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Biography: [http://lgst.athabascau.ca/faculty/andyk/](http://lgst.athabascau.ca/faculty/andyk/)

Publications: [http://lgst.athabascau.ca/faculty/andyk/work.php](http://lgst.athabascau.ca/faculty/andyk/work.php)
JUSTICE DELAYED IS JUSTICE DENIED

Anwar Naseer Khan (Professor Andy Khan)

The new Chief Justice of Lahore High Court, Rt. Hon. Manzoor A. Malik, in his inaugural speech, being seriously concerned with the continuing inordinate and unwarranted delays in Pakistani justice system, has observed that expeditious and quality dispensation of justice is a paramount priority of any judicial system. Pakistan is not alone in facing the challenge of delayed justice. Many countries face the problem of delayed and pending court cases. Undue delays in the administration of justice, both in civil and criminal courts, tantamount to denial of justice. Delayed criminal justice, particularly, is repudiation of fair trial. Ensuring access to expeditious justice and speedy trial, both in civil and criminal matters, is part and parcel of the rule of law. According to Lord Bingham, ‘the right to fair trial is a cardinal requirement of the rule of law’. The preamble of the Statute of Council of Europe states that individual freedom, political liberty and the rule of law form the basis of a genuine democracy.

It is a well-known principle that justice delayed is justice denied. The right to receive justice without delay was one of the promises made by King John of England in the Magna Carta 1215. The European Convention on Human Rights declares that two pillars of public order are ‘an effective political democracy’ and ‘common understanding and observation of human rights’. Many Codes or Charters of Human Rights constitutionalize the right to be tried without unreasonable delay.

In this article I deal with criminal law. As is well known, and is judicially acknowledged, extraordinary delays in criminal prosecutions, and prolonged and protracted court trials, of alleged offenders are an endemic phenomenon in Pakistan. In such circumstances, the maxim ‘justice delayed is justice denied’ becomes aptly relevant. Fair trial is considered to be so important that it is made a constitutional or fundamental right in many countries. Speedy justice is one of the important elements of the right of fair trial, and should be one of the fundamental principles of any just and sound judicial system. Unreasonable delay in prosecution or trial of criminal charges leads to unfairness, not only to the accused but to the witnesses and lawyers. Excessive delay to the accused is especially important because the delay may make it almost impossible to defend oneself after a long passage of time. Another important factor is that the creditability and reliability of the witnesses become a key question. This has been universally proved in many cases where the unreasonable delay has resulted in witnesses forgetting events and giving contradictory and inconsistent, even improbable, evidence.

It is an obvious fact, which is accepted by all egalitarian judicial systems, that an unjustifiable or excessive delay can prejudice a fair trial. Therefore, in the absence of evidence demonstrating that the unreasonable delay did not prejudice the fair trial of an accused, and that the delay was not caused by or attributed to the accused or his/her lawyer, it is presumed that the delay violates a defendant’s human right to fair trial, including the right to be tried within a reasonable time. The fundamental human rights laws of many countries now make it obligatory to provide procedures for fair trial including the right to be tried without unreasonable delay. For example, Article 6 of the European Human Rights Convention, which has been ‘incorporated’ in the British law by the Human rights Act 1992, imposes an obligation on the participating States to provide fair procedures for the determination of all criminal charges. It stipulates the requirements of a) a fair and public hearing, b) within a reasonable time, c) before an independent and impartial tribunal.

The European Human Rights Court, finding against the United Kingdom in a number of cases because the latter failed in its obligation in relation to criminal proceedings to bring the accused persons before a court with appropriate speed, has considered factors like the complexity of the case, the accused person’s conduct, the conduct of the competent authorities, the length of the delay, and prejudice to the accused. In all cases, the Court makes the assessment based on all the relevant circumstances. Thus all factors are taken into account and no one particular factor maybe conclusive by itself.

The US Sixth Amendment provides for speedy trials. The US Supreme Court has said that the speedy apprehension and prosecution of offenders is a very important constitutional duty, which imposes a duty on relevant public authorities to make diligent good faith efforts to locate and apprehend a defendant and bring that defendant to trial. The US Supreme Court in 1972, in Barker v Wingo, provided guidelines for dealing with
The Court identified four factors to consider: the length of the delay, the reason for it, the accused’s assertion of his or her right, and prejudice to the accused.

Similarly, section 11 of the Canadian Charter of Rights includes the right to speedy trial in its protections under Proceedings in Criminal and Penal Matters. Section 11(b) states: ‘Any person charged with an offence has the right to be tried within reasonable time’. It may be relevant to Pakistani readers of this Journal to see how the Supreme Court of Canada has interpreted the right to speedy trial under section 11(b) of the Canadian Charter. I therefore examine the Canadian jurisprudence on this topic.

The Canadian Supreme Court in 2013 reaffirmed the importance of speedy trials, by confirming Nova Scotia’s provincial Court of Appeal’s decision to stay proceedings against the accused because of the unreasonable delay. The facts of this case were that the accused was charged in 1995 based on alleged incidents in the early 1970's of indecent assault and gross indecency. He was working in India in 1995, having been transferred there by his employer a year earlier. He was extradited from India in 2007. The court held that the 14 years delay was not the fault of the accused, because it was the duty of the authorities to bring the accused to trial. The accused did nothing to hide from or hinder the authorities. In addition, the witnesses were inconsistent in their evidence because they could not remember the events and were confused. The appeal court found inconsistencies, improbabilities and contradictions in the evidence of witnesses, caused by the delay involved. The appeal court observed, ‘As the length of time increases from the date of the event to the trial, difficulties abound in prosecuting and defending such cases’. All these factors led to the appeal court to conclude that the defendant’s constitutional right to be tried within a reasonable period of time guaranteed by the Charter was infringed by reason of the unreasonable delay that occasioned real prejudice to the accused. The Supreme Court of Canada, confirming the appeal court’s reasoning, dismissed the appeal. The Court observed that the principle underlying section 11(b) of the Canadian Charter of Rights and Freedoms, while recognizing that society has a strong interest in seeing trials proceed against those charged with serious offences, accepts that unreasonable delay in a trial is damaging to the reputation of the justice system. The highest court in the country concluded, ‘It is well accepted that the minimum remedy for such an infringement is a stay of proceedings’.

The above case was concerned with the unreasonable delay in apprehending and/or prosecuting an offender. In the earlier and precedent-setting R. v. Askov, the Supreme Court of Canada established the basic principles relating to unjustified delay in prosecution of criminal cases. The Court examined the question of delay between committal and trial. In this case it had taken twenty four months for the accused after committal to face a trial. The primary causes of the delay were the institutional inadequacies and overburdened system. The Supreme Court of Canada decided that, while allocation of resources was a political decision, systemic delay could trigger the protection of speedy trial. The Court was of the opinion that it was the duty of the government to provide proper and adequate resources, facilities and manpower for speedy trials. Finding ample solutions to systemic delays is the responsibility of the government, because it is vital for both the accused and the community at large. In the opinion of the Court, the delay of twenty four months between committal and trial, despite arising in one of the busiest and most congested judicial districts in Canada, was not acceptable. The government’s submission of lack of funds was rejected, because it cannot be used as a defence where an individual’s freedom is concerned.

The Supreme Court of Canada in this case established a very important rule. It can be inferred that a long and unreasonable delay prejudices the accused. Where a court finds that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult to conclude that the accused’s fundamental rights have not been breached. The individual right of speedy trial of accused persons is a fundamental principle, which should be given proper deliberation in relation to other considerations. It should be recognized that the society in general has an interest in speedy trials, and public confidence in the administration of justice is enhanced when trials take place sooner rather than later. This necessitates a balancing of the rights of the accused with the interests of society.

The Court also decided that, where unreasonable delay is alleged, the onus of proving that no prejudice to the accused has taken place is on the prosecution. The prosecution may attempt to demonstrate that either there was
no unreasonable delay or the accused did not suffer any prejudice by the delay. Thus, it is not the duty of the accused to rebut the presumption of prejudice because of unreasonable delay. On the one hand, this would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. On the other hand, the existence of the inference of prejudice drawn from a long delay will safely preserve the pre-eminent right of the individual. It is obvious that the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable.

In *Askov*, the accused persons were jointly charged with serious offences of conspiracy to commit extortion. They were arrested in November 1983, but the trial could not start before September 1986. The trial judge granted the stay of proceedings on the basis that the major reason for the delay was institutional problems and that the accused persons had been prejudiced by the delay. On final appeal, the Supreme Court, deciding that the delay was unreasonable and the accused persons had suffered prejudice, said that all the factors should be taken into account in considering whether the length of the delay of a trial has been unreasonable. The Supreme Court added:

> As well, the societal interest in ensuring that these accused be brought to trial within a reasonable time has been grossly offended and denigrated. Indeed the delay is of such an inordinate length that public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice. The lack of institutional facilities cannot in this case be accepted as a basis for justifying the delay.

The Court laid down the following principles,

a) The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.

b) Where the delay is attributable to the action of the State (including police or prosecution) it will weigh in favour of the accused. Complex cases which require longer time for preparation, a greater expenditure of resources by police or prosecution, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

c) Delays occasioned by inadequate resources must weigh against the State. Thus, the burden of justifying inadequate resources resulting in systemic delays will always fall upon the State.

d) Where delays are attributable to the accused, certain actions of the accused, for example justified request of adjournment, can be considered as justifiable. If the actions of the accused were taken in order to delay the trial, that delay goes against the accused.

e) If the accused waives his/her rights by consenting to or concurring in a delay, provided the consent is free and unequivocal, the delay is excused. An example of a waiver is the consent by the defence lawyer to a fixed date for trial.

f) There is a general, and in the case of very long delays an often virtually irrebuttable, presumption of prejudice to the accused resulting from the passage of time. Where the State can demonstrate that there was no prejudice to the accused flowing from a delay, such proof may serve to ignore the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his/her position that he/she has been prejudiced as a result of the delay.

Applying these principles, the Court concluded that the delay of fourteen months between committal and trial was such that the defendant’s right of being tried within a reasonable time had been infringed.

As can be appreciated, the impact of the judgment in *Askov* reverberated all over the Canadian judicial system. The decision resulted in an estimated 47,000 pending criminal cases either being stayed or abandoned. The simmering and important issue of court delays, institutional deficiencies and the allocation of appropriate and sufficient funds to the judicial system came to the front and the federal and provincial governments were forced to face the music and rise to the Supreme Court’s expected high standards. Consequently, financial and other resources were provided to ensure that the right of the accused persons to a speedy trial, despite dwindling resources and burgeoning case load, must be given priority.
In 1991, the Supreme Court of Canada had another opportunity to comment on the right of an accused to speedy trial. It decided in \textit{R v Morin}\textsuperscript{xxii} that a delay of 14 months, the cause of which was solely attributable to limits on institutional resources, was unreasonable\textsuperscript{xxiii}. Although the primary purpose of the right of speedy trial is the protection of the individual rights of the accused, the society has an interest in seeing speedy trials, as it ensures fair treatment of an accused and recognizes the intrinsic value of trials being held within a reasonable time. The Court added that the society has an interest in ensuring people who are charged should be brought to trial within reasonable time and this interest increases with the seriousness of the offence.\textsuperscript{xxiv}

In the Supreme Court’s judgment, in certain circumstances some delay is inevitable. However, the question is at what point the delay becomes unreasonable. The answer should not be obtained by the application of a mathematical or administrative formula. The answer should be gained by a judicial determination balancing the interests which the right to speedy trial is designed to protect against factors which either result in or are the cause of delay. The Court decided that the judicial process of balancing of various factors requires an examination of many factors. The Court provided guidelines for the factors to be considered in analysing whether the delay is unreasonable. These factors are as follows:

1) the length of the delay;  
2) waiver of time periods;  
3) the reasons for the delay, including the inherent time requirements of the case;  
4) actions of the accused;  
5) actions of the police/prosecution;  
6) limits on institutional resources;  
7) other reasons for delay; and  
8) prejudice to the accused.

In a 2009 case (\textit{R v Godin})\textsuperscript{xxv}, the Supreme Court of Canada, once again, decided that a delay of 30 months between committal and trial was unreasonable, although some blame could be attributable to the defence lawyers. There were various causes of the delay attributable to the prosecution, for example, nine months delay by the prosecution in obtaining and disclosing the forensic DNA evidence, the failure of the defence lawyer’s request for earlier date of trial, and the delay in timely disclosure of the evidence to the accused. The defence was partly to blame in that when an adjournment was necessitated, the defence counsel could not accept, because of his existing engagement, the earliest date offered to reschedule the preliminary enquiry. In this regard to court said that the defence is not required to hold itself in a state of perpetual availability.

The Court re-emphasized that, in the absence of specific evidence of prejudice to the defendant’s liberty and security interests or his/her interests in fair trial, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In this case, the charge had been hanging over the defendant’s head for a long time and the inference should be drawn. Thus, an order of stay of proceedings was confirmed\textsuperscript{xxvi}, despite the fact that it was a complex case, because the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice\textsuperscript{xxvii}.

The Court reaffirmed the following observation of Madam Justice McLachlin (now the Chief Justice of Canada) in \textit{Morin}\textsuperscript{xxviii}:

\begin{quote}
When trials are delayed, justice may be denied. It is obvious that witnesses can forget, or even witnesses can disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice\textsuperscript{xxix}.
\end{quote}

It should be emphasized that the stay of proceedings for delayed criminal prosecutions or proceedings is not lightly taken by the courts\textsuperscript{xxx}. Nonetheless, although a stay of proceedings is the most drastic remedy in a criminal court,\textsuperscript{xxxi} there are rare occasions – ‘the clearest of cases’ – when a stay of proceedings for an abuse of
process is warranted. Undue or excessive delay in prosecutions or court proceedings is an affront to fair play and decency and an insult to the effective prosecution and trial of cases. Where it can be shown that the delay was demonstrably inconsistent with public perception of what is fair justice, the stay of proceedings in a criminal case may be the best course of action, especially in order to send message to the prosecutors and trial courts to be on their utmost guard against delays. In short, in rare circumstances, a court is justified to order stay of proceedings in order to prevent an injustice to the justice system itself.

It may be concluded that while it is self-evident that there is a very strong societal interest in having all criminal trials to be held and decided on their merits, it is also palpably obvious that the society’s interests are served by State’s obligation to ensure fair trial, including provision of financial, judicial, personnel and other resources, establishing sufficient number of trial courts and the requisite staff, and adequate and efficient criminal procedures in order to bring the accused persons before the courts within reasonable time for speedy trial. The fundamental right of speedy trial protects accused persons from long pre-trial custody or bail conditions, offers a sense of being free from stress and cloud of suspicion that accompanies a criminal charge, and gives the right to make full answer and defence, insofar as delay can prejudice the ability of the accused to raise a defence by presenting his defence in a coherent manner, leading evidence, and cross-examining witnesses.

It may be pertinent here to cite part of the Canadian Supreme Court’s criticism of the government’s excuse of limited financial resources causing delays in the judicial system. Sopinka J. in Morin, elucidating the principle of ‘justice delayed is justice denied’ in view of insufficient resources, commented:

> How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources.

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2 In India, more than 3 crore cases are pending before the three levels of the Indian courts. See [http://www.financialexpress.com/article/fe-columnist/justice-delayed-is-justice-denied/](http://www.financialexpress.com/article/fe-columnist/justice-delayed-is-justice-denied/)
3 Various Indian writers have made comments that in such dire circumstances, unless drastic and urgent measures are created and implemented, the judiciary is likely to crumble under its own weight; and, more importantly, a democracy can hardly be worth its name because the people will tend to lose faith in the justice system.
4 See the Supreme Court of Canada’s observations in Hyrniak v Mauldin [2014] SCC 7. In my submission, where the machinery of justice and the judicial system are too complex and overburdened, or are tainted with favouritism, cronyism or corruption, there is no guarantee of access to expeditious justice and speedy trials – and therefore there is denial of the rule of law.
6 This preceded the European Convention on Human Rights.
7 Clause 40 of the Magna Carta reads: "To no one will we sell, to no one will we refuse or delay, right or justice." This year, Magna Carta’s 800th anniversary was celebrated.
The author of this article discusses the consequences of inordinate delays in the criminal justice system. The primary consequence is that 'the risk of having prosecution stayed for want of speedy trial acts as a powerful incentive for the authorities to bring prosecutions forward for trial on a timely basis': R.J. Sharpe & K. Roach, *Michell v UK* (2003) 30 EHRR 52. The delay in Askov as a result of which thousands of prosecutions had to be abandoned. The Supreme Court of Canada dismissed the appeal. McLachlin J. (as she then was) stated: ‘When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.’
The Court commented that the constitutional provisions of ‘security of the person’, ‘right to liberty’ and ‘right to fair trial’ all come into play when considering speedy trials. The right of security of the person seeks to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is fresh.

Where the delay is considered by the courts to be unreasonable and unjustified, stay of proceedings is a minimum remedy: Rahey v R. (1987) 1 SCR 588.

In R. v. MacDougal (1998) 3 SCR 45, it was held that the right to be tried within a reasonable time includes the right to be sentenced within a reasonable time. Both the wording of Section 11(b) and the interests it protects support this conclusion. Section 11 comprises a wide range of rights which protect the accused from the moment he or she is first charged with an offence to the final resolution of the matter, including sentencing.

See R. v. Miracle (1992) 1 SCR 86, where the Supreme Court of Canada, by a majority of three to two, decided that the trial judge had correctly concluded that the delay was excessive. See also R. v. Slaney (1993) 2 SCR 228 in which the Supreme Court of Canada decided that five months systemic delay from the time of the charge to committal, in accordance with the relevant factors decided in Askov and Morin, was not unreasonable. Similarly in R. v. Frazer (1993) 2 SCR 866, the Supreme Court of Canada upheld the provincial Court of Appeal’s decision that the 22-months pre-trial delay was reasonable because the delay resulted partly to accommodate the defence and to accommodate the prosecution. Similar conclusion was reached by the Supreme Court of Canada in R. v. B. (1993) 3 SCR 643.

Although prejudice can be presumed - despite the defendant not offering any evidence of the prejudice - from the fact that the defendant suffered stigma and stress of being investigated and prosecuted, if the delay was not unreasonable or inordinate, or the prejudice was not great, the court is likely to favour the prosecution (See R. v. Gallagher (1993) 2 SCR 861; R. v. B. (J. G.) (1993) 3 SCR 643).


Supra, Note xxii, at pp. 795-6.

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