibus Hearing. This process is one stage of the pre-trial process.

The American Bar Association Standards relating to discovery and procedure before trial identified three stages of procedure. The first stage is where the defence and prosecution counsel meet and defence counsel examines the state’s file; the second stage is the omnibus stage. Here the court is involved in speeding up the process by which material issues are dealt with and guilty pleas are considered; the third stage is the period of discussing specifics of the cases which go to trial.

**OMNIBUS HEARING**

This is a comprehensive form of pre-trial in which issues to be raised at the trial are identified and explored in advance by both defence and prosecution attorneys. Issues such as the legality of a search and the voluntariness of a confession are exposed and determined. At the omnibus hearing, counsel is expected to file a checklist which indicates all actions to be taken in a case and which the judge will explore. In San

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107 Ibid., S. 5.3.
Antonio Division, for instance, omnibus hearing has become automatic.

State and federal courts have adopted the omnibus pre-trial hearing procedure. Concerning this procedure, Raymond T. Nimmer observed:

"The ABA report, standards relating to discovery and procedure before trial, which first proposed the concept, described a conglomerate of ideas and objectives. In implementing this conglomerate, various judges focused on specific aspects of the whole. For example, the district court in Kansas City employed the omnibus hearing primarily as a tool to enforce full disclosure of government files. In contrast, the primary functions of the hearing in San Antonio related to the creation of semi formal plea negotiation procedures and to providing a technique for eliminating written motion practices."\(^{108}\)

The procedure adopts diverse forms of disclosure, for example, the prosecutor may be called upon to give the defence its witness list. Further, at the omnibus hearing, the accused may furnish reports of expert witnesses prior to trial. This might help the other side pinpoint areas of weaknesses. The prosecutor may also obtain names and addresses of character witnesses, from which information is adduced; the net result is the disqualification of some of the witnesses. Thus a contributor to a panel discussion on omnibus/pre-trial hearing observed:

"Knowing who character witnesses are and from what locality or institution they came, produces a core from which we are occasionally able to find witnesses whose testimony with respect to defendant’s character is unfavourable to

\(^{108}\) The Omnibus Hearing an Experiment in Relieving Inefficiency, Unfairness and Judicial Delay, 1971.
Alibi witnesses and their addresses can also be obtained which would give the prosecutor the advantage or benefit of exploring the alibi.

The prosecution may also disclose government files. Full disclosure of government files removes the problem of the prosecution being accused of suppressing evidence favourable to an accused person. In *Brady v. Maryland*, the Maryland Court of Appeal observed:

"Suppression by the prosecution of evidence favourable to a defendant who had requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."\(^{109}\)

In *Brady's case*, the petitioner admitted to participating in the crime of murder during the perpetration of a robbery, but stated that his companion did the actual killing. Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extra judicial statements. Although several were shown to him, one in which the companion admitted the actual killing was withheld by the prosecution and did not come to the petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeal.

Although the omnibus hearing takes various forms, the hearing provides an arena for supervision of cases by the court. Because of the discovery process, therefore, an accused person can make an informed decision as regards plea. In


Jacksonville Division of the United States District Court for the middle District of Florida, eighty to eighty-five per cent of cases are disposed of by guilty pleas after the extent of the prosecution's case is explored at the omnibus hearing.¹¹¹

The omnibus hearing is different from the pre-trial conference although both serve as a discovery mechanism. The pre-trial conference is a device for the planning of a trial. It is set before trial, usually after arraignment.

**PRE-TRIAL CONFERENCE**

Another pre-trial procedure is the pre-trial conference. The pre-trial conference is conducted only where there is a possibility of trial. If a guilty plea is not entered at the omnibus hearing, the case is scheduled for a pre-trial conference before a trial judge, at least two weeks before trial to deal with residual matter, such as determination of the estimated trial time. Pre-trial conference is particularly useful in complicated cases, for instance, antitrust cases, income tax, corporate securities, fraud, conspiracy, criminal cases that involve multiple documents and documentary cases generally.

Rule 17.1 of the Federal Rules of Criminal Procedure provides for pre-trial conference. Rule 17.1 directs as follows:

"At any time after the filing of the indictment or information the court upon motion or any party upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference, the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's

attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney...."  

Pursuant to Section 2 of the Classified Information Procedures Act, "any party may move for a pre-trial conference to consider matters relating to classified information that may arise in connection with the prosecution."  

Classified information, under the Act, means:

"Any information or material that has been determined by the United States Government pursuant to an Executive Order, Statute or Regulation to require protection against unauthorised disclosure for reasons of national security and any restricted data as defined in paragraph V of section 11 of the Atomic Energy Act, (42 U.S.C 2014 (Y))."

Standard 12.6 of the National Prosecution Standards provides also for pre-trial conferences. The American Bar Association Standards also provide for pre-trial conferences.

Standard 5.4 reads:

"In view of its purpose as a procedural device specifically directed to planning for a trial, the

\begin{footnotes}
\item[115] S. 5.4.
\end{footnotes}
pre-trial conference obviously should be conducted only in those cases in which there is a reasonable possibility of a trial."

The pre-trial conference is a procedural device aimed at simplification of issues and other matters which may assist in the disposition of a case. In the event that the trial may be prolonged, or complex, or upon requests by agreement of counsel, or by order of the court, a pre-trial conference is likely. Information taken into consideration includes: making stipulations as to facts about which there can be no dispute; marking for identification of various documents and exhibits of the parties; waivers of foundation as to such documents; Conduct of voir dire; number and use of peremptory challenges; order of cross-examination where there are multiple accused persons; temporary absence of defence counsel during trial and final disposition by plea agreement. The conference is recorded and usually conducted by the same judge who should try the case. It is not a substitute for the trial. In fact, the court may direct attorneys for the parties to appear before a judge for a pre-trial conference. In the event of a pre-trial conference, the judge makes an order which states the action taken at the conference and the agreement made by the parties as to any of the matters considered. This order determines the ensuing course of the proceedings unless altered to prevent a gross injustice.

The pre-trial conference should not be held unless an accused person consents thereto, the proceedings are conducted in open court and a reporter should be present. This is done in order to avoid any conflict with the Sixth Amendment rights of the accused. Oral admissions of an accused or his attorney at the conference, will bind the accused only if it is reduced in writing and signed by both the accused and the attorney.
ANALYSES OF PRE-TRIAL PROCEDURES:
DISCOVERY/OMNIBUS HEARING/PRE-TRIAL CONFERENCE:

i) Concerning pre-trial discovery, there is no single set of criminal justice procedures applied uniformly throughout the United states of America. The New York Criminal Procedure Law, for instance, provides more liberal rules of discovery than the jurisprudence had provided.\textsuperscript{116} These Rules are based upon Rule 16 of the Federal Rules of Criminal Procedure.\textsuperscript{117}

The adoption of pre-trial discovery should remove surprise from the court as material information is transferred from one party to the next. However, Chief Justice Vanderbilt observed in \textit{State v. June}, that it does not necessarily lead to honest fact-finding, but to perjury and the suppression of evidence.\textsuperscript{118} An accused person who is fully informed with respect to a case against him will be in a position to prepare a false defence. Moreover, the American Bar Association Commission of judicial administration stated:

"Discovery is subject to abuse. Present Discovery rules contain adequate sanctions to control and redress abuse, but courts are too often reluctant to monitor cases in which abuse is claimed and to apply the available sanctions."\textsuperscript{119}

\textsuperscript{116} McKinney Supp. 1971.

\textsuperscript{117} 1966. On April 22, 1974, the Supreme Court of the United States promulgated by order its version of the amendments to the Federal Rules of Criminal procedure. These rules ought to have been effective on August 1, 1974, but congress interposed a law postponing the effective date of the amendments to August 1, 1975.

\textsuperscript{118} 13 N.J. 203, pp. 210 (1953).

\textsuperscript{119} ABA Standards relating to trial courts (1976), Title 18 U.S. Rules of Criminal Procedure, Rule 16 (Appendix), p. 771. See also 18 U.S.C. s.3442 which provides that persons charged with treason or a capital offence are to
A key criticism is that of Rule 16 (a) (1) (E), Title 18 of the Rules of Criminal Procedure. This section provides for discovery of the names of witnesses to be called by the government and of the prior criminal records of these witnesses. It is felt that disclosure of the names and addresses of witnesses prior to trial, may endanger witnesses. Witnesses might be opened to threats or might be in influenced to change their testimony. This, however, can be dealt with by limitations on the discovery process, for example, protective orders or depositions taken under conditions which are supervised. Florida, for instance, instead of giving a witnesses’ names and addresses presents critical witnesses for deposition at the attorney’s office. This criticism might be justified, as in the case of informants. In drug related cases a significant amount of convictions obtained are due to the evidence had from informants.\textsuperscript{120}

However, in \textit{Roviaro v. United States},\textsuperscript{121} an accused person was denied by the trial court the name and where-abouts of an informer who had purchased narcotics from the accused. Mr. Justice Burton, delivering the opinion of the court in Roviaro’s case, held that the failure of the court to allow disclosure of the identity of the informer was a reversible error.

The petitioner, Albert Roviaro, was convicted in a Federal District Court in the Northern District of Illinois for violation of 26 U.S.C. s.2554 (a) selling heroin to one "John Doe" and for violation of 21 U.S.C. s.174, knowingly furnish the names of witnesses.

\textsuperscript{120} Ibid., Rule 16, Title 18 Appendix - Rules of Criminal Procedure.

\textsuperscript{121} 353 U.S. 53 (1957). See Clark, J., dissenting opinion.
possessing and transporting imported heroin unlawfully. Prior to trial, the petitioner moved for a bill of particulars requesting disclosure of the identity of the undercover informer who had been present at the time of the offence and who might have been a material witness as to whether the petitioner transported the drugs (as charged. The Government objected to this request on the basis that "John Doe" was an informer and his identity was privileged. The motion was, therefore, denied. "John Doe" was not present throughout the trial, neither was his identity disclosed.

Petitioner contended that the trial court erred in allowing the non-disclosure of the identity of the informer, "John Doe". The Court of Appeal, for the Seventh Circuit, observed that the purpose of this privilege recognises the duty of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by maintaining that anonymity, allows them to execute that duty. However, the fundamental requirement of fairness would place a limitation on this privilege. In fact, where the disclosure would assist the defence, the privilege must give way. The public interest in protecting the flow of information must be balanced against the individual's right to present his defence and so obtain a fair trial.

The notice of alibi requirement imposed upon accused persons also attracts criticisms. Some critics observed that it violated the privilege against self-incrimination. This view was rejected by the Supreme Court in the case of Williams v. Florida. In the Williams case the petitioner was indicted for robbery in the state of Florida. Prior to his trial, he filed a "Motion for Protective Order" with a view to be excused from Rule 1.200. This rule required an accused

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person, on written demand by the prosecution, to give notice in advance of trial, if the accused wished to claim an alibi and to provide the prosecution with information as to the place where he claims to have been, and with the names and addresses of the alibi witnesses the accused would be calling. The petitioner stated in his motion that he intended to claim an alibi, but objected to the further disclosure requirements on the ground that the rule "compels the defendant in a criminal case to be a witness against himself," in violation of his Fifth Amendment and Fourteenth Amendment rights. The motion was denied. The petitioner was convicted of robbery and was sentenced to life imprisonment. The District Court of Appeal rejected petitioner's claims that his Fifth and Sixth Amendment rights had been violated.

The District Court of Appeal of Florida, Third District, stated that the discovery rule is a search for truth in criminal trials as certain crucial facts relevant to guilt or innocence can be investigated. This conforms with due process and fair trial requirements. In the result, Florida's notice of alibi rule did not violate the Fifth Amendment made applicable to the state by the Fourteen Amendment.

Mr. Justice White, who delivered the opinion of the court observed:

"The notice of alibi rule......at most....compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of the constitutional right to await the end of the state's case before announcing the nature of his defence.......we decline to hold that the privilege against compulsory self-incrimination guarantee the defendant the right to surprise the state with an alibi defense."
The courts are strongly in favour of disclosure and there are several United States Supreme Court decisions which treat non-disclosure of material evidence or the presentation of perjured testimony by the prosecution as a denial of due process.

*United States v. Agurs*, is authority for the proposition that where the prosecution was specifically requested by the defence to disclose certain identifiable evidence, and had suppressed it, or when the prosecutor has knowingly used perjured testimony, the prosecution’s misconduct is likely to lead to a reversal of any conviction.\(^\text{123}\) However, where an accused person has not specifically requested exculpatory evidence, or has made only a request of a general nature and thereafter, discovers that exculpatory evidence was concealed, the accused person must show that the evidence was so important that a different verdict would have been rendered, if the evidence had been disclosed. Although suppression of evidence, even knowingly, by a prosecutor will not necessarily require reversal of a conviction, nevertheless, prosecutors still have an ethical duty to disclose, and courts assume that this duty will be met.

In recent years, the United States of America has made great strides towards a broadening or liberalising of the right to discovery, for instance, discovery of grand jury material. The grand jury is the best discovery device available to the prosecution.\(^\text{124}\) It is a one-sided secret hearing controlled by the prosecutor, and investigates crimes. The grand jury need only decide if there is a probable cause to issue a formal charge, an indictment against an individual. A grand


\(^{124}\) Supra note 62.
jury indictment may be based on personal knowledge as well as hearsay evidence. The grand jury subpoena is a powerful weapon for the purpose of obtaining any relevant information; the prosecution can call witnesses and require them to appear with documents and other evidence.

Notwithstanding Rule 6(e)(2) of the Federal Rules of Criminal Procedure, which deals with secrecy of grand jury material, discovery of grand jury material is the norm. In the year 1966, Rule 16 of U.S.C. Rules of Criminal Procedure was broadened to expand the discovery rights of an accused person. In 1975 Congress again broadened Rule 16, consequently, there were several amendments in 1975. Rule 12.1, Notice of Alibi, and Rule 12.2, Notice of Insanity Defence, or Expert Testimony of Defendants Mental Conditions are two such rules.

Federal discovery, however, is not as liberal as the discovery procedure which is now available in some of the states. "Open file" discovery is the norm in most states. Twenty states now grant accused persons access to grand jury material. Indeed, the broadening of discovery rules has led to speedier trials.

Stephen H. Glickman and Steven M. Salky offer an explanation for the broadening of discovery rules. They observed:

"The advent of guideline sentencing creates a unique impetus for taking a fresh look at the restrictions on pretrial discovery in the Federal Rules of Criminal Procedure. The guidelines identify a variety of factors relating to the offense or the offender that have a quantifiable impact on criminal sentences. It is critically important to the defense to learn in a timely fashion whether the prosecution will assert that these factors - specific offense characteristics, adjustments, aggravating or mitigating circumstances and the like - are present in any particular case, in order to determine intelligently whether and on what terms to
enter a plea."\textsuperscript{125}

Glickman and his colleague further observed that under Rule 16, accused persons should have access to their criminal records. However, the prosecutor normally supplied the Federal Bureau of Investigation "rap sheet" which does not indicate the sentence imposed for each offence. Moreover, disclosure prior to sentencing is "too late", and Rule 16, as drafted, is not adequate to ensure that information which would assist offenders in determining the appropriate sentence should be disclosed when it would be most useful, that is, before trial or plea negotiation.

Rule 16 (a) (1) (B) states:

"Defendant's prior record, upon request of the defendant, the government should furnish to the defendant such copy of the defendant's prior record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government."

The avant-garde of board discovery rules assert that liberal discovery removes surprise and trial by ambush and so transforms the court room into an arena of fairness as trials become a quest for truth.

Discovery or disclosure is more liberalised in the United States of American than in most jurisdictions. A criticism against discovery or disclosure is that accused persons get too much protection. It is also felt that disclosure to the defence could lead to testimony which is untrue.

\textsuperscript{125} "Rediscovering Discovery", Vol. 4 No. 2 ABA Criminal Justice, pp. 13 - 14, 36 - 37, at pp. 13-14 (1989).
OMNIBUS PRE-TRIAL HEARING: Analyses

One aspect of the omnibus hearing is the use of checklists to ensure that all the material issues are ventilated and dealt with early. This benefits counsel whose practice is not in the area of criminal law. In some states, the prosecutor is called upon to give the defence its list of witnesses. Under this procedure the defence might be requested to disclose and read all documentary evidence which will be used at the trial, as well as statements of defence witnesses. In San Antonio, the Western District of Texas, the omnibus pre-trial hearing has been in operation since 1976. Chief Justice Speers stated that one of the advantages of the omnibus hearing is that it leads to more guilty pleas.\(^{126}\)

Judge Gerald Tjoflat of the United States Fifth Circuit Court of Appeals said: "The hearing holds they key to the survival of the criminal justice system."\(^{127}\) However, several states have registered varying reactions in respect of the implementation of omnibus hearing. For instance, the omnibus pre-trial hearing was said to be counter-productive in the Southern District of California.

The Federal District Court in San Diego, California, is one of the busiest of the ninety-four Federal Judicial Districts. It was the first federal court to implement the omnibus hearing procedure after it was recommended by the American Bar Association House of Delegates.

Empirical studies conducted by the American Foundation and Raymond T. Nimmer disclosed that the hearing procedure in this

\(^{126}\) Supra note 114, p. 378.

district was a failure as it did not lead to a speedy disposition of criminal cases. The studies were conducted during the year 1967, shortly after the procedure was adopted, and in the year 1970.

The 1967 study disclosed that there were too few judges to devote enough time to each case. Consequently, issues were not fully explored. Additionally, discovery was too late in the process for defence counsel to be fully seized of the facts at the hearing. Moreover, because accused persons deferred guilty pleas until after discovery was completed, the omnibus procedure increased the time between filing and disposition. Omnibus hearing increased a judge's time for cases by ten to twenty-five minutes.\(^{128}\) Raymond T. Nimmer noted that whereas accused persons would have pleaded guilty three to four weeks following arraignment, this was delayed.\(^{129}\)

In 1970 the omnibus hearing underwent changes, one of which was that a magistrate rather than a district judge presided over the hearing. Although its positive effect was the enforcement of discovery rules, it was a failure because defence counsel received only an edited version of the prosecution's file and, therefore, incomplete case reports. After receipt of these summaries, there was no communication between defence and government attorneys. In response to questionnaires by the American Bar Foundation, seventy percent of the attorneys stated that there was no informal

\(^{128}\) Nimmer, Raymond T.; The Omnibus Hearing: An experiment in Relieving Inefficiency, Unfairness and Judicial Delay, 1971, p. 11.

\(^{129}\) Ibid., p. 12.
communication whatsoever. Additionally, prosecutors exercised broad discretionary powers in disclosing reports, for example, often times the names and not the addresses of witnesses would be disclosed. This exercise of discretion made the procedure futile.

Reports were also issued a day before the omnibus hearing, and prosecutors were never familiar with case files. This was due to the fact that cases were not assigned to government attorneys until after the omnibus hearing. This was compounded by the fact that there were no deadlines for completion of discovery.

Nimmer noted that before omnibus hearing were adopted: "Trials were infrequent and a large majority of cases were disposed of - many defendants pleaded guilty at arraignment." In fact, guilty pleas did not increase. The "local legal culture"; the attitude of defence counsel also contributed to its failure. Defence counsel did not make full use of discovery devices. Counsel demonstrated very little interest in grand jury minutes, preliminary hearings and suppression of evidence hearings.

Nimmer's study was an examination of a small amount of literature concerning the hearing which had been published at the time, and an analyses of two random samples of narcotic cases filed during the period 1966 and 1967. The study focused on the impact of omnibus hearings on the trial process in San Diego, California. In the years 1967 and 1970, the American Bar Association studied the effectiveness of the

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131 Supra note 128.

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omnibus hearing upon judge-time per case and the time that elapsed from initiation to disposition. The information was obtained from questionnaires and interviews.

Apart from the Southern District of California, the only federal court with a comparable caseload is the Western District of Texas, which registered a high degree of success regarding the implementation of the omnibus hearing.

Prior to the omnibus hearing being instituted in the Western District of Texas, plea negotiation was at an extremely low level. Five per cent of all guilty were to charges which were reduced. The omnibus hearing, therefore, led to an increase in guilty pleas in the Western District of Texas, but registered no impact on the District of California.

Joel J. Frayer observed:

"Significant change in any system produces initial costs, as was illustrated in the Western District of Texas; after the introduction of omnibus, court time delays increased at first and then decreased as participants became familiar with the program. After placing the informal conference between indictment and arraignment - a major modification that eliminated the necessity for a formal omnibus hearing in most cases - there was a thirty per cent increase in guilty plea rates and a decrease in written motions and briefs. Thus, the Texas experience indicated that after an initial adjustment period, omnibus promote efficiency in a system with low guilty plea rates......"

For the omnibus hearing to be successful there should be full and continuous flow of information and timely discovery and regard must be had to whether the court system is operating efficiently. Raymond Nimmer observed that to implement

132 Supra note 127, p. 332.
133 Supra note 127.
omnibus hearing procedure into a system that is already operating effectively and expect greater efficiency is unrealistic. Such an implementation might naturally prove costly as it might lead to an increase in judge time.

The omnibus hearing which developed as an experiment in discovery or disclosure assists in the disposal of a large volume of criminal cases. Notwithstanding this, the omnibus hearing procedure, is considered superfluous in the context of a court system that is operating efficiently. Thus Tom. C. Clarke observed:

"No federal judge with speedy trial or hearing calendar problems can afford to disregard the omnibus procedure, for it is a vivid example of available 'self-help' which has a proven track record."

PRE-TRIAL CONFERENCE

The advantages of pre-trial conference include a reduction in the number of witnesses, a removal of 'in court' examination of documents or records as a result of being seen prior to trial and the removal of delays caused by the numbering of exhibits during the course of trial. The National Prosecution Standards wrote:

"The pre-trial conference stands as a judicially tested solution for a number of procedural and administrative

134 Supra note 128.
hindrances to speedy and efficient trial."\textsuperscript{136}

Empirical research of pre-trial settlement conference was undertaken in Dade County. Judicial control, judicial involvement in negotiations, lay participation, and the role of lay parties at the conference were examined by the Centre for Studies in Criminal Justice of the University of Chicago Law School.\textsuperscript{137}

The study revealed that lay participation (victims, accused persons, police officers) made a relatively small contribution to the total discussion. On an average, the attending lay person’s input was ten to fifteen per cent of the total comments. However, the presence of lay persons at these conferences remove the cost to the court system which would be incurred through writing or telephoning parties.\textsuperscript{138}

In complex cases the conference usually expedites the development of issues. The overall effect of the conference, therefore, is that cases are disposed of more speedily. In fact, when the defence is of the view that the prosecution is in full control of its case, a guilty plea would be likely. Properly administered, the conference can be an effective tool. The National Institute of Law Enforcement and Criminal Justice noted:

"Cases assigned a conference date were closed significantly more quickly than those not assigned a date. The saving (of time) occurred both with

\textsuperscript{136} National District Attorneys Association, First ed., 1977.


\textsuperscript{138} Ibid., p. 56.
judgms who had histories of slow and those with fast calendars.\textsuperscript{139}

**PRELIMINARY EXAMINATION/HEARING**

A preliminary examination is a screening mechanism to ensure that there is sufficient cause to go on to formal trial. The examination is conducted only in certain categories of federal and state cases. This form of examination obtains in over half of the states in the United States of America.

As a discovery device, it is seen as a collateral benefit of the examination and not as a reason for the examination. The real purpose of the examination is to determine whether there is probable cause to believe that an offence has been committed and that it was the accused person who committed it.

It is adopted in the state courts to serve the same function as it does in the federal courts. In Los Angeles, for instance, preliminary examination is adopted on the same basis as the federal courts.

Pursuant to Title 18 section 3060 of the United States Code, an accused person can waive a preliminary examination. Title 18, section 3060 U.S.C., therefore, makes provision for preliminary examination within a reasonable time, but not later than ten days following initial appearance where the accused person is in custody.

Where the accused is not in custody the preliminary examination must be within a reasonable time but not later than twenty days following initial appearance.

An extension of time may be granted with the consent of the

\textsuperscript{139} Supra note 137, p. 92.
accused person more than one time, by a federal magistrate, upon showing of good cause. Of course, the public interest in the prompt disposition of cases must be taken into consideration. An extension may also be granted without the consent of the accused person by a judge of the United States only upon showing that extraordinary circumstances exist and that delay is indispensable to the interest justice.

However, a preliminary examination should not be held if an accused is indicted or an information is filed against an accused in a district court before a date fixed for preliminary examination.\textsuperscript{140}

**ANALYSIS OF PRELIMINARY EXAMINATION/HEARING**

Critics of preliminary examination hold that it contributes to the backlog of cases although the hearings last from ten to twenty minutes, and an estimated ninety to ninety-five per cent of cases at a preliminary examination resulted in certification for trial or reduced charge.\textsuperscript{141}

In the United States of America preliminary hearing is not the only screening device. Cases pass through the grand jury screen as well. The standard the federal grand jury uses is not one of sufficient cause, but rather one which asks if the jury would be willing to convict on the prosecution's evidence. The utilization of both the grand jury and the preliminary examination varies through the United States of America. In federal courts as a grand jury indictment can be returned on hearsay evidence, the preliminary examination is

\textsuperscript{140} Title 18 s.3060 (e) of U.S.C.A. See also Rules of Criminal Procedure 5.1.

\textsuperscript{141} Perrine, Garrith D., Administration of Justice, Principles and Procedures, 1980, p. 243. See also LXIX Calif. L. Rev. 770.
rarely used. Therefore, preliminary examination as a sieve for weak cases cannot be effectively tested on a state by state basis.

Empirical study of preliminary hearings conducted by Kenneth Graham and Leon Letwin in Los Angeles, California, revealed a screening rate of eight per cent. Graham and his colleague observed about two hundred cases and saw sixteen accused persons dismissed. Both placed little weight on their own statistics as the sample was not scientifically random, though it was a fair cross-section. Notwithstanding, the sample confirmed that magistrates were dismissing more cases than they thought they were. They also found that many judges felt that the dismissal rate was five to six per cent. However, the prosecutors and defenders stated that the rate of dismissal was in excess of ten per cent.

The National Prosecution Standard call for the abolition of preliminary examination because standard 12.2 covered probable cause determination. The probable cause determination is a non-adversary proceeding to determine probable cause in charges other than in indictments. The purpose of the probable cause determination is to ascertain whether there is a probable cause to justify restraint on the liberty of a subject pending trial. But while its abolition is advocated in some quarters, others see its role as important.

\[142\] Costello v. United States 350 U.S., 359 (1956) is authority for the proposition that a grand jury indictment may be based on hearsay evidence.


A few judges in Los Angeles, for instance, regard the holding of a preliminary hearing as important and a few others view it as a waste of judicial resources. The majority saw it as a chore.145

The preliminary hearing is not the first appearance an accused makes in court in a felony case. In a significant number of states the initial appearance takes place right after arrest. A guilty plea and a waiver of the preliminary hearing at first appearance requires the approval of the District Attorney and in most cases it is the policy of the District Attorney’s office to refuse a plea and waiver of preliminary hearing at this stage. One of the reasons for the objection to waiver at this stage is that preliminary hearing is a valuable discovery tool. Secondly, because of the advantages the defence gain from preliminary hearing most prosecutors view a waiver with suspicion.

There were no statistics on the overall effect of this procedural device on waiting times.

On the rare occasions when preliminary examination is utilized in the federal courts it may take the form of a federal agent reading his report to support a finding of probable cause.

Despite the criticism of preliminary examination its use is encouraged in some states and heavily utilized in others. To encourage more use of preliminary examination, some states, for instance, New York, allow the use of hearsay evidence at preliminary examination.146

145 Supra note 98.

146 McKinney’s Session Law News, April 10, 1967, pp. 119 - 120.
In Los Angeles County, California, a preliminary hearing is almost always held. This attitude would tend to suggest a recognition of the importance of the role of magisterial screening. It might even suggest the need to counter-balance the powers of the prosecutor.

THE ADMINISTRATION OF CRIMINAL JUSTICE

Changes of a far reaching nature and of real significance have been brought about in the Administration of Justice in the United States of America. Some of these reforms or changes in the Administration of Justice will be highlighted

a) THE MANAGERIAL ROLE OF JUDGES

Chief Justice Robert F. Peckham, an advocate of judges as managers, that is, a judge being a "managerial activist" rather than a passive umpire, stated:

"Until quite recently the trial judge played virtually no role in a case until counsel for at least one side certified that it was ready for trial."148

Expression of the managerial role of judges is seen in the exercise of wide discretion in discovery procedure or the pre-trial stage. The judge's role as 'case managers' was born out of the increasing caseload. Judges, therefore, try to contribute to a speedy disposition of cases.

Judith Resnik observed:

"I believe that the role of judges before adjudication is undergoing a change as substantial as has been recognised in the pre-trial phase of public law cases. Today, federal district judges

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147 Supra note 143, p. 646.

148 The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition, 1981.
are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion. ... this new managerial role has emerged for several reasons. One is the creation of pre-trial discovery rights."

Professor Resnik further observed that the judge's managerial role was 'off record' and not subject to review by the appellate court. Despite the disposition rate following from settlement of criminal cases it is felt, by lawyers, that a judge could not remove from his mind information obtained at the pre-trial conference which might colour his decision at a trial. Thus Professor Resnik commented:

"Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use - or abuse - their powers."

The real aim of case management by judges is to reduce the time it takes to process a case. However, there is a paucity of empirical evidence as to whether judicial management is really effective. The avant-garde of the judges as managers claim that case management by judges reduces delays and increases case disposition. However, according to Professor Resnik, the existing evidence does not confirm this view that judicial management is the raison d'être for efficiency in the federal courts.

b) CASE FLOW MANAGEMENT

The National Advisory Commission on Criminal Justice Standards and Goals set up by the Law Enforcement Assistance Administration in 1971 came up with standards on case flow management in 1973. The Commission recommended that the final responsibility in respect of the management and movement of

\[149\] "Managerial Judges", 96 Harv. L. Rev. 378.

\[150\] Ibid., p. 425.
cases should rest with the judges. The Commission also recommended that scheduling of cases should be delegated to non-judicial personnel, but efforts should be made that defence lawyers and prosecutors do not improperly control the scheduling of cases. The Commission also recommended that the flow of cases should be monitored on a regular basis by the presiding judge and an account of the status of the court calendar be made to the presiding judge at least once each month.

The American Bar Association Commission was yet another proponent of this form of management. The American Bar Association Commission on Standards of Judicial Administration states:

"Case flow management: General Principle. The court should supervise and control the movement of all cases on its dockets from the time of filing through the final disposition. Its management procedure should be applied impartially to all litigants, afford adequate attention to the merits of each case and facilitate prompt determination of all cases."

Standard 2.51 recommends case flow management programmes and observes that this should take the form of written regulations. Management programmes should include, time standards for disposition of cases, minimization of schedule conflicts, that is, scheduling procedure should be carried out so as to remove or reduce conflicts in schedules of the participants in the criminal process, centralized supervision and continuous monitoring.

A study of six Federal District Courts in United States

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revealed that the courts which had the greatest disposition rate were those with the most demanding or stringent case flow management control.\textsuperscript{152}

Maureen Solomon observed that court studies showed that the system of assignment of cases is not the only factor that determines the success or failure of case flow management. Of the ten factors, Solomon highlighted: "establishment techniques for avoiding or minimizing the possibility of Attorneys schedule conflicts."\textsuperscript{153}

Solomon pointed out that case flow management should be a goal-oriented process; ensuring that cases "get to the point of disposition early"; this type of system ensures the speedy scheduling of cases.\textsuperscript{154}

Active control and supervision over cases from the time of filing create prompt disposition of cases. The case flow management programme with its concomitant guidelines which emphasize continuous monitoring of court calendar and dockets, minimization of schedule conflicts, time standards and centralized supervision ensures that cases are disposed of speedily. Time standards for disposition of cases encourage the participants in the criminal justice process to more speedily, thereby, contributing to the expeditious disposition of cases.\textsuperscript{155}

\textsuperscript{152} Flanders, S., Case Management in United States District Courts, Federal Judicial Centre, 1977, pp. 18 - 19.

\textsuperscript{153} American Bar Association, Commission on Standards of Judicial Administration Case Flow Management in the Trial Courts, 1973: (Supporting Studies, 2).

\textsuperscript{154} Ibid., p. 20.

\textsuperscript{155} Supra note 153.
c) **MANAGEMENT OF JURY SERVICE**

The cost and demand on jury service may be reduced if persons are properly managed. For this reason, the American Bar Association set standards which deal with aspects of jury trial.

It was only in the 1960's that jury management was examined in the United States of America. A study of jury utilization and measurement of its efficiency was carried out as part of the District of Columbia management study, sponsored by the District of Columbia Committee on the Administration of Justice. Studies were also conducted in other states. The studies led to saving in cost through implementation of recommendation from the study.

Improvements in jury management have been introduced in other jurisdictions, for instance, Houston and Los Angeles. The Federal Judicial Center has published guidelines for use of jurors in the federal and state courts.

The management of the jury system is not centralized in the United States. A jury commission or board of supervisors may be in charge of the selection and procuring of names, but the office of the clerk or court administrator is responsible for managing of jury service.

Title 28 of the United States Code, section 1866 deals with excuse for jury service. Standard 2.62 of the American Bar Association on Standards of Judicial Administration, as an extension to the statutory position, adds:

"Excuses for jury service: A person should be excused from jury service only for permanent disability affecting his capacity to service, vulnerability to embarrassment in voir dire examination or prior jury service within a year."
Temporary deferral of service should be permitted in cases of public necessity, undue hardship, temporary disability or extreme inconvenience. Request for excuse from service should be determined under the direct supervision of a judge.\textsuperscript{156}

The Uniform Jury Selection and Service Act and the Model Jury Selection and Service Act, state that excuses ought to be granted only on the grounds of severe inconvenience or physical or mental incapacity.\textsuperscript{157} This is done with a view to discourage the non-attendance of jurors. Some federal courts extend periods of service for four weeks or for longer periods of six months. Summons for six months periods and extended where jury trials are intermittent, but shortening the period of service reduces requests to be excused from jury service. Jurors will also be less exposed to the system and not likely to be tainted by experiences of prior trials.

There is no data on the amount of money paid to jurors who were never used at voir dire or trials in state courts. In the federal courts about $17,000,000 yearly is spent on jurors.\textsuperscript{158} Therefore, the courts ensure that too many jurors are not summoned so that they are under-utilized, or too few so that there will be delays. To attain greater cost efficiency, the number of jurors summoned should accord with the demand. Maureen Solomon observed:

"In many courts, the number of jurors summoned to court is maintained at a static level regardless of fluctuations in demand caused by such factors as

\textsuperscript{156} Supra note 153.


\textsuperscript{158} Ibid.
variations in the judicial manpower present or the number of scheduled trials, or the probability of pre-trial settlement......a major reason for excessive juror summonses is lack of adequate communication needed to predict juror demands."\textsuperscript{159}

Efficient jury management, according to Maureen Solomon, would take into consideration these major factors: economy, improving the experience of jurors and simplicity. Economy means accurate predictions about the number of persons needed at any time. Improving the experience of jury service would involve making the waiting area for jurors more pleasant. Simplicity would involve not causing support staff or court unnecessary work.\textsuperscript{160}

Another method of reducing the time spent in deliberation and which makes jury trial more efficient, is the issuing of pamphlet or handbook to familiarise jurors with legal terminology and court room procedure. The judicial Conference of the United States has sanctioned a "Handbook for Jurors Serving in the United States District Courts" for use by District Judges.\textsuperscript{161} There are mixed views in respect of this preliminary education for jurors by way of handbook. In United States v. Gordon,\textsuperscript{162} the United States Court of Appeal approved and praised the use of the Federal Handbook by jurors. However, in People v. Fisher, the court stated that the practice was "not to be commended, and should be indulged

\textsuperscript{159} Supra note 157, p. 27.
\textsuperscript{160} Supra note 158, p. 22.
\textsuperscript{162} 7th Cir. July 19, 1957.
if at all with great caution.............."\textsuperscript{163}

d) **COMPUTER MANAGEMENT**

Computer technology has been applied to court administration, for instance, docket management, calendar control and court reporting in order to stem the problem of backlog and delay caused by the processing and maintenance of records by hand. A Report of the National Advisory Commission on Criminal Justice Standards and Goals: Court Report, stated:

"For effective court administration, criminal courts must have the capacity to determine monthly case flow and judicial personnel workload patterns. This capability requires the following statistical data for both misdemeanors and felonies:

1. filing and disposition - the number of cases filed and the number of defendants disposed of by offences;
2. monthly backlog;
3. time periods between major steps in adjudication, length of trial;
4. prosecutor and defence workload;
5. jury utilization - numbers called........excused....;
6. courtroom utilization -record."\textsuperscript{164}

Computers can store, process and print a significant amount of data, information or statistics. The net result of the use of computers is greater speed, control over operations, and cost reduction.

The computer analyzes dockets. Consequently, information concerning the attendance of lawyers, the reason for the non-attendance of lawyers and adjournments can be easily accessed.

\textsuperscript{163} 340 Ill. 216, 147; 172 N.E. 743 at 755 (1930).
\textsuperscript{164} S. 5.3 (1973), 245.
Commenting on computer technology, in Pennsylvania, Thomas J. Clary observed:

"United States District Court for the Eastern District of Pennsylvania terminated more cases than were filed for the first time in 16 years."

Computer technology is used in court reporting. Almost all court proceedings are recorded either by stenotype, sound recording or manually transcribed. The federal courts have adopted a system of sound recording of the entire proceedings which, thereafter, is converted into computer readable information and the transcript printed. By this method a day's transcript is obtained by court personnel for review. The cost of the transcript is expensive.

Another function of computer technology is to monitor delays with a view to reducing backlogs and expediting the trial process. The queuing theory is one such technique. Stuart Nagel, commenting on this theory, observed:

"In any program for reducing delay, a court will want to try to estimate what effects changes will have upon backlog and delay. Queuing formulas describe the relationships between the variables that affect backlog and delay - variables such as the rate at which they are serviced, the number of judges and so on."

Moreover, the queuing theory stresses that to decrease delay and backlogs, the disposition rate must increase or the intake of cases into the criminal justice system reduced.

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Predictions regarding the amount of time needed for processing the different types of cases at different stages of processing are made from the average number of cases that enter the system daily, and from the average number of cases that are "serviced" daily. The prediction formula is \( T = \frac{1}{S - A} \), that is

"Time consumed relates inversely to the servicing rate of cases and directly to the arrival rate. Through this formula it can be predicted how much time can be reduced by increasing the service rate or by decreasing the arrival rate."\(^{167}\)

The basic queuing formula for assessing the effect of the variables on backlogs is \( N = \frac{A}{S} (1 - \frac{A}{S}) \). This formula calculates the amount of cases \( (N) \) "backed up" in the criminal justice system or at any stage in the process. There are, of course, other formulas, for instance, waiting time formula. The formulas tend to suggest that backlogs can be reduced by: diversion, pre-trial settlement, more judge time (delegation to quasi-judges) and less stages in the system (removal of grand juries for formal indictments).

Formulas and technology used in the business world have been utilized by the criminal justice system with much success. These have played a vital role in understanding, assessing and monitoring waiting times and backlogs.

e) **APPELLATE COURT AND TRANSCRIPTS**

The timely preparation of transcripts is a problem in the United States of America. Procedures are, therefore, put in place to expedite the speedy production of transcripts. In California, the court rules require a reporter to complete his/her transcription twenty days after the notice of appeal.

\(^{167}\) Ibid.
has been filed. Within twenty-five days, the trial court clerk is to deliver the transcript(s) to the trial judge for certification, after the parties to the proceedings have made the necessary corrections, if any, to the transcript. The parties have five days within which to make the necessary corrections.

Although preparation of the record should be completed within thirty days, the Appellate Court can extend the time limit to eighty days from the filing of the notice of appeal if good cause is shown. Empirical survey showed that the court reporters and clerks were not meeting the time limits. The average time between filing of notice of appeal and the court reporters completing transcripts was seventy-two days; only twenty of two hundred and thirty-three reporters' transcripts were completed within the time period. Reporters were also unable to complete transcripts within the eighty days extended time period. Fifty-nine of the two hundred and thirty-three studied court reporters failed to complete within the eighty day limit. The majority of court reporters who exceeded the eighty-day limit did not obtain extension on request from the Appellate Court. Only thirty-four of one hundred and thirty-four reporters requested and obtained extensions.¹⁶⁸

Technological advancement has greatly assisted in the speedy production of transcripts. The electronic sound recording system and the computer assisted transcription system are novel methods of timely completion of transcripts. Empirical study reveals that for transcripts of up to two hundred pages, the computer assisted transcription system reduced transcript completion time by sixty-seven per cent; that study estimated ninety-five per cent of transcripts can be prepared in thirty

days or less.\textsuperscript{169}

f) \textbf{CONTROLLING EXCESSIVE CONTINUANCES OR ADJOURNMENTS}

Criminal Lawyers are very often the cause of delays. They overload their schedules and often cause conflict of commitments. As a result, there are numerous adjournments or continuances due to conflicting commitments.

The National Prosecution Standards observed:

"Two major sources of excessive delay....were continuances resulting from scheduling conflicts and intentional abuse of continuance by the defence for tactical or personal purpose. While such issues are not directly addressed in speedy trial statutes as such, several jurisdictions have taken tentative steps to control the problem."\textsuperscript{170}

The steps taken are in the form of rules passed by the several states. Philadelphia, for instance, has a rule which precludes defence lawyer from representing over fifteen "defendants" who have been indicted for a period of over twelve months. The Chio rule speaks in broader terms. Before a continuance is entertained by the court, the following conditions must be fulfilled: (a) the lawyer must provide a written statement of the reason for the continuance; (b) before an adjournment or continuance is granted a new trial date is fixed; (c) the trial judge must prepare a report stating the number of continuances. The name of the lawyer is also recorded. This information is used by the court to

\textsuperscript{169} American Bar Association Judicial Administration Division, Appellate Delay Reduction Committee Standards Relating to Appellate Delay Reduction, 1986 - 1987.

penalize or discipline lawyers who request continuances on improper grounds or abuse continuances.\textsuperscript{171}

Title 18 U.S.C section 3161 (h) (8) provides for the granting of continuances in the 'interest of justice'. To prevent abuse of this provision, the judge must record justification for continuances and the reason for finding that ends of justice served by the granting of continuance exceeds the interest of the public and accused in a speedy trial. Notwithstanding, continuance is endemic to the criminal justice system.

Adopting rules is vital, but equally important is getting them implemented and so a lot depends on the judge's approach to continuance. One judge, Hilda R. Gage, commented that by being firm in the granting of continuances she was able to reduce her civil caseload and only a few cases were over eighteen months old.\textsuperscript{172} She observed:

"I have not always been as uncompromising on the subject of adjournments. When I first took the bench, I regularly signed attorney stipulations for adjournments. I soon found, however, that although I started the day eagerly looking forward to a trial, I often found my courtroom empty. It became apparent that when I granted these adjournments, I was mistakenly relying on the other two or three cases set for trial on a given day to fill my time. But the case fixed for trial would settle, and the adjourned case, which could be the "real" trial was postponed for a late date. I began to change my approach to attorney-stipulated adjournments. They would no longer be granted. This judge would not


be an administrator, rubber-stamping orders. On motion made in court, I would receive requests for adjournments; but I would not grant them except upon a showing of very good cause. What is a good cause? Experience is an excellent teacher." ¹⁷³

The effect of these approaches on "waiting times" cannot be translated into numerical terms as no statistical data were forthcoming.

AN ALTERNATIVE TO PROSECUTION
THE PRE-TRIAL DIVERSION PROGRAMME

The pre-trial diversion programme is an alternative to criminal prosecution because it removes demand or pressures on the trial courts as a wide range of minor cases are diverted out of the criminal justice system. According to the Committee for Public Justice, one of the aims of pre-trial diversion is to:

"Preserve the energies of criminal justice personnel to effectively process cases that would be appropriately handled through the adversarial court situation." ¹⁷⁴

Persons who are eligible for diversion programme are persons who are "situational" rather than "confirmed" offenders. These offenders would include persons who are motivated by interpersonal conflict and persons who are in need of treatment or other services. These offenders are low risk persons who can be effectively dealt with outside of the criminal justice system. The offences include minor neighbourhood problems, family disputes, consumer problems, driving or alcohol problems.

¹⁷³ Ibid., 16.

These low risk offenders are diverted, according to their needs into a diversion programme. An offender’s need might be vocational, educational counselling or treatment for alcohol and drug.

The need for diversion has resulted in an increase in community mediation centres. The centres confine themselves, mainly, to family disputes. Mediation centres exist in several states, such as New York, Philadelphia and Ohio.

There are two components in a diversion decision, the decision by the prosecutor to offer diversion to an offender, and the offender’s decision to accept or reject the offer. The potential divertee is fully informed of the decision to participate in the programme and of the failure to meet the condition of diversion. The putative offender usually sees this programme as a better option.

An offender who discontinues the programme or refuses to co-operate may be faced with deferred prosecution. In fact, the pre-trial diversion programme may be divided into: deferred, prosecution, dispute settlement and unconditional diversion programme.

Deferred prosecution ("Brooklyn Plan") may be re-initiated if the offender fails to co-operate or to satisfy the condition of the diversion. If drug offenders, for instance, do not fulfill the condition of the drug education programme, they will be prosecuted. Under this programme the offender agrees to waive his right to a speedy trial. Where an offender accepts unconditional diversion, the participant is not referred back to court for prosecution. The offender and victim consent to this type of diversion upon request. The condition of diversion can include restitution or community
service.

During the transitional period of the Speedy Trial Act, diversion was heavily relied upon as a method of disposing of criminal cases prior to charges being filed by indictment or information. The pre-trial agencies which were established by the Administrative Office of the U.S. Courts under Title 11 of the Speedy Trial Act, among other things, performed functions which were essential to an ongoing diversion programme. On April 22, 1977, one hundred and twenty-seven offenders from the Southern District of New York were referred to the Probation Department for investigation for deferred prosecution between September 1, 1976 and February 28, 1977.

These offenders ranged from age fifteen to fifty. The offences included bank robbery, threat to government property, harassment of foreign guest, etcetera. The manifest effect of deferred prosecution in the Southern District of New York was that one hundred and fifty cases were diverted out of the criminal justice system.

The Federal Criminal Diversion Act of 1977 allowed for diversion at federal level. One of the intentions of the legislation was to reduce the criminal caseload of the federal courts by providing alternatives to criminal prosecution for persons charged with non-violent offences and in some cases, non-violent offences.

Before diversion can be considered in any jurisdiction, it

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175 Hearing before the Sub-committee on Improvements in Judicial Machinery of the Committee on the Judiciary, U.S. Senate, 95th Cong., 1st Sess. on s. 1819 - the Federal Criminal Division Act of 1977, p. 23.

176 Ibid.
should be ascertained whether there is a substantial number of non-violent criminal offenders. The situation that caused the offender to be involved with the law should also be considered. This will indicate the approach that should be adopted, service-oriented or dispute settlement.

Diversion not only reduce cost as cases are removed from the criminal justice system, but it removes the pressure on an overburdened criminal justice system. It is believed that diversion causes a reduction in recidivism. However, one writer observed:

"What findings there are on outcomes in terms of recidivism lead one to conclude that diversion programmes are no better and no worse than the courts."\(^{177}\)

However, in a service-oriented programme such as a treatment programme, the offender would receive the type of treatment that a penal institution would not provide. The offender's problem would either be resolved or lessened.

**SUMMARY**

Unjustifiable delay and the resultant backlog in the criminal justice system is a recognised problem. The need to cope with this problem has focused on reforms to reduce caseload, speed up the disposition process and safeguard the right of an accused to a speedy trial.

The methods adopted by the United States of America criminal justice system include the reforms approaches which have been discussed: time limits, early settlement of cases by discovery procedures, effective screening at preliminary

hearing, plea bargaining, court management techniques and case flow management.

The Federal Speedy Trial Act of 1974 was designed to improve the court system as the language of the Constitutional Sixth Amendment did not delineate permissible delay. Although the caseload of the several district courts varied, the compliance rate with the Act was high overall. The statistical profile, however, regarding compliance, did not include excludable delays.

The effectiveness of the Act cannot be viewed in isolation to the other components in the criminal justice system. Of course, the practical application of the Act depended for its workability on the integration of other reform methods. The workability of the Act depended on the Pre-trial Service Agencies which allowed for early screening of offenders eligible for diversion. The Act also stimulated the need for management techniques. Additionally, change in the "local legal culture" underpins the effectiveness of time limit as a measure.

Liberal discovery rules and discovery procedures have encouraged increased efficiency in the criminal justice system. The positive effect of discovery is that the accused person can assess his case in more realistic terms and, therefore, make an informed plea. Discovery should begin early and be completed in a reasonable time so that, if necessary, a prompt trial can follow.

Preliminary examination is also a screening device and acts as a discovery mechanism, thus removing weak cases or unjustifiable prosecution out of the system. The statutory provision of waiver of preliminary hearing is designed to make trials speedier. In federal courts, a grand jury indictment
is regularly returned in felony cases, therefore, the need for preliminary examination is almost negligible. In some states, for example, Los Angeles, California, it is frequently utilized.

Plea bargaining has dominated the criminal justice system. Ninety per cent of criminal cases are disposed of by guilty pleas. It is effective and necessary where court calendars are overcrowded as the criminal justice system would not be able to cope with full-blown trials. This device also minimizes costs. Protective procedures are necessary components of the plea bargaining system to protect innocent offenders from being pressured into guilty pleas. This seem to be the most effective reform strategy.

Alaska’s experience after the abolition of plea bargaining in 1975 demonstrated that the criminal justice system can operate without plea bargaining or actual plea negotiation. A lesson which comes out of Alaska’s experience is that the absence of formal rules relating to plea bargaining does not prevent implicit bargaining which carries with it sentencing discounts. Implicit bargaining might have the same effect or impact on guilty plea rates as sanctioned plea negotiation.

Operation of the courts can be improved by management techniques. Management approaches, in relation to case flow, personnel and record keeping, is necessary to deal with the changing nature of court caseloads. Consistent management strategies and new technology such as the use of steno-computerised transcript system can result in improved case disposition times.

The caseload situation has led to alternatives to court adjudication. The diversion programme is one such alternative. The benefit of this device to the divertee and
the criminal justice system has been projected. The American experience suggests that this alternative device in dealing with low risk offenders does not impede the aims of the criminal justice system in protecting society and rehabilitating offenders.

Although the reforms discussed are not a panacea, benefits have accrued from their implementation. The Speedy Trial Act imposed penalties and strict time limits on federal prosecution, thus encouraging compliance. Additionally, many cases are disposed of by plea bargaining. However, on one reform approach can independently eliminate excessive court delays. The goals of speedy trial through reform methods can only work if there is full and earnest participation in the criminal justice system. The people factor is, therefore, important.
Appendix D

A Simple Representation of the Federal Criminal Court System:

United States of America

SUPREME COURT OF UNITED STATES

Final and highest Appellate Court in the federal courts system.

FEDERAL CIRCUITS

11 Federal Judicial Circuits (28 U.S.C.A. s.41)

DISTRICT COURT

94 District Courts
CHAPTER V

CONCLUSION AND RECOMMENDATIONS FOR

SPEEDY TRIAL REFORMS IN JAMAICA

The concept "reasonable time" lacks clarity and precision. Therefore, for this and other reasons, delays continue to be a feature of the trial process. Concomitantly, no local jurisprudence has clearly shown where the line of demarcation should be drawn between acceptable and unacceptable delay. Accordingly, precise legislative or alternative methods ought to be looked at with a view to speeding up the criminal trial process.

This chapter will, therefore, suggest some possible procedural and administrative reform methods for Jamaica. Proposals for reform will be examined within the context of reform approaches in the jurisdictions considered. These reform proposals will take into consideration Jamaica's economic resources and size of the population, since these are crucial factors which will affect the success or failure of any reform.

The intractable problem of delays in the criminal courts has not been the subject of any definitive study in this jurisdiction. However, the questionnaire and data in this study do provide some evidence of the existence of this problem.

A great deal of sentiment has been expressed for expediting the trial process, but such sentiment has not been translated into any significant reform movement. Over the past twenty years, reform measures have been implemented in a fragmentary fashion, but these have not effectively solved the caseload, baglog, or delay problems. In fact, no fixed system of monitoring these reform measures were implemented, nor was the relative success or workability of these measures evaluated.
over a period.

The English and American approach in assessing the workability of reform or possible reform approaches, include the use of pilot projects or empirical studies before and after implementation of reforms. Such research provides a guide to cost effectiveness. This is always an important factor, especially for a country with limited resources. Some of the speedy trial measures as they relate to the Supreme Court of Jamaica briefly are:

a) the Gun Court, which, since 1974, has become a feature of the criminal procedure in Jamaica. The general utility of the Gun Court is detailed in chapter II;¹

b) an increase in the number of puisne judges;

c) an increase in the sitting period of puisne judges. In order to better monitor cases, especially older ones, judges are now rostered to sit for an entire term, eleven to fourteen weeks in the Home Circuit Court;

d) the amendment of the Jury Act to provide for the selection of jurors from the voters’ list allows for the inclusion of a wider spectrum of the population and, therefore, more jurors. Experience has revealed that a vast number of jurors are barely literate and this has led to an increase in deliberation time, especially in rural Jamaica. Additionally, because of the increase in crime, the police cannot adequately process the voters’ list for criminals;

e) structural changes to the Home Circuit Court. The Supreme Court building in Kingston now has a robing room, jury room, counsel room, comfortable air-conditioned chambers for judges and air-conditioned court rooms.

The buildings used for Circuit Court matters in the rural areas are without these amenities. For instance, the building used for the sitting of the St. Catherine Circuit Court is so small that sometimes counsel has to wait outside until his/her case is called. The benches are so constructed that it is virtually impossible for counsel to take notes. There is often times disruption in utilities, which affects the progress of trials.

The above measures are reformist or piecemeal and have not significantly tackled the problem of excessive delay. Therefore, reforms that have not been explored but which can have potential significance will also be considered.

SUGGESTED REFORMS STRATEGIES

1. **PRELIMINARY EXAMINATION/PRELIMINARY INQUIRY**

"Paper committal" is not the practice in Jamaica. A preliminary examination is required in all indictable cases triable by a jury. The procedure concerning preliminary examination is embodied in section 34 of the Justices of the Peace Jurisdiction Act.

* Preliminary examination and preliminary inquiry are interchangeable terms. Parliament was prorogued on March 9, 1993, therefore, the Bill will have to be resubmitted to Parliament.
There are no available statistics as to how long a preliminary inquiry lasts or the length of time it takes an accused person to be committed. However, the average waiting time, as disclosed in chapter II suggests that delay exists as a result of preliminary inquiries.\(^2\) Preliminary inquiry or full oral inquiry, in some cases, might be a waste of time, for instance, when the evidence is not challenged.

Steps are now being taken to introduce paper committal in Jamaica. There is at present a Bill entitled: "The Committal Proceedings Act, 1991". This Bill is likely to become law. The memorandum of objects and reasons states:

"The existing provisions dealing with the holding of preliminary examinations to determine whether an accused persons charged with an indictable offence should be committed for trial before a Circuit Court have been found to cause unnecessary delays and expense in bringing such proceedings to a conclusion.

This Bill seeks to introduce a new procedure to be called "committal proceedings" to replace preliminary examinations.

To reduce delay and expense a person’s written statement, if it satisfies certain conditions, will be admitted in committal proceedings as evidence to the same extent and effect as if such person had given oral evidence before the Resident Magistrate in the committal proceedings. On the basis of such evidence alone a Resident Magistrate may, if satisfied that the accused person ought to be tried for an indictable offence, commit the accused to stand trial before a Circuit Court. The Resident Magistrate has also been empowered to take oral evidence of a person other than the accused if he considers that, in the circumstances of the case, this should be done. He may also take an oral statement from the accused if the accused so wishes."

\(^2\) A sample of 44 cases committed to the Home Circuit were examined. The average waiting time was 12.06 months.
a) THE COMMITTAL PROCEEDINGS BILL: PROCEDURE UNDER THE BILL

The Bill reads:

"AN ACT to Abolish preliminary examinations and to provide for the procedure relating to committal for trial in cases of indictable offences and for matters incidental thereto."

This Bill is broadly similar to the English 1967 Criminal Justice Act. The effect of the Bill is to make written statements admissible in evidence to the same extent as depositions. The Bill has 22 clauses and 3 schedules. The first schedule seeks to amend or repeal sections of the Justices of the Peace Jurisdiction Act. Section 2 of the Criminal Justice (Administration) Act and sections of the Judicature (Resident Magistrates) Act. Some of the clauses will be dealt with briefly.

Clause 3 provides for the taking of a statement from a witness who is dangerously ill and unlikely to recover. A Justice of the Peace may take, in writing, the statement of such a person on oath and this statement may be given in evidence at the committal proceedings or at the trial of the offender.

Clause 4 provides that an accused person may be committed for trial on written statements rather than by oral evidence, provided that the conditions set out in clause 8 are satisfied. Clause 8 (2) states that a written statement by any person is admissible if:

a) the statement is recorded in writing by a policeman and read to the person who made it;

b) the statement purports to be signed by the maker and recorder of the statement;

c) the statement contains a declaration by the maker to the effect that it is true;

d) in the case of a person who has attained the age of fourteen years, that he made the
statement, knowing that he could be liable to prosecution if he stated anything he knew to be false or did not believe to be true;

e) where a person is under fourteen years of age, he must understand the importance of speaking the truth.

Clause 4 (3) provides that if a submission is made that the evidence is not sufficient to commit the accused, the Resident Magistrate will, on the basis of the statements, make a determination in respect of the issue.

Although clause 4 of the Bill provides for the admission of written statement, the Resident Magistrate may, in his/her discretion, by virtue of clause 5, authorise the taking of oral evidence from any person other than the accused, if satisfied that oral testimony is desirable in the circumstances. The Resident Magistrate may order the taking of oral evidence presumably, where identification is in issue. This is so even if the witness gave a statement. Although the section does not expressly state so, the defence will be entitled to cross-examine the witness if he so desires.

The procedure under clause 8 stipulates that the statement must be taken by a member of the Jamaica Constabulary Force, who under the Bill is called a recorder, and signed by the maker; it must contain a declaration by the maker that the statement is true. The recorder must appear before a Justice of the Peace and depose or depone in the "prescribed manner" as to the correctness of the recording of the statement.

Copies are to be served on the defence in accordance with clause 10 of the Bill. Clause 10 (2) provides that the statement shall be served within seven days on the defence, but the Resident Magistrate may grant an extension of this time period. The Resident Magistrate, in his/her discretion
may vary this time period. Moreover, where an application is made by any party to the proceedings that there is inadequate time to consider the statement, the Resident Magistrate shall adjourn the proceedings for such time as is considered appropriate.

Clause 8 (3) (d) and clause 8 (3) (e) specifically deal with the disclosure of exhibits mentioned in the statements. The clause seems to suggest that the defence is entitled as of right to inspect or be supplied with copies of documents, for example, a confession, forensic or medical reports which form part of the prosecution’s case.

Clause 13 of the Bill provides for the admission of written statement or deposition upon proof by any credible witness that the witness whose statement or deposition was taken at the committal proceedings is dead; extremely ill; outside of the jurisdiction; insane or is being kept out of court by means of the procurement of the accused or on his behalf. Except where the witness is dead, the consent of the trial court will be required in all other circumstances.

Clauses 15 and 16 deals with the process to secure the attendance of witnesses. Failure or disobedience to attend court would make a witness liable to penalties for contempt of court.

The Bill calls for the dispensation with "old style committal", full oral enquiry, but oral evidence may be taken from a witness although the witness has given a statement. Prima facie proof by written statements should be a time saving device rather than the tedious proof of facts by preliminary examinations, especially when the facts are not in dispute.
In practical terms, the real advantage to an accused person to this type of procedure is that all statements will be served on the defence. This is so as, the real concern of the clerks of courts or prosecutors, at this stage, would be to serve statements within the time period. The prosecutor would not have sufficient time to read each statement and furnish the defence with only copies of such statements or documents which form part of the prosecution’s evidence and to which the defence would be entitled as of right. This is in contrast to a preliminary examination, where only the deposition of witnesses who deposed and the statement of witnesses who did not depose, but the prosecution intends to call, would be made available to the defence. If there is a statement which can assist the defence, that statement will also be made available. In practice, the statement which can assist the defence, that statement will also be made available. In practice, the statement is usually made available to the defence when the Office of the Director of Public Prosecutions received the case file.

Committal proceedings, as contemplated by the Bill, should be cost effective and, therefore, beneficial to the public purse. For the period January to September 1991, ($58,221.21) was paid towards witnesses’ expenses.

In assessing the practical effectiveness of paper committals, recourse must be had to the English experience as discussed in chapter III. Since the passage of the Criminal Justice Act, 1967, empirical studies on waiting times show that the average waiting time for paper committals is far less than the waiting time for full oral inquiry. Additionally, committals upon the content of written statements was found to be cost effective and relieved the magistrates of taking notes in long hand.

One of the criticisms of "paper committal" in that
jurisdiction is that cases were committed for trial which should not have been committed. The Royal Commission felt that unnecessary committals were mainly due to the lack of careful consideration of the statements.\(^3\)

The fundamental object of the Bill which is to prevent delays must not be overlooked. Therefore, the aim of committal proceedings as a device for screening cases out of the system when the evidence is insufficient, should always be taken into account. If the Bill becomes law, then its success and effectiveness could be further achieved with modifications to specific areas of the present Bill and addressing certain deficiencies in the system. Remedial measures will be proposed for dealing with these areas.

B SUGGESTED REMEDIAL PROPOSALS

1) POLICE STATEMENT TAKING

The present quality of police statement taken needs to be improved. One of the effects of the Bill is that policemen will now have to be properly trained in statement taking. Investigation into an offence is initiated by the police. As applied to police investigation, a statement is a proof of evidence which will be used to secure a conviction in a court of law. The purpose of the statement is to put the prosecution counsel in a position to adduce evidence to the standard required in a criminal case of the guilt of the accused.

Because the standard of proof in a criminal case is proof

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beyond a reasonable doubt, this involves a thorough investigation on the part of the investigating policeman into the attendant circumstances. It means collecting statements from all material witnesses. It should be a thorough statement. Suggested proposals for police statement taking are formulated at Appendix E. Moreover, if cases are not properly screened at this stage, they will be sent further along the system and cause more delays.\(^4\)

One of the duties of the clerks of the courts or the Resident Magistrates, would be to delete evidence which is prejudicial and, therefore, not admissible and to tender statements which contain evidence that is relevant and admissible. Proper statement taking would obviate the task of deleting useless evidence.

**ii) TIME LIMIT UNDER THE COMMITTAL PROCEEDINGS BILL**

The Bill makes provision that statements should be served seven days prior to the sitting of the Resident Magistrate at the committal proceedings. This seven days period is mandatory and not directory. However, what follows if the Resident Magistrate does not extend the period after the mandatory seven days has elapsed? The court then has power to stop prosecution if there is an abuse of process; for instance, if the accused would be prejudiced in the conduct or preparation of his defence because of the seven days delay on the part of the prosecution.\(^5\) The accused person's witnesses may have left the jurisdiction or the area during that period. However, where the Resident Magistrate refuses to commit an accused because the statements were not served within the

\(^4\) Ibid. See also Butler, Sid, Acquittal Rates, Home Office Research and Planning Unit, Paper 16, 1983.

mandatory period, the prosecutor may by a voluntary bill of indictment cause the accused person to stand trial in the Supreme Court. The application is made to a Judge of the Supreme Court in accordance with section 2 (2) of the Criminal Justice (Administration) Act.

Additionally, if one is to be guided by the Gun Court Act, experience has shown that pressure would be placed upon the prosecution or support staff to serve statements within that time frame. In fact, varying the prescribed period, in accordance with clause 10 (3), would be heavily relied upon when that clause should be sparingly used. It is impossible to serve statements within the seven-days time frame in cases where legal aid assignments are involved. Therefore, a more attainable time frame should be considered. There should be some guidelines as to whether these statements should be typed or photocopied or both. If photocopied, this would mean all courts will now have to be equipped with photocopy machines. If the statements are to be typed, it would mean more typists and efficient typewriters.

iii) DISCLOSURE BY THE PROSECUTION
It is not clear from the Bill whether all statements should be served on the defence. The Bill is silent as regards statements of witnesses in the prosecution’s possession which the prosecution does not propose to tender, whether such statements should be supplied to the defence as of right. Clarity is important as it introduces predictability into the criminal process and removes delays.

Committal proceedings being an avenue of disclosure, the Bill should formulate clearer disclosure or discovery rules. Criminal disclosure is predicated on the right of an accused to be fully informed of the case against him/her so that a proper defence can be made. Disclosure also prevents
injustice to the innocent accused, who perhaps has no knowledge of the evidence. Floyd Feeny’s observation reflects the usefulness of disclosure. He stated:

"The most active defence solicitors were...asked why they requested disclosure in some cases and not in others and whether they found it useful. One group of solicitors said they always request disclosure.....as accused often did not know which facts were relevant and that he or she sometimes gave inaccurate or impartial information, it was often difficult to evaluate the case on what the accused said."\(^6\)

The documents or objects of disclosure contemplated by clause 10 (1) are: copies of such statements or other documents as are intended to be considered at the committal proceedings in respect of the offence for which the accused person is charged. Therefore, oral evidence recorded in the form of depositions, statements, confessions, medical and forensic reports would fall within the contemplation of this clause. What, therefore, is the duty of the prosecutor as regards unused materials, statements and exhibits?

The obligation or duty of the prosecution to disclose to the defence any other material in their possession has an element of uncertainty and, therefore, recourse would have to be had to the English and local jurisprudence and the Jamaica Memorandum dated July 27, 1982 as at Appendix F.

However, there is no procedure to enforce disclosure.

Moreover, what is "material" is a subjective determination.\textsuperscript{7} Proposed disclosure rules are, therefore, formulated at Appendix G.

iv) **DISCLOSURE BY THE DEFENCE**

Committal proceedings being a type of discovery or disclosure device, the defence has first hand knowledge of the prosecution's case. The prosecution has no knowledge of the defence's case. There is, therefore, an information imbalance. When the defence is in the form of an alibi, an accused, at the committal proceedings, should serve an advance notice of particulars of alibi to the prosecution. The 1967 Criminal Justice Act of England, section 1 describes evidence in support of alibi as:

"Evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not or was unlikely to have been at the place where the offence is alleged to have been committed at the time of its alleged commission."

Advanced notice of particulars of an alibi would be in the interest of justice and also a time saving device. The alibi could be checked and evidence produce by the prosecution to rebut it. This may cause the defence to abandon the alibi altogether, thus shortening proceedings. The proceedings would also be shorter as the prosecution would now have an informed basis of cross-examination should the accused give evidence on oath. Whereas, if the defence was not disclosed, the prosecution might be engaged in time consuming

investigative cross-examination. To provide some form of informational balance, the Bill should also provide for mutual disclosure of expert evidence based on the English Crown Court (Advance Notice of Expert Evidence Rules, 1987).\textsuperscript{8}

\textbf{v) ATTENDANCE OF WITNESSES}

One of the main reasons for delays put forward by respondents to the questionnaire in chapter II was the non-attendance of witnesses. Therefore, the procedure dealing with the attendance of witnesses should be more adequate.

Clauses 15 and 16 read very well on paper but their practical workability is questionable as the attendance of witnesses, especially in murder cases, is not encouraging. The fact that failure or disobedience to attend would make a witness liable to penalties for contempt of court might be of no moment to the witness. In fact, the prospect of punishment for disobedience might even prevent a prospective witness from coming forward.

Moreover, witnesses tend to be very mobile; therefore, a witness unit ought to be established to monitor the movement of witnesses. Witnesses should be requested to inform this unit of full details of their movements and the names and addresses of relatives who can be contacted.

The economic reality is that witnesses are unable to afford transportation. The bus fare, for instance, from Linstead to St. Catherine and back to Linstead is now ($20.00). At the St. Catherine Circuit Court, in July 1991, witnesses informed the court that they were unemployed and unable to pay for

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transportation to attend court in the event that the cases in which they were involved were adjourned. This reality must be taken into consideration. Whenever witnesses are summoned to attend court and have to travel long distances, they should be asked if they wish to claim transportation cost in advance. The Witnesses Expense Act, 14 of 1959, stipulates the entitlement of various classes of witnesses.

Additionally, some witnesses have lost wages and even their jobs because of frequent court attendance. Therefore, when witnesses have to attend court, included with summons, should be a note to their employers informing them of this fact. As most witnesses attend court under compulsion, it is imperative that some consideration be given to their needs.

vi) CAUTION STATEMENT

One area in need of streamlining is the procedure dealing with caution statements or confessions. Some provision dealing with its admissibility should be made in the Bill. A solution to the frequency with which caution statements or confessions are challenged, would be to create greater safeguards for the accused person. As a condition precedent to admissibility, confessions should not only be recorded in longhand but also be tape-recorded to ensure the integrity of the statement.

Alternatively, where a confession is made in the absence of a Justice of the Peace, an accused should be made to repeat it in the presence of a Justice of the Peace. This would make the confession almost unchallengeable and, therefore, remove the need for a voir dire.

Moreover, when an accused person makes an admission to a policeman, the policeman should, at once, make a record of it and where possible obtain his signature and, if necessary, present the record at the trial. In R v Leroy Burke, the
court observed that the production of such a record would lend reliability to the admission.⁹

Preliminary inquiry is one of the many anachronism in the criminal justice system. The procedure causes delay, a waste of manpower and economic resources. Indeed, if this Bill becomes law, the trial process would be less time consuming.

2. **TIME LIMITS**

A preliminary observation in this regard could be made. Once the accused is committed for trial in the Supreme Court, there are no time limits governing the disposal of the case. Would the introduction of time limits by means of a Speedy Trial Act, as enacted by the United States of America, have practical implications in speeding up the pace of the disposition of criminal cases?

As discussed in chapter IV, Thomas Church Jnr., observed that "local legal culture" impacts on the pace of litigation.¹⁰ He sees "local legal culture" as a criterion for deciding on the implementation of time limits, where it contributes to delays. One writer questioned whether time limits would be a solution where backlog is not due to inefficiency but rather to an incapacity to deal with growing caseloads.¹¹ Dilatory tactics by prosecutors or defence attorneys in this jurisdiction contribute to delay and could be viewed as one

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¹⁰ Thomas Church Jr. described "local legal culture" as the participants in the legal process who influence the day to day activities of the court as the court grapples with protracted delays.

aspect of inefficiency.

For a criminal case to proceed within a particular time frame, there must be some co-ordination between the prosecution, defence, the police, witnesses, support staff and all the participants in the criminal process with a view to meeting that time period. There should also be speedy access to justice. On the matter of time limits, Julie Vennard observed:

"While time limits have played a part in setting standards or targets according to which courts assess their performances, the real key is... successful judicial control over a wide ranging programme of delay reduction. A commitment on the part of the court to enforce reasonable deadline is viewed as an essential prerequisite of such a programme. In addition, the court should monitor the extent to which time limits are met, and set up consultative machinery to 'foster' co-operation from the defence and prosecution on the goals of the programme."\(^{12}\)

In England it is felt that comprehensive time limits similar to the United States Speedy Trial Act achieve little.\(^{13}\) There are no comprehensive time limits in England but there are time limits affecting both custody and bail cases as discussed in Chapter III. There is also a time limit of eight


\(^{13}\) Supra note 3, para. 8.33, p.15. The Royal Commission on criminal procedure stated that time limits in the United States of America had little success. In fact, the Commission observed at para. 8.35:

"experience of time limits in other jurisdictions suggests to us that a time limit of itself does not automatically attract adequate resources and in their absence it tends to result in adjustments of the system to circumvent it."
week from committal to trial. If that time period is exceeded, the accused can only be tried with the consent of the judge.\textsuperscript{14} However, the trial judge generally consents to trial.\textsuperscript{15}

A legislative provision in this jurisdiction which fixes a time period from committal to trial would give an added dimension to the constitutional "reasonable time" provision.

There should also be time limits relating to unfit or incompetent accused persons. The courts in Jamaica have no power to make an Hospital Order or an order committing any person to a mental institution. The issue of unfitness to plead is dealt with after arraignment. When the jury makes a finding that an accused person is unfit to plead, the accused person is kept in "strict custody" without any fixed time constraints. In \textit{R v Hubert Prince},\textsuperscript{16} which was discussed in chapter II, Prince was tried and found guilty of manslaughter after being in "strict custody" for ten years.

What lessons can be learnt from the English and American experience regarding speedy trials as they related to the incompetent or unfit offender?

Both the English and the American approach are to avoid

\textsuperscript{14} \textit{Great Britain}, Courts Act, 1971, s.19. See also the Crown Court Rules, 1971, S.I. 1971/1292.

\textsuperscript{15} Supra note 3.

\textsuperscript{16} Unreported K20/87(3). It must be noted that a probation officer, who interviewed Prince, said that Price informed him that he was not mad but he was hoping that with time the witnesses would have died or leave the jurisdiction. See Newspaper: The Jamaica Record, "Inmates (Mentally Incompetent) In Prison 10-15 Years", Kingston, vol. 2, No. 294, May 14, 1990, p. 1.
prolonged pre-trial incarceration. The American jurisprudence suggests that regular evaluation of accused person's competence should be undertaken. Thus, in *United States v Geelan*,\(^{17}\) the court, per Solomon J, stated that the federal prosecutor violated his duty to the accused person by not obtaining regular reports on him after he was adjudged incompetent and committed to a state hospital. The court emphasized the fact that the government has a duty to bring an accused person to trial as promptly as possible and must carefully and vigilantly protect the interests of both the incompetent individual and society.\(^{18}\)

In England, the issue of fitness to plead may be dealt with or postponed until any time up to the opening of the case for the defence.\(^{19}\) It is in the interest of the accused that the issue of fitness is tried after arraignment, as the defence may successfully challenge the prosecution's case on points of law or fact.

In England, when an accused person is unfit to plead or a finding is recorded by a jury that the accused is under a disability, according to the nature of the disability he may be:

a) admitted to such hospital as specified by the Secretary

\(^{17}\) F.2d 587 (9th Cir.1975).

\(^{18}\) Ibid. p. 588. Henry Geelan, an incompetent accused, appealed from the District Court because there was a denial of his motion to dismiss the proceedings against him because of the lack of a speedy trial.

of State. While he is detained in pursuance of an admission order, if the Secretary of State, after consultation with the relevant medical officer is satisfied that the accused persons can be tried, the Secretary of State will refer such persons for trial;

b) granted a Guardianship Order within the meaning of the Mental Health Act, 1983;

c) granted a Supervision and Treatment Order within the meaning of Schedule 2 to the Criminal Procedure (Insanity and Unfitness to Plead) Act, 1991;20

d) granted an order for an absolute discharge with respect to (a) above. The court can only make such an order where the sentence to which the offence relates is not fixed by law.21

The English Criminal Procedure (insanity and Unfitness to Plead) Act, 1991, which was recently passed, seeks to improve the position of accused persons who are mentally ill at the time of commission of an offence or at the time of trial. Under this Act, when the court makes a determination that an accused person is unfit to plead or under a disability, it shall proceed to determine whether the accused "did the act or made the omission charged against him."22


21 Ibid.

There should be judicial mandates in this jurisdiction, with respect to the making of Hospital, Guardianship and Supervision Orders. The type of order would depend on the nature of the disability and should be subject to time limits.

If a court is advised by a medical officer that an accused person cannot be restored to competence, the charge should be dismissed forthwith and the accused committed to the care of a mental institution or his family. The court would have to inquire into the suitability of the family unit.

Such an approach would divert those persons who cannot be made fit, from the criminal justice system and speed up the trial process for those who can be brought back to competency. The court should be duty bound to discover how long accused persons adjudged unfit to plead will take to be restored to competence or whether they are making progress towards recovery. This would prove more effective than indefinitely suspending the accused persons' right to "trial within a reasonable time."

Indeed, a secured psychiatric hospital for offenders would encourage recovery towards competency with respect to offenders who can be restored. Further, in the interest of time, the issue of fitness to plead should be tried by a judge. Trial of the issue by a jury is of historical interest; a trial judge could deal with the matter more expeditiously.

1) **CUSTODY TIME LIMITS**

There are no time limits in Jamaica concerning the length of time an accused is kept in custody. However, Custody Time Limits would have the needed effect of expediting the trial process.
The English experience shows that Custody Time Limits "provided valuable discipline and consistency."\(^{23}\)

In \textit{R v Governor of Winchester Prison, Ex Parte Roddie and Another, R v Crown Court at Southampton, Ex Parte Roddie and Another}. The court, per Lloyd L. J, stated:

"The purpose of laying down specific time limits for custody at each successive stage of the proceedings was to prompt the prosecution to move with expedition and to avoid the accused being kept in custody for an excessive period at any stage."\(^{24}\)

The concept of statutory Custody Time Limits as embraced by Great Britain should be replicated in Jamaica with modifications. There should be a time limit of no more than one hundred and ten days between committal and trial. Subject to an extension on a showing of "good cause". Guidelines as to what is "good cause" would eliminate any discrepancy.

The one hundred and ten-day time limit for trial of offenders in custody in solemn proceedings has served the Scottish Criminal Justice System in bringing about a speedy trial. A similar adaptation may produce like result in Jamaica. In the event that the time limit expires and the court does not grant an extension of time, then an accused person would be entitled to be released on bail in accordance with the criteria for bail.

There would also be a positive economic side to custody time limits as resources made available to penal institutions would


now be used to the best advantage. In 1990, it cost the Government of Jamaica about, SEVEN DOLLARS AND EIGHTY CENTS, $7.80, per day to feed only one prisoner. In 1991, it cost the government TWELVE DOLLARS, $12.00, per day. The budget allocation for the period 1991-1992 was J$88.8 million which was considered inadequate. In 1990-1991, the budget allocation was J$75.6 million. These sums were allotted to repair buildings, vehicles and administer the business of the prisons.  

It now costs a little over TWELVE DOLLARS, $12.00, per day to feed a prisoner three meals, due to the fact that there are two penal institutions which operate farms; Richmond and Tamarind, which produce certain foodstuffs. The penal institutions make purchases from these farms at a reduced cost.

Empirical research shows that Custody Time Limits:

"alone will only have limited effect in helping to shorten waiting time to trial, particularly in serious and complex cases."

In Jamaica, complex cases are not a significant proportion of the composition of the criminal caseload, Custody Time Limit would reduce delay in the disposition of remand cases, as it would place additional pressure on the prosecutor to move expeditiously. As an alternative to remand in custody, use could be made of electronic monitoring of accused persons who

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25 Information obtained from Roy Roberts, Department of Correctional Services, 40 Harbour Street, Kingston, Jamaica.

properly should be in custody and are released on bail. This measure would ease the congestion problem in the prisons.

Comprehensive time limits similar to the United States of America Federal Speedy Trial Act are not recommended for implementation in this jurisdiction. If the proposed time limits are implemented in Jamaica, then there must be prescribed judicial imperatives for their enforcement. Moreover, the attitude of lawyers would also have to be changed to make the implementation of time limits work. As a possible first step to this change in attitude, the Registrar of the Supreme Court could periodically publish long-standing cases which are in the judicial system, the number of adjournments, along with the names of the lawyers involved in the cases. This might encourage counsel to change their present tendencies towards adjournment and so prepare and dispose of their cases in a less time consuming manner.

2. STATUTORY LEGAL AID

The demand for criminal legal service has risen. The effect, therefore, is that access to lawyers is either difficult or not available to those persons who cannot pay.

In 1980, a study of the Gun Court was conducted by Myrtle Grandison. This study revealed that fifty-three per cent of persons accused of firearms offences could not afford a lawyer. Because legal aid is considered the foster-child of the practice, there are few lawyers available to represent persons requiring criminal legal aid. Some of the lawyers who participate, have developed an adjournment culture, hence this has contributed to delays in the criminal courts. In R. v

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Leroy Cargill and Patrick Roberts, the Court of Appeal of Jamaica made reference to the delays in legal aid cases. The court called attention to the fact that Rule 13 of the Poor Prisoners' Defence Rules, articulated in the Third Schedule of the Act, was frequently relied on by counsel. Rule 13 states that where an assigned counsel appears for a prisoner, counsel may return the brief eight days before the commencement of the trial. The court also observed in Cargill's case that it was with grave difficulty that a lawyer could be found willing to accept a legal aid case.

Free statutory legal aid is provided by the 1961 Poor Prisoners' Defence Act, which repealed the poor Prisoners' (Capital Offence) Law. This Act provides legal aid to an accused person whose charge falls within a certain category of legal offences, for instance, murder, manslaughter, rape and robbery with aggravation. The main criticism voiced against criminal legal aid is that the fees are unattractive and do not represent fair remuneration for services rendered. Again, payment for legal aid services is long in coming. With the increase in the cost of petrol and the inflationary economic trend in general, lawyers who were actively engaged in this area have been compelled to withdraw their services.

As there is an absence of incentive to accept legal aid, and the lack of a desire on the part of lawyers who accept it to proceed with due speed, statutory legal aid should be revised to adequately compensate the participants. A senior lawyer for instance, gets J$262.60 (6.30 pounds) for the first day of a murder trial and J$150.00 (3.57 pounds) for each successive day he appears.

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28 Unreported: S.C.C.A. No. 130, 131/84, p.4.
29 Ibid.
What, therefore, is the solution to this problem?
An accused person who satisfies the criteria for statutory legal aid might not be financially able to retain a private lawyer but might be in a position to make a contribution. Those who can make a contribution should be compelled to do so in accordance with their means. A scale of contributions should be worked out taking the accused persons's weekly, fortnightly or monthly disposable income into consideration.

Where the accused is unemployed, then a means test could be done on the basis of any savings the accused might have. If he has no savings, at the time the means test is done, then should his financial situation improve during his trial, the courts should be informed so that a contribution can be obtained. Where the accused cannot pay, he would still be entitled to statutory legal aid; this would ensure a fair trial for every accused person. Criteria should be laid down so that the process is not abused. Fix fees are not recommended as they do not take into consideration the complexity of the case.

Additionally, where several persons are jointly charged, there should be but one legal aid lawyer. If, however, there is a conflict of interest in so far as the accused persons are concerned, then each would be entitled to separate lawyers.

Where an accused person is assigned a legal aid lawyer, then the accused must show good cause why he/she wants a change of lawyer. The Deputy Registrar of the Supreme Court recalled a case where an accused person changed about eight legal aid lawyers. Rule 14 of the Legal Aid Rules instructs:

"A person who refuses to accept the services of counsel or a solicitor assigned to him under a legal aid certificate in respect of any proceedings shall not be entitled to have another counsel or
solicitor assigned in respect of those proceedings."

The reality is that an accused can change his lawyer and the court is quite willing to grant a change of lawyer if the accused person so desires. If he refuses to accept a female lawyer, the court would accommodate him.

Finally, it should be the rule-of-thumb of the Bar Association in Jamaica, that lawyers should not refuse a criminal case because the evidence against the accused appears to be strong or because of the nature of the defence; to do so is to anticipate the verdict of the fact finding tribunal and to usurp the power of the jury.\(^\text{30}\)

In England, the legal profession attaches great significance to the "cab-rank" rule. The nub of this rule is that barristers are available to clients, whoever they may be and whatever their cause. The Bar Council thinks it is wrong that instructions of any kind should be refused on the basis that the barrister does not do legal aid work.

3. **PLEA BARGAINING**

In view of the expressed desire by persons in the criminal justice system, for formal introduction of plea bargaining based on the United States of America plea bargaining system, conclusions and proposals in this regard will be made. As discussed in chapter IV, plea bargaining is an Anglo-American expression and plays a prominent role in the administration of justice in the United States of America. Because of increasing caseloads in that country, plea bargaining has become the norm.

In England, there is no institutionalised system of bargaining, yet a significant proportion of convictions are based on guilty pleas, particularly in the magistrates’ courts.\textsuperscript{31}

Plea bargaining in the true sense of the term is alien to Jamaica criminal justice system. What can be termed charge concession, not plea bargaining, is what exists in Jamaica. To call this type of concession, plea bargaining, would be a pejorative misnomer.

In Jamaica, charge concessions could take the following forms:

a) On the request of defence counsel, the prosecution might agree to modify a charge and proceed with a lesser charge, for instance, manslaughter instead of murder, but the allegations should support the lesser charge.

In this regard, the prosecution should be guided by the dictum in \textit{R v Soanes.}\textsuperscript{32} In that case, the accused person killed her baby and was charged with murder. Pursuant to an agreement that she had with counsel for the prosecution, she offered to plead guilty to the offence of infanticide. The trial judge disapproved of this arrangement and insisted that the accused stand trial for murder. The accused was convicted of infanticide at the trial.

The judge sought the opinion of the court of criminal appeal as to whether the accused’s guilty plea to the lesser offence ought to have been accepted. Lord Goddard observed, that it


must always be in the discretion of the judge whether he will allow a plea to a lesser offence. Moreover, it was improper for counsel for the crown himself to propose a charge reduction agreement, where there was nothing on the deposition which suggested a reduction of the charge or crime to a less serious offence.

In cases where an accused person and another have a quarrel and the accused person in the heat of a quarrel picks up a stone and strikes the person and that person dies, the prosecution usually accepts a guilty plea to manslaughter. However, the acceptance of the plea to manslaughter is subject to the court.

b) On the request of the defence, the prosecution might concede to dropping lesser or other related charges on an indictment if an accused person pleads guilty to one or more of the charges. The other charges may be withdrawn; where there is another indictment with other related charges, the court may direct that these charges remain or lie on the file.

c) Where the evidence against a co-accused is very weak, the prosecution may withdraw the charge against the co-accused in return for the co-accused giving evidence against the other(s). Of course, where the accused pleads guilty, he is granted a less severe sentence. Where the prosecutor withdraws or reduces a charge, without a request being made by the defence, this would not be a charge concession as this would be a unilateral act of the prosecution.

Charge concessions or guilty pleas play a triniscule role in the Jamaica criminal justice system. On the question of guilty pleas, J. F. Dayle stated:
"A judicial unit can dispose of about eighty-eight cases per year. If a judicial unit is to dispose of, two hundred and fifty cases or more per year, the plea rate must be seventy-five per cent or more."33

In every twenty-five or more cases there might be one guilty plea. In the Michaelmas term, for the period October 29, 1990 to November 16, 1990, of the fifty-seven cases on the calendar for Kingston and St. Andrew, only one accused person pleaded guilty and this was to the charge of wounding with intent. While in the Hilary term, for the period January 28, 1991 to February 1991, of the seventy-four cases on the calendar for Kingston and St. Andrew, there was only one guilty plea and this was in respect of a murder charge and the accused pleaded guilty to manslaughter. During the Easter term, for the period June 3, 1991 to June 21, 1991, of the forty-nine cases listed on the calendar for Kingston and St. Andrew, there was only one plea of guilty and this was to a manslaughter charge. Here again the accused was charged with murder. The data in Table X are inadequate, but give some indication of what occurs in the Home Circuit Court, one of the busiest courts.

## TABLE X

GUilty Pleas for the Parish of Kingston and St. Andrew*

<table>
<thead>
<tr>
<th>DATE</th>
<th>NO. OF GUILTY PLEAS</th>
<th>PER CENT GUILTY PLEA</th>
<th>TOTAL NO. OF CASES LISTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1.92-3.2.92</td>
<td>8 (manslaughter)</td>
<td>15.4%</td>
<td>52</td>
</tr>
<tr>
<td></td>
<td>(incest)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>28.1.91-15.2.91</td>
<td>1</td>
<td>1.4%</td>
<td>74</td>
</tr>
<tr>
<td>18.2.91-8.3.91</td>
<td>2</td>
<td>2.9%</td>
<td>67</td>
</tr>
<tr>
<td>10.5.91-24.6.91</td>
<td>2</td>
<td>2.8%</td>
<td>71</td>
</tr>
<tr>
<td>24.6.91-12.7.91</td>
<td>2</td>
<td>4.8%</td>
<td>41</td>
</tr>
<tr>
<td>8.1.90-26.1.90</td>
<td>3</td>
<td>3.2%</td>
<td>92</td>
</tr>
<tr>
<td>12.3.90-6.4.90</td>
<td>4</td>
<td>8.3%</td>
<td>48</td>
</tr>
<tr>
<td>17.9.90-5.10.90</td>
<td>2</td>
<td>2.3%</td>
<td>86</td>
</tr>
<tr>
<td>8.10.90-26.10.90</td>
<td>1</td>
<td>1.6%</td>
<td>60</td>
</tr>
<tr>
<td>9.11.90-7.12.90</td>
<td>0</td>
<td>0%</td>
<td>50</td>
</tr>
</tbody>
</table>

* Court calendars: Supreme Court Registry files.

333
When lawyers intimate to the court that their clients intend to "adopt a certain course", plead guilty, judges tend to distance themselves from any kind of involvement in sentence bargaining. Judges strictly adhere to the guidelines in *R v Turner*[^34] and the practice directions[^35]. They are also mindful of the guidelines in *Dean Robert Warth*.[^36] In Warth's case, the court, per the Lord Chief Justice, suggested there should be:

"No visit to the judge except in the most exceptional circumstances; certainly not to discuss any question of plea. Secondly, if there must be such a visit, and if the judge is thought to have made some sort of promise or indication about punishment, counsel should make a note there and then and ask the judge to approve the note and initial the note before counsel goes to see his client and makes any mention of any suggestion of a promise by the learned judge."[^37]

The real utility of plea bargaining is that cases are disposed of more speedily by negotiated guilty pleas, especially where the caseload is voluminous. The criminal justice system does not have the infrastructure to maintain a system of plea bargaining as embraced by the United States of America and were the rules and attendant safeguards put in place and unfettered discretion given to the prosecution, it would have but little practical effect in this jurisdiction. A criminal justice system responds to its social environment and experience has shown that accused persons who are to be tried by a jury, do not as rule plead guilty.

[^37]: Ibid., p. 190. This case gives an added dimension to the *Turner* guidelines.
The tendency of accused persons to plead not guilty depends to some extent on the accused persons' perception of the risk of conviction if they go to trial. Jurors are not sequestered and jury nobbling is easy. In some part of rural Jamaica, because of the size and integrated nature of the community, jurors tend to pre-judge a case before it is tried. More often than not, the verdicts do not accord with the evidence. In some cases, it is not unknown for members of the jury to be supportive of a particular defence counsel because of previous acquaintance. On an average, for every two convictions by a jury, there is an acquittal. Although not very adequate, Table XI gives some indication of the acquittal rate in the Home Circuit Court.

**TABLE XI**

*HOME CIRCUIT COURT: ACQUITTAL RATE*

<table>
<thead>
<tr>
<th>DATE</th>
<th>TOTAL NO. OF CASES</th>
<th>TOTAL DISPOSED OF</th>
<th>PER CENTUM GUILTY VERDICT</th>
<th>PER CENTUM NOT GUILTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 7-Feb. 3, 1992 (Hilary Term)</td>
<td>81</td>
<td>27</td>
<td>33.3</td>
<td>22.2</td>
</tr>
<tr>
<td>June 3-June 21, 1991 (Easter Term)</td>
<td>49</td>
<td>7</td>
<td>57.14</td>
<td>28.57</td>
</tr>
<tr>
<td>Jan. 28-Feb. 15, 1991 (Hilary Term)</td>
<td>74</td>
<td>7</td>
<td>42.85</td>
<td>42.85</td>
</tr>
<tr>
<td>Mar. 12-Apr. 5, 1990 (Hilary Term)</td>
<td>48</td>
<td>13</td>
<td>25</td>
<td>23.1</td>
</tr>
<tr>
<td>Jan. 8-Jan. 26, 1990</td>
<td>92</td>
<td>13</td>
<td>46.1</td>
<td>23.1</td>
</tr>
</tbody>
</table>

*The statistics concerning acquittals which were discussed in chapter II include the Supreme Court and Resident Magistrates' Courts. There are no statistics on the number of appeals allowed.  
**Source:** Files of the Supreme Court Registry.

335
Although the English experience indicates that there is no institutionalised system of bargaining, sixty to seventy percent of criminal cases are disposed of by guilty pleas. It seems, therefore, "implicit bargaining" takes place. Recently, the court in England articulated the factors which should be taken into consideration when discounting sentence on an accused person who pleaded guilty and had assisted the police and court.\(^{38}\) The Court of Appeal, per the Lord Chief Justice stated:

"Within those limits......the judge must bring himself to tailor the sentence so as to punish the defendant, but at the same time reward him as far as possible for the help he has given.....".\(^{39}\)

The reward factor is central to "implicit bargaining". Notwithstanding this factor, accused persons in Jamaica take their chances. The manifestation of charge concessions should maintain its place in the criminal justice system and its growth encouraged. Perhaps in appropriate cases, prosecuting counsel could approach defence counsel regarding reduction or withdrawal of a charge or charges in return for a guilty plea, instead of the defence making the initial move.

4. **THE DISTRIBUTION OF CRIMINAL CASES**

Removing cases from the Supreme Court to the jurisdiction of the Resident Magistrates' Court would speed up disposition time, as the volume of cases would be reduced. There is no doubt that the procedure for trying cases in the Resident Magistrates' Courts is shorter and cost effective. There are certain cases which are triable either in the Resident Magistrates' Court or the Supreme Court. These cases include,

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\(^{39}\) Ibid., p.411.
the cultivation and possession of ganja, trading in and manufacturing drugs, possession of cocaine and using the xostal services for distribution of drugs. Whether any of these cases is tried in the Resident Magistrates' Court or the Supreme Court would depend on the perceived advantage to be gained by the accused in being tried at either venue. Making provisions to try cases either-way is not a predictable method of removing cases from the Supreme Court.

It is proposed that certain cases should be removed from the jurisdiction of the Supreme Court. This would not shift delay from one venue to another, as preliminary hearings are conducted in cases triable in the Supreme Court and the Resident Magistrate could dispose of the case in the time spent on preliminary hearings. The case that should be transferred to the jurisdiction of the Resident Magistrate are: rape, incest and buggery.

Most young girls, boys and some women are reluctant to give evidence before a jury concerning sexual assaults, and a significant amount of time is consumed in coaxing victims to speak. In some cases, victims are treated in an unfeeling fashion by defence counsel in an effort, either to discredit or belittle victims in the eyes of jurors. In a recent case heard in the Supreme Court in May 1992, a rape victim was cross-examined for four days. Counsel repeatedly asked the same questions. During cross-examination the victim fled the court room in tears and returned only after much coaxing by the prosecutor.

Trial by Resident Magistrates would remove this reluctance and


waste of time. Additionally, these cases would be heard once instead of twice as the need for preliminary inquiries would be obviated. It would certainly reduce the caseload of the St. Catherine Circuit Court which deals with a significant number of rape cases.

5. PRE-TRIAL CONFERENCE/PRE-TRIAL REVIEW
The practical effect of pre-trial conference or pre-trial review in relation to complex cases or cases where there are several accused persons and voluminous documentation, is that they reduce considerably the length of trials.

In Jamaica, pre-trial reviews should be held in complex cases. These should take the form of informal conferences where certain issues are identified and ventilated. These issues would include: severance of accused persons or offences in an indictment; bases of challenges to confession; the order of calling witnesses or presentation of evidence; the order of cross-examination where there are several accused persons; guilty pleas; medical evidence; absence of defence counsel during the trial; the examination of exhibits; disclosure or discovery of certain statements in the prosecution’s possession and the serving of notices of further evidence of additional witnesses.

The procedure should be somewhat parallel to the "summons for directions" in civil procedure with the necessary adaptation to suit criminal practices. The judge conducting the conference should be the same judge who tries the case. A summary of what transpired at the conference should be placed in the judges bundle and the prosecutor’s file. Should an accused change his lawyer, a summary of what took place at the conference should be made available to the lawyer appearing at the trial. This procedure should be held shortly after the accused is committed to the Circuit Court and after a trial.
date is fixed.

This type of review should, among other things, reduce the number of witnesses, eliminate examination of exhibits in court and remove the confusion caused by the disorganisation of exhibits. Judges should not be passive umpires or their "role confined 'only' to the forensic process", but should play a managerial role in the case disposition process and this is one area in which the judge can actively guide a case through to disposition. Judge Peckham in an article, "The Federal Judge As A Case Manager" stated:

"Until quite recently the trial judge played virtually no role in a case until counsel for at least one side certified that it was ready for trial. The judge has, therefore, transferred his role into a managerial activist."\(^{42}\)

The United States of America experience indicates that pre-trial management of criminal cases by judges is a valuable innovation and an acceptable way of life.

In Jamaica, fraud cases which come before the courts are not as complex as those in more developed jurisdictions, preparatory hearings as provided by the English Criminal Justice Act, 1987 c.38 are, therefore, not recommended.\(^{43}\)

6. **CONTROLLING ADJOURNMENT PRACTICES**

The most obvious need, in this jurisdiction, is controlling adjournment practices. The statutory provisions of the United States of America, relating to continuances or adjournments,

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\(^{43}\) Great Britain: Home Office Circular No. 53/87, Criminal 871/54/24 (Background of the 1987 Criminal Justice Act).
provide for continuance where there are: (1) good cause; (2) sufficent cause; (3) exceptional circumstances; (4) in the ends of justice or interest of justice.

It is recommended that this jurisdiction should adopt rules or practice directions which deal with adjournments. There should be a limit to the number of adjournments lawyers can request. "Good cause" for the granting of an adjournment should be a substantial reason, for instance, death, illness, mental incapacity and the inability to obtain witnesses. There should be consensus among the judiciary as to what is "good cause" for granting an adjournment.

An adjournment is not justified and should not be granted, for example, where a lawyer is not properly retained, or where there is a conflict with cases in another court or because of a conflict arising with lawyer’s personal business.

Where illness is relied upon as the reason for requesting an adjournment, proof should be offered. Lawyers who frequently request adjournments should be reminded by the judiciary that the need for expeditious disposition of criminal cases takes priority over their personal convenience. Sound adjournment guidelines or rules is the beginning of expediting the disposition of cases. If judges are prepared to adopt a strict approach to adjournments, then greater efficiency would be achieved.

Further, adjournments caused by the non-attendance of witnesses who, because of fear or intimidation do not attend court, should be addressed by programmes which protect witnesses. Witnesses who are threatened should be relocated.
7. THE ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM
PROPOSALS INCLUDE STRUCTURAL REFORM

a) TECHNOLOGICAL REFORM

Computers can be used to simplify and speed up the system. This type of technology also provides ready statistical information necessary for making management decision such as, proper listing of cases and information concerning the number and availability of witnesses. They can also provide first-hand knowledge of the age of a case and the amount of backlog.

This can prevent overcrowding of the court list or too few cases being fixed for a particular day which would lead to the ineffective use of the judge’s time and court time. There is a paucity of statistical data in the courts and without full information, the needs of the court cannot be adequately determined.

In the interest of obtaining quicker transcript, computer technology can also be used. Some computers are now being used, but one court reporter complained that the computers do not lead to a timely production of transcript. The effective Computer Assisted System (CAT) and the Electronic Sound Recording (ESR) are two systems which have been implemented in the United States of America. The CAT system, which one study has shown to be very effective, should be implemented in this country. Concerning the CAT system, the court reporter’s stenographic machine is adapted to accommodate a tape that is read by a computer. The computer then translates the stenographic code from the tape and produces a rough draft of a transcript in a matter of hours.

In the recent past, courts have failed to operate because of the shortage of court reporters. In order to neutralise the effect of this shortage, tape recorders could be used. A tape
recording can be transcribed by a trained audio-typist or any typist. The tape recording of court proceedings can be monitored by the Registrar of Registrar's representative.

b) COURT ADMINISTRATION AND CASEFLOW MANAGEMENT

In the jurisdictions under consideration, the court administrator, among other duties, assesses the business of the courts and ways of improving the justice system. In fact, the court administrator makes recommendations for the continuing upgrading of the criminal justice system. In Jamaica, the court administrator's role is primarily to deal with some of the civil administrative matters which were dealt with by the Registrar of the Supreme Court.

The court administrator should also deal with some aspects of criminal administration. Among the functions of the Registrar of the Supreme Court, is monitoring the courts to ensure that cases are transferred speedily from one court to another; taking periodic inventories of the age and status of certain older cases that are pending; analyzing them and devising methods of dealing with them expeditiously. As the duties of the Registrar are many and diverse and the Registrar is heavily involved in civil matters, the task of monitoring the status of criminal cases should be transferred to the court administrator.

The problem of court administration is also qualitative and proper control of the progress of cases from their entry into the system to disposition is important to contain the problem of caseloads, delays and backlogs. The court administrator should have substantial training in public administration, management, or on the job training in these area.

As regards caseflow management, there should be a system of continuous consultation between the court administrator,
judges, lawyers, police and court staff concerning problems affecting the efficient running of the criminal courts.

c) MANPOWER
Delay is also a resource problem. People resources are the measure of a system and if personnel are well trained and properly paid, the system must benefit. The Government's Administrative Reform Programme, however, was not successful in attracting the required personnel into the criminal courts. Perhaps it is felt that the salary and fringe benefits offered by this programme were not attractive enough. It has been suggested that graduates whose studies are subsidized by the government should be bonded to work in the legal service for a one or two-year period, thereby ensuring a sufficiency of personnel.44

d) THE JURY SYSTEM AND JURY ORIENTATION
Jurors should be utilized more effectively. Efficient juror utilization includes, summoning to court the number of jurors required and predicting how many jurors are needed on a daily basis, thus, ensuring the early trial of cases.

A uniform policy relating to excuses would increase the number of jurors available for service. Additionally, increased remuneration, reimbursement for travel and daily expenses would encourage more jurors to serve.

To reduce jury deliberation time, proper orientation as to court procedure and their role is necessary. The practical utility of jury orientation is that court time would be used more economically. In addition to the judge explaining to the

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44 The Chief Justice of Jamaica Mr. Edward Zacca spoke to the subject of bonding in an address to a class of law graduates of the Norman Manley Law School.
jurors their role and duty, prospective jurors should receive, along with their summons, pamphlets or handbooks which inform them of the nature of their duty, introduce them to trial procedure and to certain legal terminology. Of course, this booklet would not include instructions in respect of law.

e) SCREENING AND THE PROSECUTOR
The early removal of futile cases out of the criminal justice system is important. Cases should be removed out of the system where there is a lack of evidence, if it is the expressed wish of the victim not to prosecute, if an accused person cannot be restored to competency and if the motive of a witness is improper. Screening is a discretionary decision, but there should be a policy with respect to screening. Proper screening acts as a filter and prevents futile cases from advancing to the trial stage.

f) STRUCTURAL ADMINISTRATION
In the interest of efficiency and expediency, amenities of the court rooms should be more accommodating to court personnel and all the consumers of justice. The court rooms, in rural parishes, could be better ventilated; having regard to the climatic condition their basic amenities should be improved. Many of the court houses were constructed during the early 19th century. They were built to meet to needs of a sparse population and a virtually crime free society. The courts in rural parishes should be modernized so as to reflect the need of the present time. The lack of proper amenities and comfortable surroundings inhibit the desire to work and the timely disposition of cases.

h) DECRIMINALISATION
Decriminalization, de jure or defacto, diversion and forms of non-judicial settlement as reform strategies do not address cases of a serious nature or habitual offenders and,
therefore, proposals for reform in these areas in relation to the superior court will not be treated. Programmes in relation to decriminalization are usually relegated to the lower courts. Research material, as regards diversion, will be used at a future date.

**SUMMARY**

The pattern of rotation judges in the Kingston and St. Andrew Circuit Courts for short periods only proved counterproductive to continuity and the speedy disposition of criminal cases. Increasing the number of judges coupled with the assignment of judges to sit for an entire term in Kingston and St. Andrew Circuit Court has proven somewhat effective in speeding up the disposition rate. Attempts are not being made to remove the Gun Court from its present location at Camp Road to the Supreme Court Building, downtown, Kingston. Because of the location of the Gun Court, where sittings become overloaded, little can be done to transfer cases to where sparse capacity exists. This measure would afford relief to the Gun Court workload as cases can be easily transferred from that court to other courts and vice versa.\(^5\)

The Committal Proceedings Bill is intended to solve the problem of delay and remove the unnecessary waste of manpower. While this objective is likely to have the advantage of speeding up the trial process, if statements are not carefully screened, then weak cases could remain in the criminal justice system for too long a period. In addition to the remedial proposals, there should be a provision in the Bill allowing Resident Magistrates to accept guilty pleas at the committal stages. Thereafter, they would forward these cases to the Circuit Court for sentencing.

There is no time limit on the time an accused person, unfit or otherwise, is kept in custody. Neither is there any time limit between committal and trial. Although comprehensive time limits similar to the United States of America Speedy Trial Act is not recommended, time limits with respect to incompetent offenders, custody cases in general and an overall time limit between committal and trial are proposed, as they would affect the speedy disposition of cases.

Having regard to the difficulty in obtaining lawyers to conduct legal aid cases, the fees should be revised so as to reflect present economic reality or 'fair remuneration'. A scale of contribution by offenders entitled to legal aid should be streamlined.

Guilty pleas save time and resources. However, Jamaica does not have the infrastructure to maintain a formal system of plea bargaining as practiced in the United States of America. However, informal charge bargaining or charge concessions should be encouraged.

The effect of the distribution of criminal cases between the Supreme Court and the court of summary jurisdiction is to reduce the caseloads of the Supreme Court. Sexual assault cases should be removed from the Supreme Court to the Resident Magistrates’ Court, as an added fillip would be given to the movement of cases.

Because of the frequency with which adjournments are granted, it is recommended that they should be controlled by means of sound adjournment guideline. Judges should also adopt a stricter approach to adjournments.

Speeding up the trial process involves a multifaceted approach. New technology, pre-trial conferences, effective
caseflow management, manpower resources, jury orientation, a change in the attitude of the "local legal culture", along with the other recommended strategies should allow for better utilization of court time, improve the efficient running of the courts, remove delays, caseloads and backlogs, thereby, improving the quality of justice. Delay is contrary to the principle of justice articulated by chapter 29 of Magna Carta: "nulli vedemus, nulli negabimus aut differemus rectum vel justiciam". However, speed should not be achieved as to cause injustice.

As a practical measure, continuous modernization of procedural and administrative rules, coupled with frequent evaluation of the criminal justice system is indispensable if delay is to be kept at a tolerable level.
Appendix E

A PROPOSED GUIDE TO POLICE STATEMENT TAKING

a) When taking a statement, it should be contemporaneous with the interview and a verbatim record made. This will avoid challenges at the trial and give credibility to the statement.

b) Where a suspect elects to make a confession, he should be cautioned in accordance with the judges’ rules. A record is to be made of the time and place of the questioning and a verbatim record taken of the statement made.

c) Prior to cautioning a suspect who elects to make a confession, the police should obtain an independent third party, a justice of the peace or an attorney-at-law. This would not only lend fairness to the statement taking procedure, but would tend to make a confession taken in such circumstances almost unchallengeable.

d) All statements and questions and answers should be signed by the suspect and countersigned by the person(s) present.

e) Police officers present at the taking of statements and, or questions and answers should be unarmed.

f) Where a suspect, before reaching the police station, makes an oral confession, for instance, "I killed 'X'", the policeman should make an accurate record of it in his notebook and where practicable, obtain the suspect’s signature or mark.

g) Where a suspect gives a statement in another language, an interpreter should record the statement in the
language of the suspect verbatim and an official translation of the statement made. It should be signed by both the translator and suspect after being read over to the suspect. These may be tendered at the trial as exhibits.

h) The suspect should be supplied with a copy of his/her statement/confession.

i) Where the suspect is dumb, he may communicate manually by means of finger spelling or sign language through an interpreter to a policeman, who records verbatim what the suspect states through the interpreter. This is to be read over to the suspect, through the interpreter and signed by the suspect and countersigned by the interpreter and police as to its correctness.

**COMMENTARY**

All police stations should have statement forms for accused persons or suspects. The form should commence with these words:

"You are charged with the offence...........you are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

OR

"I................., wish to make a statement. I want someone to write down what I say I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

If suspect wishes to make a statement, then he ought to sign the above caution after it is read or the suspect reads it. The suspect should be invited to write his statement himself
if he so desires. A statement written by a suspect would be more compelling.
Appendix F

EXTRACTS FROM MEMORANDUM ISSUED BY THE DIRECTOR
OR PUBLIC PROSECUTIONS (IAN X. FORTE, O.C. NOW
APPELLATE JUDGE) JULY 29, 1982

a) That it is agreed that prior to a person being subpoenaed
to attend court to give evidence for the prosecutor, it
is permissible for a defence attorney to interview such
a person and take a statement even though that person has
already given a statement to the police.

b) It is the view of the Director of Public Prosecutions
that after a person has been subpoenaed to give evidence
for the prosecution, a defence attorney shall not
interview the witness except with the consent of the
Director of public Prosecution or one of his officers.
Such consent:

i) Shall only be given where the witness has indicated
that he has information which may be favourable to
the defence and that he wishes to reveal that
information to the defence; and

ii) May include a requirement that a member of the
Director of Public Prosecution’s Office be present.

3. It is the view of the representatives of the private bar
that once a witness, who has been subpoenaed to give
evidence for the prosecution, offers himself for
interview on the basis that he has something that may be
of assistance to the defence, the only obligation of a
defence attorney is to inform the prosecution. It was
agreed that where the prosecution intends to lead
evidence or verbal admission or confessions, the defence
should always be alerted before the start of the case of
such intention and the terms of the admission/confession
so as to give the defence an opportunity to determine
whether or not to challenge the admissibility of the
evidence.

**COMMENTARY**

These rules of disclosure as they relate to the defence interviewing crown witnesses and the prosecutor alerting the defence as to evidence of verbal admission or confession were decided upon by the Director, a Deputy Director, Mr. Glen Andrade Q.C., now Director of Public Prosecutions, a delegation of the American Association of jurists and members of the Jamaica Bar Association.
Appendix G

*PROPOSED DISCLOSURE RULES*

a) Where the prosecution takes a statement from a witness who can give material evidence on behalf of the defence, and who the prosecution does not intend to call, prosecuting counsel is obliged to supply the name and address of that witness and a copy of the witness’s statement.

b) Where the prosecution witness gives evidence which conflicts with a previous statement or deposition made by him, prosecuting counsel is obliged to show the statement to the defence so defence counsel may cross-examine on it.

c) The defence should be informed, by the prosecutor, of all convictions of a crown witness who has a criminal record of the kind which would affect the credibility of that witness.

d) The prosecution should furnish the defence with all expert, technical or forensic evidence (handwriting, ballistic report) or similar report.

e) Where the defence proposes to adduce expert evidence, be it fact or opinion, he should furnish the prosecution with a statement of the opinion or findings or give the prosecution sight of the evidence he seeks to adduce or a copy of the opinion in his possession.

f) The prosecution should provide the defence with a copy of any written statement made by the accused or co-accused written or oral.

* See the Royal Commission on Criminal Procedure, Chairman: the Sir Cyril Phillips, Cmnd. 8092, 1981.
g) The prosecutor should provide the defence with a copy of statement or record of previous convictions of prosecution witnesses or accused persons in their possession.

h) The prosecution should, notwithstanding the relevance of a statement, refrain from furnishing a copy or allowing the defence to have sight of it, on the ground that it would be against public policy so to do. This might include national security, safety of witnesses, disclosure or unusual form of surveillance method of crime detection, alerting someone not in custody and who is a suspect and the possibility of intimidation. The objection and the reason for it should be in writing. If the defence challenges the refusal for disclosure, then the judge should rule on it. The judge should not be obliged to disclose the contents of the statements to the defence.

i) The prosecution may withhold the statement of a witness who the prosecution knows or believes the defence will call. However, if the defence does not call the witness, then the statement should be disclosed to the defence.

OR

The prosecution should have a discretion to supply the defence with only names and addresses or other details enabling the witnesses or persons to be identified so that the statements of witnesses can be used for cross-examination, if it is clear to the prosecution that the witnesses or persons will be called by the defence.

j) Disclosure of the name and address of a sensitive or vulnerable witness or other details enabling that witness or person to be identified should be supplied to counsel for the defence, by the prosecution on the understanding...
that this information should not be communicated to the accused person.

k) Where the Prosecutor is of the view that a statement will be used for improper purpose, for instance, the defence will attempt to have the witness tell untruths or depart from his/her former statement, then the prosecution is obliged to supply only the name and address.

l) Where the prosecution serves an edited statement on the defence prior to or during the committal proceedings, the defence should also be served with a copy of the statement upon which the edited version is based.

m) The prosecution should allow the defence to inspect electronic recording of any statement.

n) There should be a continuing duty on the prosecution to disclose.

COMMENTARY
What is "material" is subjective; in fact, the prosecution and the defence might not be ad idem as to what issues are material. There is no procedure to determine or consider materiality. The materiality issue could be resolved by the judge at the pre-trial conference.
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