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CAUSES FOR DELAYS IN THE CRIMINAL JUSTICE SYSTEM

Report to the Ninth Criminological Colloquium on
"Delays in the Criminal Justice System"
Council of Europe, Strasbourg Nov.28-30, 1989

Veröffentlicht in:

Delays in the Criminal Justice System - Causes and Solutions. Council of Europe,
Criminological Research, Vol. XXVIII, Strasbourg 1992, S.47-84

"The chief reason why the State devotes so much time and effort to the administration of justice is to promote the cause of peace and tranquility in the community."

William H. Taft, 1908

1. The Problem of Delay in the Criminal Justice System

Delay in the Criminal Justice System has long been perceived as a serious problem "not easily controlled by executive, legislative or judicial branches of government" (Garner, 1986).

The public, the individual offender and the victim have a right to the prompt disposition of the criminal case in which they are involved. Nevertheless, mainly the right of the offender for a fair and quick trial plays an important role in decisions by the European Court of Human Rights, the European Commission and the higher courts of the member states. Both the right of the victim and the concern of the public should be discussed under the aspect of delay more than it is done till now.

There are many reasons for this concern about delay in the criminal justice system. Delay influences the effectiveness of the system and especially the effectiveness of the punishment by postponing the sanction and putting off the punishment of the guilty and the vindication of the innocent (Feeley, 1979). Both individual and general deterrent effects may be influenced by delayed reactions. In the terms of the theory of "positive general deterrence", intending to strengthen the attitudes of the law abiding people, justice delayed might be justice denied.

Delay undermines not only the effectiveness, but also and especially important, the reliability and credibility of the system (1). Delay dilutes the strength of the prosecution, because victims and witnesses, burdened by the duration of the proceedings and/or the necessity of repeated court appearances, lose interest, refuse to cooperate (Cannavale, 1976) or are no longer capable of contributing evidence because of the long period of time between the occurrence of the offence and the court hearing.

Delay might affect the motivation of the members of the penal system. The longer the proceedings run, the lower their motivation in clearing a case becomes and delay increases the (financial) costs of the procedure for both the State and the defendant. This seem to be an important aspect for the implementation of delay reducing legislation (Church 1982).

Due to delay, dangerous defendants (if not incarcerated prior to trial) may be free and commit new crimes (National Bureau of Standards, 1970). On the other hand, pre trial delay may violate

the right of the offender in custody on remand if he or she is not incarcerated after the trial (2), as delay generally affects the rights of the defendant as mentioned by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in State constitutions and other laws.

2. Definition of "Delay" and of "Causes for Delay"

To detect possible causes of delay we first need a clear definition of what "delay" means. It seems very easy to define what delay is: a train or a plane is delayed whenever it arrives later than the scheduled time says and the admirer is delayed even one minute after the date.

We have very effective means to avoid or to sanction delays within individual relations, but we have practically no means of avoiding or sanctioning delay in public transportation, in mailing, in public administration and so on.

The problem with the penal system is that clearly defined terms are rare, and even then a "de facto" delay in case processing time does not necessarily result in a "de jure" delay, because every law provides a set of outlets, doublings and roundabouts which professionals can use to avoid the pejorative result of official delays. Furthermore, those terms are of relevance due to their usually very wide time spans in rare cases only. Sometimes we have more vague than concrete terms, such as: the file has to be submitted to the court within an "appropriate time" or "without any delay", and unfortunately the law does not define what "appropriate time" or "delay" is (see Appendix A for the F.R.G.).

Looking at decisions by the European Court of Human Rights, "reasonable time" begins to run with the charge and ends with the sentence. The "reasonableness" of the length of the proceedings have "to be assessed according to the particular circumstances with reference to the complexity of the case, the conduct of the applicants, and the conduct of the authorities. ... The inordinate delay found to have occurred in the instant case should ... be regarded as exceeding a reasonable time" (3). Such vague definitions are not at all compensated by the statement the court, that "it falls to the respondent State to come forward with explanations".

Such definitions might be useful for the jurisdiction on Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court, but not for a criminological or sociological analysis, esp. in "ordinary" cases with case processing time under 17 years (Eckle Case, where the quotation above stems from).

The right to a "speedy trial" is one of the guarantees of the U.S. Bill of Rights and many U.S. and other State constitutions. U.S. Courts have established standards and imposed penalties for the violation of this right, and the successful exercise of this right could influence the pace of litigation (Garner, 1986).

The West German Constitutional Court decided, that a considerable delay, caused by the administration of justice violates the right of the offender for a fair and legal (constitutional) trial (BVerfG NStZ 1984, 128). Extremely long procedures abase the offender to be object of the procedure, violate the right of freedom and other constitutional rights (Hillenkamp 1989). But consequences are discussed with different results (4), and time spans under discussion are extremely long, beginning at some five years.

If we take an advance look at the empirical studies, dealing with delay within the Criminal

Justice System (see Church et al. 1978 a), once again we find no easy answer to our question, what "delay" really means. Garner (1986) showed, that there is little to no consistency in how case processing time is measured and which time span is considered a delay. Delay usually denotes abnormal or unacceptable time lapse (Luskin, 1978). "While some writers refer to delay in terms of "court congestion" or "backlog", others refer to it in terms of "excessive" case processing time or the "pace" of litigation. Still others differentiate between "court system delay" and "lawyer caused delay" or "filled" and "significant postponement" time in litigation" (Bridges, 1982) (5).

Virtually every study of delay in the justice system has begun with a lengthy exposition of the problems with the term "delay", and mentioned the necessity of using a less value laden label for this subject. There is little question that delay is at best a vague pejorative (Church 1982). But there is no advantage using the term "case processing time" (or "pace of litigation"), as Luskin preferred, rather than "delay". The measures of delay that researchers invariably use are in fact measures of case processing time, that is, normal plus abnormal time lapse, and not of delay alone (Luskin, 1978). Delay is included in this measurement. Changing the word does not help solve the problem of determining from which moment on we measure the length of a delay. Furthermore, Luskin and many others give no explanation of "normal" and "abnormal" time laps in measuring case processing time.

It is not here to decide whether we really need a consistent, uniform and comprehensive theory of delay or of case processing time, as Luskin pointed out, which defines variations across individual court cases, jurisdictions and time. Even in a somewhat homogeneous jurisdiction such as the United States, it was not possible to establish such a uniform theory of delay (Luskin 1978), nor was it possible to find homogeneous measurements and a homologous starting point for empirical research (Garner 1986). Even if we find a theory including different causes, this theory will not describe the relationships between the causes (6). Only full-fledged models of case processing time may show the extent to which an innovation intended to reduce case processing time can be expected to do so (Luskin, 1978), but it is very likely that we will not be able to find or to define a comprehensive theory with explanatory value for the very different jurisdictions of the member states of the Council of Europe.

What we can try to do, however, is to point out at least some ideas on how delay is produced, which factors may influence case processing time. Furthermore, and not to underestimate, to show that it is possible to find delays in nearly every penal law case, and that nearly every case could be processed more quickly than is presently done.

Policy makers should be capable of finding the various methods which a given jurisdiction may use to speed up case processing time without use of a comprehensive theory or mathematical models.

To do so, they might use our papers and the results of our colloquium as a screen or filter to find out what the very typical regional problems are, and how to cope with those problems. As different studies showed, regional differences in sanctioning and case processing are plentiful and wide-spread (Eisenstein/Jacob 1977; Feltes 1984a); therefore solutions must also be so.

The result is that we should use a more abstract definition of delay. Only a broader definition permits adequate possibilities in analyzing the causes on a theoretical level, with fruitful results for local administrators in speeding up criminal case processing and in giving useful models or ideas for reducing excessive case processing times without new laws or big changes in law

administration.

For this reason, we will use the following definition of delay:

A procedure is delayed whenever it takes more time than necessarily required by the penal system, considering all procedural, constitutional and other rights of defendant, victim and witness.

If we split the total case processing time in terms like Steenhuis did (see his Introductory Report), "unproductive" waiting time may be defined as time when nothing is done that will bring the file to the next procedural step, and delay is any time during which a case is resting, while from a procedural point of view, the next step could be made.

If we look at the different steps through which a file has to pass, we have working time (somebody is working on a file, e.g. a secretary filling out forms, a prosecutor drafting a decision, a judge managing hearings), procedural waiting time or statutory waiting time (e.g. the summons must be made some weeks in advance of the trial; the defendant must appeal within a given time), organizational waiting time (e.g. the time needed to inquire about prior convictions) and transportation time (e.g. a file is mailed to another court).

If we take these steps, a delay occurs whenever the next step can be taken but is not taken for whatever reason. A delay in one of these steps must not necessarily result in delay of the whole procedure. The next step could be taken more quickly than usual. However, different delays on different levels may account for delay in the whole procedure, and we may have delay within or between the different steps, or delay caused by interactions between different parts of the system.

Definition of Causes for Delay

To analyse the causes for delay, we also need a definition of what a cause for delay is. Once again we suggest a broader and more open definition in order to include as many possibilities of causes as possible, and to avoid the exclusion of causes which might not be relevant to a particular case, jurisdiction, or country, but which might be of great relevance in another. Since procedure which is used affects the case processing time, our analysis must include the factors affecting the decision of which procedure will be used in clearing the file.

For this purpose we will use the following definition of cause for delay:

A cause for delay can be any factor, aspect or circumstance affecting the length and / or the type of procedure, resulting in a delay as defined above.

At least three more questions should be asked in advance in order to help to clarify the topic:

- Who is defining a given time span as a "delay", and according to whom is a procedure or a court decision "delayed"?
- Who has or might have an interest in defining or producing a delay and for what purpose (e.g.:

lawyer, defendant, judge, prosecutor)? The various types of delay serve many different functions for the actors in the criminal justice system and should be considered in their various component parts (Feeley 1983). Should we analyse causes in relation to the different interests of the actors in the penal system?

- Who are the victims of delay and what kind of harm or loss is caused by their victimization through an delayed procedure?

3. Information on the relation between case processing time, delay and other factors:
What are the (possible) causes for delays?

3.1 Case processing time and delay

If we use the term "case processing time" for the time needed to process a file through the criminal justice system, this time might be shorter or longer depending on different factors influencing the means of processing and the means by which the case is cleared. The term "case processing time" is a neutral, descriptive definition with no pejorative meanings. To get ideas on how to shorten case processing time and to have files processed more speedily and effectively, it seems to be significant to find out which factors might influence this time. The chart 1 shows possible factors influencing the case processing time and possible delays (see chart 1).

When analyzing the causes of delay, we can find avoidable causes, superfluous causes, necessary causes (no delay, if we use the definition above), unlawful, unconstitutional causes, or causes violating the European Convention on Human Rights.

Causes can be shared by individuals and institutions who are responsible for the delay. In the following section we will try to list some assumed and proven causes of delay, or factors influencing the case processing time. Interviewing criminal justice officials will uncover many more causes of delay, especially if we look at very special regions or court districts.

3.2 Causes for delay at different levels of and caused by different actors within the criminal justice systems

3.2.1 Judge and Court

Taft reported some eighty years ago that a system "had a marvelously good effect in keeping the dockets of the court clear". This system (in the Philippines) denied a judge his regular monthly salary unless he filed a certificate in which he declared that he had disposed of all the business submitted to him within the previous sixty days (Taft, 1908) (7). Because such easy solutions are not feasible in today's democratic societies for whatever reason, we find at least in the United States a thorough research on court delay. But as Garner (1986) pointed out, the bulk of the research on court delay is content to collect data and report findings without any specification of their theoretical implications (8). This might be one of the reasons why the empirical results of the studies on court delay generally speaking are not uniform and at least unsatisfactory.

As far as I know, we had no such studies in Europe, except the new one by the Research and

Planning Unit of the Home Office (Morgan, Vennard 1989) and a study in progress, drafted in collaboration by the German Max-Planck Institute in Freiburg and some Turkish colleagues (9).

Court Rules and Speedy Trial Legislation

As to court rules, used by the U.S. Supreme Court and State appellate courts to exercise oversight and administrative authority over trial courts, studies report no unanimous results in whether those court rules, addressing the issue of delay, improve case processing time or not (Grau & Sheskin, 1982). The same is true for studies on Speedy Trial Legislation (Fort et al., 1978; Ames et al., 1980; Bridges, 1982) (10). The studies were unable to establish the mechanism by which court rules or legislation influence processing time or to distinguish the role of the rules themselves in reducing case processing time from the role played by the sensitivity to delay that generated the adoption of the court rules in the first place. Only Garner (Garner, 1986 a) found a significant effect on the reduction of each case processing time by those policy initiatives (see P.Morgan's Report).

The studies show that the way courts and prosecutors are accustomed to handling and processing cases is difficult to change by administrative or "official" means due to long established traditions and personal preferences which are hard to prove with quantitative empirical methods. Those preferences determine the way of case handling much more than "official" factors. Even those reasons given by prosecutors and judges themselves need not be the relevant ones.

On the other hand, official programs to reduce delay may have an impact by furthering awareness of the problem in penal system agents, who may change their habits by their own choice rather than by "l'ordre de mufti". That's the reason why we might call for "Glasnost" in sanctioning and more information on case processing.

In the Federal Republic of Germany, in 1974 a bill (11) was passed with the main intention to speed up the criminal proceedings (Rieß 1975). As far as I know, no extensive empirical research was done to detect any effects of the law. As the statistics show, the percentage of cases proceeded within three months increased after 1974. But as I will show later, this increase succeeded until nowadays and was mainly caused by a decrease in the percentage of formally sentenced cases, or, vice versa, an increase in dismissals by the court (see table 1). Therefore it is hard to decide whether or not the reform of 1974 had a direct impact on the case processing time in the Federal Republic of Germany.

3.2.2 Expert

An expert may delay the case processing if his report takes longer because of necessary special examinations (medical, psychiatric, or psychological) or analysis (chemical, physical or other). Delay may also be caused by the fact that a special expert is needed for the case and is not available, or because of problems with the evidence (e.g. very small pieces or pieces which are very difficult to examine). To reduce this possibility of a delay, the already mentioned German Reform of 1974 gave the court the possibility to arrange a term to deliver the report and to impose sanctions, if the expert does not submit his report in time.

3.2.3 Defendant, victim, and witness

As to the other participants, we have a bulk of causes which may delay the case processing. Waiting time often can not be avoided because of rights of the victim or defendant, or due to procedural restraints. A delay may be in the interest of the offender, e.g. to stay at a special pre trial detention centre, to get time to show the court good behaviour, or simply to stay free in case a custodial sentence is expected. Characteristics of the defendant may have a major effect on delay as reported by Eisenstein and Jacob (1977), but it was not determined in which way the different characteristics affect delay. If the defendant or the victim or witness is ill, old, handicapped, or not able to follow the proceedings for other reasons, this causes delay as does the fact that he is out of town, or is a foreigner and does not speak the language of the court. Delay can be caused by victims and witnesses if they give conflicting testimonies and evidence or withdraw their testimony.

3.2.4 Prosecutor

As the prosecutor makes decisions concerning the charge, its seriousness and its complexity, his decision can have an important influence on delay. Here again, empirical results are not uniform. Researchers report only occasionally about significant independent effects on case processing time hinging on charge seriousness (e.g. Luskin & Luskin, 1983), and with contradictory empirical findings (Hausner & Seidel, 1979; Wildhorn et al., 1977) or only little direct impact of offence type and seriousness of the charge. The findings suggest indirect influence, mostly through mode of disposition and motions filed (Neubauer & Ryan 1982). Different results are reported for charge complexity (Garner, 1986). Because of the extremely organized administrative work of prosecutors, all possible administrative causes mentioned later may account for delay at the prosecutorial stage.

3.2.5 Police

Delay can be produced if a case is taken unnecessarily to the criminal investigating police or to the detectives by the patrol police, even though evidence may have been sufficient to pass the file directly to the prosecutor or for a decision to be made by the patrol police themselves. If a case has to be dealt with by special police departments and those departments have a case over load at that particular time, this can cause delay as any queuing effect might.

Cases going back and forth between special task forces (tax , custom and investigation service) and the police, or special branches of the criminal police (drug department; homicide department; prostitution department) might take a significantly longer time to proceed than regular cases.

Problems in communication and cooperation between uniformed police, criminal police, and detectives might cause delays in investigating, as problems in cooperation between police and prosecutor may (Steenhuis 1987).

A German study reports no relationship between the length of police inquiries and court proceedings (Bender & Heissler, 1978). The difficulty of the inquiries may have an impact on the length of the court proceedings, but lengthy inquiries do not necessarily have to be difficult, and short inquiries necessarily easy.

There might be factors other than the difficulty of a case which affect the length of the

proceeding. The evidence in general, or in special crimes like rape, where the inquiries take longer time (Hausner & Seidel 1981), or in crimes with a financial background such as fraud, alimony or child support cases, where the prosecutor or police have to investigate the financial circumstances.

The special character of the offense might have an impact on case processing time if it is difficult to get evidence in cases like computer fraud, environmental crime, commercial crime (12), organised and white collar crime.

The number of offenders may also affect the case processing time. More offenders may result in more difficult investigations, but this was not the fact in the study of Neubauer and Ryan (1982).

The kind of the evidence might have an impact on case processing time, as weak evidence leads to easy and quick dismissals, strong evidence to a quick charge for trial, and "medium" evidence to further inquiries and thus delays in the procedure. Short and negligently handled inquiries may result in lengthy court proceedings, because further inquiries are necessary. Prosecutors tend to agree, that negligent inquiries are rare due to double control of investigations by both the police and prosecutors. Furthermore it is mentioned, that a prosecutor, who is repeatedly responsible for negligently prepared cases, is controlled and sanctioned by "his" court or judge through informal but very effective means (Helmken, 1978).

3.2.6 Defence

The defence attorney has considerable potential influence on how and when the case is disposed. Empirical research in the U.S. tends to support the notion that cases with privately hired attorneys move more slowly than cases handled without any counsel or by a public defender (Garner, 1986).

Other possibilities for intended delay by the defence are when a guilty verdict is certain, and the defence tries to gain time (for whatever purpose) or to produce reasons for an appeal (e.g. in Terrorism Cases). (For further explanations see the Report of P.Morgan)

3.2.7 Other institutions

Non penal institutions involved, such as the juvenile department of the social services to give a social inquiry report may also delay the case processing, because the law allows to proceed the case only after this report is brought in. Furthermore, this report may influence the intensity of the personal inquiries by the court. The same is true for probation social inquiry reports (see Hall Williams 1982).

3.2.8 Sanctions and Sentencing

The mode of disposition has an impact on the case processing time (Neubauer & Ryan, 1982) as the charge does. As we will show later, in the F.R. of Germany formally charged cases last significantly longer than cases dismissed, suspended or cleared by a special order to inflict a fine.

Delay in sentencing may occur in connection with "alternative sanctions", i.e. the offender has

to fulfill a community service order or pay a fine and the case is dismissed or settled in other ways (13). Such a system is more time consuming than usual sentencing, because of more administrative necessities.

Delay in sentencing if the judge postpones his decision can be caused by the hope that the file will clear itself or can be combined with an other file for which someone else is responsible, but delay may be intentional if the judge postpones the sentence to see how the offender behaves in order to get an informal probation. In case of such a "hidden" sanction the offender is not in custody, but a custodial sanction is possible and the court observes the behaviour of the offender until the trial.

3.2.9 Appeal

An appeal necessarily lengthens the case processing. Here again it is a question of definition, whether an appeal is a cause for "delay" or a regular part of the criminal justice system.

One might say, that only successful appeals should not be counted as causes for delay, but normally one doesn't know the result at the time, an appeal is made. It is hard to tell whether an appeal is actually abusive, because not every unsuccessful appeal is made for abusive reasons (14).

Sentenced offenders may appeal a decision in order to stay in the pre trial detention centre in their neighborhood and not be moved to a distant institution.

A study showed, that appeals in West Germany were successful in some 37% of the cases where the defendant appeals, and in some 58% of the cases where the prosecutor appeals (Bender & Heissler, 1978). The official statistic gives no information on the success of the appeal, but 64.7% of the appeals of sentences by the district court are rejected as unfounded/unreasonable or inadmissible.

3.2.10 General organizational aspects

Examples for administrative or organizational aspects were mentioned by Steenhuis for the Netherlands, where it takes at least three weeks to inquire about prior convictions, and this is true not only for this country. Another problem is, that out of one hundred summons, only thirty can be dealt with by mail at the first attempt. In all other cases the addresses have to be checked, and from now on, the administration is responsible for proceeding the case. If, as Steenhuis found out, some 30% of the addresses are incorrect, those summons are void and have to be repeated (see Appendix No. 4.1 for the F.R. of Germany).

Everybody may name other examples for delays, caused by organizational aspects, faults or necessities of what is called "the system".

General organizational aspects, causing delay on nearly every level of the penal law system are plentiful. A look at what the research in the sociology of organizations and the psychology of organizational management has found would show, that we can transfer most of these results to the different levels of the criminal justice system, starting from the police and ending with the prison system.

Conflicts within the criminal justice system and problems in communication between the different parts of the system have been already discussed at the seventeenth Criminological

Research Conference in 1986 (see the reports by Rutherford, Steenhuis, Albrecht and Screvens; Interactions within the Criminal Justice System, Council of Europe 1987).

More individual aspects lead to the psychology of the law enforcement agents. The personal satisfaction of clearing a case and a file in a competent manner may either increase or decrease the case processing time. Other psychological factors such as promotion of ones career through efficient work methods or being overwhelmed by an unmanageable number of files or having temporary working problems caused by personal and others reasons, definitely have an impact on the manner in which a case is processed, or the time needed to clear a file. Here again, it is very difficult to find out, what aspects might cause delay and what might speed up the case handling (not to mention the way these factors are influenced). Everybody knows stories about prosecutors or judges with dozens or even hundreds of "sleeping" files in their cabinets.

Not enough or poorly qualified manpower was one of the reasons, mostly mentioned for delay in former days. This is called the "old conventional wisdom" by Church (1982). The cures for delay were directed at the resources, organization and formal procedures of courts, because this "conventional wisdom assumed that these rule and resource oriented elements controlled the pace of litigation". The pure addition of new prosecutors or judges by no means ensures a reduction of delay, and no relationship between court structure and court performance has been demonstrated. "Attempts to reduce delay through special programs, conferencing devices, diversion and other procedural tinkering have seldom proved themselves in practice" (Church et al., 1978).

3.2.11 Law related aspects

The law itself might be a cause for delay in the criminal justice system. It is said that penal and procedural law is too complicated (Taft, 1908), and we have procedural restraints because of special laws which are difficult to handle (e.g. business, tax related or environmental laws). In the Federal Republic of Germany the principle of compulsory prosecution ("Legalitätsprinzip") for sure lengthens the case processing time, because the police may not dismiss a penal law case or caution offenders. The police has to submit every file to the prosecutor's office. The only (unlawful) possibility for a police officer, who did not want to have a criminal offence been filed is to refuse the knowledge of the offence or to refuse the request of the victim to draw up the protocol (Feltes 1984b).

3.2.12 Historical, social and socio economical aspects

It is hard to compare the case processing time of a given period with the processing time of another period, because too many different factors may influence the results. For Austria it is reported, that murder cases took two to three times longer in 1966-69 than in 1932-33 (Schlögel, 1973), but the study shows no explanation for this result. Historical, social and socio economical aspects do have an impact on case processing time, but even with the best available data it is difficult to draw special conclusions from this.

3.2.13 Summary of the empirical results

If we try to resume the results of the different studies on delay in the criminal justice system, only some "hard" facts can be reported. Under those facts, important enough to influence the pace of litigation and strong enough to show statistical evidence, we find: (see Neubauer & Ryan 1982; Morgan & Vennard 1989)

- the mode of disposition
- the remand / bail status of the defendant (including plea)
- the number of motions filed
- the region or area in which the case is handled.

3.2.14 Local Legal Culture

Very important, esp. if we talk about possible changes within the criminal justice system to speed up the case processing time, seems to be what Church called the "local legal culture". If we compare different regions or areas, the case processing time is definitely influenced by the local legal culture as other decisions in clearing criminal cases are (e.g. the selection of what seems to be the "appropriate" sanction).

The pace of litigation is strongly affected by the informal norms, attitudes, expectations, practices and procedures of the local court systems (Church 1982, Church et al. 1978).

Furthermore, the subjective elements of the local legal community affect the level of a court system's concern with the existing case processing time. And, as Church et al. pointed out, if any one element is essential to the effort to reduce delay, it is concern by the actors within the criminal justice system with delay as an institutional and social problem (Church et al. 1978). If we include the observation from other studies of the criminal justice system and intentions to change different procedures like bail setting, pre trial release, plea bargaining, sentencing decisions, it is rather obvious that ongoing systems and their actors develop stable patterns of behaviour. It is not easy to change those patterns just by imposing a new law or implementing some new administrative technique.

The local legal culture (or the "local discretionary system", as Nimmer called it already 1976) within which a shared set of values exists regarding the conduct and pace of litigation, might be upset by a new set of official rules given by legislation or advice, resulting in even slower case processing. New rules may contradict existing values of the legal culture and may be viewed as placing an unwelcome burden on the practitioners with the result of ignoring or "undermining" the official rules or new norms.

To the extent that local legal culture is defined in the delay literature, it generally includes (see Church 1982)

- the importance of informal practices,
- the centrality of practitioner incentives, and
- the importance of practitioners expectations and (informal) norms, which are determined most directly through experience and given from one generation of practitioners to the next.

The existence of local legal culture is a highly plausible explanation for many of the reported failures of past court reform efforts. Such an overall orientation materially affects mode of disposition, sentence and disposition time (Church 1982 a).

4. Case processing time, delay and caseload: Some results from the Federal Republic of Germany

It is often mentioned, that a special kind of "queuing effect", caused by case overload and overburdened judges and prosecutors, results in long waiting time. It is assumed that the work load influences the speed with which a court or prosecutor's office expedites its work.

A study of Austrian cases showed no relationship between caseloads of prosecutors or judges and the length of proceedings (Driendl, 1981), but Church and his colleagues (Church et al. 1978) found such a positive relationship between criminal and civil caseloads and case processing time (15) (more cases - longer case processing time) as did Hausner and Seidel (1981). Church later revised at least the conclusions drawn from that result (Church 1982)(see above 3.2.1). No such relation was found by Grau and Sheskin (1982). Rhodes formulated what he called "the Disposition Hypothesis" that "the total number of prosecutions are functions of the budget constraint imposed on the prosecutor and the cost of a trial relative to a settlement for the defendant" (Rhodes, 1976), with the consequences that the demand for trials may decrease as court delay increases. He finds a strong positive correlation between court delay and the proportion of dismissed criminal cases or - in other words - between "dispositions and sentencing" (Rhodes, 1976).

Gillespie (1977) finds a decrease in judicial productivity with an increasing number of judges, suggesting to him the existence of slack resources in the courts.

4.1 The length of proceedings at the court level in the F.R. of Germany

Three out of four cases were cleared within less than three months at the court level in the Federal Republic of Germany in 1987 (administrative penal law cases Ordnungswidrigkeiten included). Compared with 1971, when only 66.1% of all cases were cleared within this time, the average length of the proceedings was substantially shortened (see chart 2).

If we take only cases with a formal conviction by the court, the percentage of cases cleared within 3 months is slightly lower, but here again cases processing time speeded up between 1973, when 58.6% of those cases were settled within 3 months, and 1983, when 66.9% were settled within this time. This percentage decreased with decreasing case load after 1983 to 64.9% in 1987 (see table 1 and chart 3). (16)

4.2 The length of proceedings at both the public prosecutor and the court level

More than half of all cases are cleared within three months at the prosecutor and court level (exactly 56.3% in 1986 and 54.4% in 1987). Again the time of the proceedings speeded up since 1971, when only 43.6% of all cases were cleared within this time. From the arrival of the file at the prosecutors office to the closing of the file by the judge, an average of 4.32 months was needed in 1986. This time shortened since 1971 (5.07 months), in spite of a heavier case load until 1983. After 1983, this trend continued until 1985, when 4.28 months were needed, although the caseloads decreased. In 1987 more time (4.46 months in average) was taken while

case loads decreased further. (17)

4.3 The length of proceedings at the police and prosecutor level

More than half of all cases are processed within one month by the police (53,4% in 1987), and 8,3% only take more than three months. From 1981 to 1983, the number of cases brought to the prosecutor by the police, increased by 2,9% (18). At the same time, the percentage of cases cleared within one month at the police increased from 56,2% to 57,2%. After 1983, the number of cases decreased by 6,2%, as the percentage of cases, cleared within one month did from 57,2% in 1984 to 53,4% in 1987. The increase of cases until 1983 was followed by a speeding up of case processing time, and the decrease of cases after 1983 resulted in slower case processing.

Nearly the same is true for the prosecutor level. Here too, more than half of all cases are processed within one month (57,5% in 1987). This percentage decreased since 1983, when 2% more (59,5%) were cleared within one month.

4.4 Differences in case processing time

If we look at differences in case processing time, we can see that cases brought to the court with a formal charge take substantially longer than cases dismissed by the prosecutor. While 58,6% of the cases dismissed have a case processing time less than one month, this is the fact for only 44,1% of formally charged cases. If the prosecutor applies for a special order to inflict a fine (19), 42,4% of those cases are cleared at prosecutor level within one month but 87,0% within three months, while only 85,4% of the cases dismissed and 80,1% of the cases formally charged are processed within this time (see table 2).

4.5 Analysis

West Germany faced a tremendous increase in penal law cases during the seventies and until 1983, the year with the largest number of cases to be handled by courts and judges. The number of cases with which judges and courts of the first instance dealt, doubled from 734.656 in 1971 to 1.519.570 in 1983 (see table 1). This increase had some impact on the way both judges and prosecutors handled their cases. During this period, the absolute figure of formal decisions or convictions in criminal law cases (without administrative penal law) increased by only 17.3% from 366.785 to 430.368 (see table in Mr. Laffargue's Report). If we include the administrative penal law cases, the increase is some 29%. The rate of sentences or convictions decreased from 57.5% to 33.7% in all cases or from 70.3% to 52.8% in criminal law cases (without administrative penal law) (see table 1 and chart 4 and 5).

At the same time, the number of judges (first instance, civil and penal law) increased by only 7.7%, and the number of prosecutors by 33.5%, while the number of cases to be handled by the court increased by 51.7% and the number of cases to be handled by the prosecutors by at least 61% (20), resulting in a higher caseload per judge and prosecutor. While the number of penal law cases per prosecutor increased by 42% from 215 in 1971 to 305 in 1983, the number of

charges per prosecutor increased only by 16% (from 132 to 153; see chart 6). The same applies for judges (21): Their caseload increased by 40%, from 124 penal law cases in 1971 to 174 in 1983, while the number of charges tried per judge increased by only 15% (from 76 to 87 in 1983).

Both judges and prosecutors used more informal methods of handling cases because of this overload (Feltes/Janssen/Voß 1984): The rate of cases formally charged by the prosecutor went down from 45,7% to 34,4% and vice-versa, the rate of cases settled in other ways than by formal charge increased (e.g. suspension of a case until the defendant pays a fine, application for a (court) order to inflict a fine (Strafbefehl), or simplified or summary procedure). This may account for speedier case processing, because cases going to trial tend to have more at stake and consistently take longer to prepare and dispose (Garner, 1986).

After 1983 a unintended "natural experiment" with interesting results took place in the F.R. of Germany: the number of proceedings handled by lower courts decreased from 1.519.570 in 1983 to 1.365.866 in 1987 by 10,1%. Due to the fact that the number of judges and prosecutors remained stable, the number of penal law cases per judge went down from 174 in 1983 to 160 in 1987, and the penal law cases per prosecutor from 305 to 285 (see chart 6). Nevertheless, the trend of informal settlement continued partly. The rate of charges decreased further from 34,4% to 31,2% in 1986, but increased to 33,4% in 1987. The number of charges per judge dropped from 87 to 75 (minus 13,8%), per prosecutor from 153 to 134 (minus 12,4%) (see table in Mr. Laffargue's report).

The sentencing rate in penal law cases decreased from 55,2% to 52,8% in 1987. For all cases, this rate decreased from 35,9% in 1983 to 32,4% in 1986, but increased to 33,7% in 1987 (see table 1), because more administrative penal law cases were sentenced formally.

One can say, that the procedural time speeded up in the Federal Republic with an increase in caseloads and slowed down only partly with a decline in caseloads after 1983. Perhaps the judges were used to handling the cases in a quicker manner than before, even with smaller caseloads. This might be an argument for what was referred to as "court culture" above. As chart 4 and chart 5 show, the rate of formal sentences (or formal convictions) decreased to, and this is true not only until 1983, but also for the period after 1983, when the caseload started to decrease (see table 1). Due to the slightly quicker handling of cases without a formal sentence, the speeding up of case processing time in the Federal Republic might be the result of both quicker handling and less formal disposal of cases.

4.6 Results

The amount of penal law cases had differential impacts on the length of the proceedings of both court and prosecutor. To summarize the results, we can say that the length of the proceedings shortened during the last 15 years. This might be due to the fact, that with increasing caseloads until 1983 the volume and the rate of informal, less costly, less difficult, and less time consuming settlements increased (more dismissals, more summarised proceedings, fewer charges, fewer sentences). Although the caseload decreased after 1983, the trend towards less formal and therefore speedier proceedings continued until 1986. In 1987 a somewhat different observation was made: The rate of charges by the prosecutor increased as did the sentencing rate for all cases; only the sentencing rate in criminal law cases decreased further.

6. Recommendations for further research

To explain the relationship between case processing time and factors causing delay, and to find solutions to shorten case processing time, further research seems to be necessary.

A questionnaire, filled out by the different actors of the system (including the defendant and the victim), asking what they understand by delay, what kind of delay affects their work and what are the consequences of the delay for the different actors in the system, may be one way to do such a research. Participatory observation may be another and perhaps a more effective solution. The empirical research should especially tackle the problem of the local differences in case processing time and the aspect of the local legal culture, e.g. in comparing different court districts (as Church 1982 a did). The actors in the penal system may learn from the results of those studies, as from information by others how to speed up case processing. They may learn that delay can be reduced, if somebody tries to do so.

The ideas researchers will gain from experts working in the system may help to understand the administrative elements within this system and the factors causing delay. Research in administration, in administrative functions and processes, and in organizational aspects as it was done by experts in a lot of other private and public organizations may lead to a special management service for the penal law system.

Notes:

(1) "Court delay ... is a central concept in a large body of contemporary criminological research. Two of the most hotly contested issues in criminology and in criminal justice policy making today and for the foreseeable future are the deterrent and incapacitative effects of sanctions. ... Deterrence, in both its classical and its modern traditions, includes three elements--certainty, severity and celerity of punishment" (Blumstein et al., 1978). All the three elements and not only the aspect of celerity are of importance for the problem of delay in the criminal justice system. Delay effects the certainty and severity of a sanction as it does the celerity. See the results of the eighth Criminological Colloquium of the Council of Europe in 1987 ("Disparities in Sentencing: Causes and Solutions") (Council of Europe, Strasbourg 1989).

(2) A substantial percentage of offenders in remand on custody are not incarcerated after the trial: in the F.R.Germany, this percentage was 50,4% in 1981, 44,2% in 1985 and 46,7 in 1987; for the subgroups of juveniles (14-17 years) this percentage is even higher (58,7%), as for young adults (18-21 years) with 49,7%; see Gebauer, M., 1987.

(3) Eckle Case (3/1981/42/67)

(4) I will not discuss the problem of sanctioning delay, e.g. the question, whether extensive delay generally leads to the elimination of the right of the state to punish or not. Furthermore, the question is not discussed, whether the decisions of the European Court of Human Rights in penal law cases with excessive length are binding for the member states; and I will not discuss the problem how to handle settlements like the Vallon Case, where - after the Italian Government had paid six million Lire to the applicant - the Court finds "as to the existence of a general interest ... no reasons of public policy (ordre public) justifying continuation of the proceedings" (Vallon Case 10/1984/82/129).

(5) For further references see Bridges, 1982, 64, footnote 54 and Church et al. 1978; Bridges pointed out, that each reference implies a different definition and a different interpretation of delay. Backlog in courts may refer to the number of cases pending on court calendars, and when characterized in terms of backlog or pending cases, delay is cast a queuing problem in which the size of the queue of pending cases reflects the extensiveness of delay. Delay in terms of the time required to process cases (case processing time) reflects the rate at which cases flow through the courts and how long they survive until reaching disposition. "In these terms, delay is a problem of court efficiency in which the length of time required to process cases reflects the extensiveness of delay" (Bridges, 1982, 64). The views of nearly all observers vary with respect to accurately measuring delays and empirically determining the amount of processing time that is "excessive" (Church et al. 1978).

(6) "We cannot tell from a list whether an independent variable (a cause) affects the dependent variable (delay or case processing time) directly or through its influence on one or more intervening variables." (Luskin, 1978, 117)

(7) Taft was at that time the American Governor on the Philippines and had different problems, especially with drugs (see Selling 1989, 31).

(8) Garner mentions that policy relevance is similarly overlooked in delay research and "policies that are studied are either highly amorphous to begin with--the LEAA everything-but-the-kitchen-sink delay reduction programs--or poorly described by the research report" (Garner 1986, 27).

(9) Information by Prof. Duyugun Yarsuvat, Istanbul and Prof. Günther Kaiser, Freiburg. First results of this study will be available not earlier than 1990.

(10) Bridges reported, that time required to process most cases changed little following passage of the Speedy Trial Act. "This result may stem from the general interests of litigants and courts in delay as well as their reaction to perceived consequences or "costs" associated with achieving the speedy trial goal. Some observers suggest those perceived costs may include heightened pressures for prosecutors to decline minor criminal cases, less thorough defense preparation and more frequent and longer delays in civil cases" (Bridges, 1982, 72).

(11) The "Erste Gesetz zur Reform des Strafverfahrensrechts (1.StVRG)" became effective January 1, 1975.

(12) Prof.Kohlmann, University of Cologne, is starting a study on case processing time in commercial crime cases.

(13) This is - in contrast to the American discussion - called "diversion" in the German Juvenile Justice System, but it is an official and legal possibility in the German Penal Procedure Code (§ 153 a StPO: "opportunity principle" vs. the principle of compulsory prosecution, which demands the police to send all cases to the prosecutor, who decides whether a case is dismissed or prosecuted).

(14) In 1987, we had 56.921 appeals of sentences of the lower local court (Amtsgericht) and 12.648 appeals of sentences of the district court (Landgericht) (19.0% of all sentences by lower local and district courts or 10.1 % of all penal cases cleared). The defendant appeals in more than 90% of those cases. Source: Rechtspflege, Fachserie 10, Reihe 2, Zivil- und Strafgerichte, 1987, Tab.3.1 - 3.5

(15) Gillespie (1977) finds a similarly strong relationship between the courts median case processing time and the number of civil and criminal cases pending at the beginning of the year, but (hard to explain) not the number of cases files during the year. For our study of the German court processing time (see below), this difference was not to be made.

(16) From the arrival of the file at the court office until closing of the file by the judge, an average of 2.93 months for all cases was needed in 1986. Years ago, when fewer cases had to be cleared, even more time was needed: 3.03 months in 1981, 3.33 months in 1978 and 3.39 months in 1971 (see the table in Mr.Laffargue's Report). The same is true for the average number of days for court hearings or trials per year and per judge: In 1971, this figure (fictive, because civil judges are included) was 81, in 1978 it was 87, in 1983 it was 84, although much more cases were handled. After 1983, this figure went down permanently to 72 in 1986. The average time for a court hearing decreased from 1.40 hours in 1971 to 1.02 hours in 1981 with increasing caseloads and remained stable for the following years.

(17) The average public prosecutor had to attend 141 days of public hearings in 1971, 151 days in 1978, and 148 days in 1983, when case loads were at their highest level. After that, the number of days decreased while the case loads also decreased: 140 in 1984, 133 in 1985, and only 129 in 1986.

(18) No data available for the time before 1981, when prosecutor statistics started.

(19) "Strafbefehl": a written procedure of imposing a fine; the accused can refuse to pay the fine and ask for a court hearing.

(20) The number of offenders, registered by the police increased from 1.000.841 in 1971 to 1.611.445 in 1982. No numbers were published for 1983 because of new statistical computing methods (a suspect who is responsible for several cases at the same time is counted only once), starting in 1984. Due to the fact that the German police has no right to dismiss cases and must give all files to the public prosecutor, these data are an indication for the caseloads of prosecutors, although the official police statistics do not include traffic offenses. Analyzing the statistics of the public prosecutors, published for the first time and only partly in the beginning of the eighties, we showed that some 35% of all cases handled by prosecutors are traffic offenses.

(21) The figures for civil judges and penal law judges had to be used because of lacking statistical figures for the number of penal law judges only.

Appendix A: Time Limits in the Penal Procedure Code of the Federal Republic of Germany (Strafprozeßordnung, StPO)

1) Remand in Custody

After 3 months of remand in custody the prosecutor or defendant may apply for a court appointed lawyer who is paid in advance by the state (§ 117 IV StPO). After 6 months of remand in custody the court of appeal (Oberlandesgericht) must decide whether the circumstances or proceedings (taking evidence and so on) warrant keeping the defendant in remand longer. The primary court has to pass the files to the court of appeals for examination (§121 StPO). Usually the court of appeals accepts the reasons given by the lower court.

2) Police

The police must give the files to the prosecutors office "without delay" ("ohne Verzug", § 163 StPO).

3) Prosecutor

There is no equivalent requirement for the prosecutor. If he sees "enough evidence for a charge" ("bieten die Ermittlungen genügenden Anlaß zur Erhebung der öffentlichen Klage.."), he prosecutes; otherwise he suspends the case.

4) Court

4.1 Before the Opening of the Trial

The same is true for the court and the decision to open trial ("Eröffnung des Hauptverfahrens"). The court is also able to suspend the case. There are no regulation concerning the time in which the court has to fix the trial date (in case of remand in custody: see above). The defendant and other parties must receive summons one week in advance of the hearing or trial (§217 StPO). The date of the actual, personal delivery by mail is used; if the defendant is not available by mail, the summons remains at the post office and this date counts as the beginning of the one week time span. If the defendant does not appear in court, the judge must prove that the postal address was correct. If not, the summons procedure must be repeated.

4.2 After the Opening of the Trial

The court can interrupt the trial/court hearing for no more than 10 days (weekends included); after 10 days of hearings, a single interruption of 30 days is allowed (§229 StPO). The final decision is to be pronounced no later than 11 days after the last hearing (§268 StPO).

The sentence must be written up within the following time spans:

5 weeks after the pronouncement for court hearings of 1 to 3 days; 7 weeks for court hearings of 4 to 9 days; 2 weeks more for every 10 days of hearings (§275 StPO).

It is possible to submit the written reasons for the decision later, if "non predictable and unavoidable circumstances postponed the drawing up of the decision in a single case" (§ 275 StPO). Therefore, terms of more than 3 months are not unusual.

A court hearing without the presence of the defendant is possible only if this was mentioned in the summons and a fine of not more than 180 days income equivalent is imposed (§ 232 StPO).

4.3 Appeal

The term for an appeal is one week after pronouncement of the sentence (§314 StPO). The

reasons for the appeal must be given one week after the court submits its reasons/substantiations for the pronounced sentence (§ 317 StPO).

The deadline for submitting reasons for an appeal in a question of law (Revision) is 1 month (§345 StPO).

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