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IRKS

On pre-trial detention and the need for effective common standards

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Pre-trial detention is a particularly sensitive topic. It is on the one hand linked to the efficacy of criminal prosecution, and thus to the satisfaction of justice and security for the people. On the other hand, pre-trial detention means the most severe infringement of personal rights of people presumed innocent. It violates the freedom of these people and it regularly risks their physical and psychological integrity.

In Europe about one fourth of all prisoners are pre-trial detainees (Aebi & Tiago, 2020: 47-48). Just for the member states of the European Union this means that on an average every single day of the year more than 100.000 people are in pre-trial detention in one of the member states. There are however huge differences in the pre-trial detention rates, which cannot be sufficiently explained with a different crime structure, social conditions, demography or migration. Research like the DETOUR project (Hammerschick, et al., 2018) reveal considerable differences in pre-trial detention practice and an overuse of pre-trial detention in many jurisdictions. On principle, all member states agree on the European Convention of Human Rights (ECtHR), on the fundamental right to freedom, on the principle of legality, on the presumption of innocence, the ultima ratio principle and the principle of subsidiarity as well as on the principle of proportionality. The differences indicate different legal cultures and disparities with respect to the standards applied when the shared principles are put into practice in the context of pre-trial detention. The value of personal rights however is supposed to be the same in all countries and this must be particularly true for the EU.

The mentioned principles contribute to a definition of pre-trial detention as an exemption and Art. 5 of the ECtHR asks for a restrictive interpretation of the grounds justifying this violation of personal freedom. Nevertheless, international studies reveal a practical preference of the authorities in many countries for detention and little use of alternatives (e.g. Fair Trials, 2016, Hammerschick et al., 2018). This calls into question the strength of these principles and the standards that are applied in this respect. There is quite some leeway for the interpretation of the principles and additionally the authorities in charge enjoy rather wide margins of discretion. Margins of discretion are on the one hand necessary for the practitioners to apply the law; on the other hand they are an entrance for wide interpretations and for motives for detention violating the fundamental legal principles. Therefore, strong legal safeguards are required. While the law mostly fulfils this requirement the practical realization often remains behind (e.g. Hammerschick, 2020 and Fair Trials, 2017).

If the ultima ratio principle is taken seriously and if there is a need for measures, alternatives to pre-trial detention should be the first choice. Alternative measures also cost only a fracture of the costs of pre-trial detention. A little use of alternatives however is not necessarily due to a lack of options. It seems to be a widespread phenomenon that the decision makers have rather little trust in the suitability of the available alternatives (e.g. Fair Trials, 2017). This is aggravated by often insufficient information available for the selection of suitable measures, aggravated by the little time available for the decisions, as well as aggravated by possible organisational hassles. Favouring alternatives to pre-trial detention one however must not forget that these alternatives are also restrictions to liberty, which only may be ordered if there is a real need. Proportionality has to be considered with alternatives as well. Generally acknowledged and realized standards on alternatives to pre-trial detention could be an important step towards an increased and appropriate use.

In many European countries foreigners are overrepresented in pre-trial detention. Practically this means that the problems related to an extensive use of pre-trial detention can only be solved if this fact is appropriately taken into consideration. With foreigners the puzzle to solve however is particularly difficult, because with them it is even more difficult to apply alternative measures. The EU has therefore developed the European Supervision Order (ESO), which is supposed to foster the application of alternatives to pre-trial detention with EU nationals. With the ESO EU-nationals can be released from detention with alternatives monitored in their home country. The ESO is an explicit message valuing alternatives to detention. In practice the ESO however still remains very much unknown among legal practitioners. Apart from time pressure

obstacles that weigh heavy are related to the needed cross-border cooperation. This objective asks for common understandings, for continuing efforts towards common standards and last but not least for mutual trust. Cases like Aranyosy and Căldăraru (ECtHR April 2016, C-404/15 und C-659/15), which shed a light on unbearable conditions in detention facilities and on big differences in detention standards, have contributed to a weakening of the mutual trust among EU member states.

There is very much need for improvement with respect to the realization of common standards. As long as the shared standards do not effectively contribute to a change of the wide range of differing practice their value remains very much restricted. There is a need for more guidance and for more clear definitions with respect to the fundamental principles. The rulings of the European Court on Human Rights (ECHR) require alternatives to be ruled out when pre-trial detention is applied, but obviously this direction does not suffice. There is a need for more concrete guidance and standards with respect to the application of alternatives, with respect to their nature and their content.

The rulings of the ECHR could give stronger and more detailed directions. Possibly it is also necessary to resharpen the legal foundations. There are however also other options to raise awareness about the nature of pre-trial detention, to promote a common understanding and common standards among legal practitioners. The provision of cross border information, of possibilities for exchange and common learning are important steps towards common standards, mutual trust and better cross border cooperation. Apart from the research focus on alternatives to pre-trial detention this is what the recently started EU-funded project "PRETRIAD – Alternative pre-trial detention measures" is about. www.pre-trial-detention.org

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