

The overuse of pre-trial detention as a public policy and human rights problem

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Introduction

There is a striking and inherently counterintuitive feature of the use of the prison as a preventive measure in criminal proceedings: a person presumed innocent in accordance with the law and the requirements of civic trust is deprived of liberty while it is still not, at least legally speaking, clear whether he or she has committed a criminal offence.¹ Thus, the person's liberty or physical freedom – which is one of the most fundamental values of the European legal order enshrined in Article 5 of the European Convention on Human Rights and Article 6 of the Charter of Fundamental Rights of the European Union – is provisionally taken in relation to a criminal offence, which may have in reality not been committed by the person concerned.

This contrast between the importance of the values at stake and the possible outcome of the legal process requires that the use of pre-trial detention is strictly circumscribed in accordance with the rule of law and the protection from arbitrariness.² That action primarily commands the identification of risks and the associated adverse effects of pre-trial detention, some of which will be briefly outlined below.

The risks and effects of the overuse of pre-trial detention

There are many aspects of public policy in the criminal justice sphere and individual rights of those concerned that are affected by the overuse of pre-trial detention. Research has shown that in general three dimensions of system performance in corrections are particularly affected by the overuse of the prison: accountability, efficiency, and effectiveness of the system as a whole.³

The overuse of pre-trial detention adversely affects the occupancy rates in prisons and the global problem of prison overcrowding. While it is difficult to establish the exact extent to which the overuse of pre-trial detention causes prison overcrowding, it is clear that those held in pre-trial detention amount to a substantial number of detainees at any given time in prisons in Europe and across the world. In particular, it is considered that within the European Union ("EU") area pre-trial detainees make up roughly one fifth of the prison population,⁴ while at the level of the Council of Europe pre-trial detainees account for approximately one fourth of the overall prison population.⁵ Similarly, globally, up to a third of the total prison population are pre-trial detainees.⁶

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¹ See further, Duff, "Pre-Trial Detention and the Presumption of Innocence", in Ashworth et al (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013).

² *S., V. and A. v Denmark* (ECHR 2018), para 73 GC.

³ Mears, "Accountability, Efficiency, and Effectiveness in Corrections: Shining a Light on the Black Box of Prison Systems", (7) 2008 *Criminology and Public Policy* 143.

⁴ Fair Trials International ("FTI"), *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* (2016), para 112.

⁵ Aebi and Tiago, *Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report* (2020), p 6.

⁶ C. Heard and H. Fair, *Pre-Trial Detention and Its Over-Use: Evidence from Ten Countries* (Institute for Crime & Justice Policy Research, 2019), p vii.

It is therefore safe to assume that overcrowding often occurs in connection with the overuse of pre-trial detention.⁷ Moreover, it is not surprising that in its pilot and leading judgments⁸ the European Court of Human Rights has addressed the issue of overuse of pre-trial detention and the related problem of prison overcrowding as systemic human rights issues, in respect of which it has indicated to Governments the solutions that needed to be taken in order to address the impugned situation.⁹

The pre-trial detention is also expensive. The costs of pre-trial detention affect the allocation of public resources within the criminal justice system and across other sectors of public expenditure. Globally the budget allocated to the prison system is considered to be largely inadequate.¹⁰ At the European level, in 2018 the daily amount spent for the detention in custody of one person was 68 Euros.¹¹ This figure should also be viewed against the fact that at the EU level government expenditure for public order and safety in 2018 amounted to 1.7 % of the gross domestic product, out of which only 0.2 % was allocated to prisons.¹² At the same time, it is worth noting that according to some estimates the costs of non-custodial measures or sanctions are lower than the costs of detention.¹³

The overuse of pre-trial detention and the related problem of prison overcrowding are also capable of undermining the principles of mutual recognition and trust in the cooperation between states. Thus, in so far as relevant for the cooperation within the EU, the Court of Justice of the European Union has made it clear in the context of the European Arrest Warrant that the principles of mutual recognition and trust cannot be used to override the adverse effects of systemic problems of inadequate prison conditions.¹⁴

At the individual level, unwarranted pre-trial detention can have devastating effects on the person concerned and his or her family, and by extension, on the society as a whole. There is evidence showing that persons remanded in pre-trial detention experience serious and sometimes irreversible impacts on their livelihood, family, and health.¹⁵ Suicide rates are also very high in pre-trial detention.¹⁶ Studies have shown that the overuse of pre-trial detention in reality gives rise to

⁷ European Parliamentary Research Service, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (2017), p. 127; Preamble to the Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

⁸ See further Glass, "The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice", 34(1) 2016 *Netherlands Quarterly of Human Rights* 41.

⁹ The pilot judgments concern: Bulgaria (*Neshkov and Others v Bulgaria* 2015); Hungary (*Varga and Others v Hungary* 2015); Poland (*Orchowski v Poland* and *Norbert Sikorski v Poland* 2009); Romania (*Rezmiveş and Others v Romania* 2017); Russia (*Ananyev and Others v Russia* 2012); and Ukraine (*Sukachov v. Ukraine* 2019). The most relevant leading cases concern: Belgium (*Vasilescu v Belgium* 2014); France (*J.M.B. and Others v France* 2020); and Slovenia (*Mandić and Jović v Slovenia* 2011).

¹⁰ Penal Reform International ("PRI"), *Global Prison Trends* (2020), p 7.

¹¹ Aebi and Tiago, n 5, p 14.

¹² Eurostat Prison Statistics (available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics; last visited 26.09.2020).

¹³ PRI, n 10, p 17.

¹⁴ *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016; *ML*, C-220/18 PPU, 25 July 2018; *Dumitru-Tudor Dorobantu*, C-128/18, 15 October 2019.

¹⁵ FTI, n 4, para 12; PRI, n 10, p 18.

¹⁶ Schönteich, *The Scale and Consequences of Pretrial Detention around the World* (Open Society Justice Initiatives, 2008), p 19.

greater risk of crime,¹⁷ and is often associated with discrimination and prejudice against the most vulnerable groups in a society.¹⁸

Conclusion

It is clear from the above that the overuse of pre-trial detention is a public policy concern which is capable of causing different dysfunctions of the criminal justice and global social systems. These dysfunctions, in turn, undermine the rule of law and lead to various breaches of human rights.

It is therefore critical for national governments and the EU to further their efforts in developing alternatives to pre-trial detention. In that respect, the work should be done on promoting probation and empowering the probation services to take on a more important role in ensuring that through the supervision, guidance and assistance, the individual rights of those concerned and the community safety considerations are properly balanced.

¹⁷ Heard and Fair, *Pre-Trial Detention and Its Over-Use: Evidence from Ten Countries* (Institute for Crime & Justice Policy Research, 2019), pp 7-8.

¹⁸ PRI, n 10, p 18.