

February 2013



**Politics
& Governance**

The political economy of pre-trial detention

**Pilar Domingo and
Lisa Denney**



Methods and Resources

Acknowledgements

We would like to thank Kersty McCourt, Madeleine Crohn, Martin Schönteich and Robert Varenik at the Open Society Justice Initiative (OSJI) for their comments on earlier drafts of this paper.

We are grateful to the OSJI for their funding support. The views expressed in this paper do not necessarily reflect those of the OSJI and responsibility for the content of the study rests with the authors.

Disclaimer: The views presented in this paper are those of the author(s) and do not necessarily represent the views of ODI or our partners.



OPEN SOCIETY
JUSTICE INITIATIVE

Contents

Executive summary	ii
1 Introduction	1
2 Objectives of the study	1
3 Brief scoping	2
3.1 Summary of the problem of pre-trial detention	2
3.2 Drivers of pre-trial detention	4
3.3 Consequences	7
3.4 Some reform approaches	7
4 Political economy analysis framework	9
4.1 Brief explanation of political economy analysis	9
4.2 Drivers of pre-trial detention at different points along the criminal justice chain	11
5 Summary	19
6 Implications for programming	20
7 Case study methods	20
References	22

Figures & boxes

Figures

Figure 1: Some relevant political economy questions for PTD	11
Figure 2: Political economy of PTD and the justice chain	12
Figure 3: The politics of PTD, and the wider socio-political context and legal framework	14
Figure 4: Summary of the political economy of PTD	19

Boxes

Box 1: Wider socio-political context – key PEA questions to consider	15
Box 2: Arrest and police custody – key PEA questions to consider	16
Box 3: The detention process/environment – key PEA questions to consider	17
Box 4: Pre-trial release/detention, prosecution and trial – key PEA questions to be considered	18

Abbreviations

DFID	Department for International Development
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental Organisation
Norad	Norwegian Agency for Development Cooperation
OSJI	Open Society Justice Initiative
PEA	Political Economy Analysis
PTD	Pre-trial Detention
UK	United Kingdom
UN	United Nations
UNDP	UN Development Programme
UNHCR	UN High Commissioner for Refugees
UNODC	UN Office on Drugs and Crime

Executive summary

On any given day, over 3 million people are held in pre-trial detention (PTD). On average, this represents one out of every three people detained, but this rises to one in two detainees in many countries. PTD is a relatively discrete justice issue that is clearly identifiable and can be addressed before escalation, presenting an important opportunity for policymakers (from ministries and donor agencies) to engage in reform. It is also diagnostic in relation to broader justice challenges and state–society relations, making it a useful gauge of other blockages within the justice sector.

The objective of this paper is to develop an **analytical framework** that draws on political economy analysis (PEA) that can contribute to identifying the drivers of PTD. This can then be taken to country level to inform programming in ways that improve results.

Drivers, costs and consequences of pre-trial detention

PTD generally refers to ‘unsentenced prisoners’, that is, those in custody who are awaiting trial, conviction, sentencing or the outcome of appeal (Schönnteich, 2008: 12). Most commonly, PTD refers to those detainees awaiting the first two stages of the justice chain listed here – trial and conviction (ibid.). PTD is excessive and/or arbitrary when the detention fails to meet the three-pronged criteria set out under international law, when detention does not observe internationally accepted standards of due process and treatment of detainees and/or is prolonged beyond what constitutes a reasonable period.

The root causes or drivers of PTD are numerous and vary greatly depending on context and region. They can result from formal **legal factors** related to the content of the law and its particular interpretation by detention, prosecuting and courtroom officials. They may reflect **process-related** issues regarding how the criminal justice system works in practice along different stages of the policing, detention, prosecution and trial stages of the justice chain and levels of coordination across these. Finally, drivers of PTD can also be associated with the **wider social norms, political setting and crime-related policy trends** that both shape and reflect social and political attitudes towards criminal justice and suspects/detainees. Excessive PTD has negative impacts at multiple levels, leading to:

- Over-crowding of detention facilities;
- Deteriorating health and mental wellbeing of detainees;
- Worsened socioeconomic position of families of detainees;
- Higher costs to society through lost productive potential and financial costs of detention;
- Diminished effectiveness and trust in the criminal justice system.

While some efforts are underway to address rates of excessive PTD and its impacts, this area of programming, at the entry point to the criminal justice system, has not attracted significant international attention to date.

Political economy analysis framework

The reasoning behind PEA is that some governance issues are the result of blockages that obtain from the particular combination of wider structural socio-political contexts, existing institutions/rules of the game (both formal and informal), associated incentive and interest structures and the particular features of the balance of power between relevant actors and stakeholders. In the case of the drivers of PTD, this paper posits that the intersection of these factors varies at different stages of the criminal justice chain in ways that reflect the particular features of those different stages. In addition, how different stages of the chain are connected to one another will have a bearing on the conduct of different actors along the chain in ways that have an impact on PTD. A feature, therefore, of the analytical framework the paper develops, is the political economy dynamics of the different stages, but also the

interconnections along the criminal justice chain and against the wider socio-political environment.

PEA can have **diagnostic value**, in terms of contributing to better identifying/mapping out the nature of the PTD problem in any given context *and* at different points in the criminal justice chain, and highlighting potential opportunities for (internationally supported) interventions to be more effectively targeted. It can also contribute to **retrospective analysis** in order to inform assessments of interventions/reform efforts by identifying the reasons for effectiveness or failure. Its central objective is to provide a method of analysis that can contribute to a better understanding of specific drivers of PTD, and where opportunities might arise to support changes in the rules of the game and the incentives and motivations of different actors that contribute to the problem.

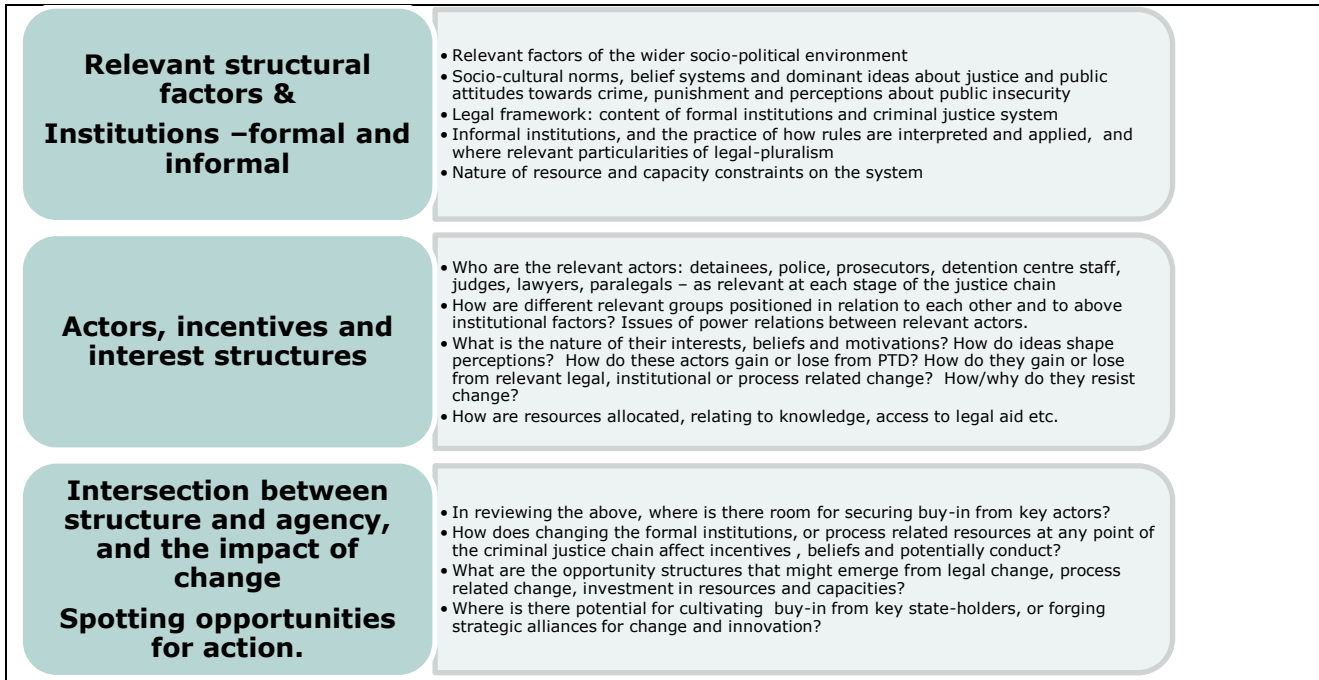
The analytical framework that this paper proposes draws on two approaches: PEA as applied to the policy world of international development and governance support; and working through the justice chain.

The political economy of pre-trial detention: a summary

We start from the position that excessive and/or arbitrary PTD is the 'problem' to be addressed, with an intention to reduce its incidence. The particular features of excessive PTD vary from country to country. The political economy questions proposed here should contribute to identifying the context-specific drivers of excessive PTD, and its particular characteristics. These questions are framed, therefore, to consider how different structural features of the content and rules of the game (both formal and informal) may be contributing to the particular problem at hand, as well as those factors that shape the conduct of key actors in the criminal justice system to either exacerbate or mitigate excessive PTD.

The figure below summarises the types of relevant factors to be considered. The first and second tiers of this framework provide an initial mapping of the context, and where some of the institutional and actor-related blockages might be that specifically contribute to the problem of PTD. The third tier of political economy questions is where the interface between structure and agency – that is, between the (changing) rules of the game and the conduct of relevant actors – is analysed, including to identify how interventions might more effectively target the relevant blockages. For instance, by introducing paralegals into the detention cycle, what is the impact this can have on how the rules of the game are implemented, or on the balance of power between the detainee, the police or the detention centre staff?

Some relevant political economy questions for pre-trial detention



For the purposes of programming in PTD, **this analytical framework is useful when applied to the different stages of the criminal justice system** – from the point of arrest to the point at which the case is resolved in a court of law. Applying PEA to each stage of the criminal justice chain enables the disaggregation of the structural features and wider socio-political and socio-cultural terrain, relevant institutional factors (formal and informal), relevant actors and their interests/incentives – and how they interact, in order to identify opportunities for influencing these to change the balance of power that maintains the *status quo*.

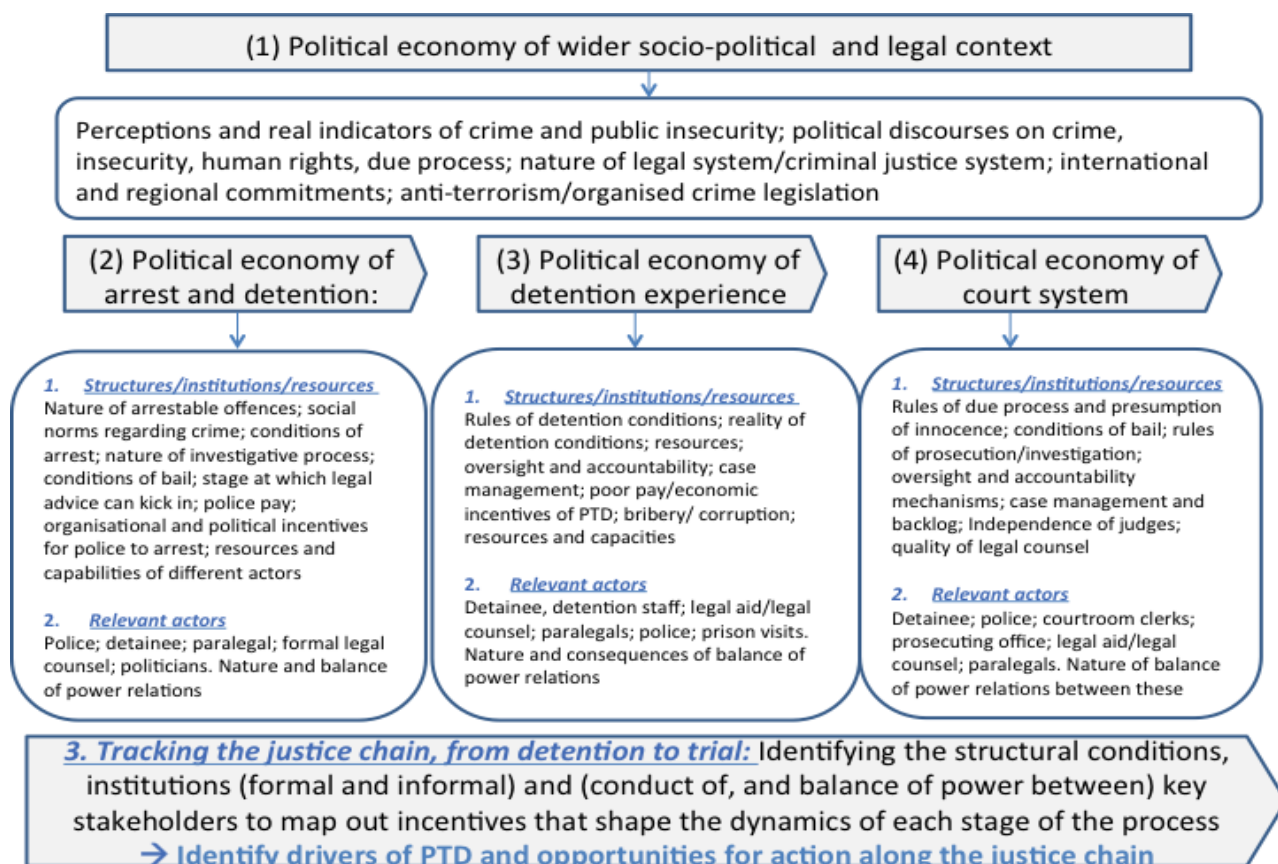
An example of what this might look like is set out below in the figure below. We identify the criminal justice system stages that are relevant for PTD as including:

- 1 The wider **socio-political context and legal framework** that shapes the rules of the game for criminal justice policy and practice;
- 2 The moment of **arrest and police custody**;
- 3 The **detention process/environment**;
- 4 The **decisions around pre-trial release/detention, prosecution and trial**.

At each of these stages, questions are asked about structures and institutions; relevant actors whose conduct has a bearing on PTD; and how these interact. Thus, it will be possible to consider how a particular change in the rules of the game might affect incentive structures of different actors (such as altering what constitutes an arrestable offence), or how the introduction of a new 'actor' (such as paralegals) might alter the balance of power between actors. These can constitute entry points for reform interventions aimed at reducing PTD.

While the third tier in the figure below appears less evidently developed, the key point to note about it is that it reflects the particular dynamics of the intersection between structure, institutions and stakeholders in different contexts. In each case, it is likely to reflect different dynamics along the justice chain that are specific to the context. It is also the point, therefore, at which opportunities for interventions can be identified, whether these are aimed at changing the rules of the game or at introducing new actors that can alter balance of power and the incentives and conduct of the relevant actors at the particular point of the chain.

Summary of the political economy of pre-trial detention at each stage of the process



Crucially, PEA disaggregated at the different stages of the criminal justice chain can generate insights into the particular dynamics of power relations, interests and incentives that shape different actors' choices and possibilities in relation to either how they contribute to, or benefit from, PTD, or what they can do to reduce its impact or prevalence. In achieving this, the analysis may thus go beyond identifying the drivers of PTD, and isolate in some cases where there may be opportunities to modify incentive structures, or encourage a realignment of interests or perceptions about why addressing PTD may be desirable.

Implications for programming

This proposed PEA framework may therefore be helpful in informing choices about how to engage strategically in supporting efforts to address excessive PTD. The PEA approach to working through the problem of PTD set out in this paper can contribute to identifying the specific opportunities for action, and what that action might look like, and where resources – given the particular political economy characteristics of a particular country or subnational context – are likely to most effectively give rise to positive change. PEA can also have diagnostic value – to inform programme design – but it should not stop at that. Rather, political economy should be fully integrated into the monitoring of programming and the life of projects to enable implementing bodies to capture changing conditions, in order that projects are able to adapt to new realities and remain relevant. PEA along the justice chain can also have retrospective analytical value where the intention is to understand what has worked – or failed – and why. The value-added to specific programme objectives to address PTD is thus important, providing analytically rigorous practical guidance.

Case study analysis will be important to test the merits of such an analytical approach.

1 Introduction

This paper develops an analytical framework drawing on political economy analysis (PEA) and other recent analysis of justice chains to study the incidence and drivers of pre-trial detention (PTD). The aim is to inform international support in justice and security programming to identify possible entry points for reform that can contribute to reducing excessive PTD.

While an increasing focus on the justice sector is palpable within the development community, in recognition of its connection to human rights and fragility (World Bank, 2011), the issue of PTD remains largely under-researched. This is a missed opportunity to engage with a key entry point to the criminal justice system for millions of people around the world.

On any given day, over 3 million people are held in PTD. On average, this represents one out of every three people detained, although in many countries the proportion rises to well over 50% of detainees. In certain countries, over three-quarters of prison populations are pre-trial detainees (OSJI, 2011a). PTD is a relatively discrete justice issue, one that is clearly identifiable and can be addressed before escalation, which presents an important opportunity for policymakers (from ministries and donor agencies) to engage in reform. It is also diagnostic of broader justice challenges and state–society relations, making it a useful gauge of other blockages within the justice sector. An analytical framework that draws on PEA provides a unique way of examining the drivers of PTD and can assist policymakers to address this issue within broader security and justice sector programming.

It should be noted upfront that a number of definitions of PTD exist. These range from those that define the pre-trial period as starting from the moment of arrest and extending up to the time the accused is first brought before a judge; to more extensive understandings that define the pre-trial period as starting from the moment of arrest and going through the trial period up until the point at which there is no further possible appeal. Here, we use PTD in accordance with Open Society Justice Initiative (OSJI) interpretations, in which PTD refers to ‘unsentenced prisoners’ – that is, those in custody who are awaiting trial, conviction, sentencing or the outcome of appeal (Schönteich, 2008: 12). Most commonly, however, the focus is on detainees awaiting trial and conviction (ibid.: 12). While the definitions as to the period of detention vary, the drivers are largely the same (of course, where the definition is more extensive, additional drivers may be relevant in the appeals process).

The paper is structured as follows. Section 2 defines the aims of the paper. Section 3 presents a brief scoping of the field, providing a summary of the key issues, where interventions have focused and what information there is about international trends in this area. Section 4, which is the main part of the paper, develops an analytical framework to address PTD, identifying key drivers and analysing these from a political economy perspective to contribute to identifying the most relevant constraints to and opportunities for addressing the problem. The framework is based on the assumption that context specificity is the main starting point. Section 5 summarises the key points, Section 6 sets out implications for programming and Section 7 outlines the approach to case studies.

2 Objectives of the study

PTD has been addressed from a number of reform perspectives. In developing countries, there has been important variation regarding levels of international engagement in support of efforts to reduce PTD. The objective of this paper is to develop an **analytical framework** that draws on PEA to contribute to identifying the drivers of PTD. This can then be taken to country level to inform programming in ways that improve results.

The underlying assumption of the analytical framework developed here is that taking account of context specificity is critical to understanding the particular features of the causal connections between actors and institutions that contribute to shaping particular

manifestations of the problem of PTD. This is in keeping with a now fairly established trend in the international development community, that working with context specificity is important to achieve relevance and effectiveness in internationally funded projects/programmes seeking to address different governance puzzles. Here, the puzzle at hand relates to identifying the causal factors behind excessive PTD, and where there may be opportunities to alter these to make international interventions more effective.

The reasoning behind PEA is that some governance issues are the result of blockages that obtain from the particular combination of wider structural socio-political contexts, existing institutions/rules of the game (both formal and informal), associated incentive and interest structures and the specific features of the balance of power between relevant actors and stakeholders. In the case of the drivers of PTD, the paper posits that the intersection of these factors varies at different stages of the criminal justice chain in ways that reflect the particular features of those different stages. In addition, how different stages of the chain are connected to one another will have a bearing on the conduct of different actors along the chain in ways that have an impact on PTD. A feature in the paper's analytical framework, therefore, is the political economy dynamics of the different stages, but also the interconnections along the criminal justice chain and against the wider socio-political environment.

Finally, it is important to stress that the analytical framework proposed here does not offer a magic bullet to assure effectiveness in support to reducing PTD. It does have two possible purposes, however. It can have **diagnostic value**, in terms of helping better identify/map out the nature of the PTD problem in any given context – and at different points in the criminal justice chain – and highlighting potential opportunities for the more effective targeting of (internationally supported) interventions. It can also contribute to **retrospective analysis** in order to inform assessments of interventions/reform efforts by identifying the reasons for effectiveness or failure. Its central objective is to provide a method of analysis that can contribute to a better understanding of specific drivers of PTD, and where opportunities might arise to support changes in the rules of the game and the incentives and motivations of different actors that contribute to the problem.

3 Brief scoping

This section develops a brief review of the state of knowledge on the drivers of PTD. It is not intended as an exhaustive literature review, but rather as an overview of the relevant issues of the key international actors supporting change/reform to address PTD issues.

3.1 Summary of the problem of pre-trial detention

PTD refers to the condition of being held in custody before trial has taken place. It is excessive and arbitrary when detention does not observe internationally accepted standards relating to due process and the treatment of individuals held in PTD, and/or is prolonged beyond what constitutes a reasonable period. Key issues include observing the presumption of innocence and respect for the right to liberty. International norms also establish that, under some conditions, a reasonable period of PTD can be justified. In accordance with the UN High Commissioner for Refugees (UNHRC), PTD 'must not only be lawful but reasonable and necessary in all the circumstances' (UNODC, 2005, cited in Schönteich, 2013: 2).¹

Determining the boundaries of what constitutes a reasonable period of PTD includes taking into account whether such a period is in accordance with international standards from the moment of arrest to the moment the detainee is brought before a judicial official, is awaiting trial or the conclusion of trial (sentencing). Here, formal commitments undertaken by state parties are of

¹ Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR) establishes that under some conditions PTD is justified. The Tokyo Rules, or UN Standard Minimum Rules for Non-custodial Measures, provide further qualifications intended to limit the use of PTD. And UNHRC provides that detention before trial should be used only when lawful, reasonable and necessary.

course relevant, as they set a standard against which a specific criminal justice system in practice can be assessed. Considerations that are relevant when deciding whether the accused should be kept in PTD include if there are reasonable grounds to believe the person will abscond or will engage in criminal activity if released.

However, there is in reality very wide variation in domestic law, the use of PTD and prevailing legal understandings about what constitutes reasonable grounds for it. This results in PTD being much more recurrent than can be assumed, for instance, from the principle of the presumption of innocence, which may appear in declaratory form in domestic law. In part, this reflects a potential tension between what is assumed to be – or is justified as – a need to protect the public and a commitment to observing the principle of presumed innocence and the rights of individuals.²

Moreover, the widespread reality of PTD also reflects the fact that the system of criminal justice has multiple stages and layers, and this complexity creates many potential loopholes, capacity gaps and opportunities that lead to excessive PTD – either by default (including through the wide range of coordination and resource problems that might feature along the policing and justice chain), or through the purposeful use of excessive PTD, which can for a number of reasons serve the interests of different actors along that chain and beyond, such as political agendas on crime. Both purposeful and default reasons for PTD also have an impact on how long detainees spend in prison. One account, for instance, shows that in Nigeria PTD can be in excess of 10 years, well beyond the limit established by the law (OSJI, 2012).

Thus, while PTD may in some cases be the result of *deliberate* decisions to keep particular individuals in detention beyond what is reasonably acceptable according to international standards, and in some cases in ways that are not in accordance with domestic law, it is often the multiple systemic fault lines at the different stages of the criminal justice chain that create the conditions for *de facto* situations of PTD. These fault lines are the object of analysis in this paper. They result from combinations of institutional blockages and incentive structures along the criminal justice chain that serve the interests of different stakeholders, that reflect particular sets of resource and capacity constraints or that mirror wider social norms and beliefs about social control, crime and punishment, and the perceived risks that detainees pose to public order.

Understanding the complexity of the multiple factors that potentially contribute to PTD is compounded by the problem of data availability and reliability (Varenik, 2008). The metrics of PTD in themselves constitute a highly uneven and unreliable body of knowledge – somewhat inevitably so, given country-specific boundaries of what PTD includes. Comparison across countries and between subnational levels is difficult given the variation both in *how* it is represented at the country level and in *what* is actually being recorded. Moreover, official data are often not representative of reality, not least because of poor systems of recording and enormous variation at subnational levels and between prisons and prison systems. Notwithstanding this, it is recurrently cited that over 3 million people are currently being held in PTD (Muntingh and Ehlers, 2011). On average, this represents one out of every three people detained, and in many countries the proportion rises to well over 50% of detainees. In some countries, more than three-quarters of prison populations are pre-trial detainees.

PTD is also a worldwide problem: it does not afflict only the developing world. The impacts are significant and multifaceted, affecting the rights and wellbeing of detained persons, but also the socioeconomic development of their families and the functioning of, and trust in, the criminal justice system. PTD involves direct costs to the public purse, and carries a wider cost to the community and society. Moreover, there is evidence that it may contribute to fostering criminal behaviour. In Brazil, for instance, it seems that PTD detainees are a source of recruitment for gangs (OSJI, 2012). Recent studies – many conducted or supported by OSJI – have begun to record more systematically the root causes, the scale and the consequences and costs of PTD to state and society across different spheres (see, notably, OSJI, 2011a; 2011b, 2012).

2 See Schönteich (2013) for a discussion of the tensions and competing objectives.

3.2 Drivers of pre-trial detention

The root causes or drivers of PTD are numerous. They also vary greatly depending on context and region. There are different possible ways of clustering potential drivers. They can result from formal **legal factors** related to the nature of the law and its particular interpretation as it relates to PTD by detention, prosecuting and courtroom officials. They may reflect **process-related** issues regarding how the criminal justice system works in practice along different stages of the policing, detention, prosecution and trial stages of the justice chain and levels of coordination across these. Finally, they can also be associated with the **wider social norms, political setting and crime-related policy trends** that shape and reflect social and political attitudes towards criminal justice and detainees. Each of these types of drivers is considered below, but here we present only a selection of what is in reality a wider range of practices, rules, conduct and resource/capacity issues.

3.2.1 Legal frameworks

Over the past two decades, there has been a progressive trend in many countries towards eliminating some of the gaps in the law that contribute to driving PTD. Measures such as eliminating the legal validity of confessions obtained under torture and in conditions of detention before appearing before a judicial authority have been put in place in much of Latin America as part of criminal justice reforms. In part, this has also reflected a trend in the region towards signing up to international or regional standards and principles that aim to protect the rights of detainees. In spite of these developments, however, a major driver of PTD is that, even when international or regional principles have been signed up to, many relevant aspects of domestic law remain unchanged with regard to the criminal justice process. Moreover, in recent years some countries in the region are seeing what is labelled the 'counter-reform' process of legal change, which includes expanding the rationale for allowing PTD, among other reasons because of rising crime and widespread perceptions of insecurity (Fuentes, 2010).

In many countries, the law makes explicit allowance for PTD as a measure that is reasonable under some conditions, such as when there is a risk of the detainee absconding or engaging in criminal activity. However, in many Latin American countries, the range of conditions presented as reasonable justifications for PTD in criminal law codes is quite expansive. For instance, in Chile, Colombia, Costa Rica, El Salvador, Nicaragua and Panama, reoffending detainees can be held in PTD by virtue of being reoffenders. In Chile, and many other countries, the gravity of the crime the detainee is suspected of committing is a relevant factor in determining PTD (Duce et al., 2009). These conditions of exceptionality allow for loopholes to survive in these systems in a manner that can facilitate excessive PTD. There is a sense in some countries in Latin America that the reforms of the past years to the criminal justice system have lowered the numbers of detainees in PTD. These issues have been much debated in Latin America in recent years in the context of criminal justice reform trends, but they are relevant to dilemmas inherent in criminal justice systems worldwide.

The rules and practice of bail constitute an important set of factors shaping excessive PTD. In India, for instance high court decisions have ruled that bail should be the rule rather than the exception. However, studies show that, when it is granted, it is often not affordable for the detainee. Either this leads to the condition of PTD, or the detainee is vulnerable to exploitation by professional 'bailers' (Saxena, 2008). In South Africa, efforts have been undertaken to make bail more just, taking account of the rights of detainees and balancing this against the concerns of victims and witnesses, through a small pre-trial services project. A key innovation in this project involved taking account of detainees' economic circumstances to decide the amount of bail, thus reducing the number of those who remain in PTD principally because they could not afford bail (Ehlers, 2008). Notably, this initiative failed to become sustainable over time, including through lack of ownership and coordination across different justice-related agencies.

Legal frameworks also affect what maximum time limits are considered acceptable for PTD. While in most countries in Latin America criminal justice codes specify time limits for PTD, in some, such as Bolivia, El Salvador, Honduras and Venezuela, time limits extend to as much as

two years (Duce et al., 2009). In other contexts, such as Cambodia, there are no legal time limits to PTD at all (Jiyoung Bang, 2008). Lengthy or an absence of time limits clearly mean individuals can be kept in PTD over unpredictably long periods. In many cases, time limits do clearly exist but are not observed. In Kenya, it has been reported that, in order to maintain an individual detention over the prescribed time limit – for whatever reasons – the detainee in question may be moved from one police station to another, ‘effectively “resetting” the time limit with each transfer’ and making it seem less in breach of the law (Edwards, 2012).

An additional factor that contributes to high levels of PTD is the fact that laws are often imprecisely worded, creating space for either accidental or deliberate interpretations that can exacerbate PTD. Reasons for deliberate use of PTD may range from wanting to keep some individuals in custody for political reasons (such as their political affiliations, including, for instance, in periods leading up to an election) (Edwards, 2012); to the belief that detainees represent a security risk to society; to more venal calculations about amounts of bribery that can be extracted from detainees encouraged to purchase their way out of excessive/arbitrary detention.

In some cases, PTD is aggravated by legislation that targets particular categories of suspects. For instance, anti-terrorist laws have contributed to normalising a situation whereby individuals are held in detention in the name of a public good – such as national security – that takes priority over the rights of the detainee regarding the presumption of innocence. This has been exacerbated since the terrorist attacks of 11 September 2001. Equally problematic are policies addressing organised crime. In some cases, the vague wording of anti-terrorism legislation creates opportunities for arrests and detention of individuals who cannot easily be charged for other offenses (Edwards, 2012).

3.2.2 Process- and practice-related factors along the policing-justice chain

While the legal framework (and whether or not it is adhered to) is important in establishing parameters for PTD, PTD results also from different **process- and practice-related issues** that surface at different stages of the justice chain. That is, the degree to which the law is observed or implemented in practice may differ quite considerably from what is established in writing. By observing the process of arrest, detention and courtroom treatment of cases, it is possible to capture what drives PTD. Here, drivers can be located at the micro level of particular points in the criminal justice chain.

Drivers will inevitably be context specific, but a number of recurrent issues at subnational levels can be pinpointed. These include the following:

- Incoherence in competencies and jurisdictions among different police, prosecution and judicial officials, including in terms of how international standards regarding detention and due process principles are perceived, creates multiple layers and dynamics of decision making throughout the criminal justice chain. These decisions may be poorly coordinated, or made by different categories of actors who may bring different views about what criminal justice entails, and how to balance detainees’ rights against other perceived security priorities. In addition, personal interests that may be related to bribery opportunities will vary among these.

In some cases, the mandate of the police may be such that their powers of arrest are overly expansive in ways that do not comply with international human rights standards (Edwards, 2012). For instance, in Zambia it was found that police were not selective in how arrest charges were issued (Matakala, 2011). The kind of offences for which arrest is seen as reasonable may be a contributing factor. The same set of studies on Zambia noted, for instance, that police detention could be significantly reduced by removing from detention persons whose offence is loitering (Redpath 2011).

- There are problems related to poor coordination and administration along the criminal justice chain. These include diverse administrative and organisational issues that result from resource and capability constraints. Typical problems are:

- Poor or non-recording of information about arrest, including the reason for arrest, the time and place of arrest and the identity of the officers involved. This may owe to a lack of fundamental resources and capabilities in police stations and detention centres (Pachira, 2011).
- Police being inadequately trained, including with respect to new laws on PTD and principles of due process, *habeas corpus* and wider human rights issues. Judicial officials also may not keep abreast of recent legal reform, as was apparent in Malawi, for instance, where officials failed to keep track of the implications of changes to the Criminal Procedure and Evidence Code, which have legal implications for PTD (Kayira, 2011).
- Detention centres lacking basic resources, such as means of transport to have detainees taken to court houses (Edwards, 2012; Matakala, 2011).
- Judiciaries with poor capacity to manage caseloads resulting in major delays in the disposition of cases, poor court roll management and insufficient office materials, including technological resources to support case management.
- Accountability mechanisms and levels of transparency regarding police conduct and courtroom personnel are deeply problematic across all regions. The problem of corrupt or poor practice along the policing and justice chain is fundamental to identifying key institutional blockages in the system, not least because of the negative incentive structures it reflects. Practices of bribery may take place in different ways and at different stages of the chain, including paying bribes to avoid detention or to move the case file along and speed up the trial stage (Edwards, 2012; Ramirez-Garcia and Samayoa, 2000). Corruption of this kind generally discriminates against the poor and can result in lengthening their time in PTD.
- PTD is exacerbated when detainees have limited resources, such as access to and awareness of rights and mechanisms of legal aid, or payment of bail. Legal redress can therefore be severely limited, which gives room for impunity and arbitrary conduct by officials along the criminal justice chain. This is likely to be affected by such factors as socioeconomic position and levels of literacy of detainees, which magnify the difficulties of access to justice.

3.2.3 Wider social norms and political pressures for tough on crime approaches

PTD is also the consequence of more purposeful decision making. The drivers include whether the motivation/incentives not to address PTD – or indeed to keep detainees in PTD – lies in wider social norms about crime and justice, specific policy trends, such as ‘tough on crime’ approaches, or calculations about political or personal advantages (such as receiving bribes) that can result from PTD. Some recurrent themes that emerge from the literature include the following:

- There is widespread systematic use of PTD as a means to obtain confessions. In Latin America, prior to reforms undertaken in the 1990s and 2000s, confessions obtained without legal counsel presence were a matter of course (Duce et al., 2009). This situation remains common in many countries today.
- PTD is sometimes conceived of as a form of punishment itself. This can reflect wider social attitudes towards detainees as likely criminals who deserve punishment, and a cultural disregard for the principle of the presumption of innocence before trial.
- PTD may reflect the hardening of police tactics in line with ‘tough on crime’ approaches to deal with deteriorating public security conditions. In Kenya, for instance, police use PTD as a strategy to combat crime, including because of limited resources, such as access to appropriate non-lethal weapons and defensive equipment, which makes it easier to arrest large groups of suspected criminals than intervene in disputes (Edwards, 2012). In Latin America, a ‘counter-reform’ movement to earlier criminal justice reforms reflects a political and police response to public demand for ‘tough on crime’ approaches in contexts of heightened perceptions of citizen insecurity and impunity for criminals (Duce et al., 2009; Fuentes, 2010; Venegas and Vial, 2008).

- Police may feel public pressure to look as if they are tough on crime or to gain public respect by seeming tough on crime.
- In some cases, arbitrary arrest is the result of orders of an administrative or political authority (such as a governor, government representative or the military), and may be politically motivated. Typically, this reflects an environment of poorly embedded democratic institutions and practices, where detention of individuals for political reasons remains a useful recourse for governing elites (whether at national or subnational levels) (Edwards, 2012). In Latin America, such practices were routine in the past (Duce et al., 2009).
- Political motivations can include the police working in protection of particular interests in any given dispute. For instance, in Senegal, it is reported that the police arrested and detained taxi drivers for up to eight days without charge during disputes between taxi drivers' associations, so as to protect a particular set of business interests (Edwards, 2012).
- Discrimination against particular ethnic or social groups can be a motivating factor for arbitrary arrest and prolonged detention.
- Corruption and opportunities for bribery, of course, remain a major motivating force at all levels of the criminal justice chain. But the particular forms this takes can vary enormously.

The above reflects a brief overview of some of the types of drivers of PTD. It is not an exhaustive review of the issues, but is indicative of the range of factors likely to surface in case study analysis.

3.3 Consequences

Research on the consequences of PTD has begun to produce evidence-based findings that are relevant for orienting where best to target reform/interventions to alleviate suffering. Some of the most evident consequences are noted here.³

- PTD inevitably exacerbates overcrowding in penal centres, contributing to deteriorating detention conditions that are hugely out of line with international human rights norms. In 2002, on average, prisons in Africa were at 141% capacity, with some at well over 300% (Penal Reform International, 2005).
- The direct consequences for detainees held in PTD are of course in themselves potentially devastating in terms of their life opportunities and health risks, given the dire health and sanitation standards in detention centres (OSJI, 2011a; 2011b; Schönteich, 2008).
- Socioeconomic impacts of PTD demonstrate that it is wasteful in terms of both the immediate costs to the state as well as the productive potential that is lost from holding people indefinitely in detention (OSJI, 2011a).
- PTD reflects the denial of the presumption of innocence, and of the observance of due process, and as a result undermines the credibility of the rule of law.
- PTD contributes to the criminalisation of detainees who otherwise may not have engaged in a criminal lifestyle. In Brazil, criminal gangs recruit most of their members from inside prisons.

3.4 Some reform approaches

Different policy and reform approaches have surfaced over the years. These vary regionally and at the country level, and have produced mixed results. Penal Reform International (2005) notes that:

³ See Schönteich (2008) for a good overview of consequences, and OSJI (2011a).

If there is one lesson to be learned from the work done in the justice sector over the past ten years or so, it is that for there to be any impact on penal and justice reform, the criminal justice sector must be viewed and approached as a whole, involving all agencies, since congestion in prison results from a whole chain of decisions made by a range of different actors.

With regard to PTD-related interventions and reforms, approaches have moved from a focus on legal reform towards a more process-oriented perspective that directs resources at different stages of the criminal justice chain. For instance, in Latin America, the single most important reform that has featured in the region in the past decade, as well as more recently, is the shift of the criminal justice system from an inquisitorial system to an accusatorial system. Other reform interventions have included undertaking measures to address issues of access to justice and legal aid, for instance in Nigeria and Sierra Leone. In Malawi, a focus on paralegals has proved effective, and in India measures taken to organise prison visits have contributed to generating organised pressure for compliance with rules on length of time in detention. In South Africa, monitoring of bail information has been used to verify decisions about the risk of releasing defendants.⁴

Data on funding trends for reforms addressing PTD are limited. Sustained interest in the issue is reflected mostly in the work of the Open Society and the UN Development Programme (UNDP). There is also work by international non-governmental organisations (NGOs) like Penal Reform International and The Asia Foundation.⁵ In addition, bilateral donors have funded specific projects on different parts of the criminal justice system, addressing directly or indirectly issues that are relevant for reducing PTD. However, bilateral donors have largely shied away from direct support to the prisons system.

There are potentially a number of reasons why PTD is not an immediately attractive policy priority for the international donor community. For instance, in contexts where citizen security is a major policy issue, the rights of detainees tend to fall low on the list of priorities for policy action. This is especially so in contexts where 'tough on crime' narratives have traction. Moreover, even including when human rights objectives are prominent in donor programming, the rights of detainees are less attractive than those of other groups. Overall, there is a sense that few international donors work with prisons and with police reform that focuses on detention issues (Hammergren, 2008).

From this brief scoping, some trends can be summarised.

- PTD constitutes a worldwide problem that undermines rule of law, and the credibility of states' commitments to protecting the rights and guarantees of all.
- Excessive PTD has devastating consequences at the individual and wider societal level, and constitutes a high cost to the public purse.
- Identifying drivers of detention is increasingly informing reform efforts – including donor-funded interventions. In some cases, these efforts have focused on legal change. More recently, there has been a trend towards working with different process issues and actors at different stages of the criminal justice chain.
- The availability of reliable data, however, remains deeply problematic.
- The emerging evidence on what drives PTD confirms that attention to context specificity is critical. Moreover, context specificity is likely to require going beyond the national context, taking account of subnational differences and paying attention to the micro detail of reform efforts, even at the level of different localities or detention centres. This is because variation at subnational levels within the same national context can be important with regard to what incentive structures operate, and what differences exist in relation to issues of capacity and other forms of resource levels, and the wider socio-political context. For instance, rural and urban settings, in particular, can present hugely different dynamics.

⁴ See case studies in OSJI (2008) for rich case study analysis on different intervention experiences in relation to PTD.

⁵ <http://www.penalreform.org/themes/pre-trial-detention>

Drawing on these trends, the remainder of this paper develops an analytical framework that can contribute to guiding reform efforts to working with context specificity in ways that help map out and identify the specific drivers of PTD at the different stages of the criminal justice chain. The objective is to identify opportunities to change incentive structures of key actors at different stages of the criminal justice chain in order to reduce excessive PTD.

4 Political economy analysis framework

The analytical framework this paper proposes draws on two approaches. First, it draws on recent thinking on PEA as applied to the policy world of international development and governance support. Second, it borrows from an approach to mapping the justice chain developed by Gloppen (2006). Gloppen's mapping considers the justice chain specifically in relation to social and economic rights litigation, and the different legal stages, actors and decision-making and implementation steps that need to be disaggregated in order to identify the particular points where there are institutional, resource- and capacity-related and motivational blockages that shape the likely direction and outcome of cases. For the purposes of this paper, we adapt this to consider the criminal justice chain, in order to identify where decisions may get stuck and what incentives, capacities and institutional constraints are interacting to contribute to PTD. Here, our focus is on disaggregating the different possible stages of the criminal justice chain that are relevant to shaping patterns of PTD in any context, and the range of institutional, motivational and capacity-related features that shape it.

Taking note of the above review, it is important to reiterate that there is never any single driver of PTD. Rather, given both the multi-layered features of the criminal justice chain, and, moreover, how these interact with the wider socio-political environment, it is likely that blockages may feature at different stages of the chain, and in response to different sets of incentives and capacity constraints. Moreover, we have noted already that at the subnational level there can be significant variance within the same national territory in terms of how PTD manifests.

4.1 Brief explanation of political economy analysis

PEA reflects a long-established tradition in the social sciences in the study of different social, political and economic phenomena. It has taken different forms over time. In recent years, it has surfaced in the policy literature relating to different development and governance problems, with the purpose of finding ways forward towards a better understanding of the policy problem and identification of potential opportunities for more effective international engagement.⁶ Donors are also increasingly utilising PEA approaches in their own work to better understand problems they face in programming. For instance, the Norwegian Agency for Development Cooperation (Norad) has undertaken PEA in relation to its programming in Kenya, and the UK Department for International Development (DFID) has developed a PEA 'How to Note' and funded PEA studies in a number of sectors, such as water and sanitation (DFID, 2009; Harris et al., 2011; Norad, 2009).

PEA takes account of how political and economic processes interact in society, the rules of the game, the incentive structures, the belief systems and ideas that underpin the conduct of different groups and individuals and how power is distributed between these. Essentially, it disaggregates the processes that both sustain and transform these relationships over time, and in relation to specific social, political or economic phenomena/problems (Collinson et al., 2003; Unsworth and Williams, 2011). And, critically, as noted in Hudson and Leftwich (2012), PEA can contribute to capturing the balance and dynamics of power relations between key actors, which is central in understanding the scope for (institutional) change and what different actors can do about this.

⁶ See Copestake and Williams (2012) and Harris et al. (2011) for good reviews of the emerging use of PEA in development work. See also Fritz et al. (2009) for a particular approach to problem-driven PEA. See also Booth and Golooba-Mutebi (2009).

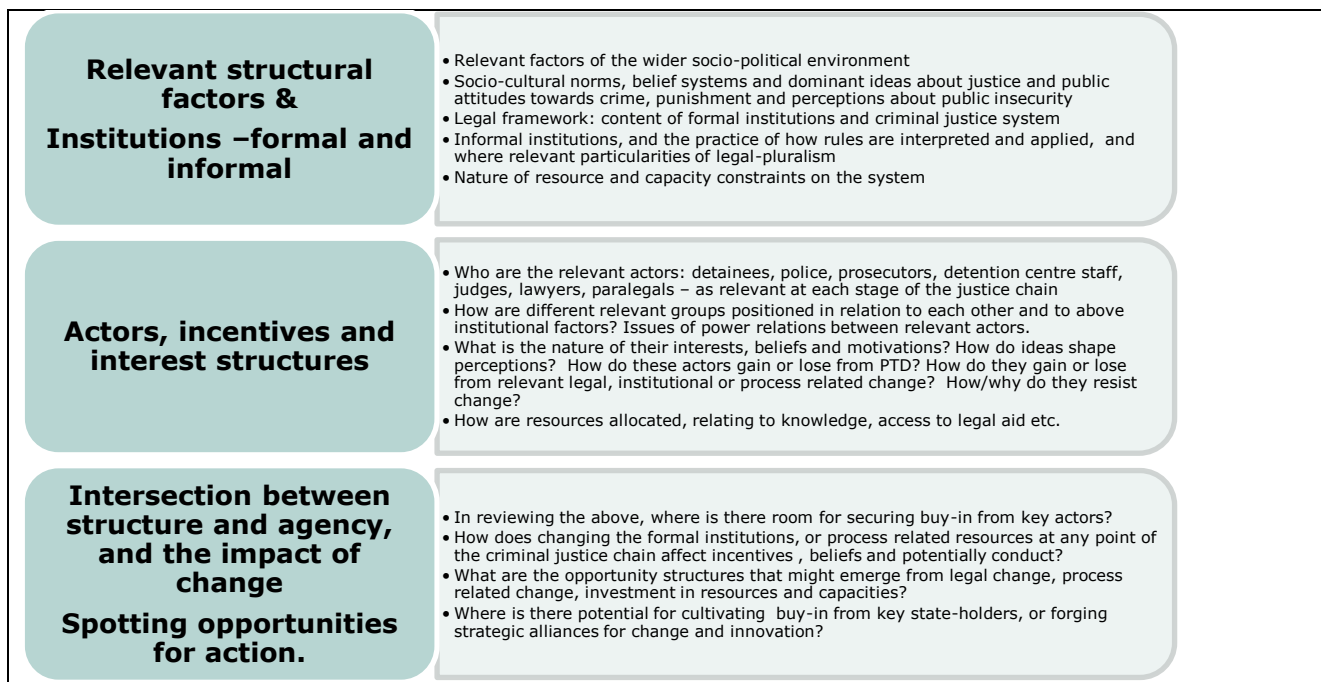
Thus, at the heart of PEA is the possibility of capturing the dynamic interplay between structure and agency, and how changes and alterations in one – for whatever reason, which can be captured by this analysis – can activate change in the other. This interplay is the site where opportunities for action might be identified. Disaggregating this dynamic interplay can contribute to informing what causal connections might be relevant in terms of institutional configurations and actors' incentives, interests and belief systems, and where there may be opportunities – for policy purposes – to engage constructively in facilitating change where this is plausible, practical and strategic.

However, it is important to factor in multi-dimensionality, as most (governance) problems reflect complex relationships between rules (including social norms), belief systems and dominant ideas, resources and capabilities, incentives, motivations and conduct that shape particular outcomes – in this case excessive PTD. Using problem-focused PEA thus requires looking closely at the component features of the problem against the objective or change process that is intended. In this case, we are concerned with reducing levels of excessive PTD. To this purpose, our use of PEA involves working through the following levels of analysis:

- 5 Examining the **structural and institutional context** in which the problem of PTD is located. This involves identifying those features of the environment that shape the formal legal, normative and political conditions that contribute to the particular characteristics of the problem. Relevant factors are likely to include the socio-political environment of crime; perceptions and attitudes to crime and wider belief systems about justice and law and order; the combined institutional body of rules of the game in the criminal justice process that results from the legal framework; and the dominant social norms and informal rules that prevail and shape the conduct of key actors towards PTD. In addition, this analytical level looks at some of the process-related aspects of the criminal justice system pertaining to resources (including assets to afford legal counsel), knowledge, information and other capabilities. This includes addressing resources and capabilities as relevant to different actors in the chain.
- 6 The nature of relevant **actors, their ideas, beliefs interests and motivations**, and how they are related to each other and positioned with regard to the institutional and structural setting in which they are located. Critically, this should not be a static analysis of who these actors are, but rather should begin to identify features about the relational interplay between their beliefs, interests and motivations, how they relate to each other and how the evolution of the relevant features of the institutional, socio-political and resource environment forges their conduct and role in shaping PTD outcomes. Moreover, different actors may actively resist institutional change or promote it, thus contributing in turn to altering the institutional and resource environment they are engaging with. Critically, this level is about mapping out the scope for agency among the different relevant actors.
- 7 The **dynamic interplay between structure and agency** – as captured in the previous levels – in order to identify opportunities for change, strategic action or coalition building to promote change.

Figure 1 offers a preliminary identification of what some of the relevant questions for PTD might be against these three levels of analysis. Critically, what is important for our purposes here is to use this analysis to focus on different components of the criminal justice chain, and to do so in ways that capture the dynamic interface between the different components of the three tiers.

Figure 1: Some relevant political economy questions for PTD



Source: Authors' adaptation of recent approaches of problem-focused PEA.

These three tiers represent our own adaptation of recent policy-relevant PEA approaches to the particular problem of PTD. It is important to highlight that these three levels of analysis are intended to shed light on what is a dynamic and relational problem. The different analytical components that are relevant here are not static, and, moreover, they are relationally defined. Thus, for instance, a change in the rules of the game (change in the law, or process-related rules) can affect the incentive structures of, or constraints bearing on, different actors in the criminal justice chain, and thus alter their behaviour. Different stakeholders can also be agents of change, by activating reform, or lobbying for it, or by activating dormant aspects of the law that had not been implemented before. It may also be the case that alterations in levels of resources and capacities may contribute to altering the balance of power between different stakeholders, or their capabilities for effective activation of (or recourse to) the law.

PTD needs to be understood, then, at the intersection of these different analytical components, and so cannot be ascribed to any single cause. Rather, drivers of PTD are likely to be located at different points of the criminal justice chain, and to be the outcome of different combinations of institutional, motivational, ideational, attitudinal, resource and coordination constraints.

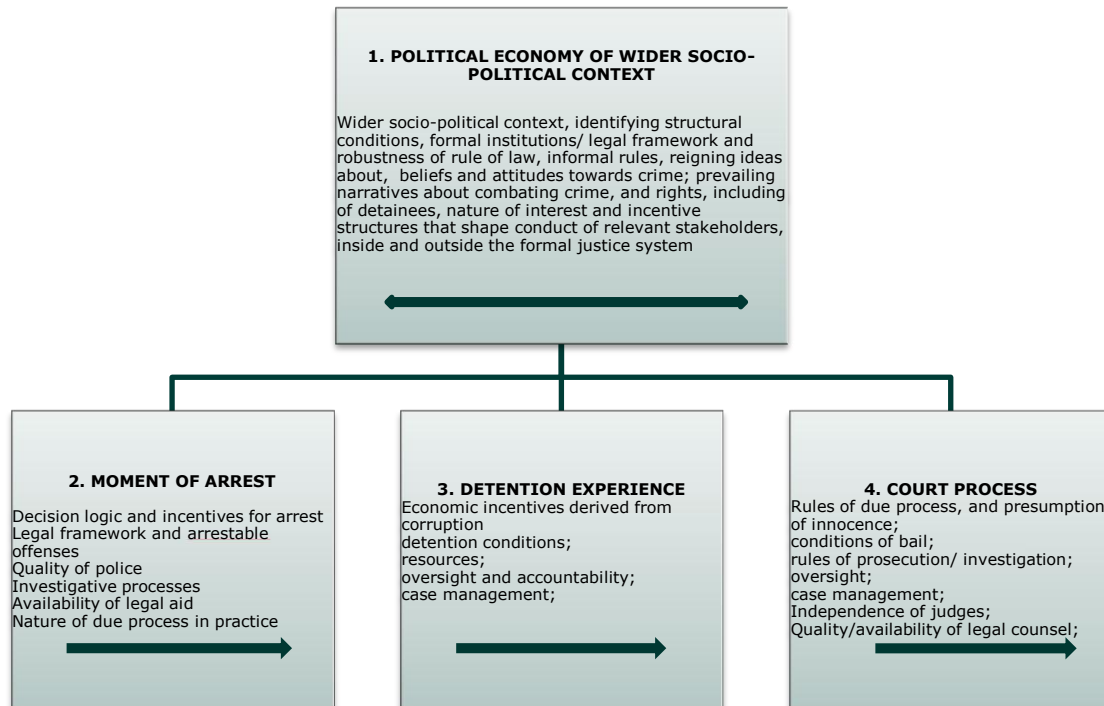
The following section disaggregates further what some of these constraints/drivers might look like at different stages of the criminal justice chain to contribute to the problem of excessive PTD. The PEA questions noted above inform the types of institutions, processes and actors – and their interaction – that need to be considered as potentially relevant for PTD. In the different stages of the chain, the third tier is intended to be borne out of the 'thick' analysis of the context-specific interplay between structure, institutions and those actors whose conduct or intervention is relevant for shaping particular features and modes of PTD, in this case.

4.2 Drivers of pre-trial detention at different points along the criminal justice chain

Drawing on these elements of PEA – structural, institutional (formal and informal) and actor centred – to uncover the institutional blockages, political and ideational motives, and the interest and incentive structures that drive PTD, this section sets out some of the possible

drivers of PTD. At each stage, different logics of decision making, institutions, stakeholders and conducts kick in, which cumulatively, along the chain, result in particular configurations of PTD patterns. Some of the key processes are, at a very general level, identified in Figure 2.

Figure 2: Political economy of PTD and the justice chain



Authors' elaboration

Following Gloppen (2006), it is helpful to disaggregate in more detail the different stages of the criminal justice chain to identify at each stage the particular configuration of relevant structural, institutional and actor-centred factors – including the formal and informal institutions – that need to be considered. Each stage of the criminal justice chain potentially reflects a particular set of conditions.⁷ Here, we consider further (i) the wider socio-political and legal context; (ii) the process of arrest and initial stages of the detention; (iii) detention itself; and (iv) relevant features of the prosecution and judicial process. In the course of case study analysis, each should be considered on the merits of its own political economy conditions. However, it is important not to lose sight of the connectedness of the criminal justice chain, and its linkages to the wider socio-political environment.

In the following section, we identify some recurrent features of these stages. It is worth noting that in most cases the potential relevant stakeholders are likely to include the police, detention centre staff and prison officers, prosecution officials, courtroom clerks, judges, the detainee, the range of potential supporting agents like public defenders and legal aid, paralegals, prison visitors, human rights organisations including ombudsman figures and, in some cases, informal justice providers. Less directly evident, but still influential, actors include politicians at the national and subnational level and other power holders who may benefit from PTD, the media and international actors with potentially different – and divergent – agendas.

These may all be relevant to varying degrees at different stages of the criminal justice chain, but their relative weighting will change, and their position in the particular balance of power at each stage will vary not only between but also within countries. For instance, the police may be especially important in the arresting moment, but will have less influence regarding the granting of bail. The constant figure throughout is the detainee.

⁷ Gloppen's (2006) framework involves identifying a range of factors that shape the process and output at each stage of the litigation process.

4.2.1 Wider socio-political context and legal framework

At the highest level, PTD reflects some aspects of the wider socio-political and governance environment against which it is set. This requires taking account of both the formal and informal **socio-political and governance environment** that in practice sanctions its occurrence. Some of the issues are set out below.

First, the nature of the state and the degree to which there is rule of law in place that is in keeping with normative principles of due process, and commitment to international standards regarding PTD, are important. The quality of the criminal justice system relies not only on the particular legal principles on which it is founded, but also on issues to do with levels of state capacity, legitimacy and territorial presence that enable it to enforce the law – including implementation of a criminal justice process that observes international principles. We know that full rule of law in this sense is a normative aspiration and not a full reality in any context. However, the issue of degree is important. Countries with weak or fragile states are especially likely to have criminal justice systems that, at different stages, are susceptible to capture (e.g. economic or political motivations that are not driven by the legal merits of PTD), or ineffectiveness (e.g. resulting from resource constraints). It is also important to understand the nature and form of legal pluralism or institutional hybridity that characterises some societies with either weak states or simply long-standing legacies of multiple norm systems coexisting (with varying degrees of tension or complementarity). The key point is that the nature of the state, and how formal law or non-state forms of dispute resolution, is embedded in state–society relations is relevant to understanding how PTD fits in the criminal justice system.

Second, the specifics of the legal process and the prevailing meanings of PTD – as noted above – set the normative and legal framework about what are arrestable offences and process-related rules for criminal justice procedures. Where the state is weak, this may not be an especially important factor in defining how detention and arrest happen in practice. But the law is not unimportant. And where the state or legal bureaucracies are stronger, the content of the law is taken more seriously. So, for instance, the ‘counter-reform’ regarding PTD in parts of Latin America that is resulting in setting in motion rules that broaden the scope for using PTD reflects a belief both that the law is relevant in shaping detention outcomes through the justice system and that the outcome of more extended PTD is a good one.

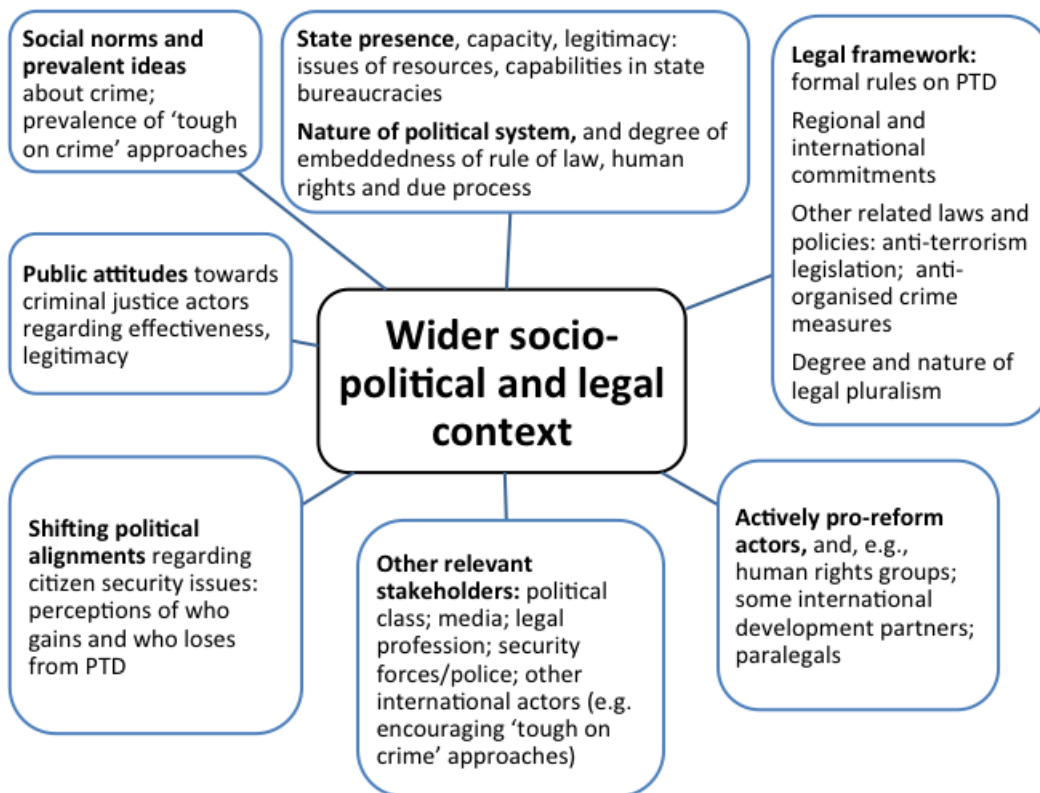
Third, the law, and how it is applied, is itself the result of the socio-political environment, and attitudes towards crime and perceptions about insecurity and impunity can condition practices towards detainees. The same law in different settings can take different forms in practice. Moreover, where there is political gain in adopting ‘tough on crime’ approaches, there is likely to be an unfavourable policy space for addressing PTD. Political policy choices might also be constrained by a lack of capacity, understanding or resources to develop alternatives.

These structural and institutional factors are important in shaping the rules of the game that, to varying degrees, lead to variations in PTD rates. But at this level, the beliefs, incentives and interests that shape how key national actors are positioned in relation to PTD are likely to be related to political or wider strategic agendas, or normative beliefs about the rights and wrongs of PTD. Relevant actors at this level typically include the political class, the media, the wider legal profession, human rights groups and different international and regional actors and networks. For different political, strategic or socio-legal and cultural reasons, these may favour more scope for PTD to exist in the criminal justice system, or they may be champions of change to reduce PTD. How these actors are positioned in relation to one another and to the issue is part of what a study would uncover at this level, including the balance of power between them. Understanding the motivations of these actors is relevant, including to identify concrete moments of opportunity to support pro-reform coalitions and be aware of the nature and causes of resistance to change, or motivations for counter-reforms, as have occurred in Chile and Russia (Fuentes, 2010; Shwartz, 2008; Varenik, 2008). In both contexts, for different sets of political reasons, but not unrelated to a liberalising moment in their respective political trajectories, policies and legal changes were implemented which narrowed the scope for PTD but in the end did not reduce excessive PTD, given wider political processes of

endorsing a 'tough on crime' approach. Understanding the specific logic of the politics that underpin such processes, and the incentives that motivate different actors to align in one way or another, can offer insights regarding windows of opportunity as these arise, and a sensitivity regarding how such alignments might be configured.

Figure 3 reflects a clustering of some of the relevant political economy factors relating to the wider socio-political context that are relevant to understanding the politics of PTD. Here, we have not identified the three levels of analysis, but rather note that there is merit in letting the particular features of the problem – at the particular stage in the policing and justice chain – be identified, including in terms of how they intersect, and then work up to mapping them out against the PEA framework. In this way, it may be possible to isolate where resources and efforts need to be focused. But crucially, the PEA approach enables us to create order from the disorder of context.

Figure 3: The politics of PTD, and the wider socio-political context and legal framework



Authors' elaboration

Once this kind of 'brain-storming' exercise is completed, the relevant range of structural/institutional variables or actor-related factors can be mapped out against the more structured political economy questions that need to be considered (see the Box 1).

Box 1: Wider socio-political context - key PEA questions to consider

Structural features and institutions

- What are the particular features of the socio-political context of perceptions about insecurity and crime?
- What is the dominant political discourse on crime? How prevalent are 'tough on crime' approaches?
- What are the key features of the legal framework: formal rules on PTD; regional and international commitments?
- How does legal pluralism shape prevailing norm systems and beliefs about citizen security and punishment?
- What other related laws and policies: anti-terrorism legislation; anti-organised crime measures bear on the system; and what is the degree and nature of legal pluralism?
- What is the nature of the state's presence, capacity and legitimacy and the degree of embeddedness of principles of rule of law, human rights and due process?
- What is the nature of political system?

Actors and incentives

- Who are the key national actors involved in shaping crime policy and attitudes towards rights, due process and relevant international norms, and how do they affect public opinion?
- What are the specific features of political alliances that benefit from different criminal policy positions?
- What are the features of pro-reform political and social actors (human rights movements; human rights ombudsman)? What is the nature of their mobilisational capabilities and resources?
- What are the features of actors advocating 'tough on crime' approaches

4.2.2 Criminal justice process: the moment of arrest and police custody

The first point at which blockages that give rise to PTD occur is when an arrest is made. PTD can be a direct consequence of more arrests being made than the system can absorb and deal with, the fact that mechanisms are not in place to limit these in accordance with principles of due process or proportionality and variations in legal frameworks and the dominant interpretations of these. Understanding the decision-making logic behind arresting a suspect, the starting point of a detention process, can help in identifying some of the initial incentives, interest structures and institutional blockages that may contribute to a situation of excessive PTD. However, this stage should not involve only understanding what drives the police to make more arrests than is perhaps warranted. Rather, the analysis should tease out the nature of specific issues of power relations that are reflected in how arrests are made, the purposes of arrest and the *real* rules of the game at the front edge of policing. This includes taking account of the balance of power between different actors, including detainees and police, and whether paralegals or public defenders can already play a role in inhibiting excessive PTD (or enabling it by their absence). Other agendas such as those of political or elite actors that benefit from arrests being made need also to be considered.

Box 2: Arrest and police custody - key PEA questions to consider

Structural features and institutions

- What are the particular features of the wider socio-political context of insecurity and crime that contribute to shaping the rules and societal expectations that police officers respond to when making an arrest? (For instance, high levels of crime and under-resourced police forces, as in Kenya, may motivate high numbers of arrests as a strategy of social control.)
- What is the nature of the legal framework and formal rules regarding what constitutes an arrestable offense; how are guarantees of due process and presumed innocence enshrined; how are they considered within police forces?
- What are the relevant informal rules and process dynamics about how police make arrests? A closer look at prevailing practices can reveal patterns of police practice in deciding to make an arrest. (For instance, evidence suggests the scope for police discretion to make arrests can be very wide. One study of India indicates that the vast majority of arrests are for petty crimes that should not be custodial, and reflect police strategies to sweep up any potential suspect in an indiscriminating manner. The principle of proportionality, therefore, is frequently flouted, including in contravention with the law.)
- What is the nature of oversight and accountability mechanisms regarding police conduct that shape the scope for arbitrary/unreasonable arrest? How are wider practices of state capture, bribery and corruption manifested in the arrest process?
- What impact do issues of resources, training and capability have on PTD? (For instance, underpaid and poorly trained police may be more likely to seek bribes. Capacity and resource issues also affect detainees' ability to seek immediate redress, or access appropriate legal counsel at the moment of arrest.)

Actors and incentives

- Who are the key actors involved in arrest and detention and how are they positioned in relation to each other and to the wider criminal justice system: police; detention centre staff?
- What are the specific features of organisational incentives that may motivate high numbers of arrest, thus increasing PTD?
- What impact do information and awareness on behalf of detainees about their rights and options for recourse have on the moment of the arrest? Such knowledge can be highly varied.

The particular balance of power that these factors reproduce will be important in determining what detainees can do about these issues, and how these initial drivers of PTD may be countered at this early stage of the chain, and with what modes of recourse. Legal reform processes may create windows of opportunity to alter this balance of power. For instance, limiting the scope of what is a custodial charge can set new standards against which police arrests can be judged or assessed. If this is further supported by mechanisms to monitor this, there may be room to alter incentive structures for police conduct. Or there may be other process related incentives which are relevant, such as the existence of arrest quotas that police officers are encouraged to aspire to (these may be formal or informally agreed). The challenge for a diagnostic analysis is to identify opportunities or cracks in the system that constitute a possibility for altering the rules of the game, or tilting the balance of power in ways that redefine incentive and interest structures of police officers, and what detainees can do to help themselves.

4.2.3 The detention process/environment

Much of the analysis on PTD focuses on detention conditions and how PTD affects the rights of detainees. But also relevant here are institutions and redress mechanisms that may be integrated into the criminal justice chain to shift the balance of power from the moment of arrest to the point at which prosecution and judicial processes kick in. Conditions in the detention centre can be critical in terms of facilitating or undermining the agency capabilities of detainees in PTD to seek recourse or redress, or to activate any form of oversight or accountability. This, of course, is also conditioned by the power imbalance that is inherent in the relationship between detainees and those officials that are in charge of detention centres,

or have decision-making power about the course of the case itself – including police, prosecuting officials and courtroom officials.

The cumulative effect of perverse incentives in the system can further contribute to incentives of detention, police, prosecuting and court staff to either benefit from PTD or else at least not be sufficiently discomfited by it, so it persists through inertia.

Box 3: The detention process/environment - key PEA questions to consider

Structural features and institutions

- What are the relevant legal frameworks and oversight mechanisms regarding detention conditions?
- What are the impacts of case-flow management and the communication of relevant information to the prosecution and court system? These may vary at subnational level.
- How do resource and capacity issues, including transport facilities to courtrooms, create specific blockages that slow down the justice process? Inevitably, the nature of resource-related constraints will vary.
- How do oversight mechanisms in their various forms (or their absence) drive PTD? Are human rights ombudsman relevant in reducing the space for PTD, and if so in what way?
- What are the real practices and informal rules of detention, and attitudes towards detainees? Where rates of acquittal are very high, for instance, PTD may be seen as the effective form of punishment because there is belief that the court system is ineffective. How is this manifested?
- What is the nature and availability of recourse to legal aid/legal counsel, or prison visits from paralegals, and how does this affects opportunities for redress?

Actors and incentives

- Who are the key actors in this stage of the policing justice chain: detention staff, legal aid and public defenders, court clerks and officials, police and prosecutors?
- Who are relevant oversight actors, including at a regional or international level, who could make a difference in rebalancing power relations such that due process is more assured? For instance, does change in the availability and capacity of legal aid/legal counsel or prison visits from paralegals alter incentive structures both for detainees to more actively seek redress but also for criminal justice officials along the chain to conduct themselves differently, or change treatment of detainees?
- What are the motivations off different actors for keeping detainees in PTD? Is there the intention of using PTD to extract information or confession from the detainee?
- How do issues of corruption and bribery shape the conduct detention centre and police staff? The financial incentives of detention might represent an important driver of PTD. The prevalence of bribery as additional income for detention facility staff might incline such staff to prolong PTD for their own financial benefit.

4.2.4 Decisions around pre-trial release/detention, prosecution and trial

Finally, there is the stage of the detention process that involves the decisions taken by prosecution and judicial officials and the process in court. This includes both the purposeful chain of decisions about what constitutes reasonable PTD, and corresponding decisions about bail, and also the default outcomes where the PTD is the outcome of omission – for instance resulting from case management and caseload issues in court.

The overlap with the previous stages is important to note here. Here, the focus of the attention is on the relationship between the detainee and those decision makers who decide on the speed of case management, and on the content of the case. The extent to which the previous stages shape these is important to note. For instance, where due process is weak and investigative powers enable police to extract confessions under duress during PTD, this can significantly alter decisions about whether detainees should remain in custody before trial begins.

Box 4: Pre-trial release/detention, prosecution and trial - key PEA questions to be considered

Structural features and institutions

- What are the rules and practice regarding the provision of legal assistance or other forms of recourse for detainees?
- What is the nature of the criminal justice system? Does the presence of either an inquisitorial or an accusatorial system make a difference in rates/length of PTD?
- What are the rules and conditions of pre-trial release/detention and the practice of bail, and how does this influence PTD?
- What are the rules and practice of case management and backlogs, and what impact does this have on the ability of the system to deal with trials in a timely manner in which due process is observed?
- How does prosecutorial discretion and influence over judicial officers' release/detention decisions influence PTD?
- What are the features of judicial independence, judicial capacity and resources (namely, rules of appointment, nature of merit system, training and socialisation of judges on issues of PTD)?

Actors and incentives

- Who are the key actors (detention centre staff, bail officers, prosecution officers, court clerks, judges)?
- Furthermore, is judicial interest preoccupied with more high-profile legal proceedings (such as corruption cases or post-conflict justice), diverting attention away from smaller trials and making backlogs worse?
- How do issues of judicial independence affect judges' incentives in ways that contribute to or reduce PTD?

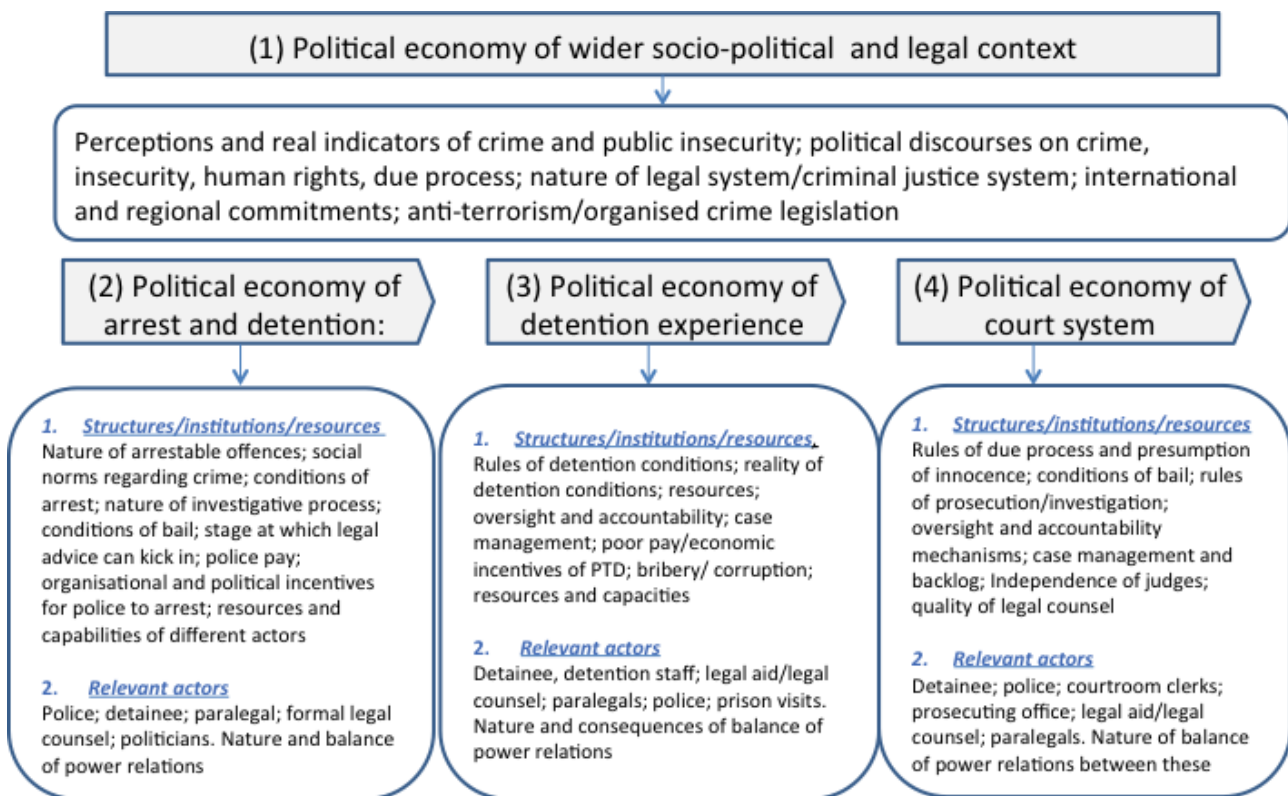
5 Summary

Taking a close look at the political economy of the drivers of PTD involves getting into the nitty-gritty details of structure, institutions and process, and unpacking how different actors are located in relation to each other, what their options are and how they choose to use these.

Across all three stages, it is important to assess how different institutional actors relate to each other, and how the balance of power is weighted differently at each stage. In all stages, the detainee is of course the weaker party. However, the presence or introduction of actors, such as paralegals, or external oversight actors, such as human rights ombudsmen, can contribute to changing the balance of power to diminish space for abuse. Equally, changing the formal rules of the game, or altering the incentives for different actors along the chain so they at least do not gain from excessive PTD, can also lead to a reduction of excessive PTD.

Figure 4 summarises how some of this unpacking might look.

Figure 4: Summary of the political economy of PTD



Authors' elaboration

Crucially, PEA disaggregated at the different stages of the criminal justice chain can generate insights into the particular dynamics of power relations, interests and incentives that shape different actors' choices and possibilities in relation to either how they contribute to, or benefit from, PTD, or what they can do to reduce its impact or prevalence. In achieving this, the analysis may thus go beyond identifying the drivers of PTD, and isolate in some cases where there may be opportunities to modify incentive structures, or encourage a realignment of interests or perceptions about why addressing PTD may be desirable. This is where the value-added of the third tier of analysis becomes relevant.

While the third tier in Figure 4 appears less evidently developed, the key point to note about it is that it reflects the particular dynamics of the intersection between structure, institutions and stakeholders in different contexts. In each case, it is likely to reflect different dynamics along

the justice chain that are specific to the context. It is also the point, therefore, at which opportunities for interventions can be identified, whether these are aimed at changing the rules of the game or at introducing new actors that can alter balance of power and the incentives and conduct of the relevant actors at the particular point of the chain.

Finally, it is worth reiterating that the types of blockages, constraints and opportunities for change that may arise at the different stages are likely to have an impact on each other. Thus, it is important to focus on the details of each stage, but equally important not to lose sight of the overall chain and the wider socio-political context in which it is located.

6 Implications for programming

This paper has proposed that a PEA framework may be helpful in informing choices about how to engage strategically in supporting efforts to address excessive PTD. Case study analysis will be important to test the merits of such an analytical approach. A key question is of course whether from such an approach it will be possible to develop generalisable conclusions about what works, and what does not, that can inform decisions about programming and project design. If context is to be taken seriously – and it is crucial that it is – then arriving at blueprint solutions is not offered by PEA of the kind suggested here.

It has been noted that such an approach to working through the problem of PTD can contribute to identifying the specific opportunities for action, and what that action might look like, and where resources – given the particular political economy characteristics of a particular country or subnational context – are likely to most effectively give rise to positive change. It has also been noted that this can have diagnostic value – to inform programme design. But it should not stop at that. Rather, PEA of this kind should be fully integrated into the monitoring of programming and the life of projects to enable implementing bodies to capture changing conditions, in order that projects are able to adapt to new realities. It has also been noted that PEA along the justice chain can have retrospective analytical value where the intention is to understand what has worked – or failed – and why. The value-added to specific programme objectives to address PTD is thus important.

However, there is no claim to providing conclusions about what measures work that can be replicated elsewhere. Nonetheless, in engaging in PEA it is far from irrelevant to learn from other experiences, especially when the nature of blockages along the justice chain that contribute PTD are likely similar in similar contexts. Therefore, findings from research of this kind can not only have specific relevance for the case at hand, but also contribute to the wider building of evidence-based knowledge in an area of justice sector reform that remains understudied.

7 Case study methods

The above analytical framework has the following goals: it can provide diagnostic value at the country level; and it can also contribute to reorienting/adapting existing interventions on the ground to have a 'better fit' with country contexts, or assessing why programmes have succeeded or failed. An objective of the paper is to set the analytical background for two to three case studies that can test the usefulness of the framework, and provide a useful guide for programming on the ground. In the selection of case studies, it will be important to consider whether the analytical purpose is diagnostic or retrospective.

In consultation with OSJI and other funders, case study selection criteria should consider the following:

- Where PTD is acknowledged as a problem;
- Where there is national interest in addressing the issue;

- Whether there is donor interest in criminal justice reform and PTD;
- Whether the case study will have a diagnostic purpose or an evaluative objective.

The preliminary case study framework and methodology is as follows.

Field research will draw on qualitative methods appropriate for PEA approaches.

Sources of information will include:

- Review of relevant legislation and criminal justice codes; data on arrest and conviction rates; prison records on detainee populations; and caseloads and case management statistics;
- Interviews and focus group discussions with key actors as relevant to the different stages of the criminal justice stage, as well as relevant actors in the justice ministries and political bodies in charge of criminal justice policies. Material from interviews will be cross-referenced with legal frameworks, policy directions, official statistics and material from published reports.

Research design will focus on developing an understanding of where and why PTD is reinforced at the different stages of the criminal justice chain and policy space, following the analytical framework.

An interview matrix should be further refined to reflect the key political economy questions for the criminal justice system.

Presentation of findings:

- Presentation of findings through case study reports;
- Finalisation and refinement of the analytical framework based on the experience of the case studies;
- Final synthesis report.

References

- Booth, D. and Golooba-Mutebi, F. (2009) 'Aiding Economic Growth in Africa: The Political Economy of Roads Reform in Uganda'. Working Paper 307. London: ODI.
- Collinson, S. (2003) 'Power, Livelihoods and Conflict: Case Studies in Political Economy Analysis for Humanitarian Action'. HPG/ODI Working Paper. London: ODI.
- Copestake, J. and Williams, R. (2012) 'The Evolving Art of Political Economy Analysis – Unlocking Its Practical Potential through a More Interactive Approach'. Working Paper. Oxford: OPM.
- DFID (Department for International Development) (2009) 'Political Economy Analysis How to Note'. London: DFID.
- Duce, M., Fuentes, C.M. and Riego, C.R. (2008) 'La reforma procesal penal en América Latina y su impacto en el uso de la prisión preventiva', in C. Riego and M.J. Duce (eds) *Prisión preventiva y reforma procesal penal en América Latina*. Santiago de Chile: Centro de Estudios de Justicia de las Américas.
- Edwards, L. (2012) 'Snap-shot of the Use and Conditions of Pre-trial Detention in Police Cells in Africa'. APCOF report.
- Ehlers, L. (2008) 'Frustrated Potential: The Short and Long term Impact of Pretrial Services in South Africa'. *Open Justice Society Initiative*, Spring: 121-139.
- Fogleson, T. (2008) 'Overview: Grand Ambitions, Modest Scale', *Open Justice Society Initiative*, Spring: 4-10.
- Fritz, V., Kaiser, K. and Levy, B. (2009) *Problem-driven Governance and Political Economy Analysis: Good Practice Framework*. Washington, DC: World Bank.
- Fuentes, C.M. (2010) 'Régimen de prisión preventiva en América Latina: La pena anticipada, la lógica cautelar y la contrarreforma'. *Revista Sistemas Judiciales* 1(14): 34-45.
- Gloppen, S. (2006) 'Courts and Social Transformation: An Analytical Framework', in R. Gargarella, P. Domingo and T. Roux (eds) *Courts and Social Transformation: An Institutional Voice for the Poor?* London: Ashgate.
- Hammergren, L. (2008) 'Balanced Justice and Donor Programs: Lessons from Three Regions of the World'. Report for DFID and OSJI.
- Harris, D., Jones, L. and Kooy, M. (2011) 'Analysing the Governance and Political Economy of Water and Sanitation Service Delivery'. Working Paper 334. London: ODI.
- Hudson, D and A. Leftwich. (2013) 'From Political Economy to Political Analysis'. Forthcoming
- Jiyoung Bang, N. (2008) 'Towards a New Consensus on Justice Reform: Mapping the Criminal Justice Sector'. Report for OSJI.
- Kayira, P. (ed.) (2011) 'Malawian Criminal Justice System'. Report for OSJI.
- Matakala, L. (2011) 'Structural Description of the Criminal Justice System', in Olivier, L. (ed.) 'Research into Pre-trial Detention in Zambia'. Report for OSJI.
- Msiska, C. (2008) 'On the Front Lines: Insights from Malawi's Paralegal Advisory Service', *Open Justice Society Initiative*, Spring: 70-85.
- Muntingh, L. and Ehlers, L. (2011) 'Introduction', in Olivier, L. (ed.) 'Research into Pre-trial Detention in Zambia'. Report for OSJI.
- Norad (Norwegian Agency for Development Cooperation) (2009) 'Political Economy Analysis of Kenya'. Report 19/2009. Oslo: Norad.
- Nwapa, A. (2008) 'Building and Sustaining Change: Pretrial Detention Reform in Nigeria'. *Open Justice Society Initiative*, Spring: 86-101.
- Olivier, L. (ed.) 'Research into Pre-trial Detention in Zambia'. Report for OSJI.
- OSJI (Open Society Justice Institute) (2011a) 'The Socioeconomic Impact of Pretrial Detention'. New York: OSJI/Open Society Foundations.
- OSJI (Open Society Justice Institute) (2011b) 'Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk'. New York: OSJI/Open Society Foundations.
- OSJI (Open Society Justice Institute) (2012) 'Improving Pretrial Justice: The Role of Lawyers and Paralegals'. New York: OSJI/Open Society Foundations.

- Ramirez-Garcia, L. and O. Samayoa. (2011) 'Reforma de la Justicia Penal. Prision preventiva en Guatemala'. In C. Riego and M.J. Duce (eds) *Prisión preventiva y reforma procesal penal en América Latina*. Santiago de Chile: Centro de Estudios de Justicia de las Américas.
- Redpath, J. (2011) 'Case Flow Management Research', in Olivier, L. (ed.) 'Research into Pre-trial Detention in Zambia'. Report for OSJI.
- Saxena, R.K. (2008) 'Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India'. *Open Justice Society Initiative*, Spring: 57-69.
- Schönteich, M. (2008) 'The Scale and Consequences of Pretrial Detention around the World'. *Open Justice Society Initiative*, Spring: 11-43.
- Schönteich, M. (2011) 'Pretrial Detention and Corruption: Justice for Sale'. Report for OSJI.
- Schönteich, M. (2013) 'The Global Scope and Consequences of Pretrial Detention'. New York: OSJI (forthcoming, provisional title). A Devco concept paper.
- Unsworth, S and G. Williams. (2011), 'Using Political Economy Analysis to improve EU Development Effectiveness'
- Varenik, R. (2008) 'Mixing Politics, Data and Detention: Reflections on Reform Efforts'. *Open Justice Society Initiative*, Spring: 172-183.
- Venegas, V. and Vial, L. (2008) 'Boomerang: Seeking to Reform Pretrial Detention Practices in Chile'. *Open Justice Society Initiative*, Spring: 44-55.
- World Bank (2011) *Conflict, Security and Development: World Development Report*. Washington, DC: World Bank.

ODI is the UK's leading independent think tank on international development and humanitarian issues. Our mission is to inspire and inform policy and practice which lead to the reduction of poverty, the alleviation of suffering and the achievement of sustainable livelihoods.

The Politics and Governance Programme is a centre for research and policy engagement on political and governance issues in development.

Overseas Development Institute
203 Blackfriars Road
London SE1 8NJ, UK

Tel: +44 (0)20 7922 0300
Fax: +44 (0)20 7922 0399

www.odi.org.uk/pogo