

Improving Pretrial Justice: The Role of Lawyers and Paralegals

ON ANY GIVEN DAY, approximately three million people around the world are held in pretrial detention. Millions more are unnecessarily arrested and detained by law enforcement agencies annually. Those in pretrial detention are often held in conditions and subject to treatment far worse than that experienced by sentenced prisoners. Pretrial detainees may lose their jobs and homes, contract and spread disease, be asked to pay bribes to secure release or better conditions of detention, and suffer physical and psychological damage that lasts long after their detention ends. Pretrial detention may last for years, with some detainees literally lost in the system. There are many causes for the global over-use of pretrial detention—but there are also some simple, cost-effective solutions.

Early intervention by lawyers and paralegals can have a positive impact on pretrial justice and pretrial detention in particular. Evidence shows that early intervention schemes can reduce the use of pretrial detention, improve the performance of criminal justice personnel, lead to more rational and effective decision-making, and increase accountability and respect for the rule of law.

Pretrial Justice: International Norms and Practice

It is the responsibility of all governments to establish fair and humane criminal justice systems. The pretrial stage of the system raises particular challenges, both from a human rights perspective and as a practical matter. Universally, arrested people have the right to be treated as though they are innocent until proven guilty and to be dealt with fairly and expeditiously throughout the pretrial process. In particular, it is crucial that governments respect an arrested person's right to legal advice and assistance. This is the cornerstone of a fair criminal justice system.

European Union: The average length of pretrial detention in the EU is 5.5 months.¹ In some member states suspects can be held for 4 years or more before they ever stand trial.²

Nigeria: The average length of pretrial detention is almost 4 years and periods in excess of 10 years are not unusual.³ A presidential committee found that nearly four percent of pretrial detainees were in prison because their case file was missing.⁴

Philippines: Speedy Trial legislation provides for a maximum of 11 months between arrest and decision of the court, but the average wait for the majority of prisoners in the country's jails is measured in years.⁵

How Can Early Intervention by Lawyers and Paralegals Help?

Lawyers and paralegals have a central role to play in advising, assisting, and representing individuals at the pretrial stage of the criminal justice

process. Ensuring legal assistance is available at the earliest possible time allows for the most effective use of resources, as cases are dealt with at the front end of the criminal justice system. Helping to ensure that appropriate decisions regarding pretrial detention and release are made early on can reduce the use of pretrial detention. This does not just benefit the individual suspect. This has wider benefits for the administration of justice and the efficiency and effectiveness of the criminal justice system as a whole. Early intervention can improve the functioning of justice, including improving transparency, accountability, and confidence in the criminal justice system.

Assisting the Administration of Justice: Lawyers and paralegals can assist with the administration of justice through early intervention that identifies:

- > Suspects who are suitable for release and/or who are illegally detained.
- > Unlawful actions by police.
- > Children and other vulnerable suspects and defendants.
- > Opportunities to divert from formal criminal proceedings.

Improving the Efficiency of the Criminal Justice System: Lawyers and paralegals can:

- > Provide support to the police and courts by conducting research and providing information where others do not have time, skills or resources to do so (for example, by locating guardians and parents of juvenile suspects).
- > Improve overall pretrial procedures to allow a more efficient process (for example, by transferring case materials from the police to the

prosecutor in a timely manner, creating bail application forms, or developing a case file management system).

Education and Policy Improvement: Lawyers and paralegals are also able to:

- > Educate clients, their families, friends, and the community about their rights and the legal system. They can also help the suspect make an informed decision to plead guilty where this is appropriate, to minimize time spent in custody.
- > Identify systemic problems and develop solutions.
- > Educate criminal justice personnel on pretrial rights and procedures.

Improving transparency, accountability, and confidence in the criminal justice system:

- > A person is most at risk of torture and ill-treatment during the early stages of police detention. The presence of legal advisors in police stations and detention facilities can reduce this risk and ensure that authorities do not exceed their legal powers.⁶
- > Lawyers and paralegals can identify unlawful conduct and poor practice by police and take appropriate action.

Effective Mechanisms to Provide Early Intervention

Paralegals are more than simply a cheaper alternative to fully qualified lawyers. When properly trained and supervised, they can be better placed than lawyers to perform a range of functions as they are often closer to the communities they serve, more flexible, and have skills necessary for innovative service.

Public Defender Schemes are usually less expensive, arguably more zealous in their defense than private practice assistance, and can structure and manage work to meet the demands of the early stages of the criminal process.

Private Practice can provide a high degree of service and flexibility. Since the demand for criminal defense is not consistent over time, the use of private lawyers can help circumvent fixed costs associated with maintaining a public defender model.

This is a summary of the report **Improving Pretrial Justice: The Role of Lawyers and Paralegals** by Ed Cape, Professor of Criminal Law and Practice at the University of the West of England, Bristol, UK. The report will be published by the Open Society Justice Initiative in 2011.

Law Students can, with some training, provide some of same functions of paralegals. Law school clinics perform a dual function of educating students and providing services to the community.

Bangladesh: A paralegal program operating in three prisons resulted in the release of 700 unnecessarily detailed prisoners in one year.⁷

Malawi: The Paralegal Advisory Service contributed to a fall in the proportion of prisoners held in pretrial detention from 35 to 17 percent.⁸

Sierra Leone: Paralegals reduced the pretrial detainee population in a prison by 50 percent over four months.⁹

Recommendations

Governments, NGOs, and professional legal bodies advocating for pretrial justice should take the following actions:

- > Make resources available to comply with international and national obligations to provide pretrial legal assistance, especially for those who are unable to pay for it.
- > Establish independent legal aid institutions responsible for making legal advice and assistance practical and effective. Amend relevant laws and procedures as necessary.
- > Ensure routine collection of reliable statistical information on critical aspects of the criminal justice system with a view to setting improvement targets.
- > Identify existing resources for pretrial legal assistance at the early stages of the criminal process, including at police stations. Locate overall assistance patterns and address bottlenecks.
- > Where appropriate and relevant develop nationwide schemes of accredited paralegal services to provide legal assistance at the early stages of criminal process.
- > Determine which forms of intervention will have most impact and how best they can be provided.

1. *Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pretrial Procedures Between Member States of the EU*, SEC(2006)1079 (Brussels: European Commission, 2006), pp. 10, 11

2. Fair Trials International, *Detained Without Trial*, 2011, p. 24, Appendix 2, Available at <http://www.fairtrials.net>

3. A. Nwapa, "Building and Sustaining Change: Pretrial Detention Reform in Nigeria," in *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 86.

4. *Id.*, p. 89.

5. R. Abitria, *How Speedy are Philippine Criminal Cases Disposed of? A Survey of the cases in Quezon City Jail and Mandaluyong City Jail* (Pasig City: HLAJ, 2008).

6. Association for the Prevention of Torture, *Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty* (Geneva: APT, 2010), p. 1.

7. 'Locked up and Forgotten?', Conference on Penal Reform in Developing Countries, 6/7 October 2010, available at http://www.penalreform.org/files/GTZ_locked_UP_forgotten.pdf.

8. C. Msiska, 'On the Front Lines: Insights from Malawi's Paralegal Advisory Service', in OSJI, *Pretrial Detention* (New York: OSJI, 2008), p. 76.

9. Sierra Leone, Justice Sector Development Programme (JSDP), *Annual Report 2010* (London: UK Department for International Development (DFID), 2010).