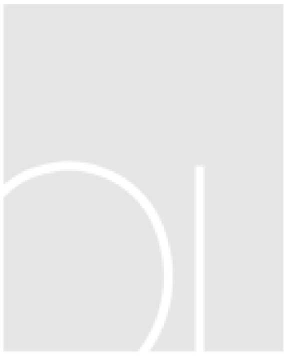
PRE-TRIAL DETENTION
DÉTENTION AVANT JUGEMENT



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PRE-TRIAL DETENTION

Human rights, criminal procedural law and penitentiary law, comparative law

DÉTENTION AVANT JUGEMENT

Droits de l'homme, droit de la procédure pénale et droit pénitentiaire, droit comparé

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Edited by

P.H.P.H.M.C. van Kempen

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P.H.P.H.M.C. van Kempen (ed.)

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PREFACE

It is well known that crime is a major social problem in society. Over the last decade it has become self-evident that the criminal justice system has not coped with crime despite huge increases in police resources, despite processing more people through the courts and locking up more people than ever before. The sheer volume of crime has continued to grow. Indeed crime, far from being unusual, is now a very common phenomenon. It has also become self-evident that crime and its related problems can only be tackled effectively if society is involved and co-operative. For far too long we have relied on the police and the courts to deal with crime and for too long we have relied on the belief that deterrence – both the fear of being caught and the fear of punishment – will regulate criminal behaviour. Now it is generally accepted that if we are to contain and control crime, the co-operation and involvement of both individuals and society in both partial and societal sense are vital. Increasingly we are looking to find ways of managing the crime problem as well as processing individuals through the criminal justice system

In the new millennium there are emerging changes that demand more accountability and offer more challenges. What will the 21st century hold for us as far as crime and the criminal justice system are concerned? Will there be a shift in philosophy from a preference for punishment to a preference for treatment? The argument emerges that it is not enough to lock people up; something must be done to reduce the likelihood that they will commit crimes as juveniles and become repeat offenders. Can we still afford a rate of recidivism of nearly 70–80% in some jurisdictions? May the new century bring forth a sentiment for treatment oriented reform so that prevention strategies can develop?

The topic of this timely publication is pre-trial detention. Since incarceration is considered a form of punishment, it would be logical to expect that prisons would house more convicted offenders serving sentences than accused suspects waiting for trial. That is not the case According to Roy Walmsley's, World Prison Population List of 2011, more than 10.1 million people are held in penal institutions throughout the world, mostly as pre-trial detainees/ remand prisoners or as sentenced prisoners. Almost half of these are in the United States (2.29m), Russia (0.81m) or China (1.65m sentenced prisoners).In addition more than 650,000 are in 'detention centers' in China; if these are included the overall Chinese total is over 2.3 million and the world total more than 10.75 million.

This book has its immediate roots in a four-day colloquium on pre-trial detention, organized by the International Penal and Penitentiary Foundation (IPPF), which was held in Stellenbosch/Cape Town, South Africa, in February 2010. Much gratitude goes to all contributors to the book, some of whom were unfortunately not able to attend the colloquium, but who have nevertheless all greatly contributed to it through their papers. The chapters in the book have profited a great deal from the information that was shared during the colloquium.

The book is divided in three parts. Part one is an introductory comparative analysis of pre-trial detention.

In part two of the book the following themes are addressed:

- The CPT and pre-trial detention in Europe
- Pre-trial detention from an Inspector of Prisons view
- Execution of pre-trial detention as regards women in Poland
- Electronic monitoring as an alternative to pre-trial detention
- The impact of the European Arrest Warrant on pre-trial detention

Part three is devoted to 21 National Reports of countries regarding pre-trial detention. These reports will play a role in decision making for countries over the word to evaluate and plan strategies towards the phenomenon.[1]

Charl Cilliers
Professor of Penology, University of South Africa

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[1] Note by author: the original language of this text is English.

PRÉFACE

Il n'est un secret pour personne que la criminalité compte parmi les principaux problèmes auxquels nos sociétés sont confrontées. Au cours de la dernière décennie, il est devenu évident qu'en dépit de l'augmentation des effectifs policiers, de la progression du nombre de personnes ayant comparu devant les tribunaux et d'un nombre d'incarcérations sans précédent, le système de justice pénale n'a pas su résoudre la problématique de la criminalité qui, bien que déjà considérable, s'est encore amplifiée. En effet, loin d'être inhabituelle, la criminalité s'est muée en un phénomène extrêmement répandu. Il est aussi devenu évident que la criminalité et les problèmes qu'elle entraîne ne peuvent être combattus efficacement que si la société s'implique et coopère. Depuis trop longtemps, nous nous reposons sur la police et les tribunaux pour traiter la criminalité et trop longtemps aussi que nous croyons que la dissuasion (tant la crainte d'être pris que d'être sanctionné) régulera le comportement criminel. À l'heure actuelle, il existe un certain consensus sur le fait que si l'on veut limiter et contrôler la criminalité, il est indispensable d'obtenir la coopération et l'implication des citoyens et de la société, tant au sens individuel que sociétal. Nous recherchons sans cesse des méthodes de gestion de la problématique de la criminalité et de traitement des personnes par le système de justice pénale.

Le nouveau millénaire voit émerger des changements qui vont de pair avec un accroissement de la responsabilisation, tout en créant de nouveaux défis. Que nous réserve le 21e siècle en matière de criminalité et de système de justice pénale ? Assisterons-nous à une évolution d'une philosophie qui privilégie la répression vers une philosophie qui privilégie le traitement ? Des voix de plus en plus nombreuses s'élèvent pour dire qu'il ne suffit pas d'emprisonner les délinquants, mais qu'il faut réduire le risque de délinquance juvénile et éviter ainsi la récidive. Pouvons-nous vraiment nous permettre un taux de récidive de près de 70-80 % dans certaines juridictions ? Le siècle naissant peut-il susciter un sens de la réforme orientée sur le traitement qui permette le développement de stratégies de prévention ?

Cette publication est consacrée à la détention avant jugement. Dans la mesure où l'incarcération est considérée comme une forme de sanction, il serait logique de souhaiter que les prisons hébergent plus de délinquants condamnés purgeant leur peine que de suspects en attente d'un procès. Si l'on en croit la Liste de la population carcérale mondiale 2011 de Roy Walmsley, il n'en est rien, puisque plus de 10,1 millions de personnes sont détenues dans des institutions

pénitentiaires dans le monde, dont une majorité de personnes en attente d'un procès / en détention provisoire ou prisonniers condamnés. Près de la moitié de ces derniers sont incarcérés aux États-Unis (2,29m), en Russie (0,81m) ou en Chine (1,65m prisonniers condamnés). Si l'on ajoute à cela les 650.000 personnes détenues dans des "centres de détention" en Chine, le total des personnes emprisonnées dépasse 2,3 millions pour cet État et 10,75 millions dans le monde.

Le présent ouvrage trouve son origine dans un colloque de quatre jours consacré à la détention avant jugement, organisé en février 2010 à Stellenbosch/ Cape Town, Afrique du Sud, sous l'égide de la Fondation internationale pénale et pénitentiaire (FIPP). Je tiens à exprimer ma gratitude aux auteurs des diverses communications rédigées, qui ont tous apporté une contribution précieuse à cet ouvrage, même si certains n'ont malheureusement pas été en mesure de participer au colloque. Les différents chapitres de l'ouvrage ont largement profité des informations partagées durant le colloque.

L'ouvrage est divisé en trois parties. La première partie est composée d'une analyse comparative introductive de la détention avant jugement.

Les thèmes suivants sont abordés dans la seconde partie :

- Le CPT et la détention avant jugement en Europe
- La détention avant jugement selon la perspective d'un Inspecteur des prisons
- L'application de la détention avant jugement des femmes en Pologne
- La surveillance électronique comme alternative à la détention avant jugement
- L'incidence du mandat d'arrêt européen sur la détention avant jugement

La troisième partie quant à elle, est consacrée aux Rapports nationaux consacrés à la détention avant jugement émis par 21 pays. Ces rapports interviendront dans le processus décisionnel de divers pays désireux d'évaluer et de planifier des stratégies relatives à ce phénomène.[1]

Charl Cilliers
Professeur en pénologie, Université d'Afrique du Sud

[1] Note de l'auteur : la langue originale de ce texte est l'anglais.

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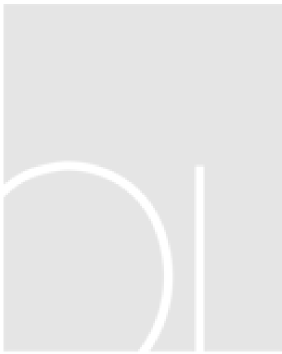
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PART ONE

INTRODUCTORY SYNTHESIS AND ANALYSES

1ÈRE PARTIE

SYNTHÈSE ET ANALYSES INTRODUCTIVES

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PRE-TRIAL DETENTION IN NATIONAL AND INTERNATIONAL LAW AND PRACTICE: A COMPARATIVE SYNTHESIS AND ANALYSES

Piet Hein van Kempen*

I. INTRODUCTION

There are at least five important reasons for an extensive examination and discussion of detention prior to imprisonment following on from a criminal conviction. First of all the numbers: it is estimated that on any given day around 2.5 million people are being held in pre-trial detention and other forms of remand imprisonment throughout the world[1] and that in the course of a year approximately 10 million people will pass through pre-trial detention.[2] Second, the application of pre-trial detention is problematic in the context of universally recognized human rights norms. Particularly relevant in this respect are the right to liberty, the presumption of innocence, the right to humane treatment, and the prohibition of torture and ill treatment. Throughout the world violations of these fundamental norms are frequent, and it is likely that breaches of these norms occur in nearly every country in the world – or perhaps indeed in every country. Perhaps more than any other group, pre-trial detainees are extremely vulnerable to abuse by the State because they are entirely in the power of

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1 Roy Walmsley, *World Pre-trial/Remand Imprisonment List (Pre-trial detainees and other remand prisoners in all five continents)*, Kings College London, ICPS/International Centre for Prison Studies, 2008.

2 See David Berry *et al.*, *The Socioeconomic Impact of Pretrial Detention*, New York: Open Society Foundations/United Nations Development Program, 2011, p. 12 (at: www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201).

authorities who have an interest in gaining information or a confession.[3] Third, pre-trial detention is a burden on society and the detainee's family: pre-trial detention is costly to the tax payer, it hinders the detainee from contributing to the economy and might, for instance, lead to loss of job and home.[4] At the same time – and this brings up the fourth reason – it must also be recognized that no adequately functioning criminal justice system that is able to effectively prevent and repress crime can presently do entirely without detaining any suspects. Fifth and finally, there are several, relatively new developments related to international legal cooperation between States that merit attention from the aspect of pre-trial detention. This volume therefore offers a wide variety of topics that are relevant to pre-trial detention.

I.1. OUTLINE OF THIS VOLUME

Thematic chapters

A thematic approach to pre-trial detention issues may be found in Part II of this volume. Almost the whole spectrum of issues just mentioned is dealt with in the chapter by Casorla, who also discusses several developments that affect the application of pre-trial detention and detention statistics, such as the influence of victims on criminal procedure and the influence of policies to counter terrorism or environmental crime. It is indeed certain that there is no exclusive correlation between statistics on crime and pre-trial detention rates (see also the chapter on Spain). Rates of detention might also depend closely on many developments within the criminal justice system, such as criminalization of conduct, the effectiveness of police surveillance, methods and duration of criminal investigation, prosecution policies, politicization of criminal justice, and (as Lambropoulou notes in her chapter on Greece) in an increased representation of foreigners, whose criminal record cannot be easily or quickly controlled. And of course, the scope of the grounds on which pre-trial detention may be applied is highly relevant in all systems. These grounds, which in fact represent functions of pre-trial detention, are not only discussed further below (section III.6) but also in the chapter by Rapoza.

A entirely separate issue is addressed by Van Kalmthout & Knapen, who write about the international standards for the conditions of detention set by the European Committee for the Prevention of Torture and Inhuman or Degrading

3 See Moritz Birk *et al.*, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, New York: University of Bristol/Ludwig Boltzmann Institute/Open Society Foundations, 2011, p. 18 (at: www.unhcr.org/refworld/docid/4e324fa22.html or http://bim.lbg.ac.at/files/sites/bim/pretrial-detention-and-torture-06222011_0.pdf).

4 See David Berry *et al.*, *The Socioeconomic Impact of Pretrial Detention*, New York: Open Society Foundations / United Nations Development Program, 2011, p. 12.

Treatment or Punishment (CPT). A national counterpart to international monitoring of detention may be the appointment of a national inspector of prisons, which is the topic discussed by Reilly. When discussing pre-trial detention it is very important to realize that there are many categories of detainees that have their own specific problems, challenges and are in need of specific approaches. This not only applies to detainees with a higher security risk than usual, such as suspects of organized crime or terrorism (as for the latter, see especially the chapter on England & Wales[5]). For different reasons it is also true for categories of detainees that are more vulnerable than most, such as minors, women, foreigners, religious or ethnic minorities, and homosexuals.[6] Paprzycki & Pomiankiewicz therefore discuss the theme of pre-trial detention relative to women (see also the chapter on South Africa, which pays a good deal of additional attention to the position of children).

Of course, there would be less need for international and national mechanisms for reviewing conditions of detention if the authorities had adequate alternatives to detention at their disposal. In that context, Rapoza discusses electronic monitoring as an alternative to pre-trial detention. Although there are many projects around the world to apply and improve alternatives to detention, the truth is that at the same time there are developments that lead to new challenges and/or increased use of detention. Also relevant in this regard – *i.e.*, apart from the developments already mentioned above – is the enhancement of international legal cooperation between States, as illustrated by Boetticher, who explains the impact of the European Arrest Warrant on pre-trial detention policy and numbers.

National chapters

Many different topics are reviewed in Part III of this volume, which contains 21 individual chapters on pre-trial detention in the following countries: Argentina, Belgium, China, Denmark, England & Wales, France, Germany, Greece, Ireland, Italy, Japan, The Netherlands, New Zealand, Norway, Poland, Portugal, South Africa, Spain, Taiwan, Turkey, and the United States of America (USA); these countries are hereafter referred to as "reporting States" or "responding States". These national reports are based on an extensive questionnaire to which judges, State officials and scholars from these countries have responded. Although it turned out to be impossible to achieve a fully balanced distribution of countries

5 See also the comparative law study of Stella Burch Elias, 'Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects', 41 *Columbia Human Rights Law Review* 1 (2009), p. 99–210; Douglass Cassel, Pretrial and Preventive Detention of Suspected Terrorists: Options and Constrains under International Law, 98 *Journal of Criminal Law & Criminology* 3 (2008), p. 811–852.

6 See also Peter J.P. Tak & Manon Jendly (eds), *Minorities and Cultural Diversity in Prison/ Minorités et diversité culturelle en prison* (IPPF/FIPP), Nijmegen, Wolf Legal Publishers, 2006.

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over the world's six continents, all the continents are at least represented in this volume.

The chapters regarding these countries mostly adopt the following structure: After the introduction (I) an account is given of the international and national human rights framework that applies to the reporting country under consideration (II). Subsequently, each chapter presents an explanation of the country's national criminal procedural law framework (III) and its standards for the actual conditions of detention, its detention facilities and the rights of its detainees (IV). Each chapter further discusses the possibilities available in the reporting country to apply alternatives to detention (V), before finally offering conclusions (VI).

Some chapters on national systems, however, go far beyond presenting the national system, going further into certain themes. Particularly noteworthy in this respect are the chapters on Spain (in which Guerra Pérez & Díez Ripollés provide much interesting statistical and empirical information and analyses on the application of pre-trial detention), Denmark (in which Rentzmann throughout the chapter describes developments regarding solitary confinement), South Africa (in which Van Zyl pays additional attention to the position of children), and England & Wales (where Shute & Mora offer an extensive additional focus on, *e.g.*, pre-trial detention without charge as well as the treatment of suspects of terrorism).

Introductory comparative synthesis and analyses

The present chapter – which constitutes Part I of this volume – follows the basic structure of the chapters on national systems set out above. It focuses mainly on the topics that these national chapters discuss. What follows purposes to offer a comparative synthesis of the reporting States' national systems against the background of the international human rights norms discussed further below. The analyses focus on possible correlative relationships between the acceptance of international and constitutional fundamental rights norms, the quality of criminal procedural and penitentiary law, and rates of pre-trial detention and the application of pre-trial detention in practice. It not only examines whether and how international human rights standards on detention are influencing national law and practice, and the extent to which international norms are suitable to do so, it also tries to reveal strengths and weaknesses of domestic law systems as such. Although the comparative synthesis and analyses here is based mainly on the information provided in the national chapters and the thematic contributions in this volume, other, additional materials are taken into consideration where this is of supplementary value.[7]

[7] For example, as regards criminal procedural law (see *infra* section III), the information in A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, has been of great additional value

I.2. DEFINITION OF PRE-TRIAL DETENTION

In a comparative law context it is not easy to come up with a precise definition of pre-trial detention, as Casorla explains in his chapter in this volume.[8] This is due to the fact that there is a great variation between the procedural law systems of countries regarding the legal categories of deprivation of liberty that are recognized in those systems, that international human rights instruments are based on many different definitions of pre-trial detention, and that national procedural law and international human rights norms are consequently not based on a single, uniform definition. This chapter therefore takes pre-trial detention to be understood in a broad sense. Unless stated otherwise, the term pre-trial detention refers to all forms of detention prior to imprisonment based on a final criminal conviction. This may thus include pre-trial detention in a strict sense, trial pre-conviction detention and trial post-conviction detention. Examples of pre-trial detention are police custody (pre-trial detention by the police) and remand (pre-trial detention on the authority of some judicial organ, such as a prosecutor, a judge, a court). The term detention is used here as opposed to imprisonment, which entails deprivation of liberty based on a final criminal conviction.

II. ACCEPTANCE OF INTERNATIONAL AND NATIONAL FUNDAMENTAL RIGHTS REGARDING DETENTION

Some of the most relevant fundamental rights relative to pre-trial detention have already been mentioned above. Of these particularly the fundamental rights to liberty and the presumption of innocence generate procedural guarantees that restrict the possibilities to take someone into detention, while the right to humane treatment and the prohibition of torture and ill-treatment significantly regulate the minimum conditions of such detention. All these fundamental rights are embedded in both national constitutions and international (global and regional) human rights instruments. The task of ensuring these fundamental rights falls first and foremost on the national authorities. Seen from this perspective, detailed recognition of these rights in national constitutions should facilitate national authorities sufficiently to ensure them. In reality, though, many States seem not to be sufficiently able – or willing – to fulfil this task without the presence of international human rights instruments and their

regarding the respondent states that are represented in this volume and are members of the European Union (*i.e.* Belgium, Denmark, England & Wales, France, Germany, Greece, Ireland, Italy, The Netherlands, Poland, Portugal, and Spain).

[8] See section 2 of that chapter.

supervision by international human rights bodies. It is therefore useful to examine whether States recognize these rights in their constitutions and whether they are bounded by international instruments.

Subsequently, such examination might make it possible to draw conclusions as to the following questions. Is there some correlation between the extent to which States have committed themselves to these rights by constitutional law and/or international law and the state of their law and practice regarding detention? I start from the hypothesis that States that have both strong constitutional rights on detention and have ratified the most relevant international instruments will have a better record of acting in conformity with those rights than States to which only one of the two applies or neither. Is that hypothesis shown to be true? Because international human rights law stands at a more general and, in principle, also a higher level than national law, the examination now commences with the former.

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Detention is the subject of many global and regional instruments of international law, particularly human rights conventions as well as soft law human rights declarations and sets of rules or principles. Notably relevant in this regard on a global level are the *Universal Declaration of Human Rights* (UDHR, 1948; see Article 3, 5, 9), and furthermore the legally binding *UN International Covenant on Civil and Political Rights* (ICCPR, 1966; Articles 7, 9, 10), *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT, 1984; Articles 10, 11), *UN Convention on the Rights of the Child* (CRC, 1989; Article 37), and *UN International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED, 2006; Articles 2, 17).

Legally binding instruments that are relevant here are also available on a regional level. Some of the most important of these are the African Union's (AU) *African Charter on Human and Peoples' Rights* (AfChHPR, 1981; Article 6), and *African Charter on the Rights and Welfare of the Child* (AfChRWC, 1990; Articles 16, 17); the Organization of American States' (OAS) *American Convention on Human Rights* (ACHR, 1969; Articles 5, 7), and *Inter-American Convention to Prevent and Punish Torture* (I-ACPT, 1985; Articles 5, 7); and, finally, the Council of Europe's (CoE) *European Convention on Human Rights* (ECHR, 1950; Articles 3, 5), and *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT, 1987).

As these instruments entail important conditions and regulations concerning the detention of individuals, they will be referred to and explained further below when relevant to the topic under discussion. At this point it suffices to note that

only the ICCPR (Article 9), the ACHR (Article 7), and the ECHR (Article 5) in some detail offer a general framework of conditions to ensure that no one is arbitrarily deprived of his/her liberty. The corresponding provision in the AfChHPR is rather shallow, but the jurisprudence of the African Commission on Human and Peoples' Rights provides somewhat more detail as to its meaning.[9]

Comparison of States' ratifications of international instruments

All reporting States have ratified the global international ICCPR, CAT, and CRC, with the exception of China (not the ICCPR), Taiwan (none of them), and the USA (not the CRC).[10] Only Argentina, Belgium, France, Germany, Japan, The Netherlands and Spain have also ratified the still recent ICPPED. It deserves to be noted in respect of Taiwan that it is the only one of all reporting States that is not a member of any of the global or regional international organizations that are relevant here: it is, for example, not accepted as a member of the United Nations, which means that it is unable to enter international human rights instruments that are adopted by this organization. This means, as Wang remarks in his chapter on Taiwan: "Without the stimulation from outside world, Taiwanese people have to develop a new social conscience that will promote modern values and human rights." Taiwan has done so by promulgation of a law that holds that "Human rights protection provisions in the two Covenants have domestic legal status."[11] As a result, it can indeed be concluded that the international fundamental rights to liberty, presumption of innocence, humane treatment in detention and against torture and ill-treatment are universally recognized by all States under consideration here, including Taiwan. That several States have made reservations in respect of one or more of these rights – such as Belgium, Denmark, Ireland, The Netherlands, New Zealand, Norway, and the USA, most frequently in regard to Article 10(2) and (3) ICCPR – does not alter this conclusion, considering the nature of the reservations.

Furthermore, with the exception of the USA, all reporting States have also ratified all the above mentioned regional instruments that apply to the region to which these States belong. At the time of writing, the USA has ratified neither

9 See Malcolm Evans & Rachel Murray, *The African Charter on Human and Peoples' Rights*, Cambridge: Cambridge U.P., 2008, p. 197–198. See also Jamil Ddamulira Mujuzi, 'Protecting Prisoners' Rights before the African Commission on Human and Peoples' Rights: The Role of Civil Society', *CSPRI Newsletter*, No. 22 (June 2007); see also Lukas Muntingh, 'Improved monitoring and reporting to promote and protect the rights of prisoners under the African human rights system', *CSPRI Newsletter*, No. 33 (December 2007).

10 As regards U.N. instruments, all the following information concerning ratifications is based on the U.N. Treaty Collection Database (http://treaties.un.org/; reference date 1 July 2011).

11 More extensively on this issue, see the chapter on Taiwan.

the ACHR nor the I-ACPT.[12] The ECHR and ECPT have been ratified by all 47 Council of Europe member States, which consequently includes all 27 European Union States as well as all the European States under consideration here. Regional human rights instruments are not available in Asia and Oceania, as a consequence of which China, Japan, Taiwan and New Zealand are not parties to any such instrument. This means that only China and formally also Taiwan are not ratifying parties to any international human rights convention that offers a general framework of requirement for deprivation of liberty or minimum standards for the conditions of detention.

Meanwhile, these instruments are not only of great value in that they contain fundamental norms that limit and regulate deprivation of liberty, they are also important because many of them provide bodies whose task it is to supervise the implementation of those norms in the participant States' law and practice. Several of these bodies accept complaints from individuals. As for the general framework guaranteed by the ICCPR (notably Articles 7, 9, 10), the Human Rights Committee (HRC) is most relevant in this regard. The competence of the Committee to receive individual complaints is accepted by many reporting States. This applies primarily to South Africa, New Zealand, and Argentina. In fact, so far Argentina is the only reporting State that recognizes both the individual complaints procedures of the CAT and ICPPED. Individuals may also complain to the HRC against all reporting European countries, with the exception of the UK (and thus also England & Wales). Again, apart from the UK, all European countries furthermore accept individual complaints with the CAT (interestingly, under the CAT Optional Protocol the UK – in common with Argentina, Denmark, France, Germany, The Netherlands, New Zealand, Poland, and Spain – does however accept the competence of the global CAT Subcommittee on Prevention of Torture (SPT) to make unrestricted visits to places where people are deprived of their liberty). By contrast, individuals who are deprived of their liberty in China, Japan, Taiwan, or the USA do not have any possibility to complain at the global level about alleged or real violations of any of the aforementioned instruments.

Ats the regional level, individual complaints against South Africa may be filed with the AfCionHPR. However, this State has not recognized the possibility to do so with the African Court of Human and Peoples' Rights (AfCtHPR), nor has it yet signed the 2008 Protocol[13] that will replace the AfCtHPR with an African Court of Justice and Human Rights (AfCtJustHR).[14] Regarding Argentina, individuals have the right to file complaints with the Inter-American Commission of Human Rights (I-ACionHR). Meanwhile, the European Court of

12 See the OAS Database (at: www.oas.org/DIL/treaties_and_agreements.htm; reference date 1 June 2011).

13 See the 2008 *Protocol on the Statute of the African Court of Justice and Human Rights.*

14 See the AU treaty database (http://au.int/en/treaties/status; reference date 27 January 2011).

Human Rights (ECtHR) is competent to receive individual complaints against all respondent European Countries. Furthermore, all these European States also recognize the competence of the CPT to visit any place where persons are deprived of their liberty by a public authority, in order to examine their treatment. Although it does not accept individual complaints, the Committee merits notice here too, for it has developed an extensive set of minimum standards for the conditions of detention and imprisonment, as is extensively explained in this volume in the chapter by Van Kalmthout & Knapen. It will be interesting to see whether the CPT's counterpart, *viz.* the CAT Subcommittee on Prevention of Torture (SPT), will eventually achieve similar influence and effectiveness as the CPT (at the time of writing the SPT's competence to make visits is accepted by the following reporting States: Argentina, Denmark, France, Germany, The Netherlands, New Zealand, Poland, Spain, and the UK (thus also England & Wales)). Again, none of the individual complaint procedures offered by any of the aforementioned regional instruments is available to individuals in China, Japan, New Zealand, Taiwan, and the USA.

II.2. FUNDAMENTAL RIGHTS IN NATIONAL CONSTITUTIONS OR BILLS OF RIGHTS

From a fundamental rights perspective it is interesting to know whether the extent to which States acknowledge international human rights norms and individual complaint procedures corresponds with the degree to which their constitutions or Bill of Rights recognize fundamental rights that are significant to detention. The most detailed set of rights, procedural requirements and substantive minimum standards on detention seems to be provided by the Constitutions of South Africa[15] and Turkey.[16] Quite detailed fundamental rights provisions concerning detention may also be found in Germany,[17] Greece,[18] New Zealand,[19] Poland,[20] Portugal,[21] Spain,[22] and de facto also England & Wales.[23] Matters are a little different for Denmark,[24] Ireland,[25] and Taiwan,[26] for these

15 See Articles 10, 12, 28, 35 and 37 of the Constitution of South Africa.
16 See Articles 17 and 19 of the Constitution of Turkey.
17 See Articles 2 and 104 of the Constitution of Germany.
18 See Articles 6 and 7 of the Constitution of Greece.
19 See Sections 9 and 22–25 New Zealand Bill of Rights Act 1990.
20 See Articles 40 and 41 of the Constitution of Poland.
21 See Articles 25, 27, 28 and 31 of the Constitution of Portugal.
22 See Articles 15 and 17 of the Constitution of Spain.
23 See the United Kingdom Human Rights Act 1998, which in fact has fully implemented Articles 3 and 5 ECHR, among most other rights and freedoms under the Convention.
24 See Section 71 of the Constitution of Denmark.
25 See Article 40(4) of the Constitution of Ireland.
26 See Article 8 of the Constitution of Taiwan.

states have considerable detailed Constitutional provisions on deprivation of liberty too, but none on humane treatment or the prohibition of ill-treatment. Relatively moderate fundamental rights provisions that are relevant to detention may be found in the constitutions of Italy,[27] The Netherlands,[28] and the USA.[29] Still more confined formulations of such fundamental rights are offered by the Constitutions of Argentina,[30] Belgium,[31] China,[32] France,[33] Japan,[34] and Norway.[35]

Of course, for all States it is the case that the text of the constitution alone is not decisive, for it is readily conceivable that the rights therein have been advanced and broadened through judicial interpretation. This is the case in the USA, for example. Moreover, in many instances the scope and level of detail of constitutional rights may have less to do with a State's present recognition of fundamental rights than with the moment in history when the constitution was drafted. It would seem that modern or modernized constitutions are often more detailed than older ones, plausibly because constitutional drafters nowadays are influenced by detailed international human rights norms and jurisprudence. This seems to apply to South Africa, for example.

II.3. FUNDAMENTAL RIGHTS PROTECTION IN STATES' LAW AND IN PRACTICE

On paper, the combined protection offered by ratified international law and national constitutional provisions against arbitrary and inhumane conditions of detention appears highest in South Africa, Turkey, Germany, Greece, Poland, Portugal, and Spain. These countries have the most detailed constitutional provisions on detention, while their citizens have additional protection under both global and regional human rights instruments with binding force and accompanying individual complaint procedures. Moreover, at least as far as international human rights law is concerned, all these countries apply variations of moderate monist systems, which means that rights provisions in international human rights treaties are usually considered to have direct effect and that

27 See Articles 13 and 27 of the Constitution of Italy.
28 See Articles 11 and 15 of the Constitution of The Netherlands.
29 See Amendments IV, V, VI, VIII and XIV to the Constitution of the United States of America.
30 See Articles 18 and 43 of the Constitution of Argentina.
31 See Article 12 of the Constitution of Belgium.
32 See Article 37 of the Constitution of China (People's Republic of China).
33 The Constitution of France does not contain a Bill of Rights or a fundamental rights provision on detention. However, the Preamble of the Constitution refers to the 1789 Declaration of the Rights of Man and of the Citizen, the principles of which have constitutional value; as regards detention see Articles 7 and 9 of the Declaration.
34 See Articles 31, 33, 34 and 36 the Constitution of Japan.
35 See Articles 96 and 99 of the Constitution of Norway.

individuals have standing to invoke these rights before domestic courts. From the viewpoint of the legal framework examined above, individuals are the least protected in China, Japan, and the USA.

Evidently, these strictly legal-system-based observations do not necessarily have to correspond with the extent to which the relevant fundamental norms on detention are actually ensured in these countries. The degree to which the quality and scope of law matches with practice is a difficult question to answer, but there are some parameters that might provide some indication. The picture changes substantially for several countries when one considers, for instance, the pre-trial/remand population rate and findings of international human rights bodies. For example, South Africa and Turkey have relatively high rates of detention,[36] while both are still struggling to make the necessary improvements concerning the conditions of detention.[37] As for Poland and Turkey (again), they have been found relatively often to violate the ECHR in relation to deprivation of liberty.[38] It seems that these countries do not fully live up to what would be expected from the constitutional and international fundamental rights framework that applies to them. But it might also work the other way round. This is rather illustrated by Japan: its moderate constitutional provisions and the complete rejection of international complaint procedures has not prevented it from having a very low detention rate of 9,[39] even though it receives much more critical attention regarding the conditions of detention.[40] This applies even more strongly to China, which is reported to have the low pre-trial detention rate of 6,[41] but which faces more severe problems both in ensuring fundamental guarantees that restrict the possibilities to take someone in detention, as well as in fulfilling the minimum standards for conditions of detention and humane treatment of detainees.[42]

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36 See Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, which shows that South Africa and Turkey have rates of 101 and 71 per 100,000 of the national population, respectively, while in 60 per cent of all countries the pre-trial/remand population rate is below 40. This volume's chapter on South Africa still implies a rate of 101 (2011) and the chapter on Turkey gives a rate of 75 (2009).

37 For example, see Committee against Torture (CAT), Conclusions and recommendations, *South Africa*, UN doc. CAT/C/ZAF/CO/1, 7 December 2006, par. 20, 22.

38 For example, in recent years the ECtHR found 14 (2010), 35 (2009), 47 (2008), and 47 (2007) violations of the right to liberty in Article 5 ECHR against Poland, and 80 (2010), 88 (2009), 46 (2008), and 95 (2007) against Turkey, most of which concern (pre-trial and trial) detention. These numbers are comparatively high, and are only exceeded by Russia. See European Court of Human Rights, *Annual Report* 2010, 2009, 2008, and 2007, Council of Europe, Strasbourg, under Statistical information; Violations by Article and by respondent State.

39 Walmsley, *World Pre-trial/Remand Imprisonment List 2008*.

40 See CAT, Conclusions and recommendations, *Japan*, UN doc. CAT/C/JPN/CO/1, 3 August 2007, par. 17.

41 See *infra* section III.2.

42 See also, for example, the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, *Mission to China*, UN doc. E/CN.4/2006/6/Add.6, 10 March 2006, and Follow-up to the recommendations made by

Evidently, then, neither the international human rights system nor a constitutional framework can fully guarantee appropriate application and conditions of detention. Nonetheless, in many countries the degree of formal acceptance of international and constitutional human rights requirements and their actual application in practice are more balanced. Moreover, there are many examples of how fundamental rights law is leading to changes in law as well as in practice.[43] Some of these examples may be found in the chapters on Denmark, Greece, Ireland, Italy, Japan, The Netherlands, New Zealand, Norway, Poland, and Turkey. An interesting example is also offered by the chapter on China, in which Zhang presents important insights into how international human rights law is influencing domestic law regarding the independence of the judiciary, the presumption of innocence, banning torture and ill-treatment, and defence rights.[44]

In any case there will always be some deviation between the quality and scope of fundamental rights law that formally applies in a State and the actual practice in that State. There seem to be at least two obvious reasons for this. First, even as far as rules are concerned, practices depend not only on fundamental norms, but also on law in general. This draws me to reflect more closely on the legal framework for detention in the respondent states further below. Second, rules might be an important means to affect practices, but their existence as such does not at all guarantee that practice is in conformity with them. This is shown very well by the examination in the chapter on Spain, where Guerra Pérez & Díez Ripollés point out significant dissimilarities in the application of detention between different Spanish regions, while the same criminal procedural code, codification and international human rights mechanisms apply to them. There is, in other words, more to be taken note of than just the law. Also relevant are, for example, legal culture, the availability of resources, the quality and mentality of the police, prosecution and judiciary, the contents of policies, the nature of society, the scale of criminality, the political climate and the focus of the media. In fact they all interrelate. Not only are these factors to a greater or lesser extent influenced by national and international fundamental rights; the scope and substance of these rights and of their application are also affected by these factors. As a result, these factors and fundamental rights keep each other in a state of constant motion and development.

the Special Rapporteur in the report of his visit to China in November 2005, UN doc. A/HRC/10/44/Add.5, 17 February 2009.

43 See, *e.g.*, Council of Europe, *General measures adopted to prevent new violations of the European Convention on Human Rights*, H/Exec (2006)1, May 2006, 289 pp.

44 Cf. Yanyou Yi, 'Arrest as punishment: The abuse of arrest in the People's Republic of China', 10 *Punishment Society* 1 (2008), p. 9–24; Wei Wu & Tom Vander Beken, 'Police Torture in China and its Causes: A Review of Literature', 43 *Australian & New Zealand Journal of Criminology* 3 (2010), p. 557–579.

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORKS

Deprivation of liberty – and thus detention – is only permitted under the international human right to liberty in accordance with the grounds, conditions and procedure established by domestic law. Thus, in case of detention, not only a failure to comply with applicable human rights standards will constitute a violation of the fundamental right to liberty; failure to comply with relevant domestic law will have the same consequence.[45] International law thus refers back to substantive and procedural domestic law, but at the same time that domestic law must fulfil the international human rights guarantees. This reality merits the following examination of both levels of law by themselves as well as in relation to each other. Furthermore, it raises the question whether the system of criminal law procedure sufficiently recognizes the needs of the human rights system and vice versa.

III.1. DIFFERENT PERSPECTIVES ON DETENTION PHASES

On a general level it is possible to distinguish between three phases of deprivation of liberty preceding imprisonment within the criminal justice system, *i.e.* deprivation of liberty after a final sentence. First, pre-trial detention: deprivation of liberty before the criminal trial has commenced. Examples are police custody and remand. Second, trial pre-conviction detention: detention during the trial in first instance or during appeal proceedings after an acquittal in the previous instance. Third, trial post-conviction detention: detention during appeal proceedings after conviction in the previous instance. These three phases of detention are not necessarily reflected as such in the relevant international human rights treaties (notably the ICCPR, AfChHPR, ACHR, and ECHR), in domestic constitutional provisions, or in each of the domestic criminal procedure law systems.

In fact, Article 6 of the African Charter does not as such recognize any of these phases. The International Covenant (Article 9; cf. Article 10) and the American Convention (Article 7; cf. Article 5) only vaguely identify persons awaiting trial, accused persons and convicted persons as different categories. However, the Human Rights Committee considers that the segregation of accused persons from convicted ones 'is required in order to emphasize their

[45] See, for example, HRC, View of 26 July 1989, *Bolaños v. Ecuador*, Comm. 238/1987, par. 9; I-ACtHR, Judgment of 21 November 2007, *Chaparro Álvarez & Lapo Íñiguez v. Ecuador*, par. 57; ECtHR, Judgment of 9 July 2009, *Mooren v. Germany*, Appl. 11364/03, par. 72–73, and furthermore AfCionHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under M, section 1 (b) (adopted by Resolution at its 26th Ordinary Session in Rwanda in November 1999).

status as unconvicted persons who are at the same time protected by the presumption of innocence stated in article 14(2) ICCPR.' It therefore appears that 'accused persons' means to refer to both pre-trial detainees and pre-conviction detainees, while 'convicted persons' includes both post-conviction detainees as well as prisoners. This distinction also follows from the European Convention, but in this case clearly from the text of the treaty itself, *i.e.* from Article 5(1)(c) and (a) respectively. That some of these international human rights treaties distinguish only vaguely or not at all between categories of detainees is problematic because many human rights seem to apply differently to these different categories. When there is uncertainty as to exactly whom and how the fundamental rights these treaties aim to guarantee, it is even more unclear how they should be properly implemented and ensured in domestic law and practice. This weakens the protection these rights aim to offer.

The distinctions that emerge from human rights treaty provisions are furthermore not consistent with the phases that many domestic criminal procedure law systems display. That, however, is not surprising. Criminal law systems are not primarily designed from the perception of fundamental rights protection, but rather with the intention of providing a practical and effective instrument to prevent and repress crime. Consequently, the phases of detention in most of these systems follow the general course of criminal proceedings against suspects. Although the number of phases differs among the reporting States, most of them start with the phase(s) of police arrest and police custody, followed by some form of remand (*e.g.*, remand in custody or preventive detention). By contrast, fundamental rights systems rather recognize distinctions from the perspective of how strongly these rights should apply. From the point of view of human rights (such as the right to liberty, the presumption of innocence, the right to privacy), on a fundamental level it is in principle less acceptable to infringe such rights in respect of unconvicted detainees than convicted ones. However, from the perspective of criminal justice, matters will regularly be the other way around. Criminal investigation frequently requires that the rights of unconvicted detainees are more severely limited than those of convicted ones: the need to detain a suspect in order to forestall their collusion with the criminal investigation by the police and/or public prosecutor, as well as the need to search their person, vehicles and houses, and to seize their belongings, is usually much more pressing before the trial court actually reviews the case than after the defendant might have been convicted by the first instance court. However, in at least one respect the chronology of criminal procedure and the interest of human rights coincide in many domestic criminal procedural law systems: the longer detention persists, the more the quantity and quality of applicable requirements increases. This affects, for instance, the quality of the review, the quality of the official who may order continuation of detention, and the grounds on which it may be ordered.

III.2. STATISTICS ON PRE-TRIAL DETAINEES

International human rights law does not stipulate absolute maxima for the number of people who may be held in detention. It does, however, intend to have the effect of keeping the numbers to a minimum by preventing arbitrary detention and stressing the principle of subsidiarity/necessity: deprivation of liberty may only be applied if all less severe avenues – such as unqualified liberty, conditional liberty or alternatives to detention – are inadequate to control the suspect sufficiently.[46] To that end it specifies several relative requirements, such as the grounds for detention and detention review mechanisms, which will be discussed further below.

Scope of statistics

All the same it is useful to take a closer look at the numbers. This might clarify the scope of the problem of detention and point out certain developments. In order to be able to do so, it is again necessary to give some consideration to what detention denotes, without which it would not be possible to establish the number of detainees in a country or to understand what the numbers mean. In many countries, deprivation of liberty by police arrest or police custody prior to a judicial order is not considered pre-trial detention.[47] Although these stages undoubtedly fall within the scope of the right to liberty as protected by the International Covenant, African Charter and American and European Conventions, they do therefore not occur in the figures of many States, while in other cases it is not clear whether they have been included in the figures or not. This also applies to most of the figures presented in this volume. The figures below are mostly extracted from Walmley's *ICPS World Pre-trial/Remand Imprisonment List 2008*, because that list offers the most comparable set of figures on a world scale. Nevertheless, in many instances the figures are also based on the national chapters in this volume, or on yet other sources. If figures are not taken from the World List, this is indicated in footnotes. It should be noted that the figures sometimes vary considerably between sources, they are not always reliable and moreover, as Van Kalmthout & Knapen explain in their chapter, it is not always clear what exactly they refer to, nor on which method of calculation they are based. The following is based on the presumption that the figures refer to persons who, in connection with an alleged offence or offences, are deprived of their liberty following a judicial or other legal process but have

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46 See, *e.g.*, ECtHR 21 December 2000, *Jabłoński v. Polen*, Appl. 33492/96, par. 83–85; ECtHR, 24 July 2003, *Smirnova v. Rusland*, Appl. 46133/99, par. 58.

47 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 56.

not been definitively sentenced by a court for the offence(s).[48] Both trial pre-conviction detainees and trial post-conviction detainees are in principle thus also included in the figures.

Comparison of States' statistics

The world's highest pre-trial/remand population rate (per 100,000 of national population) is 213 (Panama) while the lowest is less than 1 (various very small countries, mainly in Oceania). Of the reporting States the highest rates occur in the USA, South Africa, Argentina, and Turkey. In the last few years the USA's rate rose from 159 (2006) to 168 (2008[49]), which means it has one of the highest rates both in the Americas and the world. South Africa has a rate of 101 (2007) or 99 (2011[50]), which is the second highest rate in f Africa and a rate in the world's top twenty. The rate of 82 (2005) in Argentina is high on a world scale but in the middle bracket in the Americas. That of Turkey is 71 (2007) or 75 (2009[51]), which means it belongs in the 15th per centile of the highest rates in Europe. A very low rate is achieved by Japan (9 in 2005), while the position of China is not entirely clear: the chapter on China seems to imply a rate of approximately 6 (2009[52]), but perhaps many times that may be involved if administrative detention is taken into consideration (2009[53], 2011[54]). In any case, Germany (16 in 2007), Ireland (15 in 2007; 14 in 2009[55]), Norway (15 in 2007), and Denmark (18 in 2007) also have low rates. These rates are also fairly low in comparison to the rates of most other Asian and European countries. In 60 per cent of the world's countries the

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48 This definition is reproduced from Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, p. 1.

49 Based on the chapter on the USA; on 30 June 2008 the number of detainees was 508.800, which results in a rate of 168 (estimated national population at this date 302.7 million).

50 Based on the chapter on South Africa; the number of detainees was 49,570, which results in a rate of 99 (estimated national population of 49.99 million in 2010).

51 Based on the chapter on Turkey, the number of detainees was 55,844, which results in a rate of 78 (estimated national population at this date 74.8 million).

52 The chapter on China states that China had 941,091 pre-trial detainees in 2009 who were in detention for an average of 90 days (but this average does not include trial-detention), which makes a rate of approximately 6 given a population of 1,338.6 million (mainland only, 2009). Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, who mentions an estimation by an East Asian criminal justice expert of 100,000 pre-trial detainees, implies a rate of 8 (information for 2005, based on an estimated population of 1,319.7 million).

53 Amnesty International, *Report 2009, The State of the World's Human Rights*, A.I. Publications, 2009, p. 107: 'Hundreds of thousands of individuals were in administrative detention, including in Re-education through Labour camps, where they may be detained for up to four years without trial.'

54 See Prison Brief for China (at: www.prisonstudies.org/) and Roy Walmsley, *World Prison Population List (ninth edition)*, University of Essex, ICPS/International Centre for Prison Studies, 2011, p. 1, in which it is mentioned that more than 650,000 are in 'detention centres' in China.

55 Based on the chapter on Ireland; the number of detainees was 623, which results in a rate of approximately 14 (information for 2009, based on an estimated population of 4.42 million).

pre-trial/remand population rate is below 40, and about the same percentage applies to the States that are represented in chapters in this volume.

In nearly 60 per cent of all countries and in almost eighty per cent of the reporting States in this volume, the proportion of the total prison population who are in pre-trial/remand imprisonment is below 40%. Turkey (60.9% in 2007; 51.4% in 2009), Italy (58.3% in 2007; or 49.8% in 2008, and 49.1% in 2009[56]), Argentina (57.6% in 2005), and Belgium (44,3% in 2007) stand out with high percentages. By far the lowest percentage applies to Taiwan: only 11.2% (2007) or 6.4% (2009[57]). Meanwhile it still has a pre-trial/remand population rate of 32 (2007) or perhaps only 16 (2009[58]). The low percentage and the rate of still 32 can be understood when one considers that Taiwan has a high prison rate (that is the rate for the number of detainees and number of prisoners combined) of 276 (2008) or 257 (2009[59]).

Factors that influence the figures

These figures may give an important indication of the degree to which the authorities are willing to infringe the right to liberty and the presumption of innocence. They are, however, by no means conclusive in this regard. Nor do they fully signify whether or not a criminal procedural law system conforms to the letter and in application with the principles of fundamental rights that are significant to detention. The reason that this is not the case is that the scale and forms of criminality with which a State is confronted will always have a bearing on the figures. In general it is much easier to keep such numbers down in a society with little criminality than in a country that is severely burdened by criminal activity.

This, of course, does not mean to suggest that high rates of serious criminality will always have to result in high detention rates. Detention is not a prerequisite to effectively countering crime in all – probably even in most – criminal cases. For example, more efficient and energetic criminal investigations or application of alternatives to detention – which will be discussed further below in section V – may also be effective in that respect. Apart from that, practice proves that there is no exclusive correlation between criminality rates and detention rates. In fact, this is illustrated by the chapter on Spain, where studies show that, while

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56 Based on the chapter on Italy.

57 Based on the chapter on Taiwan. Either the percentage has fallen incredibly in two years, or the *World Pre-trial/Remand Imprisonment List 2008* and the report on Taiwan are based on different conceptions of what a detainee is.

58 Based on the chapter on Taiwan; on 31 July 2009 the number of detainees was 3,783, which results in a rate of 16 (estimated national population at this date 23.1 million).

59 Based on the chapter on Taiwan; on 31 July 2009 the number of detainees and prisoners was over 59,000, which results in a rate of 257 (estimated national population at this date 23.1 million).

criminality has an average growth or drop rate between 2% and 4% in the last few years, the prison population has increased by 20%.[60] Casorla's chapter moreover illustrates how general amnesties of convicts can influence pre-trial detention numbers, in which case fluctuations in statistics have little or nothing to do with crime rates, either.[61] This is only one of the many factors Casorla discusses, among which are also the influence of victims on criminal procedure and policies to counter terrorism or environmental crime.[62]

Nonetheless, in case of high rates of serious criminality it might take much more effort to apply a well-functioning criminal procedural law system that actually ensures all relevant fundamental rights while effectively preventing and repressing crime. The case of Greece (see the national chapter by Lambropoulou) seems to illustrate that difficulty.

III.3. LENGTH OF PRE-TRIAL DETENTION

Before presenting statistics on the average length of detention in the respondent countries, it seems appropriate to briefly examine some relevant human rights standards. This might help to better understand what the figures indicate about the practice of detention in the States to which they refer. None of the human rights treaties that are relevant to this issue set absolute maxima on the length of (pre-trial and trial) detention. Some guidelines may, however, be extracted from the case law based on these treaties.

The fundamental right to trial within a reasonable time

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Relevant here is the fundamental right to trial within a reasonable time. This right is included in the right against arbitrary detention (see, *e.g.*, Article 9(3) ICCPR, Article 7(5), and Article 5(3) ECHR[63]) as well as the right to a fair trial (see, *e.g.*, Article 14(3)(c) ICCPR, Article 7(1)(d) AfChHPR, Article 8(1) ACHR, and Article 6(1) ECHR). Both rights are applicable here, but since the requirement to prevent unreasonable terms of detention is the strictest, I shall focus on that. On the basis of that right, international human rights law stresses that pre-trial detention should be an exception and as short as possible.[64] This

[60] See the chapter on Spain.

[61] See section 2 of that chapter (under: Une mesure difficile à … mesurer).

[62] See section 4 of that chapter.

[63] The detainees' right to trial within a reasonable time is not expressly provided in Article 6 AfChHPR (the right to liberty). The African Commission has, however, been able to read it into the fair trial requirement of Article 7(1)(d); see AfCionHPR, Decision of 16–30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/ 2003 (2007), under: Decision on the merits.

[64] HRC, General Comment No. 8, Right to liberty and security of persons (Article 9), 30 June 1982, par. 3; AfCionHPR, Decision of 16–30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/ 2003 (2007), under: Decision on the merits; I-ACtHR, Judgment of 6 May 2008,

principle of subsidiarity/necessity is fundamental whenever the authorities consider detaining someone. As the Inter-American Court states: "failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognized general principles of law."[65]

International human rights supervisory bodies assess the reasonable time requirement in light of the circumstances of each case, including the complexity of the proceedings, and their conduct by the authorities and by the defence. In principle, a period longer than approximately 18 to 24 months of detention – from the first day of custody until the day when the charge is determined – will constitute a violation of the reasonable time requirements in the Covenant and European Convention respectively.[66] Only if extremely convincing explanations are offered for the delay might this be different. The position of both the African Commission and Inter-American Court is less clear, but since both seem to join the standards of the European Court, it seems probable that a rather similar regime applies under the African Charter and American Convention.[67] The foregoing does not imply that shorter periods of detention are by definition in agreement with international human rights law. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. So in, for instance, the case of *Belchev versus Bulgaria* a detention period of 4.5 months was found to be in violation of Article 5(3) ECHR.[68]

Yvon Neptune v. Haiti, par. 98; ECtHR, Judgment of 24 July 2003, *Smirnova v. Russia*, Appl. 46133/99, par. 58–64.

65 I-ACtHR, Judgment of 2 September 2004, *Case of the "Juvenile Reeducation Institute" v. Paraguay*, par. 229.

66 HRC, View of 1 April 2002, *Teesdale v. Trinidad and Tobago*, Comm. 677/1996, par. 9.3 (17 months remand detention, including 16 months pre-trial detention); HRC, View of 23 October 2008, *Smantser v. Belarus*, Comm. 1178/2003, par. 10.3 (22 month remand detention from arrest until conviction in appeal trial). Violations regarding the lengths of pre-trial detention (period from arrest to opening trial) were also found in: HRC, View of 30 July 1998, *Perkins v. Jamaica*, Comm. 733/1997, par. 11.3 (21 months); HRC, View of 17 July 1997, *Lewis v. Jamaica*, Comm. 708/1996, par. 8.1 (23 months); HRC, View of 25 July 1996, *Henry and Douglas v. Jamaica*, Comm. 571/1994, par. 9.3 (2.5 years); HRC, View of 26 October 1995, *Seerattan v. Trinidad and Tobago*, Comm. 434/1990, par.7.2 (over 3 years). For the ECHR, see D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2009, p. 181.

67 See, *e.g.*, with reference to other case law, AfCionHPR, Decision of 16–30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/ 2003 (2007), under: Decision on the merits; I-ACtHR, Judgment of 6 May 2008, *Yvon Neptune v. Haiti*, par. 98 (25 months).

68 ECtHR, Judgment of 8 April 2004, *Belchev v. Bulgaria*, Appl. 39270/98 (incitement to unjustified bank guarantees; conviction, later quashed, case was sent back). Violations also occur in, *e.g.*, ECtHR, Judgment of 30 January 2003, *Nikolov v. Bulgaria*, Appl. 38884/97 (5.5 months; suspicion of having destroyed a car with the use of explosives; conviction to 1 year); ECtHR, Judgment of 7 February 2008, *Kostadinov v. Bulgaria*, Appl. 55712/00 (6 months and 7 days; suspect of robbery; acquitted); ECtHR, Judgment of 2 February 2006, *Iovchev v. Bulgaria*, Appl. 41211/98 (6 months and 12 days; misappropriation of funds in large amounts; no conviction); ECtHR, Judgment of 9 January 2003, *Shishkov v. Bulgaria*, Appl. 38822/97 (7 months and 3 weeks; stealing of jewellery and money; case was not yet decided).

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Moreover, periods of detention that exceed the maximum period allowed in domestic law do by definition violate the right to liberty, for these are not in accordance with the law; if, that is, domestic law sets such a maximum.

By exception, longer periods of detention than those just mentioned may sometimes be acceptable. The Human Rights Committee has hinted that even seven years and eight months of remand detention might be compatible with Article 9(3) ICCPR if special circumstances justify such delay, such as impediments to the investigations that are attributable to the accused or to his/her representative.[69] At the same time, however, the Committee seems not to be very easy to convince that such circumstances exist.[70] One of the longest period of remand detention accepted by the Human Rights Committee is 12 months, which may of course not be regarded as the limit of detention.[71] In the very exceptional case of *Chraidi versus Germany* the European Court held that nearly five and a half years of detention on remand did not constitute a violation.[72] The case involved a particularly complex investigation and trial concerning serious offences of international terrorism that were committed by criminal associations acting on a global scale; the defendant was eventually convicted on more than 100 counts. The ECtHR makes it clear that remand detention exceeding five years will in principle always constitute a violation, but that not so in this case, for very special circumstances applied. Such specific circumstances may also be feasible in highly complex cases of international organized crime, as the case of *Shabani versus Switzerland* exemplifies.[73]

These examples raise an urgent question: should any period of detention, no matter how long, always be assessed in regard to whether the particular circumstances of the case justify that period under the relevant criteria? In my opinion: no, it should not. It is argued that over five years of deprivation of freedom for an unconvicted person is so excessive that this must be considered as constituting a human rights violation if that person is not substantially responsible for the delay. This means that even in the most complicated, large-scale cases, States are under the obligation to take all necessary measures to sufficiently speed up criminal proceedings. If this is not sufficiently possible,

69 HRC, View of 28 July 1997, *Elahie v. Trinidad and Tobago*, Comm. 533/1993, par. 8.2. See similar, but then for 4 years and 7 months: HRC, View of 21 October 1994, *Koné v. Senegal*, Comm. 386/1989, par. 8.7.

70 See references in preceding footnotes. See also HRC, View of 19 July 1995, *Barroso v. Panama*, Comm. 473/1991, par. 8.5 (3.5 years; complex factual situation and protracted investigations could not sufficiently explain the delay).

71 HRC, View of 31 March 1998, *McTaggart v. Jamaica*, Comm. 749/1997, par. 8.2.

72 ECtHR, Judgement of 26 October 2006, *Chraidi v. Germany*, Appl. 65655/01, par. 33 and 49.

73 ECtHR, Judgment of 5 November 2009, *Shabani v. Switzerland*, Appl. 29044/06, par. 54–70, in which 5 years of detention constituted no violation of Article 5(3) ECHR considering the extremely complex nature of the case in question, which involved an international criminal organization and a trafficking operation producing considerable sums of money, while the investigative measures had not been disproportionate and the authorities could not be accused of any periods of inactivity in the proceedings.

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States should perhaps find ways to split up cases that consist of multiple counts. This could allow the trial of a certain part of the case for which the prosecution expects a conviction within a shorter period of time, which would not be possible if the whole case were to be tried at once.

Comparison of States

Considerable differences between States also emerge in respect of the period for which people are actually held in detention. Not all national rapporteurs were able to provide information on this issue in their chapters. Additional information has therefore been gathered from the consultation of several other sources. Footnotes indicate whether information stems from other sources than the national chapters.

Of the respondent States the average length of detention is probably longest in Argentina: the pace of its justice system apparently often results in lengthy detentions beyond the period of three years stipulated by law, which is by definition contrary to international human rights law; according to the Argentine Centre for Legal and Social Studies, prisoners wait an average of three years to be tried, with some cases taking as long as six years to go to trial.[74] No figures on the average length of detention in Turkey were available to me, but excessively long periods of detention are also a serious problem for this State. It clearly belongs among the countries in Europe where by far the most violations are found because of excessively lengthy detention.[75] Detention periods of well over seven years are not highly exceptional in Turkey.[76] Portugal achieves an average duration of between 9 and 10 months (2001–2006) of pre-trial detention of defendants in criminal cases completed in the first instance courts. A more recent number is 8.5 months (2008[77]). In that year approximately 20% of preventive detainees spent more than 1 year in detention. For Greece an average of 12 month is mentioned (2002), but also 6 to 7 months (1998–2005). The average length of pre-trial detention in Italy was 175 days (2002). Poland follows with an average detention period of 5.5 months (2008), but almost a quarter of all detainees are held in detention (pre-trial and trial) for between 1 and 2 years, while over 10% are detained for more than 2 years. Examples of cases brought to

[74] U.S. Department of State, *2008 Country Reports on Human Rights Practices: Argentine*, 25 February 2009 (at www.state.gov/g/drl/rls/hrrpt/2008/index.htm) (consulted: 1 June 2011).

[75] As mentioned *supra*, the ECtHR 88 (2009), 46 (2008), and 95 (2007) violations of Article 5 ECHR against Turkey, most of which concern (pre-trial and trial) detention.

[76] See, for example, ECtHR, Judgment of 16 January 2007, *Solmaz v. Turkey*, Appl. 27561/02 (over 7 years); ECtHR, Judgment of 13 October 2009, *Tunce v. Turkey (No. 1)*, Appl. 2422/06 (over 12 years in 20 cases); ECtHR, Judgment of 31 October 2006, *Pakkan v. Turkey*, Appl. 13017/02 (over 13 years). See also U.S. Department of State, *2008 Country Reports on Human Rights Practices: Turkey*, (consulted: 1 February 2010).

[77] U.S. Department of State, *2008 Country Reports on Human Rights Practices: Portugal*, (consulted: 1 February 2010).

the ECtHR where pre-trial detention has lasted between 4 to 6 or more years are not uncommon.[78] In South Africa detention takes an average of three months, but is can be as long as two years in some cases (2007–2008).[79] In the chapter on France it is stated that in France detention is usually a year, but there are possibilities to prolong detention; the ceiling is two, three or four years, exceptionally even more, depending on the length of the sentence.[80]

Then there are several countries where the average or longest detention periods might be more in conformity with international human rights law. I emphasize 'might': this is not entirely clear because the available data on several of these countries are not quite comparable to the countries just discussed. An average is not known for Germany, for example, but (in 2006) about 26% were in pre-trial detention for up to a month; about 24% for 1 to 3 months; about 25% for 3 to 6 months; for 19% pre-trial detention lasted 9 to 12 months, while for some 6% it exceeded a year (2006).[81] And the chapter on Spain mentions a study which shows that 61% of detentions are shorter than 3 months, while 19% are longer than 7 months, which means that the average for 20% of the detainees lies somewhere between 3 and 7 months. But this applies only to the capital city of Madrid; the figures are less favourable in the provinces (43%, 34%, and 23%, respectively). Taiwan achieved an average length of 'investigation detention' of 1.5 months and an average length of 'trial detention' at *district courts* of 2.5 months, which adds up to 4 months until the judgment in first instance (2008). The average trial detention in appeal was 3.5 months, and the average in cassation with the Supreme Court (awaiting confirmation) 1.9 months. In Japan 17.4% of the detainees are in detention for less than 1 month, while 61.6% is detained between 1 and 3 months, which means that 79% are detained for less than 3 months and 21% for over 3 months. Belgium may be comparable, with an average length of pre-trial detention of 90 days (2007).[82] There are hardly any excessive lengths of detention in Belgium, if any at all. The same average of 90 days also applies to China (2009).

Finally, there is a group of States with considerably lower figures. In Denmark the estimated average time spent in prison by non-sentenced detainees is 66 days (2009), which apparently does not include trial post-conviction detention. Of the

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[78] See for example ECtHR, Judgment of 3 February 2009, *Kauczor v. Poland*, Appl. 45219/06 (7 years and 11 months).

[79] U.S. Department of State, *2008 Country Reports on Human Rights Practices: South Africa*, (consulted: 1 February 2010).

[80] See section III of that chapter (under: La détention judiciaire; Une rigueur réglementée).

[81] In, for example, ECtHR 10 November 2005, Dzelili v. Germany, Appl. 65745/01, the Court found the length of detention in violation of Article 5(3) ECHR (four years and 8 months), but it seems that violations of this provision have not been found in more recent years.

[82] U.S. Department of State, *2008 Country Reports on Human Rights Practices: Belgium*, (consulted: 1 February 2010). In the period 1996–2001 this was around 80 days; see A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 170.

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total number of pre-trial detainees 88% per cent serve less than three months in pre-trial custody (2006[83]). In Norway the average time spent in detention is 67 days (2008), and in The Netherlands the figure is 65 (2008). Ireland seems to achieve an average length of time spent on remand that is a week shorter still, at 58 days (2009). The most attractive score falls to New Zealand: the average period of time prisoners spent in (pre-trial and trial) detention was 47 days (2009), although it is not uncommon for serious offenders to spend between one and two years in prison prior to sentence.

Although these figures are drawn from different sources (which may mean that different counting methods have been applied), and while many of them moreover are not fully comparable, they clearly illustrate that various (if not most) States do have serious problems keeping periods of detention short. These data merit an examination of what requirements for reviewing detention and which grounds for detention are recognized in international human rights law and which in national criminal procedure law. Do they match? Or do they deviate, and if so, might this partly of fully explain the high detention rates and lengthy detention periods in some States and the problems they have meeting the applicable human rights standards?

III.4. PROMPT JUDICIAL REVIEW AFTER ARREST

The fundamental right to prompt judicial review

Under the international human right to liberty, anyone arrested or detained in criminal proceedings shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.[84] This guarantee not only aims to prevent arbitrary detention at the earliest stage possible, it is also of particular importance in countries where there is a specific risk of police brutality of torture.[85] The review must be automatic and cannot depend on the application of the detained person. The officer executing the review should be objective, independent and impartial, and competent to order release.[86] Police officers and

[83] U.S. Department of State, *2008 Country Reports on Human Rights Practices: Denmark*, (consulted: 1 February 2010).

[84] See Article 9(3) ICCPR, Article 7(5) ACHR, and Article 5(3) ECHR. Article 6 AfChHPR does not expressly contain this norm, but the African Commission has recognized it in its case law; see AfCionHPR, Decision of 16–30 May 2007, *Article 19 v. The State of Eritrea*, Comm. 275/ 2003 (2007), under: Decision on the merits), and in the Commission's *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under M, section 3 (a).

[85] See Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford U.P., 2006, p. 505.

[86] HRC, View of 22 March 1996, *Kulomin v. Hungary*, Comm. 521/1992, par. 11.3; I-ACtHR, Judgment of 22 November 2005, *Palamara-Iribarne v. Chile*, par. 221–223; ECtHR (GC),

prosecutors do not in principle meet this requirement.[87] The review should furthermore be prompt. The jurisprudence of the ICCPR Human Rights Committee implies that it normally should take place within a maximum of two (perhaps three) days.[88] The European Court's case law seems to hold that periods of more than four days in detention without appearing before a judge will by definition violate Article 5(3), even in the context of the most serious crime, such as terrorism.[89] However, in ordinary cases the Court requires review within a shorter period than four days.[90] A similar stance seems to be adopted by the American Court, which, just as the European Court, equates the term 'promptly' with 'immediately'.[91]

Comparison of States

In most countries domestic law sets the period within which an arrested person has to be brought before a judge or court. For example, in some 85% of the countries of the European Union the time limit is 48 hours or less, and in about 50% it is 24 hours or less.[92] Of these countries, The Netherlands stands out most. Its general applicable time limit of 3 days and 15 hours (87 hours) is quite close to the maximum period allowed by the European Court, while it might infringe the time limit applied by the Human Rights Committee. This pertains even more to Italy and Turkey, which allow a time period of four days (96 hours), although that does not apply to all cases. It is different in Japan, where a 96 hour limit applies generally. Just like the limits of The Netherlands and Italy, this verges on the problematic, although a lot depends on how it is used in practice. As in the EU, in most other reporting States the law sets limits of 48 or even 24 hours too;

Judgment of 3 October 2006, *McKay v. the UK*, Appl. 543/03, par. 35.

87 See for (other) examples HRC, View of 29 October 2002, *Zheludkov v. Ukraine*, Comm. 726/1996, par. 8.3; I-ACtHR, Judgment of 21 November 2007, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, par. 83–84; ECtHR, Judgment of 25 September 1998, *Assenov v. Bulgaria*, Appl. 24760/94, par. 146–150.

88 See Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights*, Oxford: Oxford U.P. 2005, p. 324–325.

89 ECtHR, Judgment of 29 November 1988, *Brogan v. the UK*, Appl. 11209/84, par. 62. Confirmed in *e.g.* ECtHR (GC), Judgment of 3 October 2006, *McKay v. the UK*, Appl. 543/03, par. 33. Nonetheless, 'wholly exceptional circumstances' in which it is physically impossible to review might justify longer periods: see ECtHR, Judgment of 10 July 2008, *Medvedyev v. France*, Appl. 3394/03, par. 64–69 (crew confined aboard their drugs ship at sea).

90 See ECtHR, Judgment of 6 November 2008, *Kandzhov v. Bulgaria*, Appl. 68294/01, par. 65–67 (3 days and 23 hours; non-violent offence); ECtHR, Judgment of 3 February 2009, *İpek v. Turkey*, Appl. 17019/02, par. 32–38 (3 days and 9 hours; 16 year old suspect of terrorism).

91 I-ACtHR, Judgment of 6 May 2008, *Yvon Neptune v. Haiti*, par. 107; I-ACtHR, Judgment of 30 October 2008, *Bayarri v. Argentina*, par. 66 (period of almost 1 week constitutes violation). See also I-ACtHR, Judgment of 21 November 2007, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, par. 83, which suggests that four days might have been acceptable.

92 Cf. A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 61.

see *e.g.*, New Zealand, South-Africa, and the USA. Taiwanese law recognizes that an arrestee must be released or turned over to a competent court within 24 hours after his/her arrest, while it is common practice that the police will bring the arrestee to a prosecutor within as little an 16 hours after the arrest. Of the different limits that apply in Argentina for review by a judge or court, the shortest is 18 hours.

There are, however, some significant exceptions to what applies in most countries. In China the law states that the People's procuratorate must decide on an arrest made within seven days in ordinary cases or within 20 days if the case is complicated or involves serious crimes.[93] The People's procuratorate is responsible for investigation and prosecution. It does not therefore meet the international standards that review should be done by a judge or other officer authorized by law to exercise judicial power. Regarding the practice, the Committee against Torture notes the failure to bring detainees promptly before a judge, thus keeping them in prolonged police detention without charge for up to 37 days or in some cases for longer periods.[94]

Interestingly, whereas quite relative limits follow from international human rights law, in most countries by far, domestic law sets absolute periods of time within which someone arrested or detained must be brought before a judge or court. An exception is *e.g.*, New Zealand, in which country the law states that an arrested person who is not released shall be brought before the court as soon as possible (in practice that is generally within 24 hours, although over a weekend it may be up to 48 hours). Particular countries which, in addition to their absolute limits, do not at least also apply such a relative standard may run the risk of violating the international human right to liberty. This is even the case if the absolute limit by law is as such within the boundaries that follow from the international human rights case law, for the case law indicates that in case of less serious offences judicial review of detention should take place within a shorter period than normal. Seen from this perspective, domestic law should ideally provide both an absolute and a relative limit. Alternatively, a State's law could set different absolute limits for different categories of offences or situations. In fact, such a system can be found in Argentina and Turkey, for instance.

However and again: in the end a great deal depends on the way the rules are applied in practice. Although working with different categories might offer a solution in some cases, it does not absolutely guarantee that detention is actually kept as short as possible in every instance in practice, as the case of Turkey

[93] See chapter on China, section III (under: Arrestation). See furthermore Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 492. See also Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China*, Cambridge: Cambridge U.P., 2007 (see p. 8).

[94] CAT, Conclusions and recommendations, *China*, UN doc. CAT/C/CHN/CO/4, 12 December 2008, par. 11.

demonstrates. Another interesting case in this regard is offered by Norway: until 1 July 2002 the Norwegian Criminal Procedure Act did not provide an absolute time limit, stipulating only that the arrestee must be brought before a judge promptly; since that date the law provides both a relative and an absolute limit: the arrestee must be brought before a judge promptly and at the latest by the third day after the arrest. Nonetheless, in their chapter on Norway, Ferguson, Inderhaug & Lie explain that the statistics that have been collected indicate that the number of persons in police custody for more than 48 hours (before they are brought before a judge) has increased since then, while the number of persons who spend less than 15 days in pre-trial detention have reduced.

III.5. REVIEW OF AND LIMITS TO CONTINUED DETENTION

Prompt judicial review after arrest is naturally not very well suited to guard against prolonged periods of detention. Considering the statistics on the length of pre-trial detention (see *supra*) there is no legal mechanism that in practice offers absolute guarantees against unacceptable continuations of detention. Fortunately, however, there are several mechanisms that would seem to ensure better results, or at least guard against deterioration in practice.

Habeas Corpus

One useful guarantee in this respect might be the provision of full Habeas Corpus proceedings. The detainee's right to bring proceedings before a 'court' (*i.e.* a court, a judge or an investigative judge), in order that that authority may decide speedily on the lawfulness of his/her detention and order his/her release if the detention is not lawful, is generally recognized in international human rights law.[95] A formal review of compliance with domestic law does not meet this requirement; the court must be competent to fully assess whether the guarantees that follow from the international human right to liberty are also met.[96] The right arises immediately after the arrest or detention. However, if the State meets its obligation for prompt judicial review after arrest, the role of the Habeas

95 See Article 9(4) ICCPR, Article 7(6) ACHR, and Article 5(4) ECHR. Article 6 AfChHPR does not expressly provide the Habeas Corpus right, but the African Commission's jurisprudence does; see AfCionHPR, Decision of 15 November 1999, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Comm. 143/95 and 150/96, par. 20–34, and in the Commission's *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under M, sections 4 and 5.

96 See *e.g.* HRC, View of 3 March 1997, *A. v. Australia*, Comm. 560/93, par. 9.5; I-ACtHR, Judgment of 21 November 2007, *Chaparro Álvarez & Lapo Íñiguez v. Ecuador*, par. 133; ECtHR (CG), Judgment of 19 February 2009, Appl. 3455/05, par. 202.

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Corpus right will be fairly marginal at that stage,[97] because the right does not (*i.e.*, no longer) apply in principle if the decision to detain someone is made or fully reviewed by a judicial authority, for in that case the supervision required would be incorporated in the court's or judge's order or decision. More important for the prevention of lengthy detention periods, however, is that the right to Habeas Corpus also requires that a person detained on remand is able to bring proceedings at reasonable intervals to challenge the lawfulness of his/her detention.[98] What interval is reasonable depends on the circumstances of the case, such as the reasons for the deprivation of liberty. Review at intervals of one month meets this requirement in case of detention on remand, which according the European Court calls for periodic review at short intervals.[99]

All respondent States do provide Habeas Corpus proceedings or procedures that meet the requirement that a court, a judge or an investigative judge shall speedily decide on the lawfulness of detention. The forms of these provisions differ considerably between the States, however. Differences emerge for example as regards when review takes place or may take place, at what intervals, by whom, and whether reviews are automatically executed at designated moments, ex officio by the court or judge, at the detainee's request, or after the prosecutor's request for application or prolongation of detention, and whether the law sets terms within which courts have to decide Habeas Corpus appeals. Much of this depends on the nature of the domestic criminal procedural law system, such as the relation between the investigative stage and trial stage, the duration of these stages and, of course, also the procedural system by which detention may be ordered. For example, if detention is repeatedly automatically reviewed by the court (*e.g.,* Belgium, The Netherlands, Turkey), the possibilities open to the detainee to request review at a moment he or she considers appropriate might be rather limited in some jurisdictions (*e.g.,* Belgium). Or if suspects on remand can file an unlimited number of requests for release (*e.g.,* Ireland, The Netherlands, New Zealand, Norway, Poland, Portugal, Taiwan, and Turkey), a new request that does not contain new circumstances might be denied without a full review of the necessity of detention (*e.g.,* Ireland and New Zealand). Some States do offer limited grounds on which the Habeas Corpus right can be exercised (*e.g.,* New Zealand, Portugal and most apparent China), while in the others it can be grounded on any reason (*e.g.,* Italy and The Netherlands). In many countries detention will be automatically reviewed at intervals. This applies for instance to

[97] Cf. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford U.P., 2006, p. 466–467.

[98] HRC, View of 31 October 2006, *Shafiq v. Australia*, Comm. 1324/2004, par. 7.2, and more implicitly HRC, View of 15 July 1997, *A. v. New Zealand*, Comm. 754/97, par. 7.3 (no violation just because there was regular review); ECtHR, Judgment of 25 September 1998, *Assenov v. Bulgaria*, Appl. 24760/94, par. 162.

[99] ECtHR, Judgment of 25 September 1998, *Assenov v. Bulgaria*, Appl. 24760/94, par. 162; ECtHR, Judgement of 25 October 1989, *Bezicheri v. Italy*, Appl. 11400/85, par. 20–21.

countries in which detention and the prolongation thereof may generally only be ordered for a certain period of time that does not exceed the maximum period set by law (*e.g.,* Denmark, Japan, Norway, and Turkey). As a result, the detention will be reviewed every time the stipulated period of time has passed and the court subsequently considers – ex officio or at the request of the prosecution – whether further detention should be ordered.

Clearly, no single domestic system appears to be equivalent to any of the others. This makes it fairly impossible to draw conclusions as to which kind of system best guards against arbitrary, unlawful, or unnecessary application of detention. International human rights law indeed leaves States wide latitude in organizing a system that meets the detainees' right to challenge the lawfulness of his/her detention at reasonable intervals. The international case law on this right is in fact so casuistic and indefinite that it is not at all clear what kind of system is favourable from a human rights standpoint. Therefore, any system that ensures the possibility of regular review in every case is acceptable.

Absolute and relative limits to period of detention set by law

Another possibility that deserves mentioning here is the establishment by law of limits to the period for which suspects may be held in detention. International human rights law only provides for relative time limits, as has been explained *supra*, but in most respondent countries domestic law formulates concrete maxima for the time detention may last.

Of the respondent States, detention before the trial commences is restricted, for example, in the USA (the trial must generally start within 70 days of the date when the information or indictment is filed, and this shall normally be filed within 30 days of the date on which the individual concerned was arrested or charged), The Netherlands (104 days, or 2 years in terrorism cases), Italy (3 to 12 months, depending on the offence), Poland (3 to 12 months; the law recognizes possibilities for further extension), the UK, *i.e.* England and Wales (182 days; the law recognizes possibilities for further extension). In Turkey (6 to 36 months) the applicable period depends on the offence and the particulars of the case. This also applies to Greece. So in all these countries the authorities either have to release the detainee or bring the case to court ultimately at the end of the fixed term, which means that the trial court will then be able to review whether detention is still justified.

Fixed periods within which trials have to be concluded are also determined in several countries and in various ways. In some States fixed time limits are absolute; in others they leave room for exceptions. Moreover, the periods vary considerably among these countries. See, for example, Denmark (depending on the offence, 6 or 12 months until the judgment in first instance, and another such period for the appeal), Italy (depending on the offence, 9 months to 2.5 years

until the judgment in first instance, and 2 years to 6 years for the whole trial), Portugal (14 months until the judgment in first instance 14 months, 18 months without a final conviction; in cases of *e.g.* terrorism or organized crime the limits are 18 and 24 months respectively, and in specifically complex cases 30 and 40 months respectively), Poland (up to 24 months until the judgment in first instance, but the law recognizes possibilities for extension), Argentina (3 years for the whole trial), Spain and Taiwan (quite detailed systems in which the limits depend for instance on the maximum penalties carried by the offence and the phase of the trial), and China (in normal cases the police may detain a suspect for a maximum of three months while conducting the investigation, but there are several exceptions to the general three-month requirement[100]).

Since international human rights law entails relative limits, none of these domestic systems as such seem to be in conflict with it. The same also applies to criminal procedural law systems to which no concrete maximum periods for pre-trial or trial detention apply, such as those in Ireland, Japan, New Zealand, and Norway. In fact, international law does not care much for fixed time limits as such, as long as pre-trial detention is generally applied as an exception and is as short as possible in each concrete case. Do fixed limits nevertheless serve this aim? That is not certain. What is important is that many of these limits are not absolute, or they can be evaded. In The Netherlands, for example, the maximum of 104 days of pre-trial detention is frequently circumvented by so-called 'pro-forma hearings': the prosecution brings the case to trial within this period and at the first court session it requests an adjournment, which is usually granted. Without having to discuss the case in substance, the court may then order that the suspect be detained further. From then on this qualifies as trial detention, which may last up to 60 days after the judgement in first instance. Furthermore, the statistics on detention rates, the proportions of the total prison population who are in detention, and the average length of detention do not indicate that fixed time limits serve to prevent continued detention. These are all at least moderate and in most cases low in the countries without such limits, *i.e.* Ireland, Japan, New Zealand, and Norway; while they are high in several countries in which the period of detention is restricted by law. Although that does not mean that time limits never prevent the application of detention, they may easily have the opposite effect: instead of actually reviewing whether detention is justified and necessary in a particular case, the authorities might tend to automatically

[100] See chapter on China, section III (under: Nombre de personnes placées en détention; and under: Protection contre les privations de liberté illégales ou excessivement longues). See furthermore Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 492.

exhaust the maximum period granted by law.[101] It seems to be more important, therefore, that authorities in every case seriously review the fundamental principle of subsidiarity/necessity, *i.e.* that detention is a measure of last resort; in other words, that – to adopt the terminology that de Miranda Pereira uses in his chapter on Portugal – they observe the *ultima ratio* of deprivation of liberty in the pre-trial phase.

III.6. PROCEDURAL REQUIREMENTS FOR DETENTION (LEVEL OF SUSPICION, TYPE OF OFFENCE, GROUNDS)

According to international human rights law, the application of pre-trial and trial detention to individuals on the basis of a criminal charge requires that reasonable suspicion exists that the person has committed an offence and that the detention serves a legitimate purpose. I shall now briefly discuss these three requirements, *viz.*, reasonable suspicion, an offence, and acceptable grounds.

The suspicion requirement

Whereas the requirement that reasonable suspicion shall exist is only expressly phrased in the European Convention (Article 5(1)(c)), it must also follow from the International Covenant, the African Charter and the American Convention.[102] Detaining someone on a criminal charge while there is no reasonable suspicion against that person would constitute arbitrary detention, which is prohibited under all of these instruments. A reasonable suspicion that the detainee is guilty of an offence is a condition *sine qua non* for the lawfulness of continued detention.[103] According to the African Commission, mere 'suspicion' is insufficient, while the American Court demands 'sufficient indication' to presume that the arrested or detained person is the perpetrator of or an accomplice to the crime.[104] The European Court holds that reasonable suspicion 'presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the

[101] See also A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 84.

[102] Indeed, it has been recognized in AfCionHPR, Decision of 1–15 November 1999, *Amnesty International and Others v. Sudan*, Comm. 48/90, par. 59, AfCionHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under M, section 1 (b); I-ACtHR, Judgment of 7 September 2004, *Tibi v. Ecuador*, par. 107. See very implicit HRC, View of 26 July 1989, *Bolaños v. Ecuador*, Comm. 238/1987, par. 8.3.

[103] See also I-ACionHR, Report of 11 March 1997, *Bronstein et.al. v. Argentina*, Report 2/97, par. 26.

[104] AfCionHPR, Decision of 1–15 November 1999, *Amnesty International and Others v. Sudan*, Comm. 48/90, par. 59; I-ACtHR, Judgment of 7 September 2004, *Tibi v. Ecuador*, par. 107.

offence.' What may be regarded as reasonable, however, will depend on all the circumstances of the case.[105]

All respondent States recognize the existence of a certain degree of suspicion as a precondition for detention in criminal proceedings. The substance of that degree, however, varies between the countries. In Japan, Norway, and the USA, for example, the minimum level of suspicion required is that there is 'probable cause' to suspect that the accused has committed a crime, while in South Africa there needs to be 'reasonable suspicion', and in New Zealand 'good cause'. Although the terminology of these thresholds suggests differences, it is difficult to establish whether they are actually the same or not. Much depends on how they are interpreted in the case law and applied in practice. In the USA the meaning given to 'probable cause' for example, is very much in line with the European Court's interpretation of 'reasonable suspicion'. And whereas the criminal code in Spain simply allows detention of suspects, Spanish case law clarifies that the mere existence of a 'suspicion' or a 'simple belief' is inadequate to detain someone; there has to be some factual basis on which the suspicion is based. Apart from this, it is also difficult to really compare the several degrees of suspicion because in most countries the terms used are English translations of other languages. Nevertheless, some countries are striking for their apparently relatively severe requirements. For instance, Germany, Taiwan and Turkey only allow pre-trial detention of persons who are 'strongly suspected' of having committed an offence, while the law of Belgium and that of Greece requires 'serious indications of guilt' and that of China a 'grave suspicion'.[106] Several countries deploy a system with two levels of suspicion. See, for instance, Denmark (reasonable suspicion/substantial suspicion), The Netherlands (reasonable suspicion/grave presumption), and the USA (reasonable suspicion/probable cause). In some cases this has to do with the grounds on which the detention is based (*e.g.,* Denmark), while in others it depends on whether it concerns arrest/police custody or pre-trial and trial detention (The Netherlands and the USA).

An important principle following from the right to liberty is that the longer detention lasts, the stronger the reasons for applying it need to be. At least at first sight it would seem that legal systems which stipulate that, after some time, the continuation of detention requires a greater degree of suspicion are especially in line with this principle. However, in reality it may have the opposite effect. If the authorities slacken the higher degree of suspicion in practice, the result might be that the lower degree has to be reduced too.

105 ECtHR, Judgment of 30 August 1990, *Fox, Campbell & Hartley v. the UK*, Appl. 12244/86, par. 32.

106 Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 496.

Requirements regarding offences that allow for pre-trial detention

The suspicion must concern an offence or offences. The International Covenant, African Charter, and American and European Conventions, and the appropriate case law all fail to clarify what kind of offences may provide the reason for detention.[107] What is required, however, that detention is proportionate (detention must be reasonable relative to the crime of which the detainee is suspected and to the risks to be averted by detention) and subsidiary/necessary (detention may only be applied if all less severe avenues are inadequate to control the suspect adequately).[108] As a result, not every offence is suitable for justifying detention. This is first and foremost for offences that do not carry prison sentences. The question now is whether States assess, on a case-by-case basis, whether the concrete offence merits detention or whether they additionally operate a system that reserves detention for certain specified categories of offences.

Again, there is great diversity among the systems of the respondent States. Some do allow for pre-trial detention for offences for which imprisonment is not provided as a penalty (*e.g.,* England & Wales, Italy, Japan, USA), while the law of other States requires that the offences be punishable by imprisonment (*e.g.,* Argentina, Greece, New Zeeland) or by a certain minimum term of imprisonment (*e.g.,* Norway at least 6 months; Poland at least 1 year; Denmark at least 18 months; Spain in principle at least 2 years; The Netherlands at least 4 years, with some exceptions; Portugal at least 3 or 5 years, with a minor exception; Italy usually at least 2, 4 or 5 years, with exceptions; Ireland at least 5 years, with exceptions).[109] Of course, such thresholds prevent the application of detention in certain categories of cases. However, the fact that domestic law allows for detention in regard to certain offences does not mean that everybody who is suspected of committing such an offence may be detained. There might, however, be a risk that authorities would tend to detain such persons automatically, rather than assessing whether it is really necessary in the concrete case.

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107 There is nonetheless Rule 6 of the Council of Europe Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse of 27 September 2006: 'Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable.'

108 See, *e.g.*, HRC, View of 3 April 1997, *A. v. Australia*, Comm. 560/1993, par. 9.2; I-ACtHR, Judgment of 21 January 1994, *Gangaram Panday Case v. Suriname*, par. 47–48; ECtHR 21 December 2000, *Jabłoński v. Polen*, Appl. 33492/96, par. 83–85. See also *supra* sections III.3 (under: The fundamental right to trial within a reasonable time) and III.6 (under: Requirements as regards offences that allow for pre-trial detention).

109 See also A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 64–70.

Grounds on which pre-trial detention may be based

There is great diversity among States regarding the grounds on which detention may be ordered. At the same time, international human rights law only seems to recognize a limited number of grounds that may be applied. In order to be acceptable, the domestic grounds must fit under the grounds acknowledged by international human rights law. These grounds, which in fact represent acceptable functions of pre-trial detention, include the prevention of:

- absconding (the risk that the suspect will fail to appear for trial);
- interference with establishing the truth (the danger that the suspect will take action to prejudice the administration of justice);
- immediate recidivism (the risk that the suspect will commit further offences);
- threat of public disorder (the risk that public disorder will be caused if the suspect is not detained or if he were to be released).[110]

The European Court also seems to accept a fifth ground, but only in highly exceptional circumstances: the 'safety of the person under investigation'.[111] The relevance of this ground – which also seems to be recognized in *e.g.* the Code of Criminal Procedure of China as 'protective detention'[112] – is not entirely clear. If the safety of the suspect is really at stake it would seem that the fourth ground (actual threat of public disorder) could be applied. Meanwhile the 'seriousness of the offence' and the 'severity of the possible sentence' are not considered to be autonomous grounds for detention. Although these factors might be taken into account when assessing whether there are satisfactory reasons to detain someone, as such these factors are insufficient to justify the application of the grounds that are accepted, particularly after a certain period of time. Notice should also be taken especially of the character of the suspect, his/her assets, his/her links with the State in which s/he is being prosecuted, and his/her international contacts. Applying pre-trial detention to a suspect because of the characteristics of the group to which s/he belongs rather than an individualized risk assessment would therefore be at odds with the right to liberty, and also – as Young in the chapter on New Zealand indicates – with the presumption of

110 See HRC, View of 23 July 1990, *Alphen v. The Netherlands*, Comm. 305/1988, par. 5.8: detention in remand 'must not only be lawful but reasonable in all the circumstances' and 'must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime', and HRC, View of 29 March 2005, *Marques v. Angola*, Comm. 1128/2002, par. 6.1; AfCionHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, under M, section 1 (e); I-ACionHR, Report of 11 March 1997, *Bronstein et.al. v. Argentina*, Report 2/97, par. 26–37; as for the European Court, see D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2009, p. 176–179.

111 ECtHR, Judgment of 23 September 1998, *I.A. v. France*, Appl. 28213/95, par. 108.

112 See section III of the chapter on China (under: Garde à vue).

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innocence. The risk that is recognized to justify detention must furthermore be plausible and actual. The authorities should therefore provide the reasons for detention in light of the circumstances of the case. So applying stereotyped formulas or invoking the needs of the investigation or of society in a general and abstract manner will not suffice.

Most respondent States expressly recognize the following among the grounds just mentioned: the risk of absconding, the risk of interference with determination of the truth, and the risk of recidivism (see also the chapter by Rapoza). However, there are many other grounds that are also brought forward in the domestic law: threat of public disorder (*e.g.*, France, The Netherlands, Portugal, South Africa); the liberty of the suspect would be contrary to the public's sense of justice (Norway); suspicion regarding the commission of particular, serious crimes (Taiwan); the accused has no fixed residence (Japan); the need to avoid the possibility that the defendant will act against the victim's rights (Spain); the risk that the suspect would commit another violent crime against persons living together with him/her in one flat or home (Poland); the possibility of disposing of illegally acquired assets (Ireland); and the safety of the person under investigation (China, France).

This brief survey not only illustrates the variety of grounds for detention that are recognized in domestic jurisdictions, it also demonstrates that domestic criminal procedural law generally is not per se adapted to the human rights framework. This does not necessarily cause a great deal of problems in practice. In many instances it will be possible to apply domestic grounds within the limits that follow from the four of five internationally accepted reasons for detention. For example, the ground that 'the accused has no fixed residence' will in some cases fit within the ground of absconding. But some grounds might more easily cause friction. The recognition of the 'gravity of the offence' or the 'severity of the possible penalty' as express and autonomous grounds for pre-trial detention (notably in Denmark) might be more problematic. Under international human rights law such domestic grounds may only be applied insofar as there is an actual risk of absconding, interference with establishing the truth, recidivism, or disturbance of public order. Meanwhile, in most States in which the law does not expressly recognize 'gravity of the offence' or 'severity of the possible penalty' as independent grounds for pre-trial detention, these factors are nevertheless often taken into consideration when assessing other grounds.

That the human rights framework does not recognize 'the seriousness of the offence' as an autonomous ground for detention causes problems in legal practice. In many countries society does not understand if someone who is suspect of, *e.g.*, murdering someone will be released, even if there might be no actual risk of absconding, interference with justice or recidivism. Although this might cause the public to seriously distrust the criminal justice system, it does not mean that it will or might be expected to result immediately in public disorder, in which

case the public order ground does not apply either. The Norwegian ground of 'the liberty of the suspect would be contrary to the public's sense of justice' meets this problem, but only insofar as it can be applied within the human rights framework, which does not seem to be very suitable for this approach.

III.7. DEVELOPMENTS IN CRIMINAL PROCEDURE LAW REGARDING DETENTION

Since the start of the new millennium several countries have been expanding the possibilities for detention for law enforcement reasons (*e.g.*, Denmark, Italy), or have introduced restrictions on the granting of bail that did not previously exist (*e.g.*, New Zealand). In some countries the actual threat of terrorism has lead to legislative changes regarding pre-trial detention (*e.g.*, The Netherlands, and more significantly England & Wales, and the USA). At the same time, some of these countries as well as several others have been introducing legislative amendments or measures with the aim of improving detention review mechanisms (*e.g.*, Belgium, China, Italy, Norway, Poland, Taiwan), aggravating the application of continued detention (*e.g.*, Belgium, China, Denmark, Norway, Portugal), restricting the situations in which someone may be taken into detention (*e.g.*, China, Portugal, Turkey), and clarifying or expanding the rights of detainees (*e.g.*, New Zealand). Some have also improved the procedural rights of detainees, such as the detainee's right to communicate with his/her defence lawyer (*e.g.*, China, The Netherlands, Taiwan). In particular, enhancing the protection against deprivation of liberty in law does not automatically also lead to improvements in practice. As Seron, for example (in his chapter on Belgium), Zhang (in her chapter on China) and Della Case (in his chapter on Italy) imply, the real challenge is changing practice.

Meanwhile, these various developments seem to illustrate – on a general level – that many States are constantly struggling to balance both the protection against detention and the effectiveness of their criminal justice systems in preventing and repressing crime. But such a balancing act is not without risk. Particularly when the voice of populism becomes stronger in a society, or when the threat of crime or terrorism is – whether justifiably or not – felt strongly among citizens, fundamental rights usually lose to the call for repression when these interests are balanced. This is not only problematic from the point of view of the rights themselves, and thus from the perspective of the State of Justice; balancing fundamental rights and the effectiveness of the criminal justice in preventing and repressing crime may also damage the latter, for the antithesis between these interests is partially false. Detention usually has severe consequences for both the detainee and his/her relatives and perhaps others. Detention can easily result in the loss of one's job, relationships and/or home, and moreover brings the detainee into an environment that is largely occupied

by people who are involved in crime. Both these factors – which are merely two of many adverse consequences of detention – might catalyze future criminality by the detainee. In such cases detention is counterproductive in preventing and repressing crime. This does not mean that detention should be abandoned all together, but it does imply that, even from the perspective of an effective criminal justice system, detention should be applied as a measure of last resort. This becomes even more apparent when one also considers the benefits of avoiding detention that are discussed in the thematic chapter by Rapoza.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

The requirements under criminal procedural law for pre-trial detention and standards for conditions of detention are not isolated from each other. Procedural requirements are indispensable in limiting the application of detention and are therefore indispensable to avoid (further) overcrowding of detention centres. Moreover, procedural rights – such as the right that detainees can have access to legal assistance and can contact their family – are also important in guarding against ill-treatment. Criminal procedural law requirements may furthermore prevent detention being misused for the purposes of criminal investigation. For instance, detaining someone in order to press him to make a statement would be against the right to liberty, since detaining someone for that purpose is not recognized as a valid ground on which to deprive someone of his/her liberty. In his chapter (on Taiwan), Wang provides another impressive example in this respect. His anecdote concerns a detainee who firmly denies his guilt but later on accepts a settlement with the victim, but only to escape sexual abuse in the detention centre. In fact, such situations are not only problematic from the view of the right to liberty; they are also contrary to the privilege against self-incrimination. It is for such reasons that the Human Rights Council – as Casorla points out in his chapter – encourages all States to "ensure that the conditions of pre-trial detention do not undermine the fairness of the trial".[113]

Weaknesses and strengths of international human rights instruments

Procedural criminal law requirements, however, are far from sufficient to guarantee detainees adequate conditions of detention in all respects. What is

[113] Report of the Human Rights Council, U.N. doc. A/64/53 (2009), 10/9 Arbitrary detention, 42nd meeting, 26 March 2009, par. 4(f).

more, binding international human rights norms that relate to penitentiary conditions are not satisfactory either, because they are limited in number, and their formulations are rather general. One of the most detailed provisions contained in international human rights conventions is Article 10 of the 1962 UN International Covenant on Civil and Political Rights, which still only holds that:

> "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
> 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>   (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

Of course, detention involves many more topics that are of fundamental importance to detainees than this provision expresses. Whereas binding international conventions are thus rather limited as regards penitentiary requirements (although they might be developed in international human rights case law[114]), many soft law instruments do offer very detailed sets of provisions that formulate rights for detainees and prisoners, and express many obligations that the authorities have relative to penitentiary institutions. Some of the most important examples are the UN 1955 *Standard Minimum Rules for the Treatment of Prisoners,*[115] the African 1996 *Kampala Declaration on Prison Conditions*, and the African 2002 *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa,*[116] the I-ACionHR 2008 *Principles and Best*

114 See for example P.H.P.H.M.C. van Kempen, 'Positive Obligations to Ensure the Human Rights of Prisoners. Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR, and the AfChHPR', in: Peter J.P. Tak & Manon Jendly (eds), *Prisoners policy and prisoners rights. Protection of fundamental rights of prisoners in international and domestic law/Politiques pénitentiaires et droits des détenus. La protection des droits fondamentaux des détenus en droit national et international*, Nijmegen: Wolf Legal Publishers 2008, p. 21–44.

115 There are many more U.N. instruments that concern protection of persons subjected to detention or imprisonment. These may be found at the OHCHR website (at: www2.ohchr.org/english/law/index.htm).

116 These and other African instrument relating to detention, imprisonment and penitentiary institutions are available at the websites of the AfCionHPR (at: www.achpr.org/english/_info/index_declarations_en.html) and of Penal Reform International (www.penalreform.org/models-reform).

Practices on the Protection of Persons Deprived of Liberty in the Americas,[117] and the COE 2006 *European Prison Rules.*[118] It would go far beyond the scope of this chapter to explain the contents of these instruments. For the same reason it is not possible here to describe and compare the penitentiary law and practice of the States that are represented in this volume. I shall therefore limit myself to making only a few observations.

It is first of all relevant to note that, while the international instruments relating to detention, imprisonment and penitentiary institutions may be vast, their capacity to legally force states to abide by the rules set out in them is in most cases very limited if not entirely absent. One reason for this is that most of the instruments are not legally binding. Nevertheless, the national chapters imply that in many countries international human rights norms do seem to influence the law, but only to a lesser extent the actual practice of the penitentiary system (see, *e.g.*, Argentina, China, New Zealand, South Africa, Poland, Taiwan, Turkey). Precisely because actual practice is lagging, monitoring systems are imperative. But international human rights instruments that mainly focus on deprivation of liberty usually also lack a monitoring system that is effective in both law and practice. Perhaps the most important exception to this is the COE 1987 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, which constitutes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and its monitoring visits within the member States of any place where persons are deprived of their liberty by a public authority. Interestingly, the legal basis for the CPT's extensive work is formally weak, both procedurally (it may only draw up a report on the facts found and make recommendations; Article 10) and substantively (its task is only to examine the treatment of persons deprived of their liberty with a view to the protection of such persons from torture and from inhumane or degrading treatment or punishment; Article 1). Nevertheless, the CPT has become quite effective. The CPT's recommendations and detailed standards – which are being applied with increasing frequency by the European Court of Human Rights, the case law of which has great practical relevance, as the chapters on European States show[119] – have gained great authoritative power among the member States, and often influence national law and practice (see the chapters on Belgium, Denmark,

[117] This as well as other relevant Instruments of the Inter-American System are available at the OAS website (at: www.oas.org/en/iachr/pdl/links/default.asp).

[118] Many more relevant European instruments are available on the COE website (at: www.coe.int/prison (under: Recommendations)).

[119] See also Council of Europe, *General measures adopted to prevent new violations of the European Convention on Human Rights. Stock-taking of measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the Convention (Application of former Articles 32 and 54 and of Article 46)*, H/Exec (2006)1 (Last update: May 2006), 293 pp. (at: www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp).

Germany, The Netherlands, Turkey, and most extensively those on England & Wales, and Greece). Even so, it should be noted that many of these recommendations and standards are not directly concerned with ill-treatment and torture.

In their chapter, Van Kalmthout & Knapen examine the standards the CPT has established, which have to be met by the authorities. I shall not repeat their exposition here. Suffice it to say that the CPT has contributed magnificently to the setting of norms and supervision concerning detention and imprisonment in Europe. On the international level, a similar institution came into being a few years ago: the Sub-Committee against Torture (S-CAT), which monitors the UN 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* through a system of regular visits to places where people are deprived of their liberty. This Committee works in close cooperation with the CPT. The future will tell whether the S-CAT will be able to exert as much influence on a global scale as the CPT has managed at the European level.

Importance of national penitentiary law and practice

Eventually, however, the actual implementation of detention and prison standards falls to the domestic authorities of States. And in regard to their supervision, Van Kalmthout & Knapen stress that domestic complaint procedures for detainees and prisoners are of primary importance. But there are also other domestic supervisory mechanisms that deserve consideration. An important example is offered in the chapter by Michael Reilly, who explains the tasks, activities and results of a national Inspector of Prisons. Reilly draws close attention to the fact that not only the quality of the assessment by supervisory bodies and the standards that they apply are of crucial importance, but also the formal guarantees that surround them in order to secure their independence, impartiality and powers to fulfill their monitoring task.

Indeed, the rights of detainees and the conditions of detention must eventually be secured in national law and practice. Thus topics discussed in the national chapters are, for example: detention facilities (where are persons kept in police custody and remand); categories of detainees (*e.g.*, minors, women, dangerous suspects, terrorists); their accommodation (*e.g.*, the amount of space that the law or regulations require each pre-trial detainee to have; individual or collective accommodation); the information provided to detainees; how it is guaranteed that detainees receive humane treatment (including, *e.g.*, access to sanitary installations, or whether they are allowed to wear their own clothes); contacts with the outside world (*e.g.*, visitors, telephone calls, letters); daily programme of pre-trial detainees (*e.g.*, work, exercise); protection and care of pre-trial detainees; and detainees' rights to complain. Moreover, many of the national chapters discuss the influence of international human rights

instruments and decisions on the law or practice regarding conditions of detention, as well as the most significant developments in the particular country.

Even more than the criminal procedural law requirements for the application of pre-trial detention, it seems that there is a gap between law and practice when guaranteeing adequate conditions of detention and detainees' rights. So even if the law "reflects the theory of modern correctional administration" – to use the words of Matsuo in his chapter on Japan – this will not suffice. The chapters on the respondent states make it clear that many countries are struggling to improve their penitentiary system (see *e.g.,* China, South Africa, Turkey). Several countries have recently adopted or implemented new, modern penitentiary legislation (*e.g.*, Germany, Japan, Ireland, Poland); have strengthened existing legislation (*e.g.*, Greece, New Zealand, Norway); or are in the process of drafting new such legislation (Taiwan). As mentioned above, in many cases international human rights law and international soft law prison rules have greatly influenced the content of these domestic laws and measures. Improvements were also implemented by improving the possibilities available to appeal against decisions by the prison authorities (Taiwan); specific clarification of the obligations of the police when detaining persons (Ireland); or upgrading existing facilities and building new ones (*e.g.*, France, Portugal). Countries are also adopting new legislation and measures to reduce the isolation of persons in prison and the negative effects thereof (Denmark, Norway), or to detect and reduce sexual violence in prisons (the USA). But as Aparicio & Ortenzi observe (in their chapter on Argentina) "it is also true that abiding by the law proves difficult because of budgetary reasons, building infrastructure and insufficiency of staff, all of which are present in the judicial system, in the […] police, and in the […] penitentiary systems."

The forgoing does not mean to imply that states are only striving to improve the humanity of their penitentiary systems. For example very strict detention regimes are applied in relation to terrorism suspects, (see the chapters on, *e.g.*, England & Wales, Italy, The Netherlands, the USA). Moreover, no doubt some States claim that securing the human rights of detainees is of great importance, while in fact their priorities are entirely different. For that reason, too, clear penitentiary standards and effective international and national supervisory mechanisms are imperative.

Categories of detainees

As has been mentioned in the introduction to this chapter, certain categories of detainees – such as children, women, foreigners, religious or ethnic minorities, homosexuals – have their own specific problems and challenges, and are need specific approaches, as explained in the thematic chapter by Paprzycki & Pomiankiewicz relative to women. In fact, the problems that arise with detainees

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in general often apply much more extensively and progressively to these categories; in many cases, people even fall within several of these categories. Various of these categories therefore receive specific attention in international human rights law, as is illustrated by UN 1990 *Rules for the Protection of Juveniles Deprived of their Liberty*, and the COE Council of Ministers *Recommendation Rec. R(84)12 concerning foreign prisoners*,[120] to name just two soft law instruments.

However, it is of course much more important that national law should acknowledge the special nature of specific categories of detainees, as the law of South Africa proposes to do in relation to children (see the national chapter by Van Zyl). The chapters on the reporting countries nevertheless seem to imply that many categories of vulnerable detainees are not offered specific attention and protection. For example, according to these chapters, homosexuals and transsexuals are only offered special protection in a few countries (Greece, The Netherlands, and probably also Ireland, New Zealand, and Portugal). In several other countries it is clear that there are no special regulations for their protection (*e.g.*, Belgium, Denmark, Germany, Poland, and Taiwan), but they may ask to be placed in isolation in at least some of these States (*e.g.*, Denmark, Italy, Norway), which is not per se a humane solution to the problem. In this regard, however, there seems to be a gap between law and practice. Thus protection in law does not guarantee protection in practice, nor vice versa. Meanwhile, it is probable that many countries do not offer adequate protection in either direction.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

From both the fundamental right to liberty and the presumption of innocence it follows that States must apply the principle of subsidiarity/necessity: deprivation of liberty may only be applied if all less severe avenues are inadequate to sufficiently control the suspect. This same principle is also recognized – either expressly or implicitly – in most national criminal procedural law systems. Thus legally, unqualified liberty is primary. That also applies – as Pradel notes in his chapter on France – in case there is strong evidence of the suspects' guilt. Only insofar as the liberty of the suspect would harm justified interests is there room for conditional liberty or perhaps even alternatives to detention. The authorities may thus not detain a suspect unless these alternatives are inadequate too. This is important, moreover, since it seems that once pre-trial detention has been applied, the defendant stands a greater chance of being sentenced to a prison

[120] On the topic of foreigners in prison, see Peter J.P. Tak & Manon Jendly (eds), *Minorities and Cultural Diversity in Prison/Minorités et diversité culturelle en prison* (IPPF/FIPP), Nijmegen, Wolf Legal Publishers, 2006.

sentence – or to a longer prison sentence – than in case s/he has not been detained pre-trial (as Tak notes in his chapter on The Netherlands).

However, the enormous numbers of pre-trial detainees in many countries would seem to imply that neither the right to liberty nor the presumption of innocence is applied very royally in these countries. This might be due to a lack of awareness in practice of the actual importance of these requirement. In this respect, too, the judiciary might have an especially important task in preventing and redressing shortcomings and abuses in the pre-trial detention system, as Vianno concludes in his chapter on the USA when he speaks of the pre-trial detention "crisis". That does of course not detract from the responsibilities of the administration and the legislator. Improvement of the law can positively influence the practice of pre-trial detention, as Yarsuvat & Aksoy Rétornaz conclude in regard to Turkey in their chapter. Especially relevant in this respect is also an observation that Feest makes in his chapter on Germany; he implies that recognition of requirements such as the presumption of innocence on a general level is not enough when these are not also adequately expressed and followed up in the more specific norms governing pre-trial detention. Meanwhile, this problem is not entirely confined to states internally: even the system of international cooperation in criminal matters – as the thematic chapter by Boetticher illustrates in regard to extradition procedures within in European Union[121] – does not take sufficient account of the principles of subsidiarity/necessity as well as proportionality.

All this does not necessarily mean that alternatives to pre-trial detention are hardly ever applied. Interestingly, in several of the countries that have very high detention rates, alternatives to detention – particularly bail – are applied on a relatively large scale (*e.g.*, the USA and South Africa), while bail is hardly or never applied in several other countries with moderate detention rates (*e.g.*, The Netherlands), low rates (France, Portugal), or even very low rates (*e.g.*, Germany, Norway). The information in the exposés in this volume does not provide a clear reason for this paradox. Nevertheless, a possible explanation might be that countries with high detention rates not only apply detention in many situations in which other countries might refrain from such application, but that they also apply alternatives to detention in many situations where other countries would simply opt for unconditional liberty. Although developing the use of alternatives might be in concurrence with the right to liberty and the presumption of innocence, the implication would be that it will not always necessarily be so. There is always the risk that the increasing availability of alternatives to pre-trial detention will drive the police, the public prosecutor, or the courts to apply these alternatives in situations in which they previously did not apply any controlling measure against the suspect. See also the chapter by Rapoza, who notes that

121 See section 7 of that chapter.

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electronic monitoring can be said to narrow the net of state control over the accused.

These kinds of side-effects are unwelcome from the perspective of the right to liberty and the presumption of innocence, but might be hard to forestall by procedural requirements, because there will always be a margin of appreciation for the authorities when deciding whether an alternative should be utilized or not. It is difficult for the law to change the legal culture of a State. But even if alternatives are not applied without good cause, they may not be the panacea against overuse of pre-trial detention. The introduction of alternatives in several countries had little or no effect on detention rates (see, *e.g.*, the chapters on Italy, Turkey).[122] Moreover, there are also more fundamental arguments against alternatives, one being that the practicability of alternatives may depend on the suspect's social status and circumstances, as Della Casa points out (chapter on Italy). As some say with regard to bail, as quoted by Casorla: "It is better to detain all, than only to let the rich go free."

However, none of this forms a decisive argument against providing a system of alternatives to detention, if only because practice seems to prove that it can work. China would seem to be illustrative in this respect, and even more evidently Ireland, which has a low pre-trial detention rate (15 in 2007; 14 in 2009) and for which it is estimated from available data that bail is granted in approximately 25% to 33% of murder cases, and is usually granted in more than 80% of cases involving less serious offences. According to Mellett, the reason for this relatively high figure of 80% is that Ireland has a constitutional presumption in favour of bail since, in the eyes of the law, a person is innocent until proven guilty. The implication of this is thus not that States must refrain from providing alternatives to pre-trial detention, but rather that they must carefully monitor the use of alternatives both in individual cases and in general within the criminal justice system. It is furthermore important that procedural law and practice offer the possibility to adapt the application of an alternative to the particularities of the case and the individual suspect.

Many variations of alternatives to pre-trial detention are discussed in the chapters on the reporting states. These chapters also illustrate that many states in recent years have introduced, revitalized or at least tested new alternatives (see, *e.g.*, Belgium, China, Germany, New Zealand, Poland, and Portugal). Other states already had many alternatives available (see, *e.g.*, Spain, Taiwan, the USA). One relatively new alternative is the subject of extensive attention in the chapter by Rapoza, who discusses the practice of electronic monitoring, its relation to the grounds and goals of pre-trial detention, its possible use and benefits and

[122] See also chapter 1 of A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 95: "there is little evidence that the introduction of alternatives to pre-trial detention has resulted in a reduction of the percentage of pre-trial detainees in the prisons."

some of its limitations. Much of what he observes is in fact applicable to most alternatives. In relation to electronic monitoring, Rapoza concludes that when properly employed, such technology has the potential to yield a number of benefits, including the possibility of permitting an accused who would otherwise be held in detention to remain at liberty.

VI. CONCLUSION

Pre-trial detention is fundamentally governed by the right to liberty, the presumption of innocence, the right to humane treatment, and the prohibition of torture and ill-treatment. Yet, the many differences between the national systems of criminal procedural law and penitentiary law of the countries discussed in this volume illustrate that these international fundamental norms – which are broadly acknowledged by all of these countries – do not lead to far-reaching uniformity in pre-trial detention law around the world. Furthermore, the implementation of international and constitutional human rights norms in criminal procedural and penitentiary law does not by itself guarantee adequate observance of these rights in practice. This certainly does not mean that the law is a secondary concern or even irrelevant. It is evident – and also obvious from the national chapters in this volume – that international human rights norms and supervisory bodies as well as constitutional civil rights exert a positive influence on both national law and practice. The national chapters at least strongly indicate that it is quite impossible to live up to these standards in practice without an adequate legal system. These chapters moreover demonstrate that legal improvements are often essential for initiating improvements in practice. But ultimately it is up to practice – *i.e.* the courts, prosecutors, the police and prison administrations and staff – to apply pre-trial detention law in conformity with fundamental human rights norms. That does not imply that the responsibility of legislators ends with the adoption of adequate pre-trial detention law. In order to create a legal climate in which all authorities involved are actually conscious of the importance of applying pre-trial detention in conformity with the aforementioned fundamental norms, it is of great importance that legislators – or better, politicians and governments – broadcast that these principles are of principal importance.

LA DÉTENTION AVANT JUGEMENT DANS LE DROIT NATIONAL ET INTERNATIONAL ET LA PRATIQUE : SYNTHÈSE ET ANALYSES COMPARATIVES

Piet Hein van Kempen*

I. INTRODUCTION

Il existe au moins cinq raisons de taille pour se pencher sur la détention avant l'emprisonnement imposée suite à une condamnation pénale et de mener une discussion extensive sur le sujet. La première de ces raisons : les statistiques. L'on estime en effet que chaque jour, près de 2,5 millions de personnes sont maintenues en détention avant jugement et autres formes de détention provisoire dans le monde[1] et qu'au cours d'une année donnée, près de 10 millions de personnes feront l'objet d'une détention avant jugement.[2] La deuxième raison est que l'application de la détention avant jugement pose problème au regard des normes universelles relatives aux droits de l'homme. Les normes qui revêtent une importance toute particulière à cet égard sont le droit à la liberté, la présomption d'innocence, le droit à un traitement humain et l'interdiction de la torture et des mauvais traitements. Les violations de ces règles fondamentales sont fréquentes dans le monde et il est probable qu'elles existent dans

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1 Roy Walmsley, *World Pre-trial/Remand Imprisonment List (Pre-trial detainees and other remand prisoners in all five continents)*, Kings College London, ICPS/International Centre for Prison Studies, 2008.

2 Voir David Berry *et al.*, *The Socioeconomic Impact of Pretrial Detention*, New York : Open Society Foundations/United Nations Development Program, 2011, p. 12 (à l'adresse : www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201).

pratiquement tous les pays du monde, voire en effet dans tous les pays. Les détenus avant jugement sont, peut-être plus encore que tout autre groupe, extrêmement vulnérables aux abus commis par l'État puisqu'ils se trouvent entre les mains des autorités qui ont quant à elles un intérêt à obtenir des informations ou une confession.[3] La troisième de ces raisons est que la détention avant jugement est une charge pour la société et les familles des détenus : la détention avant jugement est coûteuse pour le contribuable, elle empêche les détenus de contribuer à l'économie et peut, par exemple entraîner une perte d'emploi et du domicile.[4] Dans le même temps, cette troisième raison nous amène à la quatrième : force est de constater qu'aucun système de justice pénale apte à empêcher et réprimer la criminalité ne peut fonctionner correctement s'il fait totalement l'impasse sur la détention des suspects. Enfin, la cinquième raison, nous connaissons actuellement divers développements assez récents en matière de coopération légale internationale entre les États qui méritent d'être examinés selon le point de vue de la détention avant jugement. Le présent volume aborde de ce fait une grande variété de sujets pertinents en matière de détention avant jugement.

I.1. RÉSUMÉ DU PRÉSENT VOLUME

Chapitres thématiques

La Partie II du présent volume présente une approche thématique de la problématique de la détention avant jugement. Le chapitre rédigé par Casorla aborde pratiquement toute la panoplie des sujets mentionnés. Cet auteur évoque également plusieurs développements qui affectent l'application de la détention avant jugement et les statistiques en la matière, telles que l'influence des victimes sur la procédure pénale et l'influence des politiques de lutte contre le terrorisme ou la criminalité environnementale. En effet, il est établi qu'il n'existe pas de corrélation exclusive entre les statistiques de la criminalité et le taux de détention avant jugement (voir également le chapitre consacré à l'Espagne). Les taux de détention peuvent aussi être étroitement liés à de nombreuses évolutions du système de justice pénale lui-même, telles que la criminalisation du comportement, l'efficacité de la surveillance policière, les méthodes et la durée de l'enquête criminelle, les politiques en matière pénale, la politisation de la justice pénale et (comme le souligne Lambropoulou dans son chapitre consacré à la

[3] Voir Moritz Birk *et al.*, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, New York: University of Bristol/Ludwig Boltzmann Institute/Open Society Foundations, 2011, p. 18 (à l'adresse : www.unhcr.org/refworld/docid/4e324fa22.html ou http ://bim.lbg.ac.at/files/sites/bim/pretrial-detention-and-torture-06222011_0.pdf).

[4] Voir David Berry *et al.*, *The Socioeconomic Impact of Pretrial Detention*, New York: Open Society Foundations / United Nations Development Program, 2011, p. 12.

Grèce) la présence accrue d'étrangers dont le casier judiciaire ne peut être contrôlé aisément ou rapidement. Sans oublier que l'ampleur des motifs susceptibles de mener à une détention avant jugement est très pertinente dans tous les systèmes. Ces motifs, qui représentent en réalité des fonctions de la détention avant jugement, sont évoqués ci-dessous (section III.6) ainsi que dans le chapitre rédigé par Rapoza.

Van Kalmthout & Knapen abordent un sujet totalement différent lorsqu'ils se penchent sur les normes internationales relatives aux conditions de détention définies par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT). L'équivalent national au contrôle international des lieux de détention pourrait prendre la forme de la désignation d'un inspecteur national des prisons, sujet abordé par Reilly. Lorsque l'on aborde le sujet de la détention avant jugement, il est particulièrement important de savoir qu'il existe diverses catégories de détenus qui sont chacune confrontées à des problèmes et des défis spécifiques et nécessitent des approches spécifiques. Cette spécificité n'est pas l'apanage des détenus présentant un risque sécuritaire accru tels que les suspects dans des affaires de crime organisé ou de terrorisme (pour ce qui est du terrorisme, voir plus particulièrement le chapitre consacré à l'Angleterre et au Pays de Galles[5]). Il en va de même, pour différentes raisons, pour les catégories de détenus les plus vulnérables, par exemple les mineurs, les femmes, les étrangers, les minorités religieuses ou ethniques et les homosexuels.[6] C'est pourquoi Paprzycki & Pomiankiewicz se penchent sur le thème de la détention avant jugement dans le cas des femmes (voir également le chapitre consacré à l'Afrique du Sud, qui accorde une attention toute particulière aux enfants).

Il est évident que si les autorités disposaient de solutions adéquates autres que la détention, la nécessité de recourir à des mécanismes internationaux et nationaux de contrôle des conditions de détention serait beaucoup moins aiguë. Dans ce contexte, Rapoza évoque la surveillance électronique comme alternative à la détention avant jugement. Si de nombreux projets menés dans le monde visent à appliquer et améliorer les solutions alternatives à la détention, il n'en reste pas moins que certains développements font naître de nouveaux défis et/ou un recours accru à la détention. Outre les évolutions déjà mentionnées précédemment, l'amélioration de la coopération légale internationale entre les États, telle qu'illustrée par Boetticher, qui explique l'impact du Mandat d'arrêt

[5] Voir également l'étude comparée du droit réalisée par Stella Burch Elias, 'Rethinking « Preventive Detention » from a Comparative Perspective : Three Frameworks for Detaining Terrorist Suspects', 41 *Columbia Human Rights Law Review* 1 (2009), p. 99-210 ; Douglass Cassel, Pretrial and Preventive Detention of Suspected Terrorists : Options and Constrains under International Law, 98 *Journal of Criminal Law & Criminology* 3 (2008), p. 811-852.

[6] Voir également Peter J.P. Tak & Manon Jendly (eds), *Minorities and Cultural Diversity in Prison/Minorités et diversité culturelle en prison* (IPPF/FIPP), Nijmegen, Wolf Legal Publishers, 2006.

européen sur la politique et les statistiques de la détention avant jugement, compte parmi les éléments pertinents en la matière.

Chapitres nationaux

De nombreux sujets sont passés en revue dans la Partie III de ce volume, qui compte 21 chapitres individuels consacrés à la détention avant jugement dans les pays suivants : Argentine, Belgique, Chine, Danemark, Angleterre & Pays de Galles, France, Allemagne, Grèce, Irlande, Italie, Japon, Pays-Bas, Nouvelle Zélande, Norvège, Pologne, Portugal, Afrique du Sud, Espagne, Taiwan, Turquie et États-Unis d'Amérique (États-Unis). Ces pays sont désignés dans la suite du présent ouvrage par le vocable « pays communiquant des rapports » ou « pays répondant ». Ces rapports nationaux s'appuient sur un questionnaire extensif auquel des juges, représentants de pays et des universitaires de ces pays ont répondu. S'il s'est avéré impossible de procéder à une distribution totalement équilibrée des pays entre les six continents, tous les continents sont au moins représentés dans ce volume.

Les chapitres relatifs à ces pays adoptent généralement la structure suivante : introduction puis (I), compte rendu du cadre légal des normes internationales et nationales des droits de l'homme applicables au pays répondant concerné (II). Par conséquent, chaque chapitre présente une explication du cadre légal des règles nationales relevant de la procédure pénale (III) et ses normes en matière de conditions de détention effectives, ses établissements de détention et les droits de ses détenus (IV). Chaque chapitre parcourt plus en détail les possibilités d'application des alternatives à la détention disponibles dans le pays répondant (V), avant de passer finalement aux conclusions (VI).

Certains chapitres consacrés aux systèmes nationaux font toutefois bien plus que présenter le système national et examinent certains thèmes de façon plus détaillée. À cet égard, les chapitres consacrés à l'Espagne (dans lequel Guerra Pérez & Díez Ripollés présentent de nombreuses informations statistiques et empiriques intéressantes et où ils analysent l'application de la détention avant jugement), au Danemark (dans lequel Rentzmann décrit les développements relatifs à l'isolement cellulaire), à l'Afrique du Sud (où Van Zyl accorde une attention particulière à la position des enfants) et à l'Angleterre et au Pays de Galles (dans lequel Shute & Mora se concentrent sur des sujets tels que la détention avant jugement sans inculpation ainsi que sur le traitement réservé aux suspects d'actes de terrorisme) sont particulièrement intéressants.

Synthèse et analyses comparatives – introduction

Le présent chapitre (qui constitue la Partie I de ce volume) suit la structure de base des chapitres consacrés aux systèmes nationaux présentée ci-dessus. Il est principalement axé sur les sujets évoqués dans ces chapitres nationaux. La suite

de ce document vise à offrir une synthèse comparative des systèmes nationaux des pays répondants au regard des normes internationales des droits de l'homme évoquées ci-après. Ces analyses se concentrent sur l'éventuelle relation de corrélation qui existe entre la signature des normes internationales et constitutionnelles relatives aux droits fondamentaux, la qualité de la procédure pénale et du droit pénitentiaire, les taux de détention avant jugement et le recours à la détention avant jugement dans la pratique. Il ne se contente pas d'examiner si les normes internationales des droits de l'homme relatives à la détention influencent le droit et la pratique nationale et si oui, comment, ainsi que la mesure dans laquelle les normes internationales sont pertinentes pour ce faire, il tente aussi de mettre en avant les points forts et les faiblesses des droits nationaux en tant que tels. Bien que dans le contexte du présent ouvrage, la synthèse et l'analyse comparative s'appuient principalement sur les informations communiquées dans les chapitres nationaux et sur les contributions thématiques au présent volume, d'autres matériaux susceptibles de contribuer au débat sont pris en compte.[7]

I.2. DÉFINITION DE LA DÉTENTION AVANT JUGEMENT

Comme l'explique Casorla dans son chapitre, il est peu aisé, dans un contexte de droit comparé, de produire une définition précise de la détention avant jugement.[8] Ceci est dû au fait que les systèmes de procédure pénale des différents États présentent d'importantes divergences entre les catégories légales de privation de liberté reconnues dans ces systèmes, que les instruments internationaux des droits de l'homme s'appuient sur de nombreuses définitions différentes de la détention avant jugement, et que le droit de la procédure pénale et les normes internationales des droits de l'homme ne se fondent dès lors pas sur une définition unique et uniforme. Ce chapitre se base donc sur la détention avant jugement au sens large. Sauf mention contraire, le terme « détention avant jugement » fait référence à toutes les formes de détention avant l'emprisonnement basé sur une condamnation pénale définitive. Il peut s'agir entre autres de la détention avant jugement au sens strict, de la détention durant le procès avant condamnation et durant le procès après condamnation. La garde à vue (détention avant jugement par la police) et la détention provisoire (détention avant jugement

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[7] Par exemple, en ce qui concerne le droit de la procédure pénale (voir *infra* section III), les informations présentées dans A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, se sont avéré très intéressantes en ce qui concerne les pays répondants présents dans ce volume et qui sont membres de l'Union européenne (*i.e.* la Belgique, le Danemark, l'Angleterre et le Pays de Galles, la France, l'Allemagne, la Grèce, l'Irlande, l'Italie, les Pays-Bas, la Pologne, le Portugal et l'Espagne).

[8] Voir section 2 de ce chapitre.

sous l'autorité d'un organe judiciaire tel qu'un procureur, un juge, un tribunal) sont deux exemples de détention avant jugement. Le terme « détention » est utilisé ici par opposition à l'emprisonnement, qui implique une privation de liberté fondée sur une condamnation pénale définitive.

II. ACCEPTATION DES DROITS FONDAMENTAUX INTERNATIONAUX ET NATIONAUX EN MATIÈRE DE DÉTENTION

Nous avons déjà cité précédemment certains des droits fondamentaux parmi les plus pertinents en matière de détention avant jugement. Le droit à la liberté et la présomption d'innocence génèrent plus particulièrement des garanties procédurales de nature à restreindre les possibilités de détention d'une personne, tandis que le droit à un traitement humain et l'interdiction de la torture et des mauvais traitements réglementent de manière significative les conditions minimales de la détention. Ces droits fondamentaux sont enracinés à la fois dans les constitutions nationales et les instruments internationaux (mondiaux et régionaux) des droits de l'homme. Il appartient avant tout et principalement aux autorités nationales de garantir le respect de ces droits fondamentaux. Suivant cette perspective, la reconnaissance détaillée de ces droits dans les constitutions nationales devrait faciliter suffisamment la tâche des autorités nationales chargées de les garantir. En réalité, toutefois, nombreux sont les États qui ne sont pas suffisamment capables (ou désireux) de remplir cette tâche en dehors de l'existence des instruments internationaux des droits de l'homme et leur supervision par des organes internationaux de défense des droits de l'homme. Il n'est de ce fait pas inutile d'examiner si les États reconnaissent ces droits dans leur constitution et s'ils sont liés par des instruments internationaux.

Cet examen pourrait ensuite permettre de tirer des conclusions quant aux questions suivantes. Existe-t-il une corrélation entre l'ampleur de l'engagement pris par les États (dans leur droit constitutionnel et / ou international) de respecter ces droits et la situation de leur droit et de la pratique en matière de détention ? Je partirai de l'hypothèse que les États qui ont à la fois adopté des droits constitutionnels forts en matière de détention et ont ratifié les instruments internationaux les plus pertinents sont plus enclins à agir en conformité avec ces droits que les États présentant seulement l'une de ces caractéristiques ou aucune des deux. Cette hypothèse s'avérera-t-elle exacte ? Dans la mesure où le droit international des droits de l'homme revêt un caractère plus général et se situe en principe aussi à un niveau supérieur au droit national, je commencerai mon analyse par le droit international.

II.1. INSTRUMENTS INTERNATIONAUX DES DROITS DE L'HOMME

La détention fait l'objet de nombreux instruments de droit internationaux et régionaux, tout particulièrement les conventions des droits de l'homme ainsi que des déclarations des droits de l'homme non contraignantes et des ensembles de règles ou de principes. Au niveau international, sont tout particulièrement pertinents à cet égard la *Déclaration universelle des droits de l'homme* (DUDH, 1948 ; voir Articles 3, 5, 9), ainsi que le *Pacte international relatif aux droits civils et politiques des Nations Unies,* contraignant (PIDCP, 1966 ; Articles 7, 9, 10), la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants des Nations Unies* (CCT, 1984 ; Articles 10, 11), la *Convention des Nations Unies relative aux droits de l'enfant* (CNUDE, 1989 ; Article 37), et la *Convention internationale pour la protection de toutes les personnes contre les disparitions forcées des Nations Unies* (ICPPED, 2006 ; Articles 2, 17).

Certains instruments régionaux légalement contraignants sont par ailleurs pertinents dans ce contexte. Les plus importants sont la *Charte africaine des droits de l'homme et des peuples* de l'Union africaine (AU) (ChAfDHP, 1981 ; Article 6), et la *Charte africaine des droits et du bien-être de l'enfant* (CADBE, 1990 ; Articles 16, 17) ; la *Convention américaine relative aux droits de l'homme* de l'Organisation des États américains (OEA) (CADH, 1969 ; Articles 5, 7), et la *Convention interaméricaine pour la prévention et la répression de la torture* (I-ACPT, 1985 ; Articles 5, 7) ; et enfin, la *Convention européenne des droits de l'homme* du Conseil de l'Europe (CEDH, 1950 ; Articles 3, 5), et la *Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants* (CEPT, 1987).

Dans la mesure où ces instruments contiennent des conditions et réglementations importantes en matière de détention des personnes, ils seront évoqués et expliqués ci-après, lorsque cela s'avérera pertinent pour le sujet examiné. À ce stade, il est suffisant de noter que seuls le PIDCP (Article 9), la CADH (Article 7) et le CEDH (Article 5), dans certains de ses détails, apportent un cadre général de conditions visant à assurer que personne ne soit arbitrairement privé de sa liberté. La disposition correspondante dans la ChAfDHP est plutôt mince, mais la jurisprudence de la Commission Africaine des Droits de l'Homme et des Peuples précise sa signification.[9]

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[9] Voir Malcolm Evans & Rachel Murray, *The African Charter on Human and Peoples' Rights*, Cambridge : Cambridge U.P., 2008, p. 197-198. Voir également Jamil Ddamulira Mujuzi, 'Protecting Prisoners' Rights before the African Commission on Human and Peoples' Rights : The Role of Civil Society', *CSPRI Newsletter*, No. 22 (juin 2007) ; voir aussi Lukas Muntingh, 'Improved monitoring and reporting to promote and protect the rights of prisoners under the African human rights system', *CSPRI Newsletter*, No. 33 (décembre 2007).

Comparaison de la ratification des instruments internationaux par les États

Tous les pays communiquant des rapports ont ratifié les instruments internationaux PIDCP, CAT et CNUDE, à l'exception de la Chine (pas le PIDCP), Taiwan (aucun) et les États-Unis (pas le CNUDE).[10] Seuls l'Argentine, la Belgique, la France, l'Allemagne, le Japon, les Pays-Bas et l'Espagne ont également ratifié la récente ICPPED. Il convient de noter que Taiwan est le seul pays communiquant des rapports qui ne soit membre d'aucune organisation internationale universelle ou régionale pertinente en la matière : cet État ne fait par exemple pas partie des Nations Unies, ce qui signifie qu'il ne peut ratifier les instruments internationaux des droits de l'homme adoptés par cette organisation. Cela implique, comme le souligne Wang dans son chapitre sur Taiwan : « En l'absence de stimulation du monde extérieur, les Taïwanais doivent développer une nouvelle conscience sociale de nature à promouvoir des valeurs modernes en matière de droits de l'homme. » Pour se faire, Taiwan a promulgué une loi qui prescrit que « Les dispositions relatives aux droits de l'homme contenues dans les deux Conventions sont applicables dans le droit national. »[11] Par conséquent, nous pouvons en effet conclure que les droits fondamentaux tels que le droit à la liberté, la présomption d'innocence, le droit à un traitement humain lors de la détention et contre la torture et les mauvais traitements sont universellement reconnus par l'ensemble des États pris en compte dans le présent volume, y compris Taiwan. Le fait que plusieurs États ont émis des réserves à l'égard de l'un ou de plusieurs de ces droits (par exemple la Belgique, le Danemark, l'Irlande, les Pays-Bas, la Nouvelle Zélande, la Norvège et les États-Unis, généralement en ce qui concerne les Articles 10(2) et (3) PIDCP) ne modifie en rien cette conclusion, étant donné la nature desdites réserves.

De plus, à l'exception des États-Unis, tous les pays communiquant des rapports ont également ratifié l'ensemble des instruments régionaux susmentionnés applicables à la région dont l'État fait partie. Au moment de la rédaction du présent volume, les États-Unis n'ont ratifié ni la CADH ni l'I-ACPT.[12] La CEDH et la CEPT ont été ratifiées par les 47 États membres du Conseil de l'Europe, qui comptent les 27 États membres de l'Union européenne, ainsi que les états européens pris en compte dans le présent document. L'Asie et l'Océanie ne se sont pas dotées d'instruments régionaux des droits de l'homme, en conséquence de quoi la Chine, le Japon, Taiwan et la Nouvelle Zélande ne sont partie à aucun instrument de ce type. Cela signifie que seule la Chine, et autrefois également Taiwan, n'ont ratifié aucune convention internationale des droits de

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10 En ce qui concerne les instruments des Nations unies, toutes les informations suivantes concernant les ratifications se fondent sur la base de données de des traits des Nations unies (http ://treaties.un.org/ ; référence en date du 1 juillet 2011).

11 Pour plus de détails sur le sujet, veuillez consulter le chapitre consacré à Taiwan.

12 Voir base de données de l'OEA (url: www.oas.org/DIL/treaties_and_agreements.htm ; référence en date du 1 juin 2011).

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l'homme offrant un cadre général de règles en matière de privation de liberté ou de normes minimales relatives aux conditions de détention.

Dans le même temps, ces instruments n'ont pas seulement une grande valeur parce qu'ils contiennent des normes fondamentales qui limitent et réglementent les privations de liberté, ils revêtent aussi une grande importance en ce que bon nombre d'entre eux sont assortis d'organes dont la tâche consiste à superviser la mise en œuvre de ces normes dans le droit et la pratique de l'État participant. Plusieurs de ces organes reçoivent les plaintes émises par des individus. Le Comité des droits de l'homme est le plus pertinent en ce qui concerne le cadre général garanti par le PIDCP (plus particulièrement ses Articles 7, 9, 10). Nombreux sont les pays communiquant des rapports qui acceptent la compétence du Comité à recevoir des plaintes individuelles. C'est principalement le cas de l'Afrique du Sud, de la Nouvelle Zélande et de l'Argentine. En réalité, l'Argentine est le seul pays communiquant des rapports à reconnaître les plaintes individuelles de la CAT et de l'ICPPED. Des individus peuvent également déposer une plainte auprès du Comité des droits de l'homme contre un pays européen communiquant des rapports, à l'exception du Royaume-Uni (et par conséquent de l'Angleterre et du Pays de Galles). Une fois encore, en dehors du Royaume-Uni, tous les États européens acceptent en outre les plaintes individuelles déposées en vertu du CAT (il est intéressant de noter que, en vertu du Protocole facultatif CAT le Royaume-Uni – point commun avec l'Argentine, le Danemark, la France, l'Allemagne, les Pays-Bas, la Nouvelle Zélande, la Pologne et l'Espagne – accepte toutefois la compétence du Sous-comité pour la prévention de la torture (SPT) du CAT global de visiter sans limite les lieux où des personnes sont privées de leur liberté). Par contraste, les personnes privées de liberté en Chine, au Japon, à Taiwan ou aux États-Unis n'ont aucune possibilité de déposer une plainte à un niveau universel quant à des violations prétendues ou réelles de l'un quelconque des instruments susmentionnés.

Au niveau régional, des plaintes contre l'Afrique du sud peuvent être déposées auprès de la CADHP. Cet État n'accepte cependant pas la possibilité de déposer plainte auprès de la Cour Africaine des Droits de l'Homme et des Peuples (CAfDHP) et il n'a pas encore ratifié le Protocole[13] de 2008 qui remplacera la CAfDHP par une Cour africaine de justice et des droits de l'homme (CAJDH).[14] En Argentine, les individus ont le droit de déposer une plainte auprès de la Commission interaméricaine des droits de l'homme (CIDH). Parallèlement, la Cour européenne des droits de l'homme (CEDH) est compétente pour recevoir les plaintes individuelles contre tous les pays européens répondants. De plus,

13 Voir le *Protocole portant statut de la Cour Africaine de Justice et des Droits de l'Homme* de 2008.

14 Voir la base de données des traits de l'UA (http://au.int/en/treaties/status; référence en date du 27 janvier 2011).

tous ces États européens reconnaissent la compétence du CPT de visiter tout lieu où des personnes sont privées de liberté par une autorité publique afin d'examiner le traitement auquel elles sont soumises. S'il n'accepte pas les plaintes individuelles, ce Comité mérite également d'être cité ici, puisqu'il a développé un ensemble détaillé de normes minimales en matière de conditions de détention et d'emprisonnement, comme Van Kalmthout & Knapen l'expliquent plus avant dans le présent volume. Il sera intéressant de voir si la contrepartie du CPT, c'est-à-dire le Sous-comité pour la prévention de la torture du CAT (SPT), exercera finalement une influence et fera preuve d'une efficacité similaires à celles du CPT (au moment de rédiger ces lignes, les compétences du SPT d'effectuer des visites est reconnue par les pays communiquant des rapports suivants : Argentine, Danemark, France, Allemagne, Pays-Bas, Nouvelle Zélande, Pologne, Espagne et Royaume-Uni (donc également l'Angleterre & le Pays de Galles)). Une fois encore, aucune procédure de plainte individuelle proposée par les instruments régionaux susmentionnés n'est accessible aux citoyens chinois, japonais, néo-zélandais et américains.

II.2. LES DROITS FONDAMENTAUX DANS LES CONSTITUTIONS OU CHARTES DES DROITS FONDAMENTAUX NATIONALES

Il est intéressant de savoir, selon la perspective des droits fondamentaux, si la mesure dans laquelle les États reconnaissent les normes internationales relatives aux droits de l'homme et les procédures de plainte individuelle correspondent au degré de reconnaissance les droits fondamentaux pertinents en matière de détention dans leur constitution ou charte des droits fondamentaux. Les Constitutions de l'Afrique du Sud[15] et de la Turquie[16] semblent accorder les droits, règles de procédure et normes minimales en matière de détention les plus détaillés. L'Allemagne[17], la Grèce[18], la Nouvelle Zélande[19], la Pologne[20], le Portugal[21], l'Espagne[22] et *de facto* également l'Angleterre & le Pays de Galles[23] ont également adopté des dispositions assez détaillées en matière de droits

15 Voir les articles 10, 12, 28, 35 et 37 de la Constitution de l'Afrique du Sud.
16 Voir les articles 17 et 19 de la Constitution de la Turquie.
17 Voir les articles 2 et 104 de la Constitution de l'Allemagne.
18 Voir les articles 6 et 7 de la Constitution de la Grèce.
19 Voir les sections 9 et 22-25 de la Charte des droits fondamentaux de Nouvelle Zélande de 1990.
20 Voir les articles 40 et 41 de la Constitution de la Pologne.
21 Voir les articles 25, 27, 28 et 31 de la Constitution du Portugal.
22 Voir les articles 15 et 17 de la Constitution de l'Espagne.
23 Voir la loi britannique sur les droits de l'homme de 1998, qui a pleinement entériné les Articles 3 et 5 CEDH, parmi de nombreux autres droits et libertés accordés en vertu de la Convention.

fondamentaux. La situation est quelque peu différente au Danemark[24], en Irlande[25] et à Taiwan[26], puisque ces États ont aussi adopté des dispositions constitutionnelles extrêmement détaillées en matière de privation de liberté, mais aucune en matière de traitement humain ou d'interdiction des mauvais traitements. Des dispositions relativement modérées en matière de droits fondamentaux pertinents pour la détention sont également intégrées dans les constitutions de l'Italie[27], des Pays-Bas[28] et des États-Unis.[29] Les dispositions relatives aux droits fondamentaux intégrées dans les constitutions de l'Argentine[30], la Belgique[31], la Chine[32], la France[33], le Japon[34] et de la Norvège[35] sont encore plus restreintes.

Il va de soi que dans aucun pays, la constitution est le seul texte décisif en la matière. Il est en effet aisément concevable que les droits inscrits dans ce texte ont été étoffés et étendus grâce à l'interprétation judiciaire qui en est faite. C'est par exemple le cas aux États-Unis. De plus, il est fréquent que l'ampleur et le niveau de détail des droits constitutionnels soient moins liés à la reconnaissance actuelle des droits fondamentaux par un État qu'à celle qui était de rigueur au moment de la rédaction de la constitution. Il semblerait que les constitutions modernes ou modernisées soient souvent plus détaillées que les plus anciennes, vraisemblablement parce que les rédacteurs constitutionnels de notre époque sont influencés par des normes internationales des droits de l'homme détaillées et la jurisprudence. C'est par exemple le cas de l'Afrique du Sud.

II.3. PROTECTION DES DROITS FONDAMENTAUX DANS LE DROIT ET LA PRATIQUE DES ÉTATS

Sur papier, la protection combinée offerte par le droit international ratifié et les dispositions constitutionnelles nationales contre les conditions de détention arbitraires et inhumaines est la plus importante en Afrique du Sud, en Turquie,

[24] Voir Section 71 de la Constitution du Danemark.
[25] Voir l'article 40(4) de la Constitution de l'Irlande.
[26] Voir l'article 8 de la Constitution de Taiwan.
[27] Voir les articles 13 et 27 de la Constitution de l'Italie.
[28] Voir les articles 11 et 15 de la Constitution des Pays-Bas.
[29] Voir les amendements IV, V, VI, VIII et XIV de la Constitution des États-Unis d'Amérique.
[30] Voir les articles 18 et 43 de la Constitution de l'Argentine.
[31] Voir l'article 12 de la Constitution de la Belgique.
[32] Voir l'article 37 de la Constitution de Chine (République populaire de Chine).
[33] La Constitution de la France ne contient pas de Charte des droits fondamentaux ni de disposition des droits fondamentaux en matière de détention. Toutefois, le Préambule de la Constitution invoque la Déclaration des droits de l'homme et du citoyen de 1789, dont les principes revêtent une valeur constitutionnelle ; en ce qui concerne la détention, voir les articles 7 et 9 de la Déclaration.
[34] Voir les articles 31, 33, 34 et 36 de la Constitution du Japon.
[35] Voir les articles 96 et 99 de la Constitution de la Norvège.

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en Allemagne, en Grèce, en Pologne, au Portugal et en Espagne. Ces pays ont adopté les dispositions constitutionnelles les plus détaillées en matière de détention, tandis que leurs citoyens disposent d'une protection supplémentaire, en vertu d'instruments contraignants des droits de l'homme universels et régionaux contraignants, et ont accès aux procédures de plainte individuelle dont ils sont assortis. De plus, en ce qui concerne le droit international en matière de droits de l'homme au moins, ces pays appliquent des variations de systèmes monistes modérés, ce qui signifie que l'on considère habituellement que les dispositions légales intégrées dans les traités internationaux des droits de l'homme sont directement applicables et que les personnes ont la possibilité d'invoquer ces droits devant les tribunaux de leur pays. Du point de vue du cadre légal examiné ci-dessus, les citoyens sont les moins protégés en Chine, au Japon et aux États-Unis.

De toute évidence, ces observations strictement fondées sur le système légal ne doivent pas nécessairement correspondre à la mesure dans laquelle les règles en matière de détention sont effectivement garanties dans ces pays. S'il est peu aisé de se prononcer sur le degré d'adéquation de la qualité et de l'ampleur du droit avec la pratique, certains paramètres sont susceptibles d'apporter des indications. L'image de certains pays se modifie substantiellement si l'on se penche par exemple sur le taux de détention avant jugement/population détenue et les observations des organes internationaux de défense des droits de l'homme. L'Afrique du Sud et la Turquie par exemple, deux pays qui affichent des taux de détention relativement élevés[36], luttent sans cesse pour apporter les améliorations nécessaires aux conditions de détention.[37] Il est apparu que la Pologne et la Turquie (une fois encore) violent relativement souvent la CEDH en ce qui concerne la privation de liberté.[38] Il semble que ces pays ne soient pas pleinement en accord avec ce que l'on pourrait attendre du cadre de droits constitutionnel et international fondamentaux qu'ils ont adopté. D'autres pays sont dans la situation inverse. C'est par exemple le cas du Japon : ses dispositions constitutionnelles modérées ainsi que le rejet complet des procédures de plainte internationales n'empêchent pas cet État d'afficher un taux de détention

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36 Voir Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, qui montre que l'Afrique du Sud et la Turquie affichent respectivement un taux de 101 et 71 pour 100,000 de la population, alors que dans 60 pour cent de tous les pays, le taux de la détention avant jugement/détenue est inférieur à 40. Ce chapitre du volume consacré à l'Afrique du Sud évoque toujours un taux de 101 (2011) et le chapitre sur la Turquie un taux de 75 (2009).

37 Voir par exemple Conclusions et recommandations du Comité contre la torture, *Afrique du Sud*, NU doc. CAT/C/ZAF/CO/1, 7 décembre 2006, par. 20, 22.

38 Ces dernières années par exemple, la Cour européenne des droits de l'homme a découvert 14 (2010), 35 (2009), 47 (2008) et 47 (2007) violations du droit à la liberté inscrit dans l'article 5 CEDH en Pologne et 80 (2010), 88 (2009), 46 (2008) et 95 (2007) en Turquie, la plupart concernant la détention (avant et pendant le jugement). Seule la Russie dépasse ces chiffres comparativement élevés. Voir Cour européenne des droits de l'homme, *Rapport annuel* 2010, 2009, 2008 et 2007, Conseil de l'Europe, Strasbourg, sous Informations statistiques ; Violations par article et par État défendeur.

particulièrement faible de 9[39], même s'il suscite une attention largement plus critique en ce qui concerne les conditions de détention.[40] C'est encore plus vrai pour la Chine, qui aurait un taux de détention avant jugement très faible de 6[41], mais qui est confrontée à des problèmes plus graves, tant pour garantir les droits fondamentaux qui restreignent les possibilités de retenir une personne en détention qu'en matière de respect des normes minimales de détention et de traitement humain des détenus.[42]

Il est dès lors évident que ni un système international des droits de l'homme, ni un cadre constitutionnel ne peuvent pleinement garantir une application adéquate de la détention et les conditions de celle-ci. Néanmoins, dans de nombreux pays, le degré d'acceptation formelle des règles internationales et constitutionnelles relatives aux droits de l'homme et leur application effective dans la pratique sont plus équilibrés. De plus, il existe de nombreux exemples de la façon dont des changements apportés par la législation des droits fondamentaux apportent des modifications des lois et de la pratique.[43] Certains de ces exemples sont présentés dans les chapitres consacrés au Danemark, à la Grèce, à l'Irlande, à l'Italie, au Japon, aux Pays-Bas, à la Nouvelle Zélande, à la Norvège, à la Pologne et à la Turquie. Le chapitre sur la Chine contient lui aussi un exemple intéressant. Zhang y présente un éclairage important de la façon dont les règles internationales relatives aux droits de l'homme influencent le droit d'un État quant à l'indépendance du pouvoir judiciaire, la présomption d'innocence, l'interdiction de la torture et des mauvais traitements, ainsi que le droit à la défense.[44]

Il existera toujours une certaine divergence entre la qualité et l'ampleur des droits fondamentaux formellement appliqués par un État et la pratique effective dans cet État. Cette divergence semble avoir au moins deux origines. Premièrement, même en ce qui concerne les règles, la pratique ne dépend pas seulement de normes fondamentales mais aussi de la législation en général. Ceci m'incite à présenter ci-après des réflexions plus approfondies quant au cadre légal de la détention dans les États répondants. Deuxièmement, si les règles

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39 Walmsley, *World Pre-trial/Remand Imprisonment List 2008*.

40 Voir CAT, Conclusions et recommandations, *Japon*, UN doc. CAT/C/JPN/CO/1, 3 août 2007, par. 17.

41 Voir *infra* section III.2.

42 Voir également, par exemple, le Rapport du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants, Manfred Nowak, *Mission to China*, UN doc. E/CN.4/2006/6/Add.6, 10 mars 2006, et le suivi des recommandations émises par le Rapporteur spécial dans son rapport concernant sa visite en Chine en novembre 2005, UN doc. A/HRC/10/44/Add.5, 17 février 2009.

43 Voir par exemple, Conseil de l'Europe, *Contrôle de l'exécution des arrêts et décisions en vertu de la Convention européenne des droits de l'homme*, H/Exec (2006)1, mai 2006, 289 pp.

44 Cf. Yanyou Yi, 'Arrest as punishment: The abuse of arrest in the People's Republic of China', 10 *Punishment Society* 1 (2008), p. 9-24; Wei Wu & Tom Vander Beken, 'Police Torture in China and its Causes: A Review of Literature', 43 *Australian & New Zealand Journal of Criminology* 3 (2010), p. 557-579.

peuvent affecter dans une grande mesure la pratique, leur existence intrinsèque ne garantit en rien que la pratique leur sera conforme. L'examen du chapitre consacré à l'Espagne illustre très bien ce propos. Guerra Pérez & Díez Ripollés y soulignent en effet des dissemblances significatives dans l'application de la détention entre les diverses régions du pays, qui sont pourtant soumises au même Code de procédure pénale, à la même codification et aux mêmes mécanismes internationaux des droits de l'homme. En d'autres termes, la loi n'est pas le seul élément dont il convient de tenir compte. Les autres éléments pertinents sont par exemple la culture juridique, la disponibilité des ressources, la qualité et la mentalité des forces de police, du parquet et du pouvoir judiciaire, le contenu des politiques, la nature de la société, l'ampleur de la criminalité, le climat politique et l'attention des médias. En réalité, tous ces facteurs sont connectés. Non seulement ils sont plus ou moins influencés par les droits fondamentaux nationaux et internationaux, mais ils sont affectés par l'ampleur et la substance de ces droits et l'application qui en est faite. Par conséquent, ces facteurs et droits fondamentaux s'incitent mutuellement au mouvement et à l'évolution.

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

La privation de liberté, et par conséquent la détention, n'est autorisée que dans le cadre du droit universel de l'homme à la liberté, conformément aux fondements, conditions et procédures mis en place par le droit national. Dès lors, en cas de détention, non seulement une incapacité à respecter les règles des droits de l'homme applicables constituera une violation du droit fondamental à la liberté, mais encore l'incapacité à respecter le droit national pertinent aura les mêmes conséquences.[45] Le droit international invoque donc le droit domestique matériel et procédural, mais aussi le fait que la législation nationale doit respecter les garanties offertes par les droits de l'homme universels. Cette réalité mérite l'examen ci-après des deux niveaux législatifs, ainsi que la relation qui les unit. De plus, elle pousse à s'interroger pour savoir si le système de droit de la procédure pénale reconnaît à suffisance les nécessités du système des droits de l'homme et vice versa.

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45 Voir par exemple, HRC, Constatations du 26 juillet 1989, *Bolaños v. Équateur*, Comm. 238/1987, par. 9 ; CourIADH, arrêt du 21 novembre 2007, *Chaparro Álvarez & Lapo Íñiguez v. Equador*, par. 57 ; CEDH, arrêt du 9 juillet 2009, *Mooren c. Allemagne*, Req. 11364/03, par. 72-73, et encore CADHP, *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique*, sous M, section 1 (b) (adopté par Résolution lors de sa 26ème Session ordinaire au Rwanda en novembre 1999).

III.1. DIFFÉRENTES PERSPECTIVES QUANT AUX MODALITÉS DE DÉTENTION

À un niveau général, l'on peut distinguer dans le système de justice pénale trois modalités de privation de liberté préalablement à un emprisonnement, *c.-à-d.* la privation de liberté après une condamnation définitive. Premièrement, la détention avant jugement : il s'agit de la privation de liberté avant le début du procès pénal. Par exemple la garde à vue et la détention provisoire. Deuxièmement, la détention pendant le procès avant condamnation : il s'agit de la détention pendant le procès en première instance ou pendant la procédure d'appel après acquittement au degré de juridiction précédent. Troisièmement, la détention pendant le procès après condamnation : détention pendant la procédure d'appel après condamnation au degré de juridiction précédent. Ces trois modalités de détention ne figurent pas obligatoirement dans les traités internationaux des droits de l'homme applicables (plus particulièrement le PIDCP, la ChAfDHP, la CADH et la CEDH), dans les dispositions constitutionnelles nationales ou dans chacun des systèmes nationaux du droit de la procédure pénale.

En effet, l'article 6 de la Charte africaine ne reconnaît aucune de ces modalités en tant que telle. Le Pacte international (article 9 ; cf. article 10) et la Convention américaine (article 7 ; cf. article 5) n'identifient que vaguement les personnes en attente d'un procès et les personnes condamnées comme des catégories différentes. Le Comité des droits de l'homme considère cependant que 'l'obligation de séparer les prévenus des condamnés vise à mettre l'accent sur leur condition de personnes à la fois non condamnées et protégées par la présomption d'innocence énoncée au paragraphe 2 de l'article 14(2) PIDCP.' Il apparaît dès lors que 'le prévenu' désigne à la fois les personnes détenues avant jugement et avant condamnation, tandis que 'condamnés' inclut à la fois les détenus après condamnation et les prisonniers. Cette distinction naît également de la Convention européenne, mais dans ce cas, mais dans ce cas du texte de la convention elle-même, *c.à.d.* de l'article 5(1)(c) et (a) respectivement. Le fait que certains de ces traités internationaux relatifs aux droits de l'homme ne fassent qu'une vague distinction, voire aucune, entre les catégories de détenus est problématique dans la mesure où bon nombre de droits de l'homme ne sont pas applicables de façon identique à ces différentes catégories. En cas d'incertitude quant aux personnes et à la manière dont ces droits fondamentaux inscrits dans ces traités sont garantis, la façon dont il convient de les appliquer et de les garantir correctement dans le droit et la pratique est encore moins claire. La protection que ces droits visent à accorder s'en trouve ainsi affaiblie.

Les distinctions qui émergent des dispositions de la convention des droits de l'homme ne sont qui plus est pas cohérentes avec les modalités mises en place par bon nombre de systèmes de droit national de la procédure pénale. Il n'y a

cependant là rien d'étonnant. Les systèmes de droit pénal ne sont pas initialement conçus suivant la perspective de la protection des droits fondamentaux, mais plutôt dans l'intention d'offrir un instrument pratique et effectif pour lutter contre la criminalité et la réprimer. Par conséquent, les modalités de détention dans la plupart de ces systèmes suivent le cours général des procédures pénales contre les suspects. Si le nombre de modalités diffère d'un pays communiquant des rapports à l'autre, la plupart d'entre eux débutent par la (les) modalité(s- de l'arrestation par la police et la garde à vue, suivie par une forme de détention provisoire (*p.e.*, la détention préventive). Par contraste, les systèmes des droits fondamentaux reconnaissent plutôt les distinctions suivant la perspective de la rigueur avec laquelle ces droits doivent être appliqués. Du point de vue des droits de l'homme (par exemple le droit à la liberté, la présomption d'innocence, le droit au respect de la vie privée), il est en principe fondamentalement moins acceptable d'enfreindre ces droits à l'égard des détenus qui ne sont pas condamnés qu'à l'égard de ceux qui le sont. Cependant, suivant la perspective de la justice pénale, l'inverse est souvent vrai. Il n'est par rare que l'enquête criminelle nécessite que les droits des détenus non condamnés soient plus sévèrement limités que ceux des condamnés : la nécessité de détenir un suspect afin de prévenir la collusion avec l'enquête criminelle menée par la police et / ou le procureur, ainsi que la nécessité de fouiller leur personne, véhicules et domiciles, et de saisir leurs biens est habituellement beaucoup plus urgente avant que le procès se penche sur l'affaire qu'après une éventuelle condamnation du défendeur par un tribunal de première instance. La chronologie de la procédure pénale et de l'intérêt des droits de l'homme coïncide au moins sur un point dans bon nombre de systèmes nationaux de droit criminel procédural : plus la détention perdure, plus les règles applicables progressent en termes quantitatif et qualitatif. Cela affecte, par exemple, la qualité du contrôle, la qualité de la personne autorisée à ordonner la poursuite de la détention, et les motifs sur la base desquels celle-ci peut être ordonnée.

III.2. STATISTIQUES RELATIVES AUX DÉTENUS AVANT JUGEMENT

Le droit international relatif aux droits de l'homme ne mentionne pas de maxima absolus quant au nombre de personnes qui peuvent être maintenues en détention. Par contre, il tend à maintenir ces chiffres à un minimum en empêchant la détention arbitraire et en mettant en avant le principe de subsidiarité/nécessité : la privation de liberté ne peut être appliquée que si toutes les voies moins sévères (telles que la liberté inconditionnelle, la liberté conditionnelle ou les solutions alternatives à la détention) sont inadéquates pour

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exercer un contrôle suffisant sur le suspect.[46] À cette fin, il précise plusieurs exigences relatives telles que les motifs de détention et les mécanismes de révision de la détention qui seront abordés plus en détail ci-après.

Ampleur des statistiques

Il n'en est pas moins utile de se pencher plus avant sur ces chiffres. Cet examen approfondi permettrait de faire la lumière sur l'ampleur du problème de la détention et de mettre en avant certains développements. Pour ce faire, une fois de plus, il faut se pencher sur la signification de la détention, sans quoi il serait impossible d'établir le nombre de détenus d'un pays ou encore de comprendre le sens de ces chiffres. Il est de nombreux pays où la privation de liberté suite à une arrestation policière ou la garde à vue avant une décision judiciaire ne sont pas considérées comme une détention avant jugement.[47] Si ces étapes entrent indubitablement dans le champ d'action du droit à la liberté protégé par le Pacte international, la Charte africaine et les Conventions américaines et européennes, elles n'apparaissent pas dans les statistiques de nombreux États, tandis que dans d'autres cas, il est difficile de savoir avec certitude si elles ont été intégrées dans les chiffres ou pas. Il en va de même pour la plupart des chiffres présentés dans ce volume. Dans la mesure où cette liste offre les chiffres les plus comparables à l'échelle mondiale, les statistiques mentionnées ci-dessous sont principalement extraites de Walmley's *ICPS World Pre-trial/Remand Imprisonment List 2008*. Dans de nombreux cas toutefois, les chiffres cités se basent également sur les données mentionnées dans les chapitres nationaux du présent volume, ou encore sur d'autres sources. Les chiffres qui ne sont pas extraits de la World List, sont signalés dans les notes de bas de page. Il convient de noter que certains chiffres varient parfois considérablement d'une source à l'autre, qu'ils ne sont pas toujours fiables et qui plus est, comme l'expliquent Van Kalmthout & Knapen dans leur chapitre, il n'est pas toujours aisé de savoir exactement à quoi ils se réfèrent ou encore la méthode de calcul utilisée pour les obtenir. La partie ci-après se fonde sur la présomption que les chiffres font référence aux personnes qui, en relation avec un ou plusieurs prétendus délits, sont privées de leur liberté suite à un processus judiciaire ou autre processus légal, sans avoir été définitivement condamnées par un tribunal pour ce(s) délit(s).[48] Ainsi en principe, tant les détenus avant jugement et avant condamnation que les détenus avant jugement et après condamnation sont en principe aussi inclus dans les statistiques.

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46 Voir par exemple CEDH 21 décembre 2000, *Jabłoński v. Pologne*, Req. 33492/96, par. 83-85 ; CEDH, 24 juillet 2003, *Smirnova c. Russie*, Req. 46133/99, par. 58.

47 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen : Wolf Legal Publishers, 2009, p. 56.

48 Cette définition est tirée de Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, p. 1.

Comparaison des statistiques nationales

Le taux le plus élevé de détenus avant jugement/en détention provisoire par rapport à la population (par 100.000 unités de population nationale) est de 213 (Panama) tandis que le plus faible est inférieur à 1 (plusieurs très petits pays, principalement en Océanie). Parmi les pays communiquant des rapports, les taux les plus élevés sont enregistrés aux États-Unis, en Afrique du Sud, en Argentine et en Turquie. Au cours de ces dernières années, le taux des États-Unis a progressé de 159 (2006) à 168 (2008[49]), ce qui signifie que ce pays a l'un des taux les plus élevés d'Amérique et du monde. L'Afrique du Sud quant à elle affiche un taux de 101 (2007) ou 99 (2011[50]), soit le deuxième taux le plus élevé d'Afrique et dans les vingt plus élevés au monde. Le taux de 82 (2005) observé en Argentine, bien qu'élevé au regard des statistiques mondiales, se situe dans la moyenne des Amériques. Quant à celui de la Turquie, soit 71 (2007) ou 75 (2009[51]), il se situe dans le 15e percentile des taux les plus élevés d'Europe. Le Japon enregistre un taux particulièrement faible (9 en 2005), tandis que la position de la Chine n'est pas totalement claire : le chapitre consacré à ce pays semble impliquer un taux proche de 6 (2009[52]), mais il pourrait être beaucoup plus élevé si les détentions administratives étaient prises en compte (2009[53], 2011[54]). Quoi qu'il en soit, l'Allemagne (16 en 2007), l'Irlande (15 en 2007 ; 14 en 2009[55]), la Norvège (15 en 2007) et le Danemark (18 en 2007) se prévalent eux aussi de faibles taux. Ceux-ci sont aussi relativement bas par rapport aux taux enregistrés par la plupart des

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[49] Chiffre basé sur le chapitre consacré aux États-Unis ; le 30 juin 2008, le nombre des détenus était de 508.800, soit un taux de 168 (la population nationale étant évaluée à cette date à 302,7 millions).

[50] Chiffre basé sur le chapitre consacré à l'Afrique du Sud ; le nombre de détenus était de 49.570, soit un taux de 99 (la population nationale étant évaluée à 49,99 millions en 2010).

[51] Chiffre basé sur le chapitre consacré à la Turquie, le nombre de détenus était de 55.844, soit un taux de 78 (la population nationale étant évaluée à cette date à 74,8 millions).

[52] Le chapitre consacré à la Chine indique que ce pays détenait 941.091 personnes en détention avant procès en 2009 pendant une durée moyenne de 90 jours (mais cette moyenne ne comprend pas la détention pendant le procès), soit un taux d'environ 6, puisque la population de ce pays est de 1.338,6 millions (continent uniquement, 2009). Walmsley, *World Pre-trial/Remand Imprisonment List 2008*, qui donne une estimation effectuée par un expert en justice pénale d'Asie de l'est de 100.000 détenus avant jugement, soit un taux de 8 (information pour 2005, sur la base d'une population estimée de 1.319,7 millions).

[53] Amnesty International, *Rapport 2009, La situation des droits humains dans le monde*, A.I. Publications, 2009, p. 107 : 'Plusieurs centaines de milliers de personnes se trouvaient en détention administrative, notamment dans des camps de rééducation par le travail, où elles pouvaient être maintenues jusqu'à quatre ans sans jugement.'

[54] Voir Prison Brief for China (à l'adresse : www.prisonstudies.org/) and Roy Walmsley, *World Prison Population List (ninth edition)*, University of Essex, ICPS/International Centre for Prison Studies, 2011, p. 1, qui indique que plus de 650,000 personnes sont détenues dans des 'centres de détention' en Chine.

[55] Chiffre basé sur le chapitre consacré à l'Irlande ; le nombre de détenus était de 623, soit un taux approximatif de 14 (informations pour 2009, sur la base d'une population estimée de 4,42 millions).

autres pays asiatiques et européens. Dans 60 pour cent des pays du monde, le taux de la population de détenus avant jugement/en détention préventive est inférieur à 40, et le même pourcentage s'applique aux États représentés dans les chapitres du présent volume.

Dans près de 60 pour cent de tous les pays et dans près de quatre-vingt pour cent des pays communiquant des rapports dans ce volume, la proportion de la population carcérale totale en détention avant jugement/provisoire est inférieure à 40 %. La Turquie (60,9 % en 2007 ; 51,4 % en 2009), l'Italie (58,3 % en 2007 ; ou 49,8 % en 2008 et 49,1 % en 2009[56]), l'Argentine (57,6 % en 2005) et la Belgique (44,3 % en 2007) se distinguent par des pourcentages élevés. Taiwan affiche de loin le pourcentage le plus faible : 11,2 % (2007) ou 6,4 % (2009[57]) seulement, tout en ayant un taux de population de détenus avant jugement/en détention provisoire de 32 (2007) ou peut-être seulement 16 (2009[58]). Le faible pourcentage assorti d'un taux de 32 s'explique si l'on tient compte du fait que Taiwan affiche un taux d'emprisonnement (c'est-à-dire le taux combiné du nombre de détenus et de prisonniers) de 276 (2008) ou 257 (2009[59]).

Facteurs influençant les chiffres

Ces chiffres peuvent donner une indication de taille quant à la mesure dans laquelle les autorités sont disposées à enfreindre le droit à la liberté et la présomption d'innocence. Ils ne sont cependant en aucune façon concluants en la matière. Ils ne signifient pas davantage qu'un système de procédure pénale se conforme à la lettre aux principes des droits fondamentaux concernant la détention et les applique. Si ce n'est pas le cas, c'est parce que l'ampleur de la criminalité à laquelle un État est confronté et les formes qu'elle revêt influenceront toujours les chiffres. De manière générale, il est beaucoup plus aisé de maintenir ces statistiques à de faibles niveaux dans une société confrontée à une criminalité limitée que dans un pays de forte activité criminelle.

Cela ne tend toutefois pas à suggérer que les taux élevés de criminalité grave résulteront systématiquement vers des taux de détention élevés. La détention n'est pas une condition préalable à la lutte effective contre le crime dans toutes – probablement même dans la plupart – les affaires criminelles. Des enquêtes criminelles plus efficientes et énergiques ou le recours à des solutions alternatives

56 Chiffre basé sur le chapitre consacré à l'Italie.

57 Chiffre basé sur le chapitre consacré à Taiwan. Soit ce pourcentage a incroyablement reculé en deux années, soit la *World Pre-trial/Remand Imprisonment List 2008* et le rapport sur Taiwan reposent dur des conceptions différentes de ce qu'est un détenu.

58 Chiffre basé sur le chapitre consacré à Taiwan ; le 31 juillet 2009, le nombre de détenus s'élevait à 3.783, soit un taux de 16 (population nationale estimée à cette date de 23,1 millions).

59 Chiffre basé sur le chapitre consacré à Taiwan ; le 31 juillet 2009, le nombre de détenus et de prisonniers était supérieur à 59.000, ce qui a donné un taux de 257 (population nationale estimée à cette date de 23,1 millions).

à la détention (qui seront évoquées ci-après à la section V) par exemple, peuvent également être efficaces à cet égard. En dehors de cela, la pratique montre qu'il n'existe pas de corrélation exclusive entre les taux de la criminalité et ceux de la détention. Le chapitre sur l'Espagne illustre en effet ce propos. Des études qui y sont citées montrent que si au cours des dernières années, le taux de criminalité présente une croissance ou un recul de 2 % à 4 %, la population carcérale a quant à elle augmenté de 20 %.[60] Le chapitre rédigé par Casorla illustre en outre la manière dont les amnisties générales de condamnés peuvent influencer les chiffres de la détention avant jugement, auquel cas les fluctuations des statistiques ne sont que peu ou pas du tout liées aux taux de criminalité.[61] Il ne s'agit que de l'un des nombreux facteurs évoqués par Casorla, entre autres aussi l'influence des victimes sur la procédure criminelle et les politiques de lutte contre le terrorisme ou la criminalité environnementale.[62]

Néanmoins, lorsque les taux de criminalité lourde sont élevés, les efforts nécessaires pour appliquer un système de droit de la procédure pénale efficace qui garantit le respect de l'ensemble des droits fondamentaux, tout en prévenant et punissant effectivement la criminalité, sont beaucoup plus importants. Le cas de la Grèce (voir le chapitre de Lambropoulou) semble illustrer cette difficulté.

III.3. DURÉE DE LA DÉTENTION AVANT JUGEMENT

Avant de présenter des statistiques sur la durée moyenne de la détention dans les pays répondants, il semble adéquat de se pencher brièvement sur certaines règles pertinentes des droits de l'homme. Cet examen pourrait contribuer à mieux comprendre la réalité qui se cache derrière les chiffres en matière de pratique de la détention dans les États auxquels ils se réfèrent. Aucune des conventions des droits de l'homme pertinentes en la matière ne fixe de maximum absolu quant à la longueur de la détention (avant et pendant le procès). Certaines directives peuvent toutefois être puisées dans la jurisprudence fondée sur ces conventions.

Le droit fondamental à un procès dans un délai raisonnable

Le droit fondamental à un procès dans un délai raisonnable est pertinent en la matière. Ce droit est inclus dans le droit d'être protégé contre la détention arbitraire (voir, *p.e.*, Article 9(3) PIDCP, Article 7(5) et Article 5(3) CEDH[63]) ainsi que le droit à un procès équitable (voir, *p.e.*, Article 14(3)(c) PIDCP,

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60 Voir le chapitre consacré à l'Espagne.

61 Voir section 2 de ce chapitre (sous : Une mesure difficile à … mesurer).

62 Voir section 4 de ce chapitre.

63 Le droit des détenus à être jugés dans un délai raisonnable n'est pas expressément stipule à l'Article 6 ChAfDHP (le droit à la liberté). La Commission africaine a toutefois pu le trouver dans la règle relative à un procès équitable de l'Article 7(1)(d) ; voir CADHP, Décision du

Article 7(1)(d) ChAfDHP, Article 8(1) CADH et Article 6(1) CEDH). Ces deux droits sont applicables en l'occurrence, mais dans la mesure où la règle visant à prévenir les délais de détention déraisonnables est la plus stricte, je me concentrerai sur celle-ci. À la base de ce droit, le droit international relatif aux droits de l'homme souligne le fait que la détention avant jugement doit être l'exception et doit rester aussi brève que possible.[64] Ce principe de subsidiarité/nécessité est fondamental lorsque les autorités envisagent d'incarcérer quelqu'un. Comme l'affirme la Cour interaméricaine: «l'incapacité à respecter ces règles équivaut à une peine sans condamnation, ce qui est contraire aux principes de droit généralement reconnus.»[65]

Les organes internationaux de défense des droits de l'homme évaluent le délai raisonnable à la lumière des circonstances de chaque affaire, y compris la complexité des procédures et la façon dont elles sont menées par les autorités et par la défense. En principe, une période supérieure à environ 18 à 24 mois de détention (depuis le premier jour de garde à vue jusqu'au jour où la charge est déterminée) constitue une violation des règles en matière de délai raisonnable inscrits respectivement dans le Pacte et la Convention européenne.[66] Il ne peut être dérogé à ce délai que moyennant la fourniture d'explications extrêmement convaincantes. La position de la Commission africaine et de la Cour interaméricaine est moins claire, mais dans la mesure où ces deux institutions semblent se rallier aux règles appliquées par la Cour européenne, il semble probable qu'un régime relativement similaire soit applicable à la Charte africaine et à la Convention américaine.[67] Ce qui précède n'implique en rien que de plus

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16-30 mai 2007, *Article 19 c. l'État d'Érythrée*, Comm. 275/ 2003 (2007), sous: Décisions sur le fond.

[64] HRC, Observation générale N° 8, Droit à la liberté et la sécurité de la personne (Article 9), 30 juin 1982, par. 3; CADHP, Décision du 16-30 mai 2007, *Article 19 c. l'État d'Érythrée*, Comm. 275/ 2003 (2007), sous: Décisions sur le fond; CourIADH, arrêt du 6 mai 2008, *Yvon Neptune c. Haïti*, par. 98; CEDH, arrêt du 24 juillet 2003, *Smirnova v. Russie*, Req. 46133/99, par. 58-64.

[65] Arrêt CourIADH du 2 septembre 2004, *Affaire «Juvenile Reeducation Institute» v. Paraguay*, par. 229.

[66] HRC, Constatations du 1 avril 2002, *Teesdale c. Trinité-et-Tobago*, Comm. 677/1996, par. 9.3 (17 mois de détention provisoire, y compris 16 mois de détention avant jugement); HRC, Constatations du 23 octobre 2008, *Smantser c. Biélorussie*, Comm. 1178/2003, par. 10.3 (22 mois de détention provisoire de l'arrestation à la condamnation en appel). Il a également été estimé que des violations en matière de longueur de la détention avant jugement (période de l'arrêt à l'ouverture du procès) avaient été commises dans les affaires suivantes: HRC, Constatations du 30 juillet 1998, *Perkins c. Jamaïque*, Comm. 733/1997, par. 11.3 (21 mois); HRC, Constatations du 17 juillet 1997, *Lewis v. Jamaïque*, Comm. 708/1996, par. 8.1 (23 mois); HRC, Constatations du 25 juillet 1996, *Henry and Douglas v. Jamaïque*, Comm. 571/1994, par. 9.3 (2.5 années); HRC, Constatations du 26 octobre 1995, *Seerattan c. Trinité-et-Tobago*, Comm. 434/1990, par.7.2 (plus de 3 ans). Pour la CEDH, voir D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2009, p. 181.

[67] Voir, *p.e.*, en référence à une autre jurisprudence, CADHP, Décision du 16-30 May 2007, *Article 19 v. État d'Érythrée*, Comm. 275/2003 (2007), sous: Décision sur le fond; CourIADH,

brèves périodes de détention soient par définition en accord avec le droit international relatif aux droits de l'homme. La justification par les autorités de toute période de détention, aussi courte soit-elle, doit être convaincante. Ainsi par exemple, dans l'affaire *Belchev contre Bulgarie*, une période de détention de 4,5 mois a été jugée contraire à l'Article 5(3) CEDH.[68] De plus, des périodes de détention qui excèdent la période maximale autorisée par le droit national constituent par définition une violation du droit à la liberté, puisqu'elles ne sont pas conformes à la loi ; du moins si la législation nationale définit ce maximum.

Exceptionnellement, de plus longues périodes de détention peuvent être acceptables. Le Comité des droits de l'homme a estimé que même une détention provisoire de sept années et huit mois peut être compatible avec l'Article 9(3) PIDCP, si des circonstances spéciales justifient ce délai, par exemple des entraves à l'enquête attribuables à l'accusé ou à son représentant.[69] Dans le même temps, il semble toutefois malaisé de convaincre le Comité qu'il existe de telles circonstances.[70] L'une des plus longues périodes de détention provisoire acceptée par le Comité des droits de l'homme est de 12 mois, ce qui ne peut évidemment être considéré comme la limite de la détention.[71] Dans le cas très exceptionnel de *Chraidi contre l'Allemagne*, la Cour européenne a jugé qu'une détention provisoire de près de cinq ans et demi ne constitue pas une violation.[72] Cette affaire impliquait une enquête particulièrement complexe et un procès pour des délits graves de terrorisme international commis par des associations criminelles active à l'échelle mondiale ; le défendeur a finalement été condamné sur plus de 100 chefs d'accusation. La CEDH établit clairement qu'une détention provisoire qui excède cinq ans constituera en principe toujours une violation, mais pas dans cette affaire soumise à des circonstances très particulières. Ces circonstances spécifiques peuvent également être présentes dans des affaires

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arrêt du 6 mai 2008, *Yvon Neptune v. Haïti*, par. 98 (25 mois).

68 CEDH, arrêt du 8 avril 2004, *Belchev c. Bulgarie*, Req. 39270/98 (incitation à la constitution de garanties bancaires injustifiées ; condamnation, annulation ultérieure, l'affaire a été renvoyée). Des violations sont également constatées, *p.e.* dans CEDH, arrêt du 30 janvier 2003, *Nikolov c. Bulgarie*, Req. 38884/97 (5,5 mois ; suspicion de destruction d'une voiture à l'aide d'explosifs ; condamnation à 1 an) ; CEDH, arrêt du 7 février 2008, *Kostadinov c. Bulgarie*, Req. 55712/00 (6 mois et 7 jours ; suspicion de vol ; acquittement) ; CEDH, arrêt du 2 février 2006, *Iovchev c. Bulgarie*, Req. 41211/98 (6 mois et 12 jours ; détournement de fonds sur des montants importants ; pas de condamnation) ; CEDH, arrêt du 9 janvier 2003, *Shishkov c. Bulgarie*, Req. 38822/97 (7 mois et 3 semaines ; vol de bijoux et d'argent ; l'affaire n'a pas encore été traitée).

69 HRC, Constatations du 28 July 1997, *Elahie c. Trinité-et-Tobago*, Comm. 533/1993, par. 8.2. Voir similaire, mais pour 4 ans et 7 mois : HRC, Constatations du 21 octobre 1994, *Koné c. Sénégal*, Comm. 386/1989, par. 8.7.

70 Voir références dans les notes de bas de page précédentes. Voir également HRC, Constatations du 19 juillet 1995, *Barroso c. Panama*, Comm. 473/1991, par. 8.5 (3,5 ans ; la situation factuelle complexe et les enquêtes prolongées n'ont pu expliquer à suffisance ce retard).

71 HRC, Constatations du 31 March 1998, *McTaggart c. Jamaïque*, Comm. 749/1997, par. 8.2.

72 CEDH, arrêt du 26 octobre 2006, *Chraidi c. Allemagne*, Req. 65655/01, par. 33 and 49.

particulièrement complexes de crime organisé international, comme l'illustre l'affaire *Shabani contre la Suisse*.[73]

Ces exemples soulèvent une question urgente : une période de détention, indépendamment de sa longueur, doit-elle toujours être évaluée au regard de circonstances particulières de l'affaire susceptibles de justifier ou non cette période en vertu des critères pertinents ? À mon avis : non. L'argument avancé est qu'une privation de liberté de plus de cinq années dans le cas d'une personne qui n'a pas été condamnée est à ce point excessive qu'elle doit être considérée comme une violation des droits de l'homme si cette personne n'est pas substantiellement responsable du retard. Cela signifie que même dans les affaires de grande ampleur les plus complexes, les États ont l'obligation de prendre les mesures nécessaires pour accélérer suffisamment la procédure pénale. Dans l'impossible, il serait peut-être opportun que les états trouvent le moyen de scinder les affaires composées de chefs d'accusation multiples. Cette scission permettrait la tenue du procès pour certaines parties de l'affaire pour lesquelles le ministère public estime qu'une condamnation peut intervenir dans une période plus brève, ce qui serait impossible si l'affaire devait être jugée simultanément.

Comparaison entre les États

Des différences considérables s'observent en outre entre les États en ce qui concerne la période durant laquelle les personnes sont effectivement maintenues en détention. Tous les rapporteurs nationaux ont pu fournir des informations sur cette question dans leurs chapitres. C'est pourquoi des informations complémentaires ont été rassemblées dans la consultation ou dans plusieurs autres sources. Les notes de bas de page indiquent si les informations proviennent d'autres sources que les chapitres nationaux.

Parmi les États répondants, la durée moyenne de la détention est probablement la plus longue en Argentine : le rythme de son système judiciaire donne apparemment souvent lieu à des détentions de longue durée, supérieures à la période de trois ans fixée par la loi, ce qui est par définition contraire au droit international relatif aux droits de l'homme. Selon le Centre argentin d'étude légale et sociale, les prisonniers attendent en moyenne trois ans avant d'être jugés, délai qui dans certains cas peut aller jusqu'à six ans.[74] Si je n'ai pu disposer d'aucun chiffre quant à la durée moyenne de la détention en Turquie, des

[73] CEDH, arrêt du 5 novembre 2009, *Shabani c. Suisse*, Req. 29044/06, par. 54-70, qui a estimé qu'une détention de 5 ans ne constituait pas une violation de l'Article 5(3) CEDH au vu de la nature extrêmement complexe de l'affaire en question, qui impliquait une organisation criminelle internationale et l'exploitation d'un trafic impliquant des sommes d'argent considérable, et des mesures d'enquête qui n'avaient pas été disproportionnées. Les autorités ne pouvaient par ailleurs être accusées de périodes d'inactivité durant la procédure.

[74] Département d'État américain, *2008 Country Reports on Human Rights Practices : Argentine*, 25 février 2009 (sur www.state.gov/g/drl/rls/hrrpt/2008/index.htm) (consulté le : 1 juin 2011).

périodes de détention excessivement longues comptent parmi les problèmes de taille auxquels cet État fait face. La Turquie fait clairement partie des pays d'Europe où l'on constate le plus grand nombre de violations du fait de détentions excessivement longues.[75] Des périodes de détention largement supérieures à sept ans ne sont pas totalement exceptionnelles dans ce pays.[76] Le Portugal atteint une durée de détention moyenne avant jugement de 9 à 10 mois (2001-2006) pour les défendeurs dans des affaires pénales traitées par les juridictions de première instance. Un chiffre plus récent donne une moyenne de 8,5 mois (2008[77]). Cette année, environ 20 % des personnes détenues en préventive ont passé plus d'un an en détention. La moyenne mentionnée pour la Grèce est de 12 mois (2002), mais aussi de 6 à 7 mois (1998-2005). En Italie, la durée moyenne de la détention avant jugement s'élevait à 175 jours (2002). La Pologne suit avec une période de détention moyenne de 5,5 mois (2008), mais près d'un quart des détenus restent en détention (avant et pendant le procès) pendant 1 à 2 ans et plus de 10 % pendant plus de 2 ans. Les cas présentés devant la CEDH où la détention avant jugement a duré de 4 à 6 ans ou plus ne sont pas rares.[78] En Afrique du Sud, en moyenne la détention dure trois mois, mais elle peut aller jusqu'à deux ans dans certains cas (2007-2008).[79] Le chapitre consacré à la France affirme qu'en France, la détention dure généralement un an, mais il existe des possibilités de prolonger la détention ; le plafond est de deux, trois ou quatre ans, exceptionnellement plus, selon la longueur de la peine.[80]

Il existe par ailleurs plusieurs pays où les périodes de détention moyennes ou les plus longues pourraient être plus conformes au droit international relatif aux droits de l'homme. J'insiste sur 'pourraient être ' : ce n'est pas tout à fait clair, dans la mesure où les données disponibles relatives à certains de ces pays ne sont pas vraiment comparables à celles des pays que nous venons d'évoquer. Nous ignorons la moyenne de l'Allemagne par exemple, mais (en 2006) près de 26 % des détenus avant jugement ont passé jusqu'à un mois en détention ; près de 24 % 1 à 3 mois ; près de 25 % 3 à 6 mois ; dans 19 % des cas, la détention avant

75 Comme indiqué *supra*, la CEDH a mis en avant 88 (2009), 46 (2008) et 95 (2007) violations de l'Article 5 CEDH en Turquie, dont la plupart concernent la détention (avant et pendant le jugement).

76 Voir par exemple CEDH, arrêt du 16 janvier 2007, *Solmaz c. Turquie*, Req. 27561/02 (plus de 7 ans) ; CEDH, arrêt du 13 octobre 2009, *Tunce c. Turquie (No. 1)*, Req. 2422/06 (plus de 12 années dans 20 affaires) ; CEDH, arrêt du 31 octobre 2006, *Pakkan c. Turquie*, Req. 13017/02 (plus de 13 ans). Voir également département d'État américain, *2008 Country Reports on Human Rights Practices : Turkey*, (consulté le : 1 février 2010).

77 Département d'État américain, *2008 Country Reports on Human Rights Practices : Portugal*, (consulté le : 1 février 2010).

78 Voir par exemple CEDH, arrêt du 3 février 2009, *Kauczor c. Pologne*, Req. 45219/06 (7 ans et 11 mois).

79 Département d'État américain, *2008 Country Reports on Human Rights Practices : South Africa*, (consulté le : 1 février 2010).

80 Voir section III de ce chapitre (sous : La détention judiciaire ; Une rigueur réglementée).

jugement a duré de 9 à 12 mois et elle a excédé un an dans 6 % des cas (2006).[81] Le chapitre sur l'Espagne évoque une étude qui montre que 61 % des détentions sont d'une durée inférieure à 3 mois et 19 % supérieure à 7 mois, ce qui signifie que pour 20 % des détenus, la moyenne se situe entre 3 et 7 mois. Ces chiffres sont toutefois uniquement valables pour la capitale, Madrid, ils sont moins positifs en provinces (respectivement 43 %, 34 %, et 23 %). Taiwan atteint une moyenne de 1,5 mois de 'détention aux fins d'enquête' et une durée moyenne de 'détention pendant le procès' en *district courts* de 2,5 mois, soit au total jusqu'à 4 mois avant le jugement en première instance (2008). La détention moyenne pendant le procès en degré d'appel était de 3,5 mois, et la moyenne en cassation par la Cour Suprême (dans l'attente d'une confirmation) de 1,9 mois. Au Japon 17,4 % des détenus sont maintenus en détention pendant moins d'un mois, alors que 61,6 % le sont pendant 1 à 3 mois, ce qui signifie que 79 % de ces personnes sont détenues pendant moins de 3 mois et 21 % pendant plus de 3 mois. La Belgique connaît une situation comparable avec une durée de détention avant jugement de 90 jours (2007).[82] Les durées de détention excessives sont pratiquement (voire totalement) inexistantes en Belgique. Cette même moyenne de 90 jours s'applique également à la Chine (2009).

Enfin, un groupe de pays présente des chiffres très inférieurs. Au Danemark, la moyenne estimée du temps passé en prison par des détenus non condamnés est de 66 jours (2009), donnée qui n'inclut apparemment pas la détention durant le procès et après condamnation. Sur le nombre total de détenus avant procès, 88 % passent moins de trois mois en détention avant jugement (2006[83]). En Norvège, le temps moyen passé en détention est de 67 jours (2008), tandis qu'aux Pays-Bas, il est de 65 (2008). L'Irlande semble appliquer une détention provisoire moyenne inférieure d'une semaine, soit 58 jours (2009). La Nouvelle Zélande affiche les scores les plus attrayants : la période de détention moyenne (avant et pendant le jugement) s'élevait à 47 jours (2009), même s'il n'est pas rare que des délinquants lourds passent de un à deux ans en prison avant d'être condamnés.

Bien que ces chiffres proviennent de sources différentes (ce qui peut signifier que des méthodes de comptage différentes ont été appliquées), et si qui plus est certains ne sont pas totalement comparables, ils illustrent clairement le fait que plusieurs (si pas la plupart) États rencontrent de sérieux problèmes pour maintenir de brèves périodes de détention. Ces données méritent que l'on passe

[81] Par exemple, dans CEDH 10 novembre 2005, Dzelili c. Allemagne, Req. 65745/01, la Cour a estimé que la longueur de détention violait l'Article 5(3) CEDH (quatre années et 8 mois), mais il semble qu'aucune violation de cette disposition n'a été constatée ces dernières années.

[82] Département d'État américain, *2008 Country Reports on Human Rights Practices: Belgium*, (consulté : le 1 février 2010). Pendant la période 1996-2001, la moyenne fluctuait autour des 80 jours ; voir A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen : Wolf Legal Publishers, 2009, p. 170.

[83] Département d'État américain, *2008 Country Reports on Human Rights Practices : Denmark*, (consulté : le 1 février 2010).

en revue les règles d'examen de la détention et quels motifs de détention sont reconnus dans le droit international relatif aux droits de l'homme et lesquels dans le droit de procédure pénale national. Y a-t-il adéquation ? Divergent-elles et si oui, cette divergence est-elle de nature à expliquer en tout ou en partie les taux élevés de détention et la longueur des périodes de détention dans certains États, ainsi que les problèmes auxquels ils sont confrontés en matière de respect des règles des droits de l'homme applicables ?

III.4. CONTRÔLE JUDICIAIRE RAPIDE APRÈS L'ARRESTATION

Le droit fondamental à un contrôle judiciaire rapide

En vertu du droit de l'homme international à la liberté, toute personne arrêtée ou détenue dans le cadre d'une procédure pénale doit être aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires.[84] Cette garantie ne vise pas seulement à prévenir aussi rapidement que possible la détention arbitraire, elle revêt également une importance particulière dans les pays présentant un risque spécifique de brutalité policière ou de torture.[85] Le contrôle doit être automatique et ne peut dépendre de la requête de la personne détenue. Le magistrat qui procède au contrôle doit être objectif, indépendant et impartial et compétent pour ordonner la libération.[86] En principe, les officiers de police et les procureurs ne répondent pas à cette exigence.[87] Ce contrôle doit en outre être rapide. La jurisprudence du Comité des droits de l'homme du PIDCP implique qu'il doit normalement avoir lieu dans un délai maximum de deux (éventuellement trois) jours.[88] La jurisprudence de la Cour européenne semble s'en tenir à ce qu'une détention de quatre jours sans

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84 Voir Article 9(3) PIDCP, Article 7(5) ACHR et Article 5(3) CEDH. L'Article 6 ChAfDHP ne contient pas expressément cette norme, mais la Commission africaine l'a reconnue dans sa jurisprudence; voir CADHP, Décision du 16-30 mai 2007, *Article 19 c. l'État d'Érythrée*, Comm. 275/ 2003 (2007), sous : Décisions sur le fond) et dans les *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique* de la Commission, sous M, section 3 (a).

85 Voir Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford : Oxford U.P., 2006, p. 505.

86 HRC, Constatations du 22 mars 1996, *Kulomin c. Hongrie*, Comm. 521/1992, par. 11.3 ; CourIADH, arrêt du 22 novembre 2005, *Palamara-Iribarne v. Chile*, par. 221-223 ; CEDH (GC), arrêt du 3 octobre 2006, *McKay c. le RU*, Req. 543/03, par. 35.

87 Pour obtenir des (d'autres) exemples, voir HRC, Constatations du 29 octobre 2002, *Zheludkov c. Ukraine*, Comm. 726/1996, par. 8.3 ; CourIADH, arrêt du 21 novembre 2007, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, par. 83-84 ; CEDH, arrêt du 25 septembre 1998, *Assenov c. Bulgarie*, Req. 24760/94, par. 146-150.

88 Voir Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights*, Oxford : Oxford U.P. 2005, p. 324-325.

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comparution devant un juge constitue par définition une violation de l'Article 5(3), même dans les cas de criminalité les plus graves tels que le terrorisme.[89] Toutefois, dans les affaires ordinaires, la Cour exige que le contrôle intervienne dans un délai inférieur à quatre jours.[90] La Cour américaine semble avoir adopté la même position en assimilant, à l'instar de la Cour européenne, le terme 'rapidement' au terme 'immédiatement'.[91]

Comparaison entre les États

Le droit national de la plupart des pays définit le délai dans lequel une personne arrêtée doit être présentée devant un juge ou un tribunal. Dans près de 85 % des pays de l'Union européenne par exemple, cette limite est de 48 heures ou moins, et dans environ 50 %, elle est de 24 heures ou moins.[92] Les Pays-Bas se distinguent tout particulièrement. La limite générale applicable dans ce pays est de 3 jours et 15 heures (87 heures), soit près de la période maximale autorisée par la Cour européenne, de sorte qu'elle pourrait enfreindre la limite appliquée par le Comité des droits de l'homme. C'est encore plus vrai pour l'Italie et la Turquie, où la période autorisée est de quatre jours (96 heures), bien qu'elle ne s'applique pas à tous les cas. Les choses sont différentes au Japon où la limite de 96 heures est générale. Cette limite, à l'instar de celles qui sont appliquées aux Pays-Bas et en Italie, est presque problématique, bien que tout dépende de la manière dont elle est appliquée dans la pratique. Comme dans l'UE, le droit de la plupart des autres pays communiquant des rapports fixe une limite de 48 voire 24 heures ; voir *p.e.,* la Nouvelle Zélande, l'Afrique du Sud et les États-Unis. Le droit taïwanais reconnaît qu'une personne arrêtée doit être libérée ou présentée devant un tribunal compétent dans les 24 heures qui suivent son arrestation, alors qu'il est courant que la police présente une personne arrêtée au procureur dans un délai d'à peine 16 heures après son arrestation. La plus brève des différentes

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89 CEDH, arrêt du 29 novembre 1988, *Brogan c. le RU*, Req. 11209/84, par. 62. Confirmed in *e.g.* CEDH (GC), arrêt du 3 octobre 2006, *McKay v. the UK*, Req. 543/03, par. 33. Néanmoins, des « circonstances tout à fait exceptionnelles » dans lesquelles il est physiquement impossible d'exercer un contrôle peuvent justifier des périodes plus longues : voir CEDH, arrêt du 10 juillet 2008, *Medvedyev c. France*, Req. 3394/03, par. 64-69 (équipage confiné en mer à bord de leur bateau transportant de la drogue).

90 Voir CEDH, arrêt du 6 novembre 2008, *Kandzhov c. Bulgarie*, Req. 68294/01, par. 65-67 (3 jours et 23 heures ; délits non-violents) ; CEDH, arrêt du 3 février 2009, *İpek c. Turquie*, Req. 17019/02, par. 32-38 (3 jours et 9 heures ; suspect de terrorisme âgé de 16 ans).

91 CourIADH, arrêt du 6 mai 2008, *Yvon Neptune v. Haiti*, par. 107 ; CourIADH, arrêt du 30 octobre 2008, *Bayarri v. Argentina*, par. 66 (une période de près de 1 semaine constitue une violation). Voir aussi CourIADH, arrêt du 21 novembre 2007, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, par. 83, qui suggère qu'une période de quatre jours aurait pu être acceptable.

92 Cf. A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen : Wolf Legal Publishers, 2009, p. 61.

limites applicables en Argentine en matière de présentation devant un juge ou un tribunal est de 18 heures.

Il existe toutefois quelques exceptions significatives aux règles applicables dans la plupart des pays. En Chine, la loi précise que le procureur du peuple doit décider d'une arrestation dans les sept jours dans les cas ordinaires et dans les 20 jours si l'affaire est compliquée ou implique de graves délits.[93] Le procureur du peuple est responsable de l'enquête et des poursuites judiciaires. Ce pays ne se conforme donc pas aux normes internationales en vertu desquelles un détenu doit être traduit devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires. Pour ce qui est de la pratique, le Comité contre la Torture note l'incapacité à présenter rapidement les détenus devant un juge et par conséquent leur maintien en garde à vue prolongée sans inculpation jusqu'à 37 jours ou plus encore dans certaines affaires.[94]

Il est intéressant de noter que si les limites du droit international relatif aux droits de l'homme sont plutôt relatives, dans une très grande majorité de pays, le droit national définit des périodes absolues dans lesquelles toute personne détenue ou arrêtée doit être présentée devant un juge ou un tribunal. La Nouvelle Zélande constitue par exemple une exception, puisque le droit de ce pays prescrit qu'une personne arrêtée qui n'est pas libérée doit être présentée aussi rapidement que possible devant un tribunal (dans la pratique, ce délai est généralement de 24 heures, bien qu'il puisse atteindre 48 heures le week-end). Les pays qui n'appliquent pas une telle norme relative, en sus de leurs limites absolues, risquent de violer le droit universel de l'homme à la liberté. Il en va de même si la limite absolue prescrite par la loi se situe dans les limites issues de la jurisprudence du droit international relatif aux droits de l'homme, puisque celle-ci indique que pour les délits moins graves, le contrôle judiciaire de la détention doit se faire dans une période inférieure à la durée normale. Suivant cette perspective, le droit domestique devrait idéalement prévoir à la fois une limite absolue et une limite relative. Sinon, le droit d'un État pourrait définir des limites absolues différentes pour des catégories de délits ou des situations différentes. Ce type de système est appliqué en Argentine et en Turquie, par exemple.

Cependant et une fois encore : *in fine*, tout dépend de l'application des règles dans la pratique. Si le recours à différentes catégories peut apporter une solution dans certains cas, il n'offre pas de garantie absolue que, dans la pratique, la détention soit effectivement toujours aussi brève que possible, comme l'illustre le

[93] Voir chapitre sur la Chine, section III (sous : Arrestation). Voir en outre Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 492. Voir aussi Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China*, Cambridge : Cambridge U.P., 2007 (p. 8).

[94] Comité contre la torture, Conclusions et recommandations, *Chine*, UN doc. CAT/C/CHN/CO/4, 12 décembre 2008, par. 11.

cas de la Turquie. La Norvège constitue également un cas intéressant en la matière : depuis le 1 juillet 2002, la loi de procédure pénale de Norvège ne prescrit plus de limite absolue et précise uniquement que la personne arrêtée doit être rapidement présentée à un juge ; depuis cette date la loi prescrit à la fois une limite relative et une limite absolue : la personne arrêtée doit être rapidement présentée à un juge et au plus tard le troisième jour suivant ladite arrestation. Néanmoins, dans leur chapitre consacré à la Norvège, Ferguson, Inderhaug & Lie expliquent que les statistiques récoltées indiquent que depuis lors, le nombre de personne détenues en garde à vue pendant plus de 48 heures (avant d'être traduites devant un juge) a augmenté, tandis que le nombre de personnes qui passent moins de 15 jours en détention avant jugement a quant à lui diminué.

III.5. CONTRÔLE ET LIMITES DU MAINTIEN EN DÉTENTION

Le contrôle judiciaire rapide après l'arrestation ne convient évidemment pas particulièrement pour lutter contre les périodes de détention prolongées. Si l'on considère les statistiques en matière de durée de la détention avant jugement (voir *supra*), il n'existe pas de mécanisme légal offrant des garanties absolues contre la prolongation inacceptable de la détention. Heureusement, il existe plusieurs mécanismes susceptibles de garantir de meilleurs résultats ou à tout le moins de prévenir la détérioration de la pratique.

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Habeas Corpus

La possibilité de procédures d'*Habeas Corpus* pourrait former une garantie utile en la matière. Le droit du détenu d'entamer une procédure devant un 'tribunal' (*c'est-à-dire* un tribunal, un juge ou un juge d'instruction), pour que cette autorité puisse décider rapidement de la légalité de la détention et ordonner la libération si la détention est illégale, est généralement reconnu dans le droit international relatif aux droits de l'homme.[95] Un contrôle formel du respect de la législation nationale ne répond pas à cette exigence ; le tribunal doit être compétent pour pouvoir évaluer pleinement si les garanties offertes par le droit de l'homme universel à la liberté sont également respectées.[96] Le droit voit le

[95] Voir Article 9(4) PIDCP, Article 7(6) ACHR et Article 5(4) CEDH. L'Article 6 ChAfDHP n'accorde pas expressément le droit d'Habeas Corpus, contrairement à la jurisprudence de la Commission africaine ; voir CADHP, Décision du 15 novembre 1999, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Comm. 143/95 et 150/96, par. 20-34, et dans les *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique*, de la Commission sous M, sections 4 et 5.

[96] Voir *p.e.* HRC, Constatations du 3 mars 1997, *A. c. Australie*, Comm. 560/93, par. 9.5 ; CourIADH, arrêt du 21 novembre 2007, *Chaparro Álvarez & Lapo Íñiguez v. Ecuador*, par. 133 ; CEDH (CG), arrêt du 19 février 2009, Req. 3455/05, par. 202.

jour immédiatement après l'arrestation ou le début de la détention. Cependant, si l'État respecte son obligation de contrôle judiciaire rapide après l'arrestation, le rôle du droit d'Habeas Corpus sera relativement marginal à ce stade[97], car il ne s'applique en principe pas (*c.-à-d.*, plus) si la décision de détenir une personne est prise ou entièrement contrôlée par une autorité judiciaire, puisque dans ce cas, la supervision requise serait intégrée dans l'ordre ou la décision du tribunal ou du juge. Ce qui est plus important toutefois pour la prévention des longues périodes de détention, c'est que le droit de l'Habeas Corpus requiert également que toute personne détenue en détention provisoire soit à même d'intenter une procédure, à intervalles raisonnables, dans le but de mettre en cause la légalité de sa détention.[98] La notion d'intervalle raisonnable dépend des circonstances de l'affaire, par exemple les motifs de la privation de liberté. Un contrôle tous les mois respecte cette règle dans les cas de détention provisoire qui, de l'avis de la Cour européenne, nécessite un contrôle périodique à intervalles plus réguliers.[99]

Tous les États répondants offrent la possibilité d'une procédure d'Habeas Corpus ou de procédures qui répondent à la règle en vertu de laquelle un tribunal, un juge ou un juge d'instruction doit se prononcer rapidement sur la légalité de la détention. La forme de ces dispositions diffère cependant considérablement d'un État à l'autre. Des différences émergent par exemple en ce qui concerne le moment où le contrôle a lieu ou pourrait avoir lieu, à quel intervalle, par qui et s'il est effectué automatiquement à des moments déterminés, *ex officio* par le tribunal ou le juge, à la demande du détenu ou après une demande d'application ou de prolongation de la détention par le procureur et encore si la loi définit les délais dans lesquels les tribunaux doivent se prononcer sur les requêtes en Habeas Corpus. Ceci dépend en grande partie de la nature du droit de procédure pénal national, par exemple la relation entre l'étape de l'instruction et l'étape du procès, la durée de ces étapes et, évidemment, la procédure par laquelle la détention peut être ordonnée. Par exemple, si la détention est régulièrement et automatiquement contrôlée par le tribunal (*p.e.,* en Belgique, aux Pays-Bas, en Turquie), les possibilités qui s'offrent au détenu de demander le contrôle à un moment qu'il considère approprié peuvent être relativement limitées dans certaines juridictions (*p.e.,* en Belgique). Lorsque des suspects en détention provisoire peuvent introduire un nombre illimité de demandes de libération (*p.e.,* en Irlande, aux Pays-Bas, en Nouvelle Zélande, en Norvège, en Pologne, au Portugal, à Taiwan et en Turquie), une nouvelle

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97 Cf. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford U.P., 2006, p. 466-467.

98 HRC, Constatations du 31 octobre 2006, *Shafiq c. Australie*, Comm. 1324/2004, par. 7.2, et plus implicitement HRC, Constatations du 15 juillet 1997, *A. c. Nouvelle Zélande*, Comm. 754/97, par. 7.3 (pas de violation simplement parce qu'il y a eu un contrôle régulier); CEDH, arrêt du 25 septembre 1998, *Assenov c. Bulgarie*, Req. 24760/94, par. 162.

99 CEDH, arrêt du 25 septembre 1998, *Assenov c. Bulgarie*, Req. 24760/94, par. 162; CEDH, arrêt du 25 octobre 1989, *Bezicheri c. Italie*, Req. 11400/85, par. 20–21.

demande ne contenant aucun nouvel élément peut être refusée sans qu'il soit procédé à un contrôle intégral de la nécessité de la détention (*p.e.,* en Irlande et en Nouvelle Zélande). Certains États offrent des motifs limités d'exercice du droit d'Habeas Corpus (*p.e.,* la Nouvelle Zélande, le Portugal et, de façon plus visible, la Chine), tandis que dans d'autres, il peut s'appuyer sur tout motif (*p.e.,* en Italie et aux Pays-Bas). Nombreux sont les pays dans lesquels la détention sera automatiquement contrôlée à intervalles réguliers. C'est par exemple le cas dans des pays où la détention et la prolongation de celle-ci ne peuvent généralement être ordonnées que pour un certain temps n'excédant pas la période maximum prescrite par la loi (*p.e.,* Danemark, Japon, Norvège et Turquie). Par conséquent, la détention sera contrôlée au terme de chaque période stipulée et le tribunal examine alors (*ex officio* ou à la demande du ministère public) s'il y a lieu d'ordonner le maintien en détention.

Il est clair qu'aucun système national n'est équivalent à un autre. Il est dès lors relativement impossible de tirer des conclusions quant au type de système qui offre la meilleure protection contre la détention arbitraire, illégale ou inutile. En effet, le droit international relatif aux droits de l'homme laisse aux États une grande latitude dans l'organisation d'un système qui respecte le droit des détenus à mettre régulièrement en cause la légalité de leur détention. La jurisprudence internationale relative à ce droit est en réalité à ce point casuistique et indéfinie qu'il est très compliqué de déterminer quel type de système est avantageux du point de vue des droits de l'homme. C'est pourquoi tout système garantissant la possibilité d'un contrôle régulier est toujours acceptable.

intersentia

Limites absolues et relatives à la période de détention prescrite par la loi

Il est une autre possibilité qui mérite d'être mentionnée : la définition par la loi de limites à la période durant laquelle un suspect peut être maintenu en détention. Comme expliqué *supra*, le droit international relatif aux droits de l'homme se limite à prescrire des limites relatives, alors que le droit de la plupart des pays répondants formule des maxima concrets quant à la durée autorisée de la détention.

Les États répondants limitent la détention avant le début du procès. C'est par exemple le cas aux États-Unis (de manière générale, le procès doit débuter dans un délai de 70 jours à compter de la date du dépôt de l'information ou de l'acte d'accusation, ce qui doit normalement se faire dans les 30 jours à compter de la date à laquelle la personne concernée a été arrêtée ou inculpée), aux Pays-Bas (104 jours ou 2 ans dans les affaires de terrorisme), en Italie (3 à 12 mois, en fonction du délit), en Pologne (3 à 12 mois ; la loi accepte la possibilité d'une extension) et au Royaume-Uni, *c.-à-d.* l'Angleterre et le Pays de Galles (182 jours ; la loi accepte la possibilité d'une extension). En Turquie (6 à 36 mois) la période applicable dépend du délit et des éléments constitutifs de l'affaire. Il en va de

même en Grèce. Ainsi, dans tous ces pays, les autorités sont tenues, soit de libérer le détenu, soit de porter l'affaire devant les tribunaux au plus tard au terme du délai fixé, ce qui signifie que le tribunal de premier ressort sera alors capable de vérifier si la détention se justifie toujours ou pas.

Des périodes fixes durant lesquelles les procès doivent être menés sont également définies dans plusieurs pays et ce, de diverses façons. Dans certains États, les limites fixes revêtent un caractère absolu, dans d'autres elles laissent la place à des exceptions. De plus, ces périodes varient considérablement d'un pays à l'autre. Par exemple au Danemark (en fonction du délit, de 6 à 12 mois jusqu'au jugement en première instance, et la même période pour la juridiction d'appel), en Italie (en fonction du délit, de 9 mois à 2,5 ans jusqu'au jugement en première instance et de 2 ans à 6 ans pour l'ensemble du procès), au Portugal (14 mois jusqu'au jugement en première instance, 18 mois sans condamnation définitive ; dans les cas de terrorisme ou de crime organisé par exemple, les limites sont respectivement de 18 et 24 mois, et dans les affaires particulièrement complexes, respectivement de 30 et 40 mois), en Pologne (maximum 24 mois jusqu'au jugement en première instance, mais la loi accepte des possibilités d'extension), en Argentine (3 ans pour l'ensemble du procès), en Espagne et à Taiwan (deux systèmes assez détaillés dans lesquels les limites dépendent par exemple des peines maximales qui sanctionnent le délit de la phase du procès) et en Chine (dans les affaires normales, la police peut détenir un suspect pendant au maximum trois mois pendant lesquels elle mène l'enquête, mais plusieurs exceptions sont appliquées à cette règle générale des trois mois[100]).

Dans la mesure où le droit international relatif aux droits de l'homme contient des limites relatives, aucun de ces systèmes nationaux en tant que tel ne semble contraire aux dispositions dudit droit. Il en va de même pour les systèmes de droit de procédure pénale auxquels aucune période maximum concrète de détention avant jugement n'est applicable, comme dans le cas de l'Irlande, du Japon, de la Nouvelle Zélande et de la Norvège. En réalité, le droit international ne se préoccupe pas des limites fixes en tant que telles, tant que la détention avant jugement reste généralement appliquée sous la forme d'une exception et qu'elle soit aussi brève que possible dans chaque affaire concrète. Des limites fixes servent-elles néanmoins cet objectif ? Ce n'est pas certain. L'important, c'est que bon nombre de ces limites ne sont pas absolues ou qu'elles peuvent être éludées. Aux Pays-Bas, par exemple, la durée maximale de 104 jours de détention avant jugement est fréquemment contournée par ce que l'on appelle des 'auditions pro forma' : le ministère public porte l'affaire au procès dans le délai fixé et lors de la première session du tribunal, il demande l'ajournement, qui est

[100] Voir le chapitre sur la Chine, section III (sous : Nombre de personnes placées en détention ; and under : Protection contre les privations de liberté illégales ou excessivement longues). Voir également Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 492.

généralement accordé. Sans devoir évoquer le fond de l'affaire, le tribunal peut alors ordonner le maintien en détention du suspect. À partir de ce moment, il est question de détention pendant le procès, qui peut se prolonger jusqu'à 60 jours après le jugement en première instance. De plus, les statistiques relatives aux taux de détention, les proportions de la population carcérale totale en détention et la longueur moyenne de celle-ci n'indiquent pas si des limites de temps fixes contribuent à prévenir le maintien en détention. Toutes ces données sont au moins modérées et, dans la plupart des cas, faibles dans les pays qui n'appliquent pas de telles limites, *c.-à-d.* l'Irlande, le Japon, la Nouvelle Zélande et la Norvège ; alors qu'elles sont élevées dans plusieurs pays dans lesquels la période de détention est limitée par la loi. Si cela ne signifie pas que les limites dans le temps n'empêchent jamais l'application de la détention, elles peuvent aisément avoir l'effet inverse : plutôt que de contrôler si la détention se justifie et est nécessaire dans des cas particuliers, les autorités peuvent être tentées d'épuiser systématiquement la période maximale accordée par la loi.[101] Il semble dès lors plus important que les autorités contrôlent, dans toutes les affaires, sérieusement le principe fondamental de la subsidiarité/nécessité, *c.-à-d.* que la détention est une mesure de dernier recours ; en d'autres termes, qu'elles respectent (pour adopter la terminologie utilisée par Miranda Pereira dans son chapitre consacré au Portugal) l'*ultima ratio* de privation de liberté pendant la phase qui précède le procès.

III.6. NORMES PROCÉDURALES DE DÉTENTION (NIVEAU DE SUSPICION, TYPE D'INFRACTION, MOTIFS)

Selon le droit international relatif aux droits de l'homme, l'application de la détention avant et pendant le procès sur la base d'une accusation en matière pénale requiert l'existence d'un soupçon plausible que la personne a commis une infraction et que la détention serve une cause légitime. Je vais à présent brièvement évoquer ces trois conditions, *c'est-à-dire,* le soupçon plausible, l'infraction et les motifs acceptables.

La condition de soupçon

Si la condition de l'existence d'un soupçon plausible n'est formulée expressément que dans la Convention européenne (Article 5(1)(c)), elle découle également du Pacte international, de la Charte africaine et de la Convention américaine.[102] La

[101] Voir aussi A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen : Wolf Legal Publishers, 2009, p. 84.

[102] Il a en effet été reconnu dans CADHP, Décision du 1-15 novembre 1999, *Amnesty International and Others v. Sudan*, Comm. 48/90, par. 59, CADHP, *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique*, sous M, section 1 (b) ;

détention d'une personne sur la base d'une accusation en matière pénale alors qu'il n'existe pas de soupçon plausible contre cette personne constituerait une détention arbitraire, ce qui est interdit par l'ensemble des instruments. Un soupçon plausible que le détenu s'est rendu coupable d'une infraction est une condition *sine qua non* à la légalité du maintien en détention.[103] Selon la Commission africaine, la simple 'suspicion' est insuffisante, tandis que la Cour américaine exige quant à elle une 'indication suffisante' pour présumer que la personne arrêtée ou détenue est l'auteur ou le complice du délit.[104] La Cour européenne estime que l'existence d'un soupçon plausible 'présuppose celle de faits ou renseignements propres à persuader un observateur objectif que l'individu en cause peut avoir accompli l'infraction.' Ce qui peut être considéré comme plausible dépendra toutefois des circonstances de l'affaire.[105]

Tous les États répondants admettent que l'existence d'un certain degré de suspicion constitue une condition préalable à la détention dans une procédure pénale. La substance de ce degré varie toutefois d'un État à l'autre. Au Japon, en Norvège et aux États-Unis par exemple, le niveau minimum de suspicion requis est qu'il existe une 'cause probable' de soupçonner l'accusé d'avoir commis un crime, tandis qu'en Afrique du Sud, il faut un 'soupçon raisonnable' et en Nouvelle Zélande une 'bonne cause'. Si la terminologie de ces seuil suggère l'existence de différences, il est difficile d'établir s'il s'agit ou non des mêmes notions. Cela dépend en grande partie de leur interprétation dans la jurisprudence et de leur application dans la pratique. Aux États-Unis, la signification donnée à une 'cause probable' par exemple, s'inscrit largement dans la lignée de l'interprétation par la Cour européenne du 'soupçon plausible'. Et si le code pénal espagnol autorise simplement la détention de suspects, la jurisprudence de cet État précise que la simple existence d'un 'soupçon' ou de la 'simple croyance' n'est pas opportune pour détenir quelqu'un ; il doit exister une certaine base factuelle sur laquelle la suspicion est fondée. Pour le reste, il est peu aisé de comparer réellement les divers degrés de suspicion, étant donné que dans la plupart des pays, les termes utilisés sont des traductions [anglaises] d'autres langues. Certains pays se démarquent toutefois par les conditions en apparence relativement sévères qu'ils appliquent. Citons par exemple l'Allemagne, Taiwan et la Turquie qui n'autorisent la détention avant jugement que pour les personnes 'fortement suspectées' d'avoir commis une infraction, tandis que le droit belge

CourIADH, arrêt du 7 septembre 2004, *Tibi v. Ecuador*, par. 107. Voir très implicitement HRC, Constatations du 26 juillet 1989, *Bolaños v. Ecuador*, Comm. 238/1987, par. 8.3.

103 Voir également I-ACionHR, Rapport du 11 mars 1997, *Bronstein et.al. v. Argentina*, Report 2/97, par. 26.

104 CADHP, Décision du 1-15 novembre 1999, *Amnesty International and Others v. Sudan*, Comm. 48/90, par. 59 ; CourIADH, arrêt du 7 septembre 2004, *Tibi v. Ecuador*, par. 107.

105 CEDH, arrêt du 30 août 1990, *Fox, Campbell & Hartley c. Royaume-Uni*, Req. 12244/86, par. 32.

ou grec requièrent de 'sérieuses indications de culpabilité' et le droit chinois un 'grave soupçon'.[106] Plusieurs pays déploient un système à deux niveaux de suspicion, par exemple le Danemark (soupçon plausible/substantiel), les Pays-Bas (soupçon plausible/grave présomption) et les États-Unis (soupçon plausible/cause probable). Dans certains cas, ces niveaux sont liés aux motifs sur lesquels la détention est fondée (*p.e.*, au Danemark), alors que dans d'autres, cela dépend du fait qu'il s'agisse d'une arrestation/garde à vue ou d'une détention avant ou pendant procès (Pays-Bas et les États-Unis).

L'un des principes importants qui découlent du droit à la liberté est que plus la durée de la détention est longue, plus les motifs de l'appliquer doivent être sérieux. Il semblerait au moins à première vue que les systèmes légaux prescrivant qu'après un certain temps, le maintien en détention nécessite un degré de suspicion plus élevé s'inscrivent tout particulièrement dans la lignée de ce principe. Pourtant, dans la réalité, l'effet peut être inverse. Si dans la pratique, les autorités réduisent le niveau de suspicion le plus élevé, cela peut entraîner la réduction des degrés inférieurs.

Conditions relatives aux infractions autorisant la détention avant jugement

La suspicion doit concerner une ou plusieurs infractions. Le Pacte international, la Charte africaine et les Conventions américaines et européennes, ainsi que la jurisprudence adéquate ne précisent pas le type d'infraction susceptible de constituer un motif de détention.[107] Par contre, selon ces instruments, la détention doit être proportionnelle (la détention doit être raisonnable au regard du crime dont le détenu est suspecté et du risque qui doit être évité par la détention) et subsidiaire/nécessaire (détention ne peut être pratiquée que si toutes les autres voies moins sévères sont inadaptées pour contrôler le suspect de façon adéquate).[108] Par conséquent, toutes les infractions ne sont pas susceptibles de justifier la détention. Il s'agit avant tout des infractions qui ne sont pas sanctionnées d'une peine d'emprisonnement. Reste à présent à savoir si les États évaluent au cas par cas si une infraction concrète justifie la détention ou s'ils

[106] Yue Ma, 'The powers of the police and the rights of suspects under the amended Criminal Procedure Law of China', 26 *Policing: An International Journal of Police Strategies & Management*, No. 3, 2003, p. 496.

[107] Il existe néanmoins la Règle 6 de la Recommandation du Conseil de l'Europe Rec(2006)13 du Comité des Ministres concernant la détention provisoire, les conditions dans lesquelles elle est exécutée et la mise en place de garanties contre les abus du 27 septembre 2006: 'La détention provisoire ne doit, en principe, être appliquée qu'aux personnes soupçonnées d'avoir commis une infraction dont l'auteur est passible d'une peine d'emprisonnement.'

[108] Voir, *p.e.*, HRC, Constatations du 3 avril 1997, *A. c. Australie*, Comm. 560/1993, par. 9.2; CourIADH, arrêt du 21 janvier 1994, *Gangaram Panday Case v. Suriname*, par. 47-48; CEDH 21 décembre 2000, *Jabłoński c. Pologne*, Req. 33492/96, par. 83-85. Voir aussi *supra* sections III.3 (sous: Le droit fondamental à un procès dans un délai raisonnable) et III.6 (sous: Requirements as regards offences that allow for pre-trial detention).

appliquent un système supplémentaire qui réserve la détention à certaines catégories spécifiques d'infractions.

Une fois encore, les systèmes des États répondants présentent de nombreuses diversités. Certains d'entre eux autorisent la détention avant jugement pour des infractions qui ne sont pas sanctionnées par une peine de prison (*p.e.*, l'Angleterre et le Pays de Galles, l'Italie, le Japon, les États-Unis), alors que le droit d'autres États requiert que les infractions soient punissables d'une peine d'emprisonnement (*p.e.*, l'Argentine, la Grèce, la Nouvelle Zélande) ou d'une peine d'emprisonnement minimale (*p.e.*, Norvège au moins 6 mois ; Pologne au moins 1 an ; Danemark au moins 18 mois ; Espagne en principe au moins 2 ans ; Pays-Bas à au moins 4 ans, avec certaines exceptions ; Portugal au moins 3 ou 5 ans, avec une exception mineure ; Italie habituellement au moins 2, 4 ou 5 ans, avec des exceptions ; Irlande au moins 5 ans, avec des exceptions).[109] Évidemment, ces seuils empêchent l'application de la détention dans certaines catégories d'affaires. Cependant, le fait que dans certains cas, le droit national permette la détention sans qu'il y ait d'infraction ne signifie pas que toutes les personnes suspectées d'avoir commis de telles infractions peuvent être détenues. Il existe toutefois un risque que les autorités soient tentées de détenir automatiquement ces personnes, plutôt que d'évaluer si la détention est réellement nécessaire dans l'affaire concernée.

Motifs sur lesquels la détention avant jugement peut se fonder

Il existe entre les États une grande diversité de motifs permettant que la détention soit ordonnée. Dans le même temps, le droit international relatif aux droits de l'homme ne semble accepter qu'un nombre limité de motifs susceptibles d'être utilisés. Pour être acceptables, les motifs nationaux doivent s'inscrire dans les motifs acceptés par le droit international relatif aux droits de l'homme. Ces motifs, qui représentent en réalité les fonctions acceptables de détention avant jugement, comprennent les préventions suivantes :

- la fuite (le risque que le suspect ne se présente pas à son procès) ;
- obstacle à l'établissement de la vérité (le danger que le suspect agisse de manière à entraver l'administration de la justice) ;
- la récidive immédiate (le risque que le suspect commette de nouvelles infractions) ;
- la menace pour l'ordre public (le risque que le suspect provoque un désordre public s'il venait à être libéré).[110]

[109] Voir aussi A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen : Wolf Legal Publishers, 2009, p. 64-70.

[110] Voir HRC, Constatations du 23 juillet 1990, *Alphen c. les Pays-Bas*, Comm. 305/1988, par. 5.8 : la détention provisoire 'doit non seulement être légale, mais également être nécessaire à tous égards, par exemple pour éviter que l'intéressé prenne la fuite, mette des obstacles à

La Cour européenne semble en outre accepter un cinquième motif, mais uniquement dans des circonstances particulièrement exceptionnelles : la 'sécurité d'une personne mise en examen'.[111] La pertinence de ce motif (qui semble également reconnu *p.e.* dans le Code de procédure pénale de la Chine au titre de 'détention protectrice'[112]) n'est pas totalement claire. Si la sécurité du suspect est réellement menacée, il semble que le quatrième motif (menace réelle de l'ordre public) pourrait être appliqué. Dans le même temps, la 'gravité de l'infraction' et la 'sévérité de la peine possible' ne sont pas considérées comme des motifs autonomes de détention. Si ces facteurs peuvent être pris en compte lors de l'évaluation de l'existence de motifs satisfaisants pour détenir une personne, ils sont en soi insuffisants pour justifier l'application des motifs acceptés, plus particulièrement après l'écoulement d'une période déterminée. Il convient en outre de tenir compte de la personnalité du suspect, de ses actifs, des liens qu'il entretient avec l'État dans lequel il est poursuivi et de ses contacts internationaux. L'application de la détention avant jugement à un suspect du fait des caractéristiques du groupe dont il fait partie plutôt que d'une évaluation individualisée des risques serait dès lors contraire au droit à la liberté, mais aussi (comme le signale Young dans le chapitre consacré à la Nouvelle Zélande) à la présomption d'innocence. Le risque accepté pour justifier la détention doit par ailleurs être plausible et effectif. Les autorités doivent dès lors mentionner les raisons de la détention à la lumière des circonstances de l'affaire. Il ne suffit donc pas d'utiliser des formules stéréotypées ou d'invoquer les besoins de l'enquête ou la société en général et de manière abstraite.

La plupart des États répondants reconnaissent expressément les motifs suivants parmi ceux qui sont cités : le risque de fuite, d'interférence avec l'établissement de la vérité et le risque de récidive (voir aussi le chapitre de Rapoza). De nombreux autres motifs sont toutefois avancés dans le droit national : la menace pour l'ordre public (*p.e.,* France, Pays-Bas, Portugal, Afrique du Sud) ; la liberté du suspect serait contraire au sens public de la justice (Norvège) ; la suspicion concernant la commission de crimes particuliers, graves (Taiwan) ; l'accusé n'a pas de résidence fixe (Japon) ; la nécessité d'éviter la possibilité que le défendeur portera atteinte aux droits de la victime (Espagne) ; le risque que le suspect commette un autre crime violent contre des personnes qui résident dans le même appartement ou la même maison que lui (Pologne) ; la

l'établissement des preuves ou commette un nouveau crime', et HRC, Constatations du 29 mars 2005, *Marques c. Angola*, Comm. 1128/2002, par. 6.1 ; CADHP, *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique*, sous M, section 1 (e) ; CADHP, Rapport du 11 mars 1997, *Bronstein et al. v. Argentina*, Report 2/97, par. 26-37 ; en ce qui concerne la Cour européenne, voir D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford : Oxford University Press, 2009, p. 176-179.

111 CEDH, arrêt du 23 septembre 1998, *I.A. v. France*, Req. 28213/95, par. 108.

112 Voir section III du chapitre sur la Chine (sous : Garde à vue).

possibilité de se défaire de biens illégalement acquis (Irlande) ; et la sécurité de la personne mise en examen (Chine, France).

Cet aperçu illustre non seulement la variété des motifs de détention reconnus dans les juridictions nationales, mais aussi que de manière générale, le droit de procédure pénal national n'est pas *per se* adapté au cadre législatif des droits de l'homme. Dans la pratique, cela ne cause pas nécessairement de nombreux problèmes. Il sera souvent possible d'appliquer des motifs nationaux dans les limites imposées par quatre des cinq motifs de détention acceptés au niveau international. Par exemple, dans certains cas le motif selon lequel 'l'accusé n'a pas de lieu de résidence fixe' s'inscrit dans le motif du risque de fuite. Certains motifs pourraient toutefois aisément causer des frictions. La reconnaissance de la 'gravité de l'infraction' ou de la 'sévérité de la peine possible' comme motifs exprès et autonomes de détention avant jugement (notamment au Danemark) pourrait s'avérer plus problématique. Selon le droit international relatif aux droits de l'homme, ces motifs nationaux ne peuvent être appliqués que dans la mesure où il existe un réel risque de fuite, d'entrave à l'établissement de la vérité, de récidive ou de trouble de l'ordre public. Dans le même temps, la plupart des États qui ne reconnaissent pas expressément la 'gravité de l'infraction' ou la 'sévérité de la peine possible' au titre de motifs indépendants de détention avant jugement, prennent néanmoins souvent ces facteurs en compte lors de l'évaluation d'autres motifs.

Le fait que les droits de l'homme ne reconnaissent pas la 'gravité de l'infraction' comme motif autonome de détention pose problème dans la pratique juridique. Nombreux sont les pays dont la société ne comprend pas qu'une personne suspectée de meurtre *p.e.,* soit libérée, même s'il n'existe pas de risque effectif de fuite, d'interférence avec la justice ou de récidive. Si ce cas de figure est de nature à susciter une grande méfiance du public à l'égard du système de justice pénale, il ne signifie pas qu'il provoquera ou pourrait provoquer un désordre public immédiat, auquel cas le motif de l'ordre public ne s'applique pas davantage. Le motif applicable en Norvège 'la liberté du suspect serait contraire au sens de la justice de la société' apporte une réponse à ce problème, mais uniquement dans la mesure où il peut être appliqué dans le cadre des droits de l'homme, ce qui ne semble pas très opportun pour cette approche.

III.7. DÉVELOPPEMENTS RELATIFS À LA DÉTENTION DANS LE DROIT DE LA PROCÉDURE PÉNALE

Depuis le début du nouveau millénaire, plusieurs pays ont étendu les possibilités de détention pour des raisons d'application de la loi (*p.e.,* Danemark, Italie), ou encore ont introduit des restrictions en matière d'octroi de libération sous caution qui n'existaient pas auparavant (*p.e.,* Nouvelle Zélande). Dans certains pays, la menace réelle de terrorisme a donné lieu à des modifications législatives en matière de détention avant jugement (*p.e.,* Pays-Bas, et de façon plus

significative, l'Angleterre et le Pays de Galles, ainsi que les États-Unis). Dans le même temps, certains de ces pays ont adopté des amendements législatifs ou des mesures dans le but d'améliorer les mécanisme de contrôle de la détention (*p.e.,* Belgique, Chine, Italie, Norvège, Pologne, Taiwan), de rendre plus sévère l'application du maintien en détention (*p.e.,* Belgique, Chine, Danemark, Norvège, Portugal), de restreindre les situations dans lesquelles une personne peut être mise en détention (*p.e.,* Chine, Portugal, Turquie) et de clarifier ou d'étendre les droits des détenus (*p.e.,* Nouvelle Zélande). Certains pays ont également amélioré les droits procéduraux des détenus, tels que le droit des détenus à communiquer avec l'avocat qui les défend (*p.e.,* Chine, Pays-Bas, Taiwan). En particulier, l'amélioration de la protection contre la privation de liberté inscrite dans la loi n'entraîne pas automatiquement des améliorations dans la pratique. Comme l'affirment Seron, par exemple (dans son chapitre sur la Belgique), Zhang (dans son chapitre sur la Chine) et Della Case (dans son chapitre sur l'Italie), le vrai défi consiste à faire évoluer la pratique.

Dans le même temps, ces développements semblent illustrer (de manière générale) que les États sont nombreux à lutter en permanence pour atteindre un équilibre entre la protection contre la détention et l'efficacité de leur système de justice pénale en matière de prévention et de répression de la criminalité. Cette tentative d'équilibre n'est pas sans risque. Particulièrement lorsque la voix du populisme se fait plus forte dans la société ou lorsque la menace de la criminalité ou du terrorisme est (à juste titre ou non) fortement ressentie par les citoyens, les droits fondamentaux perdent habituellement du terrain au profit de la répression lorsque ces intérêts sont équilibrés. Cela ne pose pas seulement des problèmes du point de vue des droits eux-mêmes, et par conséquent selon la perspective de l'état de droit ; la recherche d'un équilibre entre droits fondamentaux et efficacité de la justice pénale dans la prévention et la répression de la criminalité peut également être dommageable pour cette dernière, puisque l'antithèse entre ces intérêts est partiellement erronée. La détention a généralement de lourdes conséquences, à la fois pour les détenus et leur famille et peut-être d'autres personnes encore. La détention peut aisément entraîner la perte de l'emploi et du domicile, la fin d'une relation et mettre le détenu en contact avec un environnement en grande partie peuplé par des personnes impliquées dans des activités criminelles. Ces deux facteurs (qui ne sont que deux conséquences négatives de la détention parmi d'autres) pourraient catalyser une criminalité future par ces détenus. Dans ces cas, la détention est contre-productive dans son rôle de prévention et de répression de la criminalité. Cela ne signifie pas que la détention doit être abandonnée purement et simplement, mais cela implique que même selon une perspective d'efficacité du système de justice pénale, la détention doit être appliquée en dernier ressort. Cela devient encore plus apparent au regard des bénéfices qui peuvent être engrangés si l'on évite la détention, évoqués par Rapoza dans son chapitre thématique.

IV. NORMES RELATIVES AUX CONDITIONS DE DÉTENTION, AUX INSTITUTIONS DE DÉTENTION ET AUX DROITS DES DÉTENUS AVANT JUGEMENT

Les règles prescrites par le droit de procédure pénale en matière de détention avant jugement et les normes relatives aux conditions de détention ne sont pas totalement isolées les unes des autres. Les règles de procédure sont indispensables pour limiter l'application de la détention et sont de ce fait indispensables pour éviter la surpopulation (accrue) que connaissent les centres de détention. De plus, les droits procéduraux tels que le droit des détenus à avoir accès à une assistance juridique ou à contacter leur famille, s'avèrent importants dans le cadre de la protection contre les mauvais traitements. Les règles du droit de procédure pénale peuvent en outre prévenir le recours abusif à la détention aux fins d'enquête criminelle. Par exemple, la détention d'une personne afin de la forcer à faire une déclaration serait contraire au droit à la liberté, puisque la détention d'une personne à cette fin n'est pas reconnue comme un motif valable pour priver quelqu'un de sa liberté. Dans son chapitre (sur Taiwan), Wang présente un autre exemple impressionnant en la matière. Son anecdote concerne un détenu niant fermement sa culpabilité mais qui accepte ultérieurement un règlement avec la victime, uniquement toutefois pour échapper aux abus sexuels dont il est l'objet dans le centre de détention. En fait, ces situations ne sont pas seulement problématiques dans le cadre du droit à la liberté, elles sont aussi contraires au privilège contre l'auto-incrimination. C'est pour ces raisons que le Conseil des droits de l'homme – comme le souligne Casorla dans son chapitre – encourage tous les États à « veiller à ce que les conditions de la détention avant jugement ne nuisent pas à l'équité du procès ».[113]

Points forts et points faibles des instruments internationaux des droits de l'homme

Les règles du droit de procédure pénale sont toutefois loin d'être suffisantes pour garantir aux détenus des conditions de détention adéquates à tous égards. Qui plus est, les normes internationales des droits de l'homme relatives aux conditions de détention ne sont pas davantage satisfaisantes, puisqu'elles sont limitées en nombre et que leurs formulations sont assez générales. L'une des dispositions les plus détaillées contenues dans les conventions internationales des droits de l'homme est l'article 10 du Pacte international relatif aux droits civils et politiques des Nations Unies de 1962, qui précise uniquement que :

[113] Rapport du Conseil des droits de l'homme, N.U. doc. A/64/53 (2009), 10/9 Détention arbitraire, 42e séance, 26 mars 2009, par. 4(f).

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« 1. Toute personne privée de sa liberté est traitée avec humanité et avec le respect de la dignité inhérente à la personne humaine.

2. (a) Les prévenus sont, sauf dans des circonstances exceptionnelles, séparés des condamnés et sont soumis à un régime distinct, approprié à leur condition de personnes non condamnées ;
   (b) Les jeunes prévenus sont séparés des adultes et il est décidé de leur cas aussi rapidement que possible.

3. Le régime pénitentiaire comporte un traitement des condamnés dont le but essentiel est leur amendement et leur reclassement social. Les jeunes délinquants sont séparés des adultes et soumis à un régime approprié à leur âge et à leur statut légal. »

Il va de soi que la détention implique de nombreux autres sujets que ceux qui sont contenus dans cette disposition et qui revêtent une importance fondamentale pour les détenus. Si les conventions internationales contraignantes sont donc relativement limitées en ce qui concerne les règles pénitentiaires (bien qu'elles puissent être développées dans la jurisprudence internationale relative aux droits de l'homme[114]), les instruments de droit facultatifs sont nombreux à offrir des ensembles de dispositions formulant des droits pour les détenus et les prisonniers et à exprimer de nombreuses obligations des autorités en ce qui concerne les institutions pénitentiaires. Parmi les exemples les plus importants, NU 1955 *Ensemble de règles minima pour le traitement des détenus*[115], la *Déclaration africaine de Kampala sur les conditions de détention de* 1996, la *Déclaration africaine de Ouagadougou pour Accélérer la Réforme Pénale et Pénitentiaire en Afrique* 2002[116], la CIDH 2008 *Principes et pratiques optimales relatifs à la protection des personnes privées de liberté dans les Amériques*[117], et le Conseil de l'Europe 2006 *Règles pénitentiaires européennes.*[118] L'explication du contenu de ces instruments excéderait de loin le champ d'action du présent

114 Voir par exemple P.H.P.H.M.C. van Kempen, 'Positive Obligations to Ensure the Human Rights of Prisoners. Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the CEDH, the ACHR, and the ChAfDHP', in : Peter J.P. Tak & Manon Jendly (eds), *Prisoners policy and prisoners rights. Protection of fundamental rights of prisoners in international and domestic law/Politiques pénitentiaires et droits des détenus. La protection des droits fondamentaux des détenus en droit national et international*, Nijmegen : Wolf Legal Publishers 2008, p. 21-44.

115 Il existe de nombreux autres instruments des Nations Unies qui concernent la protection des personnes détenues ou emprisonnées. Ils sont disponibles sur le site Internet du HCDH (à l'adresse : www.ohchr.org/FR/Pages/WelcomePage.aspx).

116 Cet instrument africain et d'autres encore relatifs à la détention, à l'emprisonnement et aux institutions pénitentiaires sont disponibles sur les sites Internet de la CADHP (à l'adresse : www.achpr.org/francais/_info/index_declarations_fr.html) et de Penal Reform International (www.penalreform.org/models-reform).

117 Ces Instruments ainsi que d'autres instruments pertinents de l'Inter-American System sont disponibles sur le site Internet de l'OEA (à l'adresse : www.oas.org/en/iachr/pdl/links/default.asp).

118 De nombreux autres instruments européens pertinents sont disponibles sur le site Internet du Conseil de l'Europe (à l'adresse : www.coe.int/prison (sous : Recommandations)).

chapitre. Pour les mêmes raisons, il n'est pas possible de décrire et de comparer le droit et la pratique pénitentiaire de chacun des États représentés dans le présent volume. Je me limiterai dès lors à quelques observations.

Avant toute chose, il convient de noter que si les instruments internationaux relatifs à la détention, à l'emprisonnement et aux institutions pénitentiaires peuvent être vastes, leur capacité à forcer légalement les États à respecter les règles qui y sont définies est généralement très limitée, si pas totalement inexistante. L'une des raisons en est que la plupart des instruments ne sont pas légalement contraignants. Les chapitres nationaux laissent toutefois à penser que les règles internationales relatives aux droits de l'homme semblent influencer la loi, ainsi que la pratique effective du système pénitentiaire, mais dans une moindre mesure (voir, *p.e.,* Argentine, Chine, Nouvelle Zélande, Afrique du Sud, Pologne, Taiwan, Turquie). Si le contrôle des systèmes est impératif, c'est précisément parce que la pratique effective présente un décalage. Les instruments internationaux des droits de l'homme, qui se concentrent habituellement sur la privation de liberté, manquent généralement aussi d'un système de contrôle efficace dans la loi et la pratique. La plus importante exception à cette constatation est peut-être la C*onvention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants* du Conseil de l'Europe 1987, qui institue le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) et ses visites de contrôle, dans les États membres, de tout lieu dans lesquels des personnes sont privées de leur liberté par une autorité publique. Il est intéressant de constater que la base légale du travail de grande ampleur réalisé par le CPT est assez faible d'un point de vue formel, tant sur le plan procédural (il peut uniquement établir un rapport sur les faits découverts et faire des recommandations ; article 10) qu'en substance (sa tâche consiste uniquement à examiner le traitement des personnes privées de leur liberté dans le but de les protéger contre la torture et les traitements inhumains ou dégradants ; article 1). Le CPT a néanmoins acquis une certaine efficacité. Ses recommandations et normes détaillées (qui sont de plus en plus fréquemment appliquées par la Cour européenne des droits de l'homme, dont la jurisprudence revêt une grande pertinence pratique, comme l'illustrent les chapitres consacrés aux États européens)[119] ont acquis une grande autorité parmi les États membres et elles influencent souvent le droit et la pratique des États (voir les chapitres consacrés à la Belgique, au Danemark, à l'Allemagne, aux Pays-Bas, à la Turquie et plus encore à l'Angleterre et aux Pays de Galles et à la Grèce). En dépit de cela, il convient de noter que bon nombre de

[119] Voir également Conseil de l'Europe, *Mesures de caractère général adoptées afin de prévenir de nouvelles violations de la Convention européenne des Droits de l'Homme. Mesures communiquées au Comité des Ministres lors de son contrôle de l'exécution des arrêts et des décisions en vertu de la Convention (Application des anciens articles 32 et 54 et de l'article 46)*, H/Exec (2006)1 (Dernière mise à jour : mai 2006), 293 pp. (à l'adresse : www.coe.int/t/dghl/monitoring/execution/documents/mgindex_FR.asp).

ces recommandations et normes ne concernent pas directement les mauvais traitements et la torture.

Dans leur chapitre, Van Kalmthout & Knapen examinent les normes établies par le CPT, qui doivent être respectées par les autorités. Je ne répéterai pas leur exposé ici. Il suffit de dire que le CPT a contribué en grande partie à l'établissement de normes et à la supervision de la détention et de l'emprisonnement en Europe. Au niveau international, une institution similaire a vu le jour il y a quelques années : le Sous-comité contre la Torture (S-CAT), qui contrôle la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* des NU, 1984, par un système de visites régulière dans les lieux où des personnes sont privées de liberté. Ce Comité collabore étroitement avec le CPT. L'avenir nous dira si le S-CAT sera à même d'exercer une influence aussi importante à l'échelle mondiale que le CPT au niveau européen.

Importance du droit et de la pratique pénitentiaire nationaux

En fin de compte, la mise en œuvre effective des normes de détention et d'emprisonnement appartient aux autorités nationales d'un État. Pour ce qui est de leur supervision, Van Kalmthout & Knapen soulignent le fait que les procédures de plainte nationales accessibles pour les détenus et les prisonniers sont d'une importance cruciale. Il existe toutefois d'autres mécanismes de contrôle national qui méritent d'être pris en compte. Le chapitre rédigé par Michael Reilly offre un bel exemple en la matière. Il explique en effet les tâches, activités et résultats d'un Inspecteur national des prisons. Reilly accorde une grande attention au fait que si la qualité de l'évaluation par les organes de contrôle et les normes qu'ils appliquent revêtent une importance cruciale, il en va de même pour les garanties formelles qui les entourent afin de garantir leur indépendance, leur impartialité et leurs compétences à remplir leur tâche de surveillance.

En effet, les droits des détenus et leurs conditions de détention doivent en fin de compte être assurés par le droit et la pratique du pays. Les sujets évoqués dans les chapitres nationaux sont donc par exemple : les installations de détention (où sont détenues les personnes placées en garde à vue ou en détention provisoire) ; les catégories de détenus (*p.e.,* les mineurs, les femmes, les suspects dangereux, les terroristes) ; leurs conditions de détention (*p.e.,* l'espace prévu par la loi ou les réglementations pour chaque détenu avant jugement ; logements individuels ou collectifs) ; les informations fournies aux détenus ; la façon dont il est garantit que les détenus bénéficieront d'un traitement humain (y compris *p.e.,* l'accès à des installations sanitaires ou s'ils sont autorisés à porter leurs vêtements personnels) ; les contacts avec le monde extérieur (*p.e.,* les visiteurs, les appels téléphoniques, courriers) ; le programme quotidien des détenus avant jugement (*p.e.,* travail, exercice) ; la protection et les soins apportés aux détenus avant

jugement; et le droit des détenus de se plaindre. De plus, bon nombre de chapitres nationaux évoquent l'incidence des instruments et des décisions internationaux des droits de l'homme sur le droit et la pratique en matière de conditions de détention, ainsi que les développements les plus significatifs dans un pays déterminé.

Plus encore que les normes du droit de la procédure pénale pour l'application de la détention avant jugement, il semble qu'il existe un fossé entre le droit et la pratique lorsqu'il est question de garantir des conditions de détention et des droits des détenus adéquats. Ainsi, même si la loi « reflète la théorie de l'administration correctionnelle moderne » (pour reprendre les termes de Matsuo dans son chapitre consacré au Japon) ce n'est pas suffisant. Les chapitres consacrés aux États répondants montrent clairement que bon nombre de pays font tout ce qu'ils peuvent pour améliorer leur système pénitentiaire (voir *p.e.*, Chine, Afrique du Sud, Turquie). Plusieurs pays ont récemment adopté ou mis en œuvre une nouvelle législation pénitentiaire moderne (*p.e.*, Allemagne, Japon, Irlande, Pologne) ; ont renforcé leur législation existante (*p.e.*, Grèce, Nouvelle Zélande, Norvège) ; ou sont en cours de rédaction d'une nouvelle législation en la matière (Taiwan). Comme indiqué précédemment, le droit international relatif aux droits de l'homme et les règles carcérales internationales non contraignantes ont souvent largement influencé le contenu de ces mesures et droits nationaux. Des améliorations ont également été apportées par l'amélioration des possibilités de recours contre les décisions adoptées par les autorités pénitentiaires (Taiwan) ; la clarification particulière des obligations de la police lors de la détention de personnes (Irlande) ; ou la mise à niveaux des équipements et la construction de nouvelles installations (*p.e.*, France, Portugal). Certains pays adoptent aussi une nouvelle législation et de nouvelles mesures visant à réduire l'isolement des personnes emprisonnées et les effets négatifs de cet isolement (Danemark, Norvège), ou de détecter et de réduire les violences sexuelles dans les prisons (États-Unis). Toutefois, comme l'observent Aparicio & Ortenzi (dans leur chapitre consacré à l'Argentine) « il est vrai aussi qu'il est difficile de respecter la loi pour des raisons budgétaires, d'infrastructure des bâtiments et de manque de personnel, autant de raisons applicables au système judiciaire, à la […] police et au […] système pénitentiaire. »

Ce qui précède n'a pas pour but de sous-entendre les États tentent uniquement d'améliorer le caractère humain de leur système pénitentiaires. Par exemple des régimes de détention très stricts sont appliqués aux suspects d'actes de terrorisme (cf. le chapitre sur l'Angleterre et le Pays de Galles, l'Italie, les Pays-Bas et les États-Unis, *p.e.*). De plus, il ne fait aucun doute que certains États affirment que la garantie des droits de l'homme des détenus est très importante, alors qu'en réalité, leurs priorités sont totalement différentes. C'est pour cette raison également qu'il est impératif d'adopter des normes pénitentiaires et des mécanismes de contrôle internationaux et nationaux efficaces.

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Catégories de détenus

Comme indiqué dans l'introduction de ce chapitre, certaines catégories de détenus, par exemple les enfants, les femmes, les étrangers, les minorités ethniques ou religieuses ou les homosexuels, posent des problèmes et des défis spécifiques nécessitant des approches spécifiques, comme l'expliquent Paprzycki & Pomiankiewicz dans leur chapitre thématique consacré aux femmes. En fait, les problèmes qui se posent de manière générale avec les détenus, s'appliquent habituellement de manière beaucoup plus extensive et progressive à ces catégories de détenus. Il n'est pas rare que des personnes fassent partie de plusieurs de ces catégories. C'est pourquoi le droit international relatif aux droits de l'homme leur accorde une attention toute particulière, comme illustré par les *Règles des Nations Unies pour la protection des mineurs privés de liberté* des Nations Unies, 1990, et le Conseil des Ministres du Conseil de l'Europe *Recommandation Rec. R(84)12 relative aux prisonniers étrangers*[120], pour ne citer que deux instruments non contraignants.

Il est cependant beaucoup plus important que le droit national reconnaisse la nature des catégories spécifiques de détenus, comme la législation d'Afrique du Sud propose de le faire dans le cas des enfants (voir le chapitre national de Van Zyl). Les chapitres consacrés aux pays communiquant des rapports laissent néanmoins à penser que bon nombre de catégories de détenus vulnérables ne bénéficient pas d'une attention et d'une protection spécifiques. Par exemple, selon ces chapitres, les homosexuels et les transsexuels ne peuvent compter sur une protection spéciale que dans quelques pays (la Grèce, les Pays-Bas et probablement également l'Irlande, la Nouvelle Zélande et le Portugal). Il est clair que de nombreux autres pays n'ont pas de réglementations spéciales pour assurer leur protection (*p.e.,* Belgique, Danemark, Allemagne, Pologne et Taiwan), mais dans certains de ces États au moins (*p.e.,* Danemark, Italie, Norvège) ils peuvent néanmoins demander à être isolés, ce qui n'est pas *per se* une solution humaine au problème. À cet égard, il semble pourtant qu'il existe un fossé entre la loi et la pratique. La protection de la loi ne garantit donc pas la protection dans la pratique et vice versa. Dans le même temps, il est probable que bon nombre de pays n'offrent pas de protection adéquate, d'aucune sorte.

[120] Sur le sujet des étrangers emprisonnés, voir Peter J.P. Tak & Manon Jendly (eds), Minorities and Cultural Diversity in Prison/Minorités et diversité culturelle en prison (IPPF/FIPP), Nijmegen, Wolf Legal Publishers, 2006.

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V. LES ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

Il découle, tant du droit fondamental à la liberté que de la présomption d'innocence, que l'État doit appliquer le principe de la subsidiarité/nécessité : détention ne peut être pratiquée que si toutes les autres voies moins sévères sont inadaptées pour contrôler le suspect de façon adéquate. Ce même principe est accepté (expressément ou implicitement) dans la plupart des systèmes nationaux de droit de procédure pénale. Ainsi légalement, la liberté inconditionnelle est un droit primaire. Il en va de même (comme le note Pradel dans son chapitre consacré à la France) lorsqu'il existe de solides preuves de culpabilité du suspect. La liberté conditionnelle n'a lieu d'être que dans la mesure où la liberté du suspect, voire les mesures de détention alternative, serait de nature à porter atteinte à des intérêts justifiés. Les autorités ne peuvent par conséquent pas détenir un suspect, sauf si les solutions alternatives sont inadéquates. Ceci est en outre important dans la mesure où il semble que lorsque la détention avant jugement a été appliquée, le défendeur a de plus grandes chances d'être condamné à une peine de prison (ou à une peine de prison plus longue) que s'il n'a pas été détenu avant jugement (comme le note Tak dans son chapitre sur les Pays-Bas).

Le très grand nombre de détenus avant jugement dans de nombreux pays laisse à penser que ni le droit à la liberté, ni la présomption d'innocence ne sont très largement appliqués dans ces pays. Cela pourrait être dû à un manque de conscience, dans la pratique, de l'importance réelle de ces règles. À cet égard également, le pouvoir judiciaire pourrait jouer un rôle d'une importance toute particulière dans la prévention et la correction des manquements et abus du système de détention avant jugement, comme le conclut Vianno dans son chapitre sur les États-Unis lorsqu'il évoque la « crise » de la détention avant jugement. Évidemment, cela ne porte pas préjudice aux responsabilités de l'administration et du législateur. L'amélioration de la loi peut être positivement influencée dans la pratique de la détention avant jugement, concluent Yarsuvat & Aksoy Rétornaz dans leur chapitre consacré à la Turquie. Une observation faite par Feest dans son chapitre sur l'Allemagne est particulièrement pertinente en la matière. Il laisse en effet à penser que la reconnaissance à un niveau général des normes telles que la présomption d'innocence ne suffit pas lorsque celles-ci ne sont pas aussi exprimées de manière adéquate et suivies dans les normes plus spécifiques qui régissent la détention avant jugement. Dans le même temps, ce problème n'est pas l'apanage des États : le système de coopération internationale dans les affaires criminelles lui-même (comme illustré dans le chapitre thématique de Boetticher pour ce qui est des procédures d'extradition au sein de

l'Union européenne[121]) ne tient pas suffisamment compte des principes de subsidiarité/nécessité et de proportionnalité.

Tout ceci ne signifie pas nécessairement que les alternatives à la détention avant jugement ne sont pratiquement jamais appliquées. Il est intéressant de noter que dans plusieurs des pays qui enregistrent des taux de détention très élevés, les alternatives à la détention (plus particulièrement la libération sous caution) sont appliquées à relativement grande échelle (*p.e.,* les États-Unis et l'Afrique du Sud), alors que cette mesure n'est que rarement, voire jamais, appliquée dans de nombreux autres pays dont les taux de détention restent modérés (*p.e.,* les Pays-Bas), sont faibles (France, Portugal), voire très faibles (*p.e.,* Allemagne, Norvège). Les informations contenues dans les exposés du présent volume n'offrent pas d'explication très claire à cette situation paradoxale. L'une des explications possibles est que les pays qui affichent des taux de détention élevés appliquent non seulement la détention dans de nombreuses situations dans laquelle les autres pays pourraient s'abstenir de l'appliquer, mais aussi qu'ils appliquent des solutions alternatives à la détention dans de nombreuses situations où les autres pays opteraient simplement pour la liberté inconditionnelle. Si le développement de l'utilisation des solutions alternatives peut concurrencer le droit à la liberté et la présomption d'innocence, il n'en serait pas toujours nécessairement ainsi. Il existe toujours un risque que la disponibilité accrue des mesures alternatives à la détention avant jugement incitera la police, le ministère public, ou les tribunaux à appliquer ces solutions alternatives dans des situations dans lesquelles elle n'appliquait précédemment aucune mesure de contrôle contre le suspect. Voir aussi le chapitre de Rapoza, qui note que l'on peut affirmer que la surveillance électronique peut réduire le réseau du contrôle de l'État sur les accusés.

Selon la perspective du droit à la liberté et à la présomption d'innocence, ces effets secondaires ne sont pas les bienvenus, mais il pourrait s'avérer difficile de les prévenir par des règles procédurales, car les autorités disposeront toujours d'une marge d'appréciation dans la décision de recourir à une solution alternative. Il est peu aisé pour la loi de modifier la culture législative d'un État. Mais même si les solutions alternatives ne sont pas utilisées sans qu'il y ait une cause valable, elles ne constituent pas la panacée contre le recours excessif à la détention avant jugement. L'introduction d'alternatives dans plusieurs pays n'a eu que peu ou pas d'effet sur les taux de détention (voir, *p.e.,* les chapitres sur l'Italie et la Turquie).[122] De plus, il existe des arguments plus fondamentaux contre ces solutions alternatives, entre autres le fait que leur praticabilité peut dépendre du statut social et des conditions du suspect, comme le souligne Della

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[121] Voir section 7 de ce chapitre.

[122] Voir aussi le chapitre 1 de A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 95: « there is little evidence that the introduction of alternatives to pre-trial detention has resulted in a reduction of the percentage of pre-trial detainees in the prisons. »

Casa (chapitre sur l'Italie). Comme certaines personnes citées par Casorla l'affirment à l'égard de la libération sous caution : « Il est préférable de détenir tout le monde que de se contenter de libérer les riches. »

Aucun de ces arguments contre le recours à un système de solutions alternatives à la détention n'est toutefois décisif, fut-ce parce que la pratique semble prouver qu'il peut fonctionner. La Chine semble illustrer ce propos et plus encore, l'Irlande, qui affiche un faible taux de détention avant jugement (15 en 2007 ; 14 en 2009) et dont on estime au vu des données disponibles que la libération sous caution est accordée dans environ 25 % à 33 % des cas de meurtre et est habituellement accordée dans plus de 80 % des cas de crimes moins sérieux. Selon Mellett, la raison de ce chiffre relativement élevé de 80 % est que l'Irlande applique une présomption constitutionnelle en faveur de la libération sous caution, puisque au regard de la loi, une personne est innocente jusqu'à ce que sa culpabilité soit prouvée. Il ne découle donc pas de ceci que l'État doit s'abstenir d'apporter des solutions alternatives à la détention avant jugement, mais qu'il doit surveiller avec prudence le recours aux alternatives, tant dans des cas individuels que de manière générale, dans le système de justice pénale. Il est par ailleurs important que le droit de procédure et la pratique offrent la possibilité d'adapter l'application d'une solution alternative aux particularités de l'affaire et au suspect individuel.

De nombreuses variations ou alternatives à la détention avant jugement sont évoquées dans les chapitres consacrés aux pays communiquant des rapports. Ces chapitres illustrent par ailleurs le fait qu'au cours des dernières années, bon nombre d'États ont introduit, relancé ou à tout le moins testé de nouvelles alternatives (voir, *p.e.,* Belgique, Chine, Allemagne, Nouvelle Zélande, Pologne et Portugal). D'autres États disposaient d'ores et déjà de nombreuses alternatives (voir, *p.e.,* Espagne, Taiwan, les États-Unis). L'une de ces nouvelles alternatives est examinée en détail dans le chapitre de Rapoza, qui se penche sur la surveillance électronique, sa relation aux motifs et objectifs de la détention avant jugement, son utilisation et ses avantages possibles, ainsi que certaines de ses limites. La majorité des observations qu'il formule sont applicables à la plupart des alternatives. Pour ce qui est de la surveillance électronique, Rapoza conclut que lorsqu'elle est correctement utilisée, cette technologie peut apporter certains avantages, entre autres la possibilité pour un accusé de rester libre là où sans cela, il serait maintenu en détention.

VI. CONCLUSION

Fondamentalement, la détention avant jugement est régie par le droit à la liberté, la présomption d'innocence, le droit à un traitement humain et l'interdiction de la torture et des mauvais traitements. Les nombreuses différences constatées

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entre les systèmes nationaux de procédure pénale et le droit pénitentiaire des pays évoqués dans le présent volume illustrent que ces normes internationales fondamentales (qui sont largement acceptées par l'ensemble de ces pays) ne donnent pas lieu à une grande uniformité dans le droit de la détention avant jugement dans le monde. De plus, la mise en œuvre de droits de l'homme universels et constitutionnels dans le droit pénal et criminel ne garantit pas en soi leur respect dans la pratique. Cela ne signifie certainement pas que la loi constitue une préoccupation secondaire, voire non pertinente. Il est évident (et clair au vu des chapitres nationaux contenus dans ce volume) que les normes internationales relatives aux droits de l'homme et les organes de supervision, ainsi que les droits civils constitutionnels, exercent une incidence positive à la fois sur le droit national et la pratique d'un pays. Les chapitres nationaux indiquent au moins sérieusement qu'il est presque impossible de respecter ces normes dans la pratique en l'absence d'un système légal adéquat. Ces chapitres démontrent par ailleurs que des améliorations juridiques sont souvent essentielles pour générer des améliorations de la pratique. Mais *in fine*, il appartient à la pratique (c'est-à-dire aux tribunaux, procureurs, à la police, ainsi qu'aux administrations et au personnel pénitentiaire) d'appliquer le droit relatif à la détention avant jugement conformément aux normes fondamentales des droits de l'homme. Cela ne signifie pas que la responsabilité des législateurs prend fin avec l'adoption de lois adéquates en matière de détention avant jugement. Pour créer un climat juridique dans lequel toutes les autorités impliquées sont effectivement conscientes de l'importance qu'il y a à appliquer la détention avant jugement dans le respect des normes fondamentales susmentionnées, il est vital que les législateurs (ou mieux encore, les hommes politiques et les gouvernements) diffusent le message que ces principes revêtent une importance cruciale.

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PART TWO
THEMES

2ÈME PARTIE
THÈMES

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DE QUELQUES ÉLÉMENTS RELATIFS À LA DÉTENTION AVANT JUGEMENT : INTRODUCTION GÉNÉRALE

Francis Casorla*

1. INTRODUCTION

Au mois de décembre 2009, en France, un directeur de prison était mis en examen pour homicide involontaire après la mort d'un jeune homme tué par son codétenu, alors qu'il était en détention dans l'attente de son jugement. La justice dira si ce fonctionnaire est ou non coupable d'avoir laissé un détenu avant jugement partager la cellule d'un condamné purgeant une peine pour des actes de torture et de barbarie. Mais si j'ai choisi ce fait divers en ouverture de mon introduction, c'est qu'il nous plonge, me semble-t-il, dans le vif du sujet, au croisement des questions qui nous occuperont : la détention avant jugement, pour qui ? Pour quelles raisons ? Dans quelles conditions ? Quelles exigences et responsabilités pour l'Etat ?

Or, il faut le relever dès maintenant, les réponses à ces questions simplement formulées s'avèrent extrêmement complexes, les importantes mutations dans ces domaines étant animées par des forces antinomiques et, peut-être, inconciliables : les droits de l'homme et leurs standards en matière pénale et pénitentiaire seront abondamment évoqués dans nos débats, tant la place qu'ils occupent est désormais déterminante. Mais les nouvelles formes de criminalité, les demandes renforcées de sécurité, la consécration des droits des victimes sont autant de forces non moins actives dans nos sociétés, travaillant elles aussi la matière pénale et, le plus souvent, en sens exactement inverse.

Benjamin Franklin estimait que *« ceux qui sont prêts à sacrifier une liberté essentielle à une sécurité aléatoire et précaire ne méritent ni la liberté, ni la sécurité »*. Certes, mais si le philosophe percevait bien l'antinomie irréductible entre ces deux aspirations par ailleurs également légitimes, le citoyen-

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consommateur n'a pas la même hauteur de vues. Il réclame sécurité et liberté avec la même ardeur, s'indigne également de la sévérité du juge et de sa faiblesse, tolère aussi peu un innocent en prison qu'un coupable en liberté.

Comment penser un point d'équilibre, puisqu'il ne peut s'agir ici que d'équilibre, forcément instable, en un temps et un lieu donnés, et non de poser enfin les bases d'un chimérique « projet de justice perpétuelle[1] » ? L'absolutisation des termes de la question n'aide pas : « risque zéro » contre « droits inaliénables », « guerre contre le terrorisme » contre « totalitarisme d'Etat »[2] …

La FIPP s'est penchée sur ces questions à plusieurs reprises, dès 1961 à Nivelles, à propos du régime de la détention avant jugement, plus récemment sur les conditions d'application et d'exécution de la détention préventive à la lumière des droits fondamentaux, lors des journées de la FIPP à Macao en 1994, ou encore plus proche de nous lors du Colloque de Budapest en 2006 sur le thème de l'exécution des sanctions privatives de liberté et les impératifs de sécurité.

La détention avant jugement, parce qu'elle est une exception au principe selon lequel tout homme est présume innocent jusqu'à ce qu'un tribunal l'ait déclaré coupable, se situe *a priori* sur une ligne de faille de nos systèmes pénaux. Comme telle, elle est particulièrement travaillée par les courants telluriques qui travaillent le droit pénal : la prévention se substitue progressivement à la répression, le risque à la faute (risque de récidive, d'absence au procès, de trouble à l'ordre public…).

C'est pourquoi, en introduction de nos échanges, il m'a paru utile d'évoquer ce double mouvement : d'une part la protection croissante des droits et libertés dans le domaine de la détention avant jugement ; d'autre part et en sens contraire, le renforcement des exigences de sécurité et de lutte contre la criminalité qui contribuent à conserver à la détention avant jugement un rôle important dans nos systèmes pénaux.

La détention avant jugement apparaît alors comme signe de contradiction : une pratique qui nous embarrasse mais dont nous ne saurions nous passer. La détention avant jugement apparaît aussi comme miroir : lieu de rencontre entre nos principes (forcément fondamentaux) et la réalité, la détention avant jugement nous renvoie une image contradictoire de nos sociétés.

Mais auparavant, force est d'admettre que la détention avant jugement constitue une réalité difficile à appréhender.

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1 Allusion au « Projet de paix perpétuelle » de KANT.

2 La Cour suprême des États-Unis n'a pas craint de définir la détention avant jugement comme « marque du totalitarisme d'Etat » dans sa décision *US v. Guadalupe Montaldo-Murillo*, 110 SC 2072 (1990).

2. UNE RÉALITÉ DIFFICILE À APPRÉHENDER

2.1. UNE DÉFINITION INCERTAINE

La définition de la privation de liberté ne pose pas de problème majeur. Etant dans une enceinte internationale, nous pouvons nous référer à la définition de l'article 4 du Protocole facultatif du 18 décembre 2002 se rapportant à la Convention des Nations Unies du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants.[3] La définition de la détention avant jugement s'avère plus délicate.

Elle s'applique à cette partie de la population carcérale qui n'a pas encore fait l'objet d'une condamnation définitive, selon la distinction classique des détenus entre « détenus avant jugement » et « condamnés ». Mais la catégorie des détenus avant jugement peut s'entendre de diverses façons :

- *Stricto sensu*, les personnes détenues qui n'ont pas encore été jugées ;
- Les personnes détenues déclarées coupables mais en attente de leur condamnation – dans les systèmes où culpabilité et peine font l'objet de décisions distinctes ;
- Les personnes détenues, condamnées en première instance mais disposant encore d'une voie de recours ou l'ayant exercée (appel, pourvoi en cassation).

Pour le Conseil de l'Europe, dans sa recommandation de 2006 concernant la détention avant jugement, « *détention provisoire s'entend de toute période de détention d'un suspect ordonnée par une autorité judiciaire et antérieure à la condamnation* ».[4] Ne sont donc pas concernées les personnes privées de liberté par la police en vue d'un interrogatoire ou aux fins de vérifications, en particulier dans le cadre de la « garde à vue ». En revanche, l'expression s'applique aux autres situations : détention résultant de la coopération judiciaire internationale ou de l'extradition ; détention postérieure à la condamnation, en attente soit du prononcé de la peine soit de la confirmation du jugement de première instance.

L'exclusion de la « garde à vue », c'est-à-dire de la privation de liberté décidée par la police (ou l'armée exerçant des pouvoirs de police, dans certains pays) nous paraît doublement critiquable : d'une part parce que l'autorité judiciaire, si

[3] « *On entend par privation de liberté toute forme de détention ou d'emprisonnement, ou le placement d'une personne dans un établissement public ou privé de surveillance dont elle n'est pas autorisée à sortir à son gré, ordonné par une autorité judiciaire ou administrative ou toute autorité publique.* ».

[4] *Recommandation Rec(2006)13 du comité des ministres aux Etats membres concernant la détention provisoire, les conditions dans lesquelles elle est exécutée et la mise en place de garanties contre les abus*, adoptée le 27 septembre 2006, in *Compendium des conventions, recommandations et résolutions relatives aux questions pénitentiaires*, Conseil de l'Europe, Strasbourg, 2007, p. 35 s.

elle n'est pas décisionnaire, peut être étroitement associée à la décision de la police, comme c'est le cas en France où le procureur de la République est informé par l'officier de police judiciaire de tout placement en garde à vue et peut décider de sa prolongation au-delà de 24 heures. D'autre part parce qu'elle fait l'objet d'une déclaration de droits (droit au silence dans le système d'inspiration anglo-saxonne, droits à un examen médical, à un contact familial, droit à un avocat…). D'une troisième part, parce que l'exclusion de la garde à vue méconnaît un phénomène important, dont nous parlerons, de glissement des pouvoirs de placement en détention du juge vers le procureur, là où cette distinction existe, et même vers la police ou l'administration.

Une appréhension plus juste du phénomène appelle donc selon nous une définition temporelle large de la détention, commençant avec cette première restriction de liberté décidée par la police jusqu'à la décision définitive rendue par un juge. Doivent être ainsi inclues dans notre périmètre de réflexion : la garde à vue, les différentes mesures de rétention, mais également les mesures alternatives à la détention (contrôle judiciaire, cautionnement, bracelet électronique…) restrictives de liberté, ainsi que le temps de détention effectué pendant l'exercice des voies de recours.

Et même un étonnant retour à la détention avant jugement résultant de l'application de l'article 626-5 du Code de procédure pénale français selon lequel, après un arrêt de condamnation de la France par la Cour européenne des droits de l'homme (CourEDH), lorsqu'une juridiction pénale française réexamine l'affaire, « *la personne est considérée comme placée en détention provisoire* ». De sorte que la situation d'une personne condamnée définitivement à de la prison ferme et bénéficiant d'un tel réexamen pourrait être la suivante : en détention avant jugement pendant l'instruction, elle l'est restée jusqu'à l'épuisement des voies de recours. A la suite de quoi elle a commencé à purger sa peine. Quelques années plus tard, la Cour EDH ayant condamné la France et la Cour de cassation ayant accueilli sa demande de réexamen, la personne retrouve la détention avant jugement, ce qui pourrait d'ailleurs impliquer qu'elle quitte une centrale pénitentiaire pour une maison d'arrêt. Ce masochisme juridique pourrait conduire à la délicate notion de « détention-sandwich » : deux tranches de détention avant jugement et au milieu, une tranche de peine.

Délicate à définir, la détention avant jugement s'avère difficile à mesurer.

2.2. UNE MESURE DIFFICILE À … MESURER

Le taux de détenus avant jugement par rapport à la population carcérale totale constitue l'indicateur privilégié pour une mesure de la détention avant jugement. Le plus simple, il est aussi souvent le seul disponible.

De fait, il permet une première approche du phénomène : les chiffres mondiaux fournis par le Centre international d'études pénitentiaires du King's

College de Londres (et qui étaient accessibles sur le site de la FIPP en vue de ce Colloque) permettent ainsi de distinguer d'emblée de fortes spécificités géographiques : la détention avant jugement est ainsi majoritaire, voire ultra-majoritaire, dans de nombreux pays d'Afrique[5], alors qu'elle est minoritaire en Europe et plus encore en Océanie.[6]

Au sein d'une même aire géographique, les disparités sont cependant très fortes : par exemple, 22,9 % au Costa Rica mais 63,5 % au Honduras. A la théorie des climats de Montesquieu, qui s'est trompé sur ce point comme sur beaucoup d'autres, il faut donc sans doute préférer l'étude des systèmes pénaux, dans leurs principes comme dans leur application.

En effet, pour reprendre les termes d'un membre de la Commission de suivi de la détention provisoire française, mieux comprendre la détention avant jugement suppose d' « *approfondir la connaissance d'une part de ce [qu'elle] représente dans le fait carcéral, mais plus encore, d'autre part, des mécanismes du système pénal qui en sont les sources* ».[7]

Une étude détaillée des données relatives à la détention avant jugement dans leur contexte pénal permet ainsi de dépasser les faux-semblants et mieux appréhender les déterminants de la détention avant jugement.

Une illustration française de ces faux-semblants : la part des détenus avant jugement dans la population carcérale a connu trois pics particulièrement marqués au cours des 40 dernières années, en 1974, 1981 et 1988. Cependant, on ne constate aucun accès de fièvre des délinquants ou des juges derrière cette augmentation : ce sont les mesures générales d'amnistie prises après les élections présidentielles tenues ces mêmes années (une exception française) qui ont fait baisser à chaque fois par des libérations massives de plusieurs milliers de personnes, le nombre de condamnés en prison, et donc accru mécaniquement la part des détenus avant jugement dans la population carcérale.

Monaco qu'on présente comme ayant un taux de prés de 70 % de détenus avant jugement, voit en réalité ses condamnés exécuter leurs peines de longues et moyennes durées en France en vertu des Conventions franco-monégasques de 1918 et 1963 actualisées le 24 octobre 2002, ce qui, là encore donne un taux mécanique non significatif, et même trompeur.

Au-delà de ces exemples assez particuliers, des phénomènes plus subtils ont lieu, d'interprétation délicate : en France, il apparaît ainsi que le développement du contrôle judiciaire n'a, contrairement à ce qui était attendu, pas eu d'effet significatif, par substitution, sur la détention avant jugement, mais s'est plutôt

5 Le Liberia atteignant un taux de 97 % dans la population carcérale.

6 20 % en Australie et Nouvelle-Zélande.

7 Jean-Marie Delarue in Commission de suivi de la détention provisoire, Rapport 2007, Avant-propos, p. 4.

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développé de façon autonome comme complément de la mise en examen (l'inculpation).[8]

Par ailleurs, la baisse très importante du nombre d'affaires confiées au juge d'instruction (de 64 000 en 1982 à 23 317 en 2008) n'a pas modifié substantiellement la part des détenus avant jugement dans la population carcérale : d'une part parce que les détentions avant jugement dans le cadre d'une instruction ont baissé en nombre mais augmenté en durée (6,4 mois pour les délits, 26,1 pour les crimes)[9] ; d'autre part parce que le développement du traitement en temps réel par les parquets *via* la comparution immédiate (44 617 en 2008) a multiplié les « mini détentions avant jugement » de quelques jours ou quelques semaines.[10]

Enfin, l'augmentation récente du nombre de gardes à vue (plus de 500 000 par an depuis 2006, 800 000 en 2009) est actuellement l'objet de vifs débats, entre plus grande efficacité de la police et politique du chiffre.[11]

Ces données tirées de l'exemple de la France, mais très probablement valables au-delà, soulignent la complexité des déterminants de la détention avant jugement :

- La dépénalisation ou la pénalisation de nouveaux faits modifiant le périmètre d'application de la détention ;
- Les modifications touchant la procédure pénale ;
- Les évolutions des pratiques policières et judiciaires, souvent liées à des évolutions de la société elle-même, la nature des infractions entraînant une détention avant jugement variant dans l'espace et dans le temps.

Une mesure plus précise de la détention avant jugement, et notamment sa place dans les « trajectoires pénales » des individus, est indispensable pour ne pas sous-estimer ce phénomène, au moins dans les pays qui peuvent être tentés de le faire

8 Pour la période 1984-2006, le taux de mandats de dépôt à l'instruction reste stable autour de 40 % des personnes mises en examen, alors que le taux de contrôle judiciaire bondit de 20 à 60 %. Cfr. Rapport précité, p. 30 s.

9 A rapprocher de la durée moyenne de l'instruction passée de 11,6 mois en 1990 à 22,9 mois en 2008.

10 La durée moyenne d'une détention provisoire dans le cadre d'une comparution immédiate était de 0,4 mois en 2006. Cfr. Rapport précité, p. 50.

11 Daniel SOULEZ LARIVIERE, Vers des « Miranda Warnings » en Europe, *JCP* 2009, 553, qui indique clairement que « *les avocats se préparent à mettre en œuvre cette réforme (la réforme de la garde à vue) en attaquant systématiquement toutes les procédures qui sont faites en violation des droits reconnus par la Cour européenne (des droits de l'homme)* ». Ce qui d'ailleurs a été fait dans maintes juridictions qui, pour certaines, ont choisi, à la stupéfaction des délinquants aussitôt remis en liberté ainsi que des policiers et des magistrats du Parquet, de faire allégeance à la Cour européenne au détriment du Code de procédure pénale français et de la jurisprudence de la Cour de cassation. Ce choix délibéré d'un droit international « déterritorialisé » et d'une juridiction étrangère reconnue de facto comme cour suprême, ne manque pas de poser question sur la fonction de juger … lorsqu'elle refuse de juger …

car la détention avant jugement reste globalement une réalité carcérale minoritaire, même s'il est évident qu'une majorité de la population carcérale est entrée dans le système pénitentiaire par la porte de la détention avant jugement.[12]

L'autre enjeu de nos échanges est de repérer et évaluer les forces qui travaillent la détention avant jugement, entre exigences d'humanité dilatées par la philosophie des droits de l'homme, et impératifs de sécurité.

3. LA DÉTENTION AVANT JUGEMENT ET LA PROTECTION DES DROITS ET LIBERTÉS

La recommandation du Conseil de l'Europe concernant la détention provisoire, déjà citée, s'ouvre par un considérant de principe révélateur des exigences imposées aux Etats :

> « Considérant l'importance fondamentale de la présomption d'innocence et le droit à la liberté individuelle… »

Parce que la détention avant jugement porte atteinte à ces deux principes, la plupart des systèmes juridiques obéissent, en ce qui concerne la détention avant jugement, à deux grandes règles : tout d'abord, il s'agit d'une matière au moins législative, sinon constitutionnelle ; ensuite, un primat est accordé, au moins théoriquement, à la liberté individuelle.

Les règles pénitentiaires européennes (RPE) contribuent à harmoniser, au sein des 47 Etats membres du Conseil de l'Europe, les politiques pénitentiaires en s'attachant aux modalités de la détention au sein des établissements pénitentiaires. La règle 10.1 dispose expressément que *« les règles pénitentiaires européennes s'appliquent aux personnes placées en détention provisoire par une autorité judiciaire »*. La détention avant jugement y fait cependant l'objet d'une partie dédiée, la partie VII, règles 94.1 à 101, en déclinaison du principe posé par la règle 1 : *« Les personnes privées de liberté doivent être traitées dans le respect des droits de l'homme ».*

Parmi les principes posés par ces RPE définissant un régime carcéral commun des détenus avant jugement[13], la règle 95.2 énonce le principe directeur de la présomption d'innocence, selon lequel *« le régime carcéral des prévenus ne doit pas être influencé par la possibilité que les intéressés soient un jour reconnus coupables d'une infraction pénale »,* sans qu'on voit comment traduire concrètement ce principe, passablement contradictoire avec le fait que la détention doit être conditionnée par des raisons, plausibles ou sérieuses ou

[12] L'absence de mesure des « trajectoires pénales » individuelles ne permet malheureusement pas de mesurer précisément cette part.

[13] Par exemple, la séparation des prévenus et des condamnés, règle 18.8.

encore raisonnables, de croire que l'individu a commis une infraction. Peut-on désirer une chose et son contraire ? Et surtout, peut-on en déduire une procédure pénale et un système carcéral ?

Si les pays de *common law* accordent historiquement à la protection de la liberté une prééminence au moyen notamment de l'Habeas Corpus, les autres systèmes juridiques n'en sont pas moins soucieux de pallier l'évident déséquilibre des forces au détriment de la personne mise en cause.

Les règles procédurales encadrant les différentes composantes de la détention avant jugement attestent de cette philosophie.

3.1. LES GARANTIES PROCÉDURALES

L'arrestation

Que les systèmes soient très formalistes (USA) ou peu formalistes (France), le droit définit toujours les conditions dans lesquelles une personne peut se voir arrêtée, premier acte d'une privation de liberté – celle de poursuivre son chemin. Ces conditions obéissent soit à un critère de gravité de l'infraction constatée ou soupçonnée, soit à un critère de mode de découverte de ladite infraction (le flagrant délit, par exemple).

La garde à vue

Les différents systèmes pénaux s'attachent à définir le statut du gardé à vue, la durée et les suites de la garde à vue. Plusieurs droits sont, dans de nombreux pays, attachés à cette détention qui s'accompagne le plus souvent d'un interrogatoire.

Droit au silence : découlant du privilège de non-incrimination, il fait l'objet d'un statut et d'une appréciation différents selon les pays. Partie intégrante du *Bill of Rights* des Etats-Unis (5ème amendement), il jouit d'une moindre place dans les procédures encore inquisitoires, car il n'est signifié que lors de la première présentation au juge d'instruction.

Droit à l'assistance d'un avocat : trois classes de pays peuvent être distinguées selon que la présence de l'avocat est largement admise dès l'interrogatoire de police, qu'elle est moins assurée (Allemagne, Pays-Bas), ou qu'elle est sérieusement limitée (Belgique, France).

Durée de la garde à vue : elle est partout décidée par la police et varie selon la nature de l'infraction qui l'a déclenchée. Sa durée est généralement brève et peut ou non être prolongée, souvent sous le contrôle du juge ou du procureur.

Il faut déjà relever le développement, ces dernières années, de régimes dérogatoires de la garde à vue pour les infractions les plus graves (terrorisme, criminalité organisée…).

intersentia

La détention avant jugement stricto sensu

Si elle heurte certaines sensibilités, elle n'en existe pas moins dans tous les systèmes répressifs. Son principe directeur est l'exceptionnalité, qui entraîne trois principes à peu près partout consacrés: subsidiarité, proportionnalité, judiciarité.

Auxquels s'ajoutent les conditions posées à la mise en détention avant jugement: présence d'indices de culpabilité, gravité des faits (peine de prison encourue), motifs de détention (trouble à l'ordre public, fuite…). Le Conseil de l'Europe ajoute encore à ces trois conditions cumulatives une quatrième: le placement en détention avant jugement doit être décidé dans le cadre de la procédure pénale.[14]

La durée de la détention avant jugement est au surplus encadrée par le principe de légalité et de limitation dans le temps; la durée est souvent liée à la gravité et complexité des faits. Elle est partout soumise à recours.

L'exécution de la détention avant jugement peut avoir lieu soit dans des établissements dédiés (Angleterre, Espagne, Canada) soit dans des quartiers séparés au sein d'établissements ordinaires (USA, France). A noter que l'article 75-2 du code pénal suisse prévoit que le détenu peut demander à être placé dans un établissement pour peine, où sa détention est alors comptée comme exécution anticipée de la peine à venir. Il est permis de se demander dans quelle mesure cette demande ne s'apparente pas à une reconnaissance de culpabilité…

L'imputation de la détention avant jugement à la durée de la peine prononcée est parfois obligatoire (France), parfois facultative (Japon), parfois non prévue (USA, où elle s'effectue cependant *de facto*).

Les alternatives à la détention avant jugement

Leur développement témoigne de l'accent mis sur la liberté individuelle et le caractère subsidiaire du placement en détention.

La mesure initiale est le cautionnement qui a une double fonction: s'assurer de la représentation de la personne, et garantir les suites pécuniaires de l'éventuelle condamnation. Très répandu aux USA, peut pratiqué en France, il reflète le primat qu'un pays accorde soit à la liberté (aux USA où les *bail bonds* font l'objet d'une lucrative activité), soit à l'égalité (en France, pays de la passion égalitaire où, dit-on, mieux vaut la détention pour tous que la liberté sous caution pour les seuls « riches »).

[14] Cfr. Annexe à la recommandation Rec.2006, 13, Compendium précité, p. 37.

D'autres mesures sont prévues, tel le contrôle judiciaire[15], en fort développement mais, comme nous l'avons déjà noté pour la France, dont la substitution à la détention avant jugement n'est pas automatique.

Ces enseignements du droit pénal comparé[16] doivent être rapprochés des principes normatifs qui garantissent internationalement les droits des détenus et dessinent, peut-être, un droit international de la détention avant jugement qu'il nous appartiendra de préciser dans nos travaux.

3.2. LE CONTRÔLE INTERNATIONAL DES DROITS DE L'HOMME

Outre les grands textes relatifs à la protection des droits de l'homme, plusieurs organes internationaux sont amenés à s'intéresser à la détention avant jugement, le plus souvent dans le contexte général de la détention.

Les Nations Unies

Dans le cadre de la Charte des Nations Unies, citons :

- Au sein du Conseil des droits de l'homme, le groupe de travail sur la détention arbitraire[17] et le groupe de travail sur l'Examen périodique universel[18] ;
- Le rapporteur spécial sur l'indépendance des juges et des avocats ;
- Le rapporteur spécial sur la promotion et la protection des droits de l'homme dans le cadre de la lutte contre le terrorisme ;
- Le rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants.

Le Conseil des droits de l'homme, dans sa dixième session tenue en mars 2009, à la suite du rapport du groupe de travail sur la détention arbitraire, a ainsi

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15 En France art. 138 CPP, aux USA art. 18 USC § 3142c.

16 La plupart de ces observations sont tirées de J. Pradel, *Droit pénal comparé*, 3ème édition, Dalloz, 2008 et du même, *Procédure pénale comparée dans les systèmes modernes : rapport de synthèse des colloques de l'ISISC*, Nouvelles études pénales, Erès, 1998. Cfr. également Service des Etudes juridiques du Sénat novembre 2004, *Les droits du justiciable et la détention provisoire*, Site internet du Sénat français.

17 Voir par exemple l'avis juridique émis en 2007 sur la prévention de la détention arbitraire à l'occasion de transferts internationaux de détenus dans le cadre de la lutte contre le terrorisme, www.aidh.org/ONU_GE/conseilddh/07/rapp-dp-detention.htm.

18 Voir par exemple le Rapport national concernant la France, réf. A/HRC/WG.6/2/FRA/1, en particulier les remarques relatives à l'assistance d'un avocat pendant la garde à vue, à la rétention administrative des étrangers ou encore aux conditions de détentions, p. 15 s.

encouragé tous les Etats *« à veiller à ce que les conditions de la détention avant jugement ne nuisent pas à l'équité du procès »*.[19]

La Convention des Nations Unies du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants[20], et le Protocole facultatif du 18 décembre 2002 s'y rapportant[21], intéressent de façon plus directe la détention en général, et par voie de conséquence la détention avant jugement. Ces textes fondent en effet une protection internationale des droits de détenus, en particulier au nom de leur dignité.[22]

Sans garantie juridictionnelle, la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants n'est cependant pas sans influence.

Le Conseil de l'Europe

Le Conseil de l'Europe a développé ses propres outils relatifs à la détention avant jugement, sur le fondement de l'article 5 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, en particulier les paragraphes 1.c et 3.

Paragraphe 1.c :

> « Toute personne a droit à la liberté et à la sûreté. Nul ne peut-être privé de sa liberté, sauf dans les cas suivants et selon les voies légales :
> (…) c. S'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci ; (…)»

Et paragraphe 3 :

> « Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1.c du présent article, doit être aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires et a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure. La mise en liberté peut être subordonnée à une garantie assurant la comparution de l'intéressé à l'audience.»

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19 Rapport du Conseil des droits de l'homme, dixième session (2-27 mars 2009), document réf. A/64/53, p. 40.

20 Texte disponible sur www2.ohchr.org/french/law/cat.htm.

21 Entré en vigueur en 2006, texte disponible sur http ://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/551/49/PDF/N0255149.pdf ?OpenElement.

22 A noter que parmi les organes de ces traités, on trouve le comité contre la torture ainsi que le sous-comité pour la prévention de la torture, institué par le Protocole de 2002, chargé notamment de l'inspection des lieux de détention nationaux.

Sur ce fondement, la Cour EDH, bras armé du Conseil de l'Europe, a développé une abondante jurisprudence relative aux droits des personnes détenues avant jugement, droits qu'elle découvre et « canonise » inlassablement.[23]

Le droit d'être privé de liberté « selon les voies légales »: Cour EDH 30 novembre 2008, *Maire d'Eglise c. France*. Condamnation de la pratique dite du « petit dépôt » : *« à l'issue de la garde à vue, la personne est maintenue en détention pendant une quinzaine d'heures, en attendant la comparution devant le juge d'instruction, en dehors de tout cadre normatif »*. La Cour constate de ce défaut de base légale une violation de l'article 5§1.

Le droit de ne pas être privé de liberté arbitrairement: Cour EDH 19 février 2009, *Doronine c. Ukraine*. La Cour se reconnaît le pouvoir de requalifier une détention administrative en détention dans le cadre d'une enquête criminelle. La privation de liberté constitue donc une notion autonome.

La Cour EDH a également livré son interprétation des *« raisons plausibles de soupçonner »* de l'article 5§1.c: dans Cour EDH 6 novembre 2008, *Kandjov c. Bulgarie*, *« la notion de « raisons plausibles de soupçonner » est d'abord une garantie servant à restreindre le champ d'application des détentions prévues à l'article 5§1.c en posant des exigences quant aux charges retenues contre le suspect. »*

La détention avant jugement est particulièrement soumise au désormais classique *principe du délai raisonnable*.[24] Le droit d'être rapidement traduit devant un juge et le droit d'être jugé dans un délai raisonnable, sur le fondement de l'article 5§3 : Cour EDH 3 février 2009, *Ipek et autres c. Turquie*, *« la Cour affirme que, même en matière de terrorisme, la garde à vue ne peut dépasser quatre jours avant toute intervention judiciaire »*.

Le droit à être placé ou maintenu en détention par un juge: Cour EDH 27 novembre 2008, *Solovei et Zozoulia c. Ukraine*, cas d'une détention provisoire prononcée par le procureur. Depuis Cour EDH 4 décembre 1972, *Schiesser c. Suisse*, la Cour apprécie la qualité des personnes qui doivent intervenir dans les cas de privation de liberté de l'article 5§1.c. Ce doit être non seulement un magistrat, mais encore un magistrat qui :

- soit indépendant à l'égard du pouvoir exécutif et des parties ;
- entende personnellement l'individu traduit devant lui ;
- examine les circonstances qui militent pour ou contre la détention.

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23 Avec 57 000 nouvelles requêtes en 2009, 120 000 dossiers en instance et des délais de jugement de plusieurs années, la Cour EDH se trouve à son tour prise au piège du délai raisonnable. Cfr. Conférence d'Interlaken des 18-19 février 2010, Site internet de la Cour EDH.

24 Cfr. « Le délai raisonnable est-il bien raisonnable ? », Gilles LUCAZEAU (sous la direction de), JCP G n° 3, 14 janvier 2009, I 103. A noter Cass. Crim. 2 septembre 2009, *Revue Droit pénal* 2009, 145, deux arrêts selon lesquels les difficultés de fonctionnement de la juridiction appelée à statuer au fond ne sauraient justifier la prolongation de la détention avant jugement au-delà d'un an après la décision de mise en accusation dés lors qu'il n'est pas relevé que les autorités compétentes ont apporté une diligence particulière à la poursuite de la procédure.

intersentia

Le droit à un cautionnement raisonnable: dans un arrêt *Neumeister* du 27 juin 1968 la Cour EDH dit que le cautionnement devait être approprié et tenir compte de la situation de l'intéressé, notamment de ses ressources. *A contrario* comme on le verra plus loin, dans Cour EDH 8 janvier 2009, *Mangouras c. Espagne* il est dit qu'une caution de 3 millions d'euros n'est pas jugée excessive.

Le droit d'introduire un recours devant un tribunal afin qu'il statue à bref délai sur la légalité de la détention: Cour EDH 4 décembre 2008, *Husak c. République tchèque*. La Cour réaffirme sa jurisprudence concernant le droit du détenu devant le juge de la privation de liberté à un contrôle périodique de la justification de la détention, sous forme d'une audience.

Le droit à la liberté au-delà de la seule question de la détention: Cour EDH 21 octobre 2008, *Bessenyei c. Hongrie* selon laquelle il y a violation de l'article 2 du protocole n° 4 du fait d'une interdiction de quitter le territoire dans l'attente d'un procès. La Cour assimile cette limitation de liberté (comme l'est une mesure de contrôle judiciaire) à une privation de liberté et y applique les mêmes critères de contrôle, en l'espèce la réévaluation périodique du bien-fondé de la mesure.

Droit à l'avocat pendant la garde à vue: La Cour élève la cadence concernant la présence de l'avocat en garde à vue: 12 arrêts en 6 mois entre fin 2008 et début 2009. Une étape importante est franchie avec Cour EDH 27 novembre 2008, *Salduz c. Turquie*. Lors de la garde à vue, l'accès à un avocat doit être possible *« dès le premier interrogatoire (…) par la police, sauf à démontrer, à la lumière des circonstances particulières de l'espèce, qu'il existe des raisons impérieuses de restreindre ce droit »*. Un tribunal viole l'article 6 s'il fonde sa condamnation sur les aveux obtenus pendant la garde à vue hors la présence d'un avocat.

De nombreuses procédures pénales, dont celle de la France, paraissent à cet égard condamnées à évoluer. L'arrêt *Dayanan c. Turquie* du 13 octobre 2009 a clarifié les doutes subsistant entre « accès » et « assistance » d'un avocat: *« L'équité d'une procédure requiert que l'accusé, dès qu'il est privé de liberté, puisse obtenir toute la gamme d'interventions propres au conseil: la discussion, l'organisation de la défense, la recherche des preuves, la préparation des interrogatoires, le soutien de l'accusé en détresse et le contrôle des conditions de détention.»*

Les personnes placées en détention avant jugement bénéficient par ailleurs des droits garantis par la Cour EDH à tous les détenus, particulièrement au titre de *l'article 3 de la Convention EDH interdisant la torture et les peines ou traitements inhumains* ou dégradants, depuis l'arrêt *Kudla c. Pologne* du 26 octobre 2000 qui oblige les Etats membres à s'assurer que la détention est compatible avec le respect de la dignité humaine.

Cette construction prétorienne du juge de Strasbourg s'est considérablement développée pour constituer un véritable droit commun européen de la détention, qui déborde trop largement notre sujet pour être plus que mentionné.[25] Il faut

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25 V. Béatrice Belda, L'innovante protection des droits du détenu élaborée par le juge européen des droits de l'homme, *AJDA* 2009, 406.

noter qu'il s'agit, là encore, de composer entre deux principes apparemment contradictoires : d'un côté l'impératif de sécurité, d'un autre côté un principe sacralisé de liberté décliné en une série de droits attribués toujours davantage au détenu par la Cour EDH dont la cible favorite est constituée par les pays dont la procédure reste encore marquée par le système inquisitoire.

La dernière décision est particulièrement révélatrice des difficultés à trouver un équilibre entre le droit à des conditions de détentions dignes et les impératifs de sécurité en prison. Dans l'arrêt Cour EDH *Khider c. France* du 9 juillet 2009[26], les juges de Strasbourg ont estimé que les conditions de détention d'un prévenu particulièrement dangereux, conditions marquées par des transfèrements répétés d'établissement pénitentiaire, le placement prolongé en régime d'isolement et des fouilles corporelles intégrales régulières, étaient constitutifs d'un traitement inhumain et dégradant au sens de l'article 3 de la Convention. On aurait pu tout aussi bien apprécier ces conditions comme des mesures certes regrettables mais indispensables à la sécurité face à des individus dangereux et/ou présentant un risque d'évasion élevé.

A cette protection européenne du détenu par le juge, et dans le même sens que lui, il faut rappeler d'une part la recommandation 2006/13 adoptée le 27 septembre 2006 par le Comité des ministres du Conseil de l'Europe concernant la détention provisoire, les conditions dans lesquelles elle est exécutée et la mise en place de garanties contre les abus, d'autre part les « Règles pénitentiaires européennes » (RPE), mesures de *soft law* adoptées pour la première fois en 1973 et révisées en 2006, qui contribuent à un rapprochement des régimes et des pratiques de détention avant jugement au sein du Conseil de l'Europe.

Le droit à réparation pour détention avant jugement injustifiée, l'absence de justification se déduisant *a posteriori* de l'absence de condamnation, doit être spécialement relevé car il constitue un nouveau droit dont la mise en œuvre ne paraît pas encore stabilisée.[27] L'exemple français est à cet égard assez révélateur.[28]

26 V.A. Maron et M. Haas, Une belle qui met à la torture, *Droit pénal* n° 10, octobre 2009, comm. 129 ; *Gazette du Palais* 28/29 octobre 2009, p. 20, note J.F. Renucci.

27 Pour une étude détaillée de l'indemnisation de la détention provisoire (détention avant jugement) au titre de l'article 149 CPP, voir Commission de suivi de la détention provisoire, Rapport 2007, chapitre 3, p. 54 s.

28 En 2006, la commission nationale de réparation des détentions a examiné en appel 114 recours et rendu 94 décisions.

intersentia

4. LES CONTRAINTES DE LA SÉCURITÉ, UNE RÉALITÉ INCONTOURNABLE

> «La liberté et la sécurité peuvent être réconciliées; et dans notre système elles sont réconciliées dans le cadre du droit.»[29]

La détention avant jugement ne pouvait rester à l'écart de l'évolution du droit pénal, évolution d'une logique répressive fondée sur la culpabilité, à une logique sécuritaire fondée sur la dangerosité et le risque. Sa nature même la place au centre des logiques préventives, à la différence de la détention pour peine. Or cette logique, initiée aux USA au tournant des années 70, a connu une rapide extension après les attentats du 11 septembre 2001 et affecte désormais des systèmes pénaux qui y étaient jusque là relativement étrangers.

Mais au-delà du terrorisme, c'est tout le système pénal qui s'est «durci». Il s'analyse souvent comme une prévention du risque de délinquance par la prise en compte de probabilités. Cette logique vise à la fois à la diminution des risques de commission d'infractions et à l'augmentation corrélative des risques d'arrestation et de sanctions sévères des délinquants considérés non plus comme des «infracteurs» à réinsérer, des «malades» à traiter[30], des partenaires de dialogue, mais comme des individus opportunistes et responsables.

Une logique qui s'appuie sur des moyens modernes d'identification des vecteurs de délinquance: fichiers de police informatisés et interconnectés nationalement et internationalement, analyses stratégiques de territoires urbains et suburbains, extension continue des systèmes de vidéosurveillance et leur exploitation, tests ADN et fichiers génétiques particulièrement efficaces contre les délinquants sexuels multirécidivistes, les délinquants à hauts risques, les prédateurs violents…

Cette logique préventive s'appuie aussi, allant jusqu'aux confins de la notion dilatée de discrimination, sur l'identification de «groupes à risques», les «jeunes», les étrangers, les toxicomanes, les récidivistes, les populations nomades, les habitants de quartiers sensibles[31], par le fléchage dans leur direction de l'action policière avec un objectif de tolérance zéro.

Viennent ensuite la neutralisation par l'extension des capacités pénitentiaires, voire leur privatisation totale ou partielle, du fait du recours massif à l'emprisonnement, y compris avant jugement, la limitation des libérations conditionnelles qui accroit parfois de nombreuses années la durée de détention, la mise en place de peines planchers, voire de peines incompressibles, pour les

[29] Juge Kennedy sous l'arrêt de la Cour suprême des Etats-Unis *Boumediene v. Bush*, 553 U.S. (2008).

[30] Philippe SALVAGE, La grande délinquance est elle une maladie mentale?, *Revue Droit pénal*, février 2010, p. 5.

[31] Philippe MARY, Pénalité et gestion des risques: vers une gestion « actuarielle » en Europe?, *Déviance et société* 2001, p. 38.

récidivistes, le maintien en détention de condamnés dangereux après exécution de leur peine, le procès pénal de malades mentaux, procès également présenté comme une « catharsis » bénéficiant aux victimes…

Cependant l'opposition entre volonté de sécurité et garantie de droits fondamentaux n'est pas si franche comme le montre le développement des sanctions alternatives, parallèlement à des dépénalisations liées à des réorientations des politiques criminelles, prenant aussi en compte le fait que le système pénal est souvent saturé face à une délinquance qui reste quasiment partout à un niveau élevé.

Mais c'est surtout dans les secteurs perçus comme lourds de menaces que les règles relatives à la détention avant jugement ont le plus évolué, dans un sens privilégiant la sécurité strictement inverse à celui donné par le développement des droits de l'homme.

4.1. LA GUERRE CONTRE LE TERRORISME ET LA CRIMINALITÉ ORGANISÉE

> *« La principale question à traiter est de savoir, d'une part, si et comment le système de justice pénale, et, plus particulièrement la procédure pénale, ont été affectés par le paradigme du crime organisé et du terrorisme. D'autre part, il s'agit de savoir si, le cas échéant, ils se sont éloignés des garanties procédurales et des standards en matière de protection des droits de l'homme dans le domaine de la procédure pénale.»*[32]

Quelle est donc l'évolution de la détention avant jugement sous l'influence de ce mouvement mondial ? Quelle est la place et l'influence des règles dérogatoires pour le terrorisme et le crime organisé ?

Le changement des pouvoirs d'enquête dans de nombreux pays est une des manifestations marquantes de cette évolution. Un glissement s'est opéré du pouvoir judiciaire vers le pouvoir exécutif. Les pouvoirs de la police, parfois aussi des services de renseignement et de l'armée, deviennent de plus en plus étendus, tandis qu'au sein du pouvoir judiciaire lui-même, le procureur prend le pas sur le juge.

> *« L'architecture classique du principe de la séparation du travail et des pouvoirs entre le droit administratif et le droit pénal a disparu. (…) Des mesures coercitives sont utilisées de façon préventive, et pas seulement par les autorités judiciaires.»*[33]

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[32] John VERVAELE, Rapport général concernant la section III (procédure pénale) du XVIIIème congrès international de droit pénal, *Revue internationale de droit pénal*, 80ème année (vol. 80), 1er/2ème trimestres 2009, p. 23.

[33] Ibid, p. 57.

Le projet de résolution adopté en novembre 2008 au Colloque de Pudla (Croatie) en vue du XVIIIème congrès international de droit pénal (Istanbul 20-27 septembre 2009) ne craignait pas d'affirmer : « *Considérant que les paradigmes de la « guerre contre le crime organisé et le terrorisme » et la gravité des infractions qui s'y rapportent, ont conduit à de vastes réformes du système de justice pénale et de la procédure pénale en suite d'une gouvernance influencée par le crime et la sécurité…* »

Les régimes dérogatoires au droit commun se sont multipliés, par exemple en France[34] avec, ces dernières années, une série d'exceptions au droit commun de la procédure pénale, au nom de l'efficacité envers les formes de criminalité les plus dangereuses :

- Régime de garde à vue considérablement durci lorsque l'infraction est qualifiée d'activité terroriste, pouvant aller jusqu'à six jours, le premier entretien avec un avocat étant reporté à la 96ème heure[35] ;
- mise en place d'un réel régime de police administrative de prévention du terrorisme

Au Royaume-Uni, le *United Kingdom Terrorism Act*, 2000, prévoit des mécanismes d'arrestation et de fouille même en l'absence de « suspicion raisonnable », critère pourtant déterminant en droit commun britannique.

Guantanamo représente dans doute l'expérience « ultime » du primat de la sécurité sur les garanties judiciaires dans le contexte de la lutte contre le terrorisme. La lutte contre le terrorisme s'y est en effet largement affranchie des principes et des règles du droit commun[36], instaurant une détention non seulement avant jugement, mais également étrangère à tout cadre procédural légal.[37]

Il faut relever que la sémantique guerrière convoquée dans la lutte contre le terrorisme – et également contre la criminalité organisée – ne s'est pas avérée neutre en termes « procéduraux », puisque c'est une base militaire qui a été perçue comme l'endroit le plus favorable à ces détentions. Des auteurs ont pu alors évoquer une « militarisation » du droit pénal ».[38]

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[34] V. Christine Lazerges, La tentation du bilan 2002-2009 : une politique criminelle du risque au gré des vents, *Revue de science criminelle* 2009 p. 689.

[35] Loi du 23 janvier 2006.

[36] Le *Patriot Act* entré en vigueur le 26 octobre 2001 permet la détention des « ennemis combattants » sur la base militaire de Guantanamo.

[37] Plus exactement, ce cadre a été élaboré au fil des condamnations de l'administration américaine par la Cour suprême. V. Virginie NATALE, L'ultime tentative de la Cour suprême américaine pour préserver les doits des détenus de Guantanamo : l'arrêt *Boumediene v. Bush*, 553 US (2008), RSC 2008, p. 893.

[38] M. DELMAS-MARTY, Le paradigme de la guerre contre le crime: légitimer l'inhumain?, RSC 2007, p. 461.

4.2. D'AUTRES INFLUENCES

A elles seules, elles mériteraient chacune les travaux d'un colloque de notre Fondation. Si ces problématiques ne sont pas nouvelles, elles se sont développées à un point tel qu'elles posent de véritables questions de frontières entre un droit pénal sollicité à l'extrême et d'autres branches du droit, le droit civil notamment.

La protection de l'environnement

L'intensité de la répression est directement – quoique parfois inconsciemment – corrélée à la gravité de la menace perçue, entretenue par une activité militante inlassable se réclamant de la défense de la nature, activité efficacement relayée dans les opinions publiques ainsi persuadées que le droit, au-delà de la sanction de la faute, peut les protéger totalement du risque.

A ce titre, il est probable que la lutte contre les atteintes à l'environnement suscite dans un prochain avenir des régimes encore renforcés de répression. Le phénomène est d'ailleurs largement amorcé, dans une pénalisation croissante de ces atteintes, figures d'une délinquance et même d'une criminalité environnementales.

Les conséquences procédurales touchant la détention avant jugement apparaissent déjà. La Cour EDH, dans un arrêt *Mangouras c/ Espagne*, 8 janvier 2009, a ainsi estimé, concernant le capitaine du *Prestige*, pétrolier dont le naufrage avait causé en novembre 2002 une grave pollution sur les côtes de Galice, qu'une caution fixée par le juge d'instruction à 3 millions d'euros ne violait pas l'article 5 §3 de la Convention, qui dispose *in fine* que « *la mise en liberté peut être subordonnée à une garantie assurant la comparution de l'intéressé à l'audience* ».

Mais, n'hésite-t-on pas à écrire dans l'arrêt « *c'est la nature exceptionnelle de l'infraction, le délit contre l'environnement, qui va justifier une atteinte exceptionnelle aux garanties protégées par la Convention* ». Pourtant, comme on l'a vu, la jurisprudence de la Cour était sur ce sujet relativement favorable aux individus mis en cause, dans l'arrêt *Neumeister* du 27 juin 1968, où il était dit que le cautionnement devait être approprié. La gravité des conséquences sur l'environnement ont prévalu sur ces conditions.[39]

On n'a pas craint d'affirmer, à propos de cette décision de la Cour – sévère si on la compare à sa jurisprudence en la matière – que «*face à la nécessité de protéger cet intérêt juridique supérieur qu'est la protection de l'environnement, les garanties procédurales doivent se faire plus discrètes* ».[40]

[39] La Cour estimant par ailleurs que le montant du cautionnement était proportionné aux moyens de l'assureur du navire et de son capitaine, assureur qui mit cependant 83 jours à régler le montant de la caution.

[40] J.-P. Marguénaud, *L'adaptation des garanties procédurales européennes aux exigences de la répression des délits contre l'environnement: CEDH 8 janvier 2009, 3ème section, Mangouras c/ Espagne*, RSC 2009 p. 180.

Cette tendance, porteuse d'un projet solidariste de société, privilégie l'insécurité surdéterminée pouvant résulter de risques technologiques majeurs, et s'appuie sur l'angoisse née de l'incertitude de dommages considérables … à la nature. On peut lire ceci : *« Un principe républicain de responsabilité signifie la mise en place d'une loi générale contraignante en matière de protection du patrimoine naturel et paysager, c'est-à-dire d'interdictions et d'obligations strictes, seule manière de maintenir à long terme la souveraineté du peuple, ainsi que la sacralité de la nature et des sites, sur le territoire national.»*[41]

Mais c'est dans la défense inconditionnelle des droits des victimes que cette partie de la doctrine, bousculée par la logique sécuritaire dans la réponse à la délinquance, se montre la plus déterminée. La confusion est ici à son comble entre le procès pénal et le procès d'indemnisation, en particulier lorsque sont réunis droits des victimes et atteintes à l'environnement, la recherche du payeur solvable entrainant de graves distorsions du droit pénal dans des procès à finalité civile avec les moyens de la procédure pénale.[42]

Les droits des victimes

La question de la place quasi prépondérante de la victime dans le procès pénal dans les systèmes où elle est admise à ce procès pourrait signer le naufrage du droit pénal[43] dans les sciences sociales et dans le droit civil de la réparation. Elle est désormais posée par l'ensemble de la doctrine notamment française, qu'elle fasse prédominer une analyse psycho-sociologique à base de « méta-analyses », de « notions transférentielles », de « personnes désirantes »[44], ou qu'elle s'en tienne à une analyse purement juridique et procédurale.[45]

On a observé très justement qu'après « la crise de l'idéal réhabilitatif » et du traitement supposé du délinquant, certains, souvent immergés dans un milieu associatif militant, ont voulu faire évoluer tout le droit pénal vers une « justice » réparatrice ou restauratrice donnant une place centrale à la victime, notamment

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[41] J.-C. MATHIAS, Droit libéral de l'environnement ou droit républicain de la nature, *Recherche droit et justice* n°33, 2009-2010, p. 2.

[42] Où l'on voit que l'idéal de réparation peut parfois s'accommoder de préoccupations lucratives … P.-D. VIGNOLLE, La consécration des fautes lucratives: une solution au problème de responsabilité punitive, *Gazette du palais*, 13-14 janvier 2010, p. 7 ; R. MESA, La consécration d'une responsabilité civile punitive: une solution au problème des fautes lucratives, *Gazette du palais*, 21 novembre 2009, p. 15. On aura compris qu'il s'agit pour les victimes de dépasser la stricte réparation intégrale du préjudice pour se faire transmettre par les juges les profits résultant d'une faute considérée comme lucrative, en quelque sorte une récupération du « lucratif » par la victime.

[43] Que l'on peut considérer comme d'essence de droit public.

[44] Sous la direction de G. Giudicelli-Delage et C. Lazerges, La victime sur la scène pénale en Europe, *PUF, coll. Les voies du droit*, 2008.

[45] J. CARBONNIER, *Droit et passion du droit sous la Ve République*, Flammarion Champs Essais 2008, p. 146 et s. ; X. PIN, La privatisation du procès pénal, *Revue de sciences criminelles* 2002, 245.

par la médiation et la négociation. Cette partie de la doctrine pourrait avoir atteint à son tour ses limites en raison « *de la grande diversité idéologique de ses partisans (de l'abolitionniste au tenant d'une répression accrue dictée par la victime en passant par le communautariste) qui crée une vaste nébuleuse artificiellement homogénéisée sous le vocable de victimologie* ».[46] On ne saurait mieux dire…

La résurgence du discours de défense sociale par le renouveau de la notion de dangerosité dans la logique sécuritaire, moins structurée idéologiquement que la réinsertion par le traitement ou la rédemption par la réparation et le dialogue communautaire, voire intercommunautaire, répond incontestablement à de fortes aspirations de protection face à une délinquance analysée comme un risque facteur d'angoisse.

La vision moderne du délinquant comme un acteur rationnel et responsable devant assumer les conséquences de ses actes se heurte à la tendance toujours vivace qui entretient la confusion de « *l'interchangeabilité des rôles infracteur/ victime* »[47], voire la délégitimation de l'Etat et de ses organes, étant observé que c'est la même tendance qui redevient « sécuritaire » lorsque la valeur protégée est l'environnement, valeur préférée à celle de l'intégrité de la personne et de ses biens..

Mais il y a place pour tout le monde, la dilatation excessive des procédés restauratifs devant être ramenée aux délits mineurs contre les biens avec victimes identifiées et délinquants solvables ou solvabilisés, ce qui en réduit considérablement le champ, de la même façon que le traitement automatisé convient, en matière de contraventions, aux amendes forfaitaires.

Le poids croissant des victimes dans la procédure pénale, lorsque celles-ci sont admises au procès pénal où elles se révèlent de redoutables procureurs, est un phénomène désormais établi dans bien des systèmes juridiques.

L'exclusion des victimes des décisions relatives à la détention avant jugement tiendra-t-elle encore longtemps ? Une admission des parties civiles à faire appel des décisions relatives à la détention et la liberté des individus mis en cause nous paraît en effet constituer une forte portée symbolique.

5. CONCLUSION

L'exemple, sinon le salut, viendra-t-il du droit international pénal ? L'effet miroir évoqué au début de mon intervention s'avère ici particulièrement brutal, sinon cruel, précisément pour cette raison que la détention avant jugement est le lieu de rencontre, on pourrait parler ici de collision, entre principes et réalités.

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[46] Ph. MARY, Pénalité et gestion des risques: vers une gestion « actuarielle » en Europe ?, *Déviance et société*, 2001, 33.

[47] Robert CARIO, Ibid, p. 493.

Autant la protection internationale des détenus s'avère, comme nous l'avons vu, exigeante, autant la justice internationale pénale se révèle particulièrement peu propice à leur application.

J'ai déjà évoqué les nombreux outils internationaux relatifs à la détention avant jugement. Dans son rapport 2009, comme je le mentionnais, le Conseil des droits de l'homme des Nations Unies encourageait tous les Etats « à veiller à ce que les conditions de la détention avant jugement ne nuisent pas à l'équité du procès ».

Mais la justice internationale pénale, par exemple au sujet des terribles crimes commis au Rwanda en 1994 ne craint pas un nombre important d'accusés devant le Tribunal pénal international pour le Rwanda (TIPR) qui ont déjà effectué plus de 10 ans de détention avant jugement, certains étant détenus depuis 1995.[48]

Ces conditions expliquent peut-être en partie le récent refus de la cour d'appel de Paris à faire droit à une requête du TIPR visant, via l'émission d'un mandat d'arrêt, à la mise en détention d'une personne accusée de crime contre l'humanité et génocide, au motif que cette personne se soumettait déjà à un contrôle judiciaire qui n'avait pas lieu d'être modifié.[49]

Où l'on voit que si le droit international pénal, notamment européen agit incontestablement sur les droits nationaux, l'inverse est également possible, et même salutaire dans un dialogue des droits, à défaut d'un improbable dialogue des juges.

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[48] Source : *Liste et situation des détenus du TIPR au 17 novembre 2009*, site internet du tribunal : www.ictr.org.

[49] Pour une étude de cette décision sous l'angle de la procédure en droit pénal international, voir Olivier Cahn, Le jugement en France par délégation d'une juridiction pénale internationale, RSC 2008 p. 273.

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THE CPT AND PRE-TRIAL DETENTION IN EUROPE

Anton van Kalmthout & Marije Knapen*

1. INTRODUCTION

Pre-trial detention is topical. The number of persons deprived of their liberty as remand prisoners[1] is overall high in Europe. On this continent, the percentage of remand prisoners of the total prison population ranges from 10 to about 64%. On average, 20–25% of all prisoners in the Council of Europe Member States are on remand. This is exclusive of the numerous pre-trial detainees, who are on remand in a police station. Despite the fact that remand prisoners are not (yet) finally convicted by a court of law, they are often detained under (very) poor circumstances. This is especially the case with respect to remand prisoners who stay in police stations. These police stations, as is continuously stated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter CPT) in its visit reports, are generally not designed to accommodate persons longer than a few days.[2]

Within the framework of the Council of Europe, pre-trial detention, in the broad sense of detention on remand, has been a relevant issue for already some decades now. The Recommendation concerning prison overcrowding and prison population inflation[3], which has been adopted by the Committee of Ministers on

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1 In this article, the terms ‘pre-trial detention’ and ‘remand detention/remand in custody’ are both used. In Europe, there is no common definition (see in this respect for the Member States of the European Union the study on “Pre-trial Detention on the European Union” by A.M. van Kalmthout, M.M. Knapen and C. Morgenstern (eds)).

2 Website of the CPT: www.cpt.coe.int/en/default.htm. The country reports can be found under ‘Visits’. For the purpose of this article, we only refer to the latest relevant country reports that have been published on the website in the English language.

3 Rec. No. (99) 22.

30 September 1999, deals with measures relating to the pre-trial detention stage in order to combat prison overcrowding.[4] The in 2006 revised European Prison Rules[5] (EPR) "apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction" (Rule 10.1). The EPR contain rules in Part VII which are especially designed for remand prisoners/untried prisoners.[6] This Part is aiming at assisting "untried prisoners by spelling out more fully to what their status entitles then additionally".[7] There is also the Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.[8]

The fact that amongst the remand prison population a relatively large group consists of foreigners[9], made the European Union think about a "model" in which (within the framework and territory of the EU) EU citizens could be transferred to their country of residence in order to undergo a supervision measure as an alternative to provisional detention.[10] This idea resulted in a Council Framework Decision that has been formally adopted by the Council on 23 October 2009. Within a reasonable time[11], EU Member States should have to implement the Framework Decision within their national jurisdiction, as is also the case with respect to two other Framework Decisions, which are strongly connected.[12] The interrelationship between these Framework Decisions is

4 Part III of the Recommendation.

5 Rec. No. (2006)2.

6 For the purpose of the EPR untried prisoners "are prisoners who have been remanded in custody by a judicial authority prior to trial, conviction or sentence" (Rule 94.1).

7 See the Commentary on Rule 95.3, p. 38 (see Commentary on the EPR at: www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp).

8 Rec. No. (2006)13. According to this Recommendation (1.1), remand in custody is "any period of detention of a suspected offender ordered by a judicial authority and prior to conviction. It also includes any period of detention pursuant to rules relating to international judicial co-operation and extradition, subject to their specific requirements. It does not include the initial deprivation of liberty by a police or a law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning". It also includes "any period of detention after conviction whenever persons awaiting either sentence or the confirmation of conviction or sentence continue to be treated as unconvicted persons" (1.2). Remand prisoners are "persons who have been remanded in custody and who are not already serving a prison sentence or are detained under any other instrument"(1.3).

9 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU,* Nijmegen, Wolf Legal Publishers 2009, p. 106.

10 Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

11 Art. 27.1: by 1 December 2012 the Member States have to comply with its provisions.

12 COUNCIL FRAMEWORK DECISION 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294/20). At the moment, at a national level, the implementation processes of two other Framework Decisions are running: Council Framework Decision 2008/947/JHA of 27 November 2008 on

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worthwhile, but not (yet) clear and should be subject to further research, which falls outside the scope of this article.[13]

The main reasons why especially foreign offenders run the risk of being remanded in custody is the risk of absconding and the absence of a fixed address in the Member State where the alleged crime has been committed. It remains questionable whether judges would be ready to impose an alternative to remand in custody on a foreign national if he/she is not convinced that the country to which the person will be transferred to is able/willing to execute the alternative/supervision measure. The same question arises with respect to the Framework Decision on the supervision of probation measures and alternative sanctions. One thing is quite clear: in order to enhance mutual trust, Member States have to be (more) familiar with each other's criminal justice systems as is currently the case.[14]

Specific national legislation concerning (the legal position) of remand prisoners does not exist in each jurisdiction in Europe; that is to say that most of the time Penitentiary legislation is applicable to all prisoners. There is, however, a gap between paper law and the law in action within this field of law. Sentenced prisoners are often surrounded by a more comprehensive prison regime. They often have a richer day programme/programme of activities and are placed in a prison where there is mostly more space to e.g. out-of-cell activities and outdoor exercises. Remand prisoners, while most of the time having the same legal position, are frequently excluded from such a regime or detained under poorer conditions in a more sober regime. In some cases, restrictions are placed upon them; in other cases, they are still deprived of their liberty in police cells.

In the light of these developments and facts, it is worthwhile to get an impression of the work of the CPT with regard to pre-trial detention/remand in custody. Within this field, the CPT could be considered the supervisory (non-judicial) body *par excellence*. From the work of the CPT we can learn how detention conditions in European countries are and should be. That is the reason why this article looks at pre-trial detention from the perspective of the CPT.

the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L337/102), and COUNCIL FRAMEWORK DECISION 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327/27).

13 It will be dealt with by PhD research at Tilburg University and Avans-Fontys University of Professional Education.

14 C. Morgenstern, European initiatives for harmonisation and minimum standards in the field of community sanctions and measures, *European Journal of Probation* Vol. 1, No. 2 (2009), p. 127–137, at 133 (at: www.ejprob.ro/index.pl/ (last retrieved 1 July 2011).

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The second paragraph will be devoted to figures on pre-trial detention in order to get an idea of the size of the problem in Europe. In paragraph 3), we will look at the CPT and its country reports. Its findings in the country reports with regard to pre-trial detention will be highlighted. Already for a long time, the CPT addresses the issue of remand in custody[15]; especially, when persons are remanded in custody in police establishments (where they should not be detained according to CPT's standards) and/or are subjected to restrictions. To illustrate the importance of the CPT findings, we also look at the European Court of Human Rights in order to see how the Court refers to the CPT Standards and to specific findings in its country visit reports.[16] Finally, we provide for some concluding remarks (paragraph 4).

2. PRE-TRIAL DETENTION IN THE MEMBER STATES OF THE COUNCIL OF EUROPE[17]

Pre-trial detention exists in all European jurisdictions. It is a means to effectively enforce criminal law. On the other hand, pre-trial detention is often linked to prison overcrowding, and human rights violations are not unlikely to happen. One may say that there is tension between "the individual right to liberty, the presumption of innocence, and the need for an effective criminal procedure that follows the rule of law".[18] Pre-trial detention is the central theme in a recently published study on "Pre-trial Detention in the European Union". The study resulted in 27 country reports and an Introductory Summary. The background of this study, which has been initiated and financed by the EU, is the recently adopted Council Framework Decision on the application, between Member

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[15] In its General Reports, Standards, and country reports, the CPT most of the times refers to 'remand in custody' instead of using the term 'pre-trial detention'. This is in line with the terminology used in the framework of the Council of Europe.

[16] 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "20 years of combating torture", 1 August 2008–31 July 2009, p. 8 (at CPT's website: www.cpt.coe.int/en/default.htm (under 'Documents')).

[17] Several comparative studies have been carried out before, *i.e.* E. Cape, J. Hodgson, T. Prakken & T. Spronken (eds), *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerp-Oxford, Intersentia, 2007; F. Dünkel & J. Vagg (eds), *Waiting for Trail. International Perspectives on the Use of Pre-Trial Detention and the Rights and Living Conditions of Prisoners Waiting for Trail* (62/1 & 62/2), Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht 1994; D. van Zyl Smit & F. Dünkel (eds), *Imprisonment Today and Tomorrow. International Perspectives on Prisoners' Rights and Prison Conditions*, The Hague, Kluwer Law International 2001.

[18] A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU,* Nijmegen, Wolf Legal Publishers 2009, p. 3.

States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. The study focuses on pre-trial detention/remand detention or custody "as a measure to secure the presence of a suspect during investigation and trail, but also discusses police custody".[19]

Pre-trial detention should only be used as an *ultimum remedium* (a last resort), because of 1) its intense character and 2) the presumption of innocence principle. Pre-trial detention is the most coercive measure in the pre-trial phase of criminal proceedings. However, when one looks at the data on pre-trial detention (as a percentage of the total prison population), one can easily see (table 1) that its figures, with a few exceptions, are overall high on the European continent. Persons who are remanded in custody are likely to be finally convicted to a custodial sentence (which has an effect on the size of the prison population); this becomes all the more true when we realise that in many European jurisdictions the period spent in pre-trial detention should be deducted from the final sentence. Through the EU-study we found that in most cases pre-trial detention is followed by a custodial sentence, otherwise the persons should be compensated in some sort of way for the (unnecessary or unlawful) loss of liberty.

The fact that pre-trial detention is ordered often (and too easily according to some critics) is not the only problem. When one looks at the case law of the European Court for Human Rights (ECtHR), one may find that pre-trial detention in some cases lasts too long. In some jurisdiction, pre-trial detention may last for years. Another problematic issue with regard to pre-trial detention is that it is not unlikely that especially foreigners are affected by it. In most European jurisdictions pre-trial detention may be ordered on the ground that there exist a risk that the person may flee/escape/hide from criminal proceedings. Especially with regard to foreigners, pre-trial detention is (easily) ordered on this ground. Some jurisdictions have as an additional ground for pre-trial detention that the person has no residence in the county, has been a fugitive in the past or has willingly ignored the obligation not to leave town or the country.[20]

The fact that foreigners are more likely to be detained, was one of the motives of the EU to create a Framework Decision which "lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures" (Art. 1). Further, it is important not to forget that often detention conditions are poorer

[19] Ibidem.
[20] Ibidem, p. 74.

for a person who has not been finally convicted. One could say that this is at odds with the principle of the presumption of innocence.[21]

Today, one can easily travel abroad, especially within the EU territory. Pre-trial detention is no longer "national business", but goes across borders and therefore has cross border effects. In this respect, there is a growing interest in each other's criminal systems. Especially with regard to (material) detention conditions; states do not want their citizens to be detained in a country where human violations lie in wait (and as a possible result run the risk of violating Art. 3 of the COE 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)). With respect to the judicial cooperation in criminal matters between the EU Member States: when one transfers a person (in the future) to another Member State where detention conditions are (very) poor, one might wait for the Court to come up against that practice.

2.1. DATA

There are different sources in Europe, which provide numbers and percentages on pre-trial detention. The data from these sources often differ per source. Main reasons for this are the use of different definitions and measuring data on a different due date. European sources are e.g. the Annual Penal Statistics of the Council of Europe (SPACE I, Survey 2007)[22], the Prison Briefs by the International Centre for Prison Studies (ICPS)[23], the European Sourcebook of Crime and Criminal Justice[24], and Eurostat.[25] In this article we only focus on data from the ICPS and the Council of Europe (SPACE I).

ICPS

In January 2008, the International Centre for Prison Studies published the "World Pre-Trial/Remand Imprisonment List" with data for 194 countries.[26] The list refers to "those persons who, in connection with an alleged offence or offences, are deprived of their liberty following a judicial or other legal process but have not been definitively sentenced by a court for the offence(s)".

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21 See e.g. Penal Reform International 2001, p. 30 (§37) "Because of the 'presumption of innocence' their situation, however, should be more favourable in several aspects".

22 See *infra*.

23 International Centre for Prison Studies (ICPS), London: see the *World Prison Population List*, the *World Pre-trial/Remand Detention List* as well as the *Prison Brief* for the respective countries (at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/).

24 At: www.europeansourcebook.org.

25 At: www.epp.eurostat.ec.europa.eu (available e.g. under "Population and social conditions" (Crime and Criminal Justice, see e.g. the publication "Statistics in Focus" ed. 19/2008, table 8 with data for 1995 and 2001–2006).

26 At: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/. In almost 60% of the countries, the proportion of pre-trial prisoners on the total prison population is between 10% and 40%.

According to the list, the persons will be in one of the five following stages, but not all legal systems and not all cases will involve all stages: 1) the 'investigation' stage, when they are being interrogated to see if there is justification for bringing a court case against them, 2) the 'awaiting trial' stage, after the investigation has ended and a decision has been taken to bring a court case, 3) the 'trial' stage, while the trial is actually taking place, 4) the stage when they have been convicted by the court but not yet sentenced – the 'convicted unsentenced' stage, and 5) the 'awaiting final sentence' stage, when they have been provisionally sentenced by the court but are awaiting the result of an appeal process which occurs before the definitive sentence is confirmed.

The ICPS also publishes Prison Briefs for the respective countries. They contain the most recent information and give an impression of, *inter alia*, the total prison population, the imprisonment rate per 100,000 inhabitants, the prison occupancy level, the percentage of pre-trial detainees, the percentage of juveniles, women, and foreigners of the total prison population. The Prison Briefs also refer to the relevant national source; the figures from ICPS are also based on national sources. The ICPS does not present a division in different categories, like the Annual Penal Statistics of the Council of Europe do.[27]

SPACE I

The study on "Pre-trial Detention in the European Union", mainly used the Annual Penal Statistics of the Council of Europe (SPACE I)[28], because they provide the most detailed comparisons on e.g. prison capacity, prison population rate per 100,000 inhabitants, occupancy, lengths of imprisonment, characteristics of the prison population, incidents, etc. SPACE I gives electronically available information for the 47 Member States of the Council of Europe from the same due data, namely 1 September (the so-called stock statistics). The most recent Survey (2007) has been published on 24 March 2009.[29] SPACE I data are all based on national statistics. SPACE also offers information on the flow numbers (i.e. how many persons have been submitted in the course of a year). In SPACE I Survey 2007, information with regard to pre-trial detention has been captured in table 4 ("Legal status of the prison population on 1 September 2007 (numbers)")

27 The European Sourcebook does not present a division either. Eurostat does not present information on pre-trial detention at all, which is also the reason why we did not use these sources here.

28 See Part 2 of the Chapter "Introductory Summary" (p. 15–55) of the study A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Nijmegen, Wolf Legal Publishers 2009.

29 M.F. Aebi & N. Delgrande, *Council of Europe Annual Penal Statistics, Space I, Survey 2007*, Strasbourg/Lausanne, COE/University of Lausanne 2009 (see this and earlier surveys, from 1999 onwards, at: www3.unil.ch/wpmu/space/space-i/annual-reports/). Note by editor: recently the Council of Europe also published surveys for 2008 and 2009.

and table 5 ("Legal status of prison population on 1st September 2007 (percentages and rates)"). In table 4, one can see that the data on pre-trial detention is broken down into five categories: 1) untried prisoners (no court decision yet reached), 2) convicted prisoners, but not yet sentenced, 3) sentenced prisoners who have appealed or who are within the statutory limit for doing so, 4) sentenced prisoners (final sentence), and 5) other cases.

In table 5, SPACE I distinguishes between prisoners who are not serving their final sentence (i.e. category 1, 2, 3, and 5) and untried prisoners (i.e. category 1). Category 4 is excluded because it contains prisoners who received their final sentence. Prisoners who fall within the 5 ("other cases") vary per country, but in general they are labelled as irregular migrants detained for administrative reasons, persons who are failing to pay their administrative fine, prisoners who are waiting to be transferred to a psychiatric treatment centre, persons who are detained on the basis of social protection law, etc.. In general, their detention is based on a ground outside the scope of criminal law and thus not on a criminal suspicion or sentence.

If one understands the term pre-trial detention in its narrow sense, i.e. detention before the trial has started, one could say that the group of untried prisoners are actually in pre-trial detention, because in their case no judge has yet reached a decision. In this view, pre-trial detention is interpreted in a narrow sense. Often, pre-trial detention is used to point out the group of prisoners who have not yet been finally convicted. In this way, pre-trial detention is interpreted in a broad sense. In this respect, it would perhaps be clearer to refer to remand detention/remand (in) custody to point out the period in which a person may be deprived of liberty before a court of law comes to the final conviction. In SPACE I it is referred to as all categories of prisoners (1, 2, 3, plus 5) minus the category of prisoners who have received their final sentence (4); the other cases are included as well.

In the study on "Pre-trial Detention in the European Union", it was argued that the category of other cases should in principle not be included in the calculation. This category holds in fact no pre-trial prisoners. For this reason, the category "other cases" has not been counted under pre-trial prisoners in the study. The following Table 1 shows different ways to calculate the percentage of pre-trial (remand) prisoners by varying in the use of the category "other cases". The different calculations lead to different results. In the study on "Pre-trial Detention in the EU", the authors decided to leave out the category "other cases"; pre-trial prisoners are seen as those who are untried, those who are convicted but not yet sentenced and those who are sentenced but who have appealed or who are within the statutory limit for doing so. As a result the number of pre-trial prisoners is calculated as the sum of all prisoners who have not received their final sentence, minus the detainees who are not detained as being suspects (i.e. the other cases). This number is divided by the total prison population minus the other cases (in table 1 referred to as 'Calculation method I'). We

compare the outcome of this calculation with the calculation used by SPACE, i.e. the sum of all prisoners (including the other cases) who have not received their final sentence divided by the total prison population, including the other cases. The study also shows another calculation method, which we also present here: the number of all prisoners who have not received their final sentence minus the other cases, divided by the total prison population including the other cases (in the table referred to as 'Calculation method II').

The latter method provides the lowest percentages of pre-trial detention in the EU. The SPACE I calculation, which includes the other cases in the sum of pre-trial prisoners as well as in the total prison population, results in the highest percentages. However, if one wants to exclude the detainees who are detained on grounds that fall outside the scope of criminal law, Calculation method I provides a more reliable picture of the percentage of prisoners on remand.

Not all countries provide data for the different categories of pre-trial detainees. This is for example the case with Denmark, Finland, Germany and Sweden. The Czech Republic could not provide information on the category untried prisoners (the concept exists in the country, but it is indicated that there are no figures available). Twelve countries[30] have explicitly stated that the second category ("convicted prisoners but not yet sentenced") does not exist within their criminal justice system. Another four countries (Cyprus, Estonia, Poland, and Slovakia), in which the concept of convicted prisoners but not yet sentenced exists, did not have figures available.

Countries seem to have problems with providing information on the third category, i.e. prisoners who have appealed or who are within the statutory limit for doing so. In sixteen countries[31] the concept exists, but there are no figures available. Only Hungary has indicated that the concept doesn't exist in its jurisdiction.

SPACE I itself gives the following remarks with regard to the relevant tables (4 and 5): firstly, if there are no figures available under category 3 without any further information being provided, it is assumed that prisoners in that situation are included among those under category 4 ("sentenced prisoners"). This could hold an underestimation of the data on pre-trial detention. Secondly, if there are no figures available under category 3 without any further information being provided, it cannot be excluded that persons in that situation are included in the category of untried prisoners. When this is the case, data on untried prisoners should only be used with caution.

Another reason why the data on pre-trial detention should be used with caution is that these data only refer to pre-trial detainees who are detained in a

[30] Austria, Belgium, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Spain (Catalonia), and Turkey.

[31] Armenia, Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Georgia, Iceland, Norway, Poland, Romania, Slovak Republic, Spain, Spain (Catalonia), England and Wales, and Scotland.

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remand centre or prison. No data are available on the numerous pre-trial detainees, who are for a certain period detained in a police station. In reality the number of pre-trial detainees in most of the countries is higher than the data in Table 1 suggest.

Table 1. Percentages of pre-trial detention in the Member States of the Council of Europe

	ICPS	ICPS	SPACE I, 2007 Enquiry[32]		Calculation method I	Calculation method II
	Pre-trial detainees in % of the total prison population	Date	Untried prisoners (no court decision yet reached) in % of the total prison population	Prisoners not serving a final sentence in % of the total prison population	Pre-trial detainees (minus other cases) in % of the total prison population (minus other cases)	Pre-trial detainees (minus other cases) in % of the total prison population
Albania*	39.0	June 2008				
Andorra*	46.7	1–9–2006				
Armenia	22.1	1–12–2008	14.6	17.9	17.9	17.9
Austria	23.2	1–5–2009	22.9	33.4	25.6	22.9
Azerbaijan*	16.0	31–12–2006				
Belgium	35.0	1–3–2009	26.3	41.1	35.2	32.0
BH: BiH (state level)*						
BH: Fed. BiH	19.4	30–4–2008	14.6	16.4	16.4	16.4
BH: Republika Srpska	14.8	1–9–2007	6.0	14.8	14.8	14.8
Bulgaria	10.4	1–1–2009	9.3	15.5	15.5	15.5
Croatia*	28.6	1–1–2009				
Cyprus	15.4	31–8–2008	15.4	15.4	15.4	15.4
Czech Republic	11.2	21–10–2009	0.0	11.9	11.9	11.9
Denmark	34.4	4–9–2008	28.1	29.3	28.5	28.1
Estonia	27.1	1–1–2009	26.5	26.5	26.5	26.5
Finland	17.2	16–5–2009	13.8	17.8	14.4	13.8
France	27.7	1–9–2007	24.6	27.6	27.6	27.6
Georgia	16.1	31–1–2008	14.8	14.8	14.8	14.8
Germany	15.5	31–3–2009	16.9	17.5	17	16.9

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32 In principle the data refer to the same date: 1 September 2007. However, for 13 countries figures are on another date than on 1 September 2007: Bulgaria (1-1-2008), Czech Republic (31-12-2007), Estonia (31-12-2007), France (1-10-2007), Germany (31-3-2007), Latvia (1-1-2007), Lithuania (1-7-2007), Poland (31-12-2007), Portugal (31-12-2007), Spain (Catalonia) (31-12-2007), Sweden (1-10-2007), Switzerland (6-9-2007), UK England and Wales (30-6-2007).

Greece*	28.6	30–6–2007				
Hungary	28.8	30–6–2009	22.2	28.4	26.9	26.4
Iceland	7.1	15–7–2008	10.4	10.4	10.4	10.4
Ireland	20.0	26–10–2007	18.6	19.3	18.7	18.6
Italy	50.9	31–12–2008	33.1	61.7	60.4	58.5
Latvia	27.5	1–1–2009	5.1	25.4	17.7	16
Lichtenstein	28.6	5–9–2007	0.0	33.3	33.3	33.3
Lithuania	12.1	1–1–2008	11.2	16.1	16.1	16.1
Luxembourg	42.0	1–9–2007	29.7	43.1	40.4	38.6
Malta*	35.2	22–6–2009				
Moldova	15.2	1–9–2007	7.5	15.6	15.3	15.3
Monaco	64.0	31–12–2008	36.1	63.9	63.9	63.9
Netherlands	34.7	31–8–2008	32.5	53.6	46	39.4
Norway	23.7	1–5–2009	19.8	21.7	20.2	19.8
Poland	11.6	30–9–2009	14.8	15.3	14.9	14.8
Portugal	19.6	1–11–2009	14.4	20.1	20.1	20.1
Romania	12.1	31–1–2009	6.1	10.4	10.4	10.4
Russia*	15.6	1–1–2007				
San Marino	0	1–9–2007	0.0	0.0	0.0	0.0
Serbia	28.6	1–9–2007	12.7	30.5	29.2	28.6
Slovak Republic	19.0	31–12–2008	23.7	23.7	23.7	23.7
Slovenia	22.2	1–9–2008	19.7	32.6	30.4	29.4
Spain	21.2	30–10–2009	23.9	25.4	24.6	23.7
Spain (Catalonia)			22.7	22.7	22.7	22.7
Sweden	20.0	1–10–2008	21.2	22.1	21.4	21.2
Switzerland	40.2	3–9–2008	28.9	46.3	41.4[33]	37.9
FYRO Macedonia	8.9	1–9–2007	3.2	8.9	8.9	8.9
Turkey	52.1	30–9–2009	46.5	60.9	60.9	60.9
Ukraine*	24.5	1–4–2009				
UK: England and Wales	16.1	30–6–2009	10.5	17.7	16.4	16.1
UK: Northern Ireland*	33.8	26–10–2009				
UK: Scotland	18.0	30–10–2009	17.7	21.6	21.6	21.6

* No data available in the SPACE I Annual Penal Statistics 2007 Enquiry.

33 This percentage should be read with caution, because the data provide for one number for both the categories 'sentenced prisoners who have appealed or who are within the statutory limit for doing so' and 'sentenced prisoners (final sentence)'. In this table the number is left out the calculation.

Different calculation methods result in different outcomes. For the SPACE I data it means that when there are no[34] or very little other cases[35], the percentages of the pre-trial detainees are equal. For countries with relatively large numbers of persons who are detained in prisons for non-criminal reasons (the other cases) (i.e. more than 100[36]), we can observe striking differences. For example in the Netherlands the percentages vary from 39.4% to 53.6%, in Austria from 22.9% to 33.4%, Belgium from 32.0% to 41.1%, in Switzerland from 37.9% to 46.3%, in Latvia from 16% to 25.4%.

3. PRE-TRIAL DETENTION AND ITS APPROACH BY THE CPT[37]

3.1. CPT IN GENERAL

Article 3 ECHR states that: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". When national remedies are exhausted, complaints on an alleged violation of this ban can be submitted to the European Court of Human Rights in Strasbourg. This review afterwards by the judicial system is, however, not sufficient to safeguard the absolute ban of Article 3 effectively. This is especially the case with persons deprived of their liberty and

[34] That is the situation in 18 States: Armenia, Bosnia Herzegovina (Fed. BiH and Republica Srpska), Bulgaria, Cyprus, Czech Republic, Estonia, Georgia, Iceland, Liechtenstein, Lithuania, Monaco, Portugal, Romania, San Marino, Slovak Republic, Spain (Catalonia), Former Yugoslav Republic of Macedonia, and Turkey.

[35] France (2) and Scotland (1).

[36] That is the case in 13 States: Austria, Belgium, Finland, Germany, Hungary, Italy, Latvia, Netherlands, Poland, Serbia, Spain, Switzerland, and England and Wales. If the percentages vary a lot (like e.g. in the Netherlands), also depends on the size of the total prison population. In 7 States one can observe a change, but it is only little. Here, the group of other cases is not big (less than 100, but more than in France and Scotland): Denmark, Ireland, Luxembourg, Moldova, Norway, Slovenia, and Sweden.
In 9 States there are no data available: Albania, Andorra, Azerbaijan, Croatia, Greece, Malta, Russia, and Ukraine, Northern Ireland.

[37] See for a comprehensive study on the CPT: L. de Lange, *Detentie genormeerd. Een onderzoek naar de betekenis van het CPT voor de inrichting van vrijheidsbeneming in Nederland [Detention regulated. A research on the influence of the CPT on the deprivation of liberty in Dutch prisons]*, Nijmegen, Wolf Legal Publishers, 2008; Chapter 5 of this work contains thorough analyses of the standards the CPT has laid down in the reports during the years of its existence. According to De Lange, "the CPT doesn't work in a vacuum" as the reports "clearly show that they provide a source of guidance for its work" (see p. 351). See furthermore R. Morgan & M. Evans, *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture*, Strasbourg, Council of Europe Publishing 2001, p. 54–57, and R. Morgan & M. Evans, *Combating torture in Europe: the work and standards of the European Committee for the Prevention of Torture (CPT)*, Strasbourg, Council of Europe Publishing 2001, p. 88–90, deal with the CPT and different categories of prisoners; also with pre-trial detainees (see the relevant pages referred to in this footnote).

therefore subjected to the authority of the government. In that subordinate situation, the risk of being confronted with acts of government officials which are not in accordance with the prohibition of Article 3 EVRM, is not an exception. Because of their detention, the possibilities to defend oneself against violations of Article 3 EVRM with judicial means are not completely blocked but at the very least surrounded by obstacles.[38] For that reason, the Council of Europe, apart from the repressive mechanism of judicial review afterwards by the European Court, also developed a preventive mechanism: the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment, better known under the acronym CPT. The foundation for this was laid in the COE 1987 *European Convention for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment* (ECPT). According to article 1 of this Convention the CPT "shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment". The mandate of the CPT does not only entails remand centres and prisons but any other place where persons are held by the authorities for example police stations, social care homes, juvenile detention centres, holding centres for immigration detainees and psychiatric hospitals. The CPT performs this task by visiting these places and reporting its findings to the authorities of the State concerned. Since its twenty years of existence, the Committee carried out 279[39] visits to all forty-seven Member States of the Council of Europe.

Under the Convention, CPT delegations have unlimited access to places of detention and the right to move inside such places without restriction. They interview persons deprived of their liberty in private and communicate freely with anyone who can provide information. The recommendations which the CPT may formulate on the basis of facts found during the visit, are included in a report which is sent to the State concerned. Reports can only be published with the consent of the State. Up to now, almost all visit reports have been published.

Over its years of activity in the field, the CPT has developed standards relating to the treatment of persons deprived of their liberty. These Standards, together with the European Prison Rules and the decisions of the European Court of Human rights form the legal and moral basis and touchstone upon which the CPT's findings, comments, recommendations and standards are built.

[38] J. Callewaert, L'article 3 de la Convention Européenne: une norme relativement absolue ou absolument relative?, in: *Liber Amicorum Marc-André Eisen*, Bruxelles 1995, p. 31.

[39] As of 5 January 2010.

3.2. PRE-TRIAL AND TORTURE OR INHUMAN OR DEGRADING TREATMENT

As opposed to the European Court of Human Rights, the CPT is not a judicial mechanism a posteriori but a preventive mechanism, which tries a priori to prevent possible violations of art. 3 ECHR. In order to practise this task, standards are needed in view of which can be decided if such a matter exists or could exist. When the CPT was established, these standards were lacking. As a result, the CPT already established in its first General Report: "In spite of the wealth of material available, the CPT often finds that no clear guidance can be drawn from it for the purpose of dealing with specific situations encountered by the Committee, or at least that more detailed standards are needed".[40] As a consequence, gradually a corpus of standards on safeguards against ill-treatment and conditions of detention has been developed, as regards both persons deprived of their liberty in general and detained persons belonging to particularly vulnerable groups. These standards have largely been made public through substantive sections in the General Reports of the Committee.

Also with regard to the treatment of pre-trial detainees, standards are developed to be used as touchstone at visits to police establishments and remand prisons. These standards are used to evaluate if a situation amounts to torture or ill-treatment or if a situation could give rise to torture or ill-treatment, according to the CPT. However, it will rarely be a question of torture because the CPT interprets the term, following the European Court of Human rights, in a very restricted sense and confines this qualification to severe cases of deliberate physical and psychological ill-treatment by police officers.

Ill-treatment which cannot be considered torture on the basis of these strict interpretations will be, depending on the seriousness of the ill-treatment, qualified as severe ill-treatment or ill-treatment. Sometimes this form of ill-treatment is described as "could well be considered to amount to torture". In cases of torture and ill-treatment it is always a matter of physical or psychological ill-treatment by government officials. Ill-treatment, sexual violence and humiliations by other detainees are not qualified as torture or ill-treatment but as inhuman or degrading treatment. However, as a rule the CPT follows these qualifications only with regard to the circumstances of detention. If these circumstances are not in accordance with the standards but not serious enough to be qualified as inhuman or degrading, terms as inadequate, unacceptable and unsatisfactory are used to specify the seriousness of the undesirability of the situation.

In itself, the fact that some circumstances of detention do not meet the standards does not mean that this can always be qualified as inhuman or degrading treatment. In those cases the CPT will confine itself with a

40 1st General Report 1991.

recommendation to the authorities to remove these shortcomings. If the qualification ill-treatment or inhuman or degrading treatment is justified, the recommendations will be more imperative and often demands are made even during the visit to make the necessary changes immediately. In a lot of cases the CPT employs, as does the ECtHR[41], an accumulative criterion, so that circumstances that do not have an inhuman or degrading character in itself can lead, in combination with other circumstances, to such a qualification. In that respect, the individual circumstances of detention as a whole could amount to inhuman or degrading treatment.

3.3. CPT STANDARDS AND VISITS REPORTS ON PRE-TRIAL DETENTION

In its country reports, as well as in its Standards[42], the CPT makes a distinction between police custody and prisons.[43] According to Morgan and Evans, the assumption that it is normal for remand in custody to be in a prison probably "influenced the thinking of the CPT when it accepted that police custody would probably involve physical conditions of a lower standard than those to be found in and expected of, prisons designed for prolonged custody".[44] However, this is not in line with the legal reality: often remand prisoners and sometimes even sentenced prisoners are to be found in police establishments. Generally, at the end of each country report (in Appendix I), the CPT comes with a List of Recommendations, Comments and Requests for Information. In order to absorb the CPT's findings with regard to remand detention from the country reports, we looked in particular at the recommendations.

These recommendations are strongly linked with the standards that have been developed during the last two decades and that are uniform to all state parties to the European Convention. The list is structured in more or less the same way in each country report. It starts with a heading "preliminary remarks", followed by paragraphs that make a distinction between police custody (or: establishments under the authority of the Ministry of Interior) and prisons (or: establishments under the authority of the Ministry of Justice) and under each heading (i.e. respectively 'police custody' and 'prisons') specific topics are dealt with. These are headings under which the safeguards and detention conditions

41 See for example ECtHR 6 March 2001, *Dougoz v. Greece*, Appl. 40907/98.

42 Part I is on "Police custody" and part II on "Imprisonment". The CPT Standards can be derived from the CPT's website (at: www.cpt.coe.int/en/default.htm (under 'Documents').

43 Other places of detention fall outside the scope of this article.

44 R. Morgan & M. Evans, *Combating torture in Europe: the work and standards of the European Committee for the Prevention of Torture (CPT)*, Strasbourg, Council of Europe Publishing 2001, p. 88.

during pre-trial detention are dealt with by the CPT. The following paragraphs are structured after this format.

Preliminary remarks

Pre-trial detention is not similar to police custody. For that reason the CPT in many reports criticizes that remand prisoners have to stay for more than a couple of days in a police station. According to the CPT remand prisoners who are (still) in police custody should be transferred to a prison as soon as possible.[45] In some countries, the possibility exists that remand prisoners who are already in a prison have to be transferred back to a police establishment. When this is the case, the CPT is of the opinion that this return, for whatever purpose, "is sought only when there is absolutely no other alternative and for the shortest time possible, and is subject to authorisation by a judge or a prosecutor".[46] In its 12th General Report the CPT considers also as axiomatic, that in those exceptional circumstances where a remand prisoner is returned to the custody of the police, he/she should enjoy the three basic rights for persons detained by the police: access to a lawyer and to a doctor and the right to inform a relative or another third party of one's choice.

These rights are, in the CPT's opinion, fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc). Another essential safeguard is the existence of an independent mechanism for examining complaints about treatment whilst in police custody.[47] This is not without reason: especially in police stations the risk of being subjected to all forms of ill-treatment is very high, which can be shown by the numerous examples of physical and psychological violence used in police establishments: like slapping, kicking, deprivation of food and drink, wall-standing, deprivation of sleep, use of mechanical restraints, intimidation, etc. Also the detention conditions in police cells are not seldom an infringement of article 3 of the European Convention.

Work and education are important. For that reason the CPT is continuously urging countries (as a preliminary remark to prisons) that efforts should be made to develop programmes of education and vocational training in all penitentiary establishments.[48] In order to realise a satisfactory activities regime for prisoners "an adequate staff complement and a staff attendance system which ensures the availability of staff throughout the day" will be needed.[49] Further, the CPT sometimes refers to measures which should be taken by the relevant

45 Armenia visit 2006, Norway visit 2005.
46 12th General Report on the CPT's activities (2002) and Armenia visit 2006.
47 2nd General Report (1992).
48 Austria visit 2004, Bulgaria visit 2006, Croatia visit 2007, Georgia visit 2007.
49 Austria visit 2004.

authorities to make sure that remand as well as sentenced prisoners is provided with work.[50]

Regularly the CPT underlines that Member States should use the Recommendation Rec(99)22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation and the Recommendation Rec(2003)22 on conditional release (parole) in order to fight against prison overcrowding.[51] The CPT is of the opinion that:

> "The only viable way to control overcrowding is to adopt policies designed to limit or modulate the number of persons sent to prison. In this connection, the CPT must stress the need for a strategy covering both admission to and release from prison, to ensure that imprisonment really is the ultimate remedy. This implies, in the first place, an emphasis on non-custodial measures in the period before the imposition of a sentence and, in the second place, the adoption of measures which facilitate the reintegration into society of persons who have been deprived of their liberty".[52]

Overcrowding is one of the most urgent problems with respect to remand prisons and many countries are confronted with it, such as Austria, Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, and the UK.[53] It has negative consequences for the material and living conditions. Some examples to illustrate this: "multi-occupancy cells with a living space per prisoner of less than 3 m^2, reduced possibilities to work or to attend educational/vocational activities, and a limited choice of other out-of-cell activities".[54] Overcrowded prisons entail, *inter alia*, cramped and unhygienic accommodations, a constant lack of privacy, overburdened health-care services, and increased tension – resulting in more violence – between prisoners as well as between prisoners and staff.[55]

Remand detention in police establishments

It is not uncommon that remand prisoners are accommodated in police cells even after their first appearance in court. In several countries suspects can be held in police custody for a long period. In Hungary, for example, it is possible to execute pre-trial detention in police establishments for a maximum of sixty days.

50 Austria visit 2004, Bulgaria visit 2006, Croatia visit 2007, Georgia visit 2007, Poland visit 2004.

51 Austria visit 2004, Bulgaria visit 2006, Croatia visit 2007, Lithuania visit 2004, Poland visit 2004.

52 See e.g. Croatia visit 2007, par. 48.

53 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU,* Nijmegen, Wolf Legal Publishers 2009, p. 99.

54 Ibidem.

55 See the CPT Standards, p. 21, §13.

In Romania, the CPT found a large number of remand prisoners- and even some sentenced persons- subject to criminal investigations who were in police establishments for prolonged periods.[56] Some have been there for six months or, in a few exceptional cases, even for one and a half year. During its last visit to the Netherlands, the CPT noted that a significant number of persons spent between ten and fourteen days detained in police cells. This particularly appeared to be the case for juveniles between 16 and 18 years of age.[57] According to the CPT delegation, apparently this was due to capacity problems in juvenile detention facilities, which suggested that police cells were being used as surplus capacity for remand prisons and alien holding facilities. However, the fact remains, as was repeated by the CPT in various reports that police facilities do not offer suitable accommodation for lengthy periods of detention, particularly as concerns juveniles. Cases of ill-treatment have been encountered by the CPT many times, especially with respect to detention in police stations.

With regard to this issue, the CPT referred to the European Prison Rules in the Lithuanian country report (visit 2004). According to this Rule, a prison is the detention place for remand as well as sentenced prisoners. The EPR should apply to persons being physically detained in a prison. Moreover, they should also apply to persons are not actually staying in a prison, but nevertheless belong there, such as remand prisoners who are (for various reasons, e.g. prison overcrowding) still detained in police premises while they actually should be detained in a prison. According to the CPT, the medium term objective should be "to end completely the practice of accommodating remand prisoners in police establishments".[58]

Sometimes remand prisoners who are already transferred from a police cell to a prison cell, have to return to police custody, e.g. for further questioning. When this is the case, the return should, according to the Committee only be sought and authorised when it is absolutely unavoidable. Moreover, the judicial control of the treatment of persons remanded in police custody should be reinforced, which means that such persons should be brought before a court at regular occasions. If a person is transferred back to a police station, them this practice should be recorded properly (Hungary visit 2003) and the return should be subject to the authorisation of a judge or prosecutor (Iceland visit 1993).[59]

56 Romania visit 2008.

57 The Netherlands visit 2007.

58 Hungary visit 2005. See also *The Source Book, A synthesis of existing recommendations and standards ("jurisprudence") in respect of matters systematically addressed in the CPT's reports*, CPT (2009)33, p. 15 (this is "a comprehensive collection of extracts from CPT visit reports and General Reports, which reflects the Committee's standards in respect of issues examined during visits" and "aims to provide an internal reference tool for CPT members and the Secretariat concerning existing CPT jurisprudence; the Source Book is a key source of information for new members of the Committee" (see its preamble, p. 3)).

59 Idem (The Source Book), p. 13; see also the 12th General Report §46.

Also in Finland, the CPT found that it is not uncommon for remand prisoners to be deprived of their liberty in police cells. This can appear during part or all of the period of pre-trial investigation. The CPT found, at the time of the 2003 visit, that 120 remand prisoners were placed in police premises in the whole of the country. The time spent in these so called "police prisons" varied from a few weeks to up to four months. The report of the visit to Finland in 2008 gives a clear indication of main standards and safeguards to prevent ill-treatment in police establishments. In that report the CPT recommended to the Finnish authorities to:

- "ensure that all remand prisoners held in "police prisons" are offered at least one hour of genuine outdoor exercise every day;
- develop a regime of activities for such prisoners;
- review the existing arrangements at the "police prison" of Helsinki Police Department as regards access to a doctor and access to specialist (including dental) care, and arrange for the presence of a nurse also at weekends;
- ensure that all "police prisons" without an in-house medical service are visited on a regular basis by a nurse reporting to a doctor;
- ensure that all newly-arrived remand prisoners are medically screened, within 24 hours of their arrival at a "police prison", by a doctor or a qualified nurse reporting to a doctor;
- set up specific registers to record placements in isolation cells in the "police prisons" which possess such cells;
- ensure that the isolation cells at the "police prison" of Helsinki Police Department are kept clean;
- ensure that inmates held in isolation cells are visited by a nurse on a daily basis (…)".

If restrictions are imposed on remand prisoners' correspondence, visits and access to a telephone the police should be given detailed instructions. The police should also state "in writing the specific reasons for any such prohibitions/restrictions in each individual case". Finally, in the Finnish country visit report (2008), the CPT states that:

> "in the context of each periodic review by a court of the necessity to continue remand in custody, the question of the necessity for the police to continue to impose particular restrictions upon a remand prisoner's visits, letters and access to a telephone to be considered as a separate issue".

This is also one of the recommendations in the Norwegian country report (visit 2005). Prosecutors and members of the police should ay never use or uphold

restrictions for the goal of pressuring a remand prisoner to cooperate with the police investigation.[60]

(Material) Conditions of detention in police establishments

According to the CPT, custody by the police should be in principle of relatively short duration. Consequently, physical conditions of detention cannot be expected to be as good as in police establishments as in other places of detention where persons may be held for lengthy periods. For that reason Member states should make sure that remand prisoners "are always promptly transferred to a pre-trial detention centre or remand prison".[61]

However, as long as a person is kept in a police establishment, certain elementary material requirements should be met. In the second and twelfth General Report the CPT has formulated as basic requirements:

> "All police cells should be clean and of a reasonable size for the number of persons they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded0; preferably cells should enjoy natural light. Further, cells should be equipped with a means to rest 9e,g. a fixed chair or bench, and persons obliged to stay overnight in custody should be provided with a clean mattress and clean blankets. Persons in police custody should have access to a proper toilet facility under decent conditions, and be offered adequate means to wash themselves. They should have ready access to drinking water and be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day. Persons held in police custody for 24 hours or more should, as far as possible, be offered outdoor exercise every day".[62]

For as long as remand prisoners are held in police establishments they should be provided with some form of activity. In police establishments, the objective should be to offer each remand prisoner at least one visit every week.[63]

Material conditions in remand centres and prison establishments

With respect to the material conditions in remand centres and other prison establishments already the second General Report mentioned that:" a satisfactory programme of activities (work, education, sports, etc.) is of crucial importance for the well-being of prisoners. This holds true for all establishments, whether for sentenced prisoners or those awaiting trial". In this respect the CPT observed that activities in many remand prisons are extremely limited. The organisation

[60] Norway visit 2005.
[61] Albania visit 2008.
[62] 12th General Report (2002) and 2nd General Report (1992).
[63] Hungary visit 2005.

of regime activities in such establishments – which have a fairly rapid turnover of inmates – is not a straight forwarded matter. Clearly, there can be no question of individualised treatment programmes of the sort which might be aspired to in an establishment for sentenced prisoners".[64] However, Member States should provide for a regime that allows remand prisoners in prisons to have access to "a comprehensive regime of out-of-cell activities (including group association activities)"[65] or "an appropriate range of organised activities (e.g. work, education, sport, recreation/association, religious activities".[66]

Sometimes, reference is made to this aspect in the sense that all prisoners should be able to spend "a reasonable part of the day (i.e. 8 hours or more) outside their cells engaged in purposeful activity of a varied nature".[67] In the case of its visit to Poland (visit 2004; Cracow Remand Prison) the CPT mentions that all prisoners should have access to the indoor gym and recreation rooms on a regular basis. In the Bulgarian report (visit 2006), is stated that efforts should be made to provide all prisoners with work and educational programmes and vocational training courses. Here, it involved a closed part of a prison. In Germany (visit 2005), a special security unit had been visited by the CPT. It recommended the German authorities to abolish the special security measure which holds that remand and sentenced prisoners could be withdrawn from outdoor exercises.

As to the issue of day/regime activities – which is in some reports situated under a specific heading ('regime' or 'activities') – the CPT has found that in many countries they are "extremely limited".[68] Like the European Prison Rules, the CPT finds that remand prisoners (in the wording of the EPR, "untried prisoners") should be "able to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activity of a varied nature".[69] According to the commentary on the EPR (Rule 95.3), part II of the EPR ("Conditions of imprisonment") is also applicable to untried prisoners.[70]

(Health) Medical care (services or issues)

About a quarter of the 47 CPT-members have a medical background as general practitioner, medical specialist or psychiatrist. In all CPT delegations are also

64 2nd General Report (1992).
65 Albania visit 2008, Latvia visit 2004, Lithuania visit 2004.
66 Armenia visit 2006.
67 Aruba visit 2007, Norway visit 2005, Slovak Republic visit 2007, Slovenia visit 2006, Sweden visit 2003.
68 CPT Standards §47. See on this aspect also D. van Zyl Smit & S. Snacken, *Principles of European Prison Law and Policy*. New York, Oxford University Press 2009, p. 180–181.
69 CPT Standards §47.
70 The EPR contain a section (Part VII) especially designed for untried prisoners in order to assist them "by spelling out more fully to what their status entitles them additionally" (see the commentary on the EPR and especially on Rule 95.3).

participating medical experts outside the CPT. During the visits the medical members of the delegation check the medical files that are kept in the institution, investigate the availability and quality of the medical and psychiatric care and if needed they also carry out medical examinations, especially in case of allegations of physical ill-treatment.

Many standards refer to medical issues. For example, when they enter a prison, remand prisoners should be subject to "a comprehensive medical examination on admission (including screening for transmissible diseases) and prison establishments should at least be visited by a nurse on a daily basis."[71] In the Lithuanian report (visit 2004), the CPT (under the heading police establishments; preliminary remarks) states that the safeguard to be medically screened should also be ensured in police detention centres for as long as those centres continue to be used to hold remand prisoners. Remand prisoners should be offered the standard of 4 m^2 living space per person in multi-occupancy cells.[72] In Lithuania (visit 2004) all prisoners should have adequate conditions of detention "as regards cell equipment and furnishing, as well as heating during cold weather". Moreover, all prisoners should have access to products with which they can clean their cells.[73]

The safeguard to be medically screened should also be ensured in police detention centres for as long as those centres continue to be used to hold remand prisoners.

However, in many countries these requirements are not always fulfilled. With regard to the forensic psychiatric care the CPT criticizes in many country reports the lack of a therapeutic material environment and of psycho-social therapeutic activities for mentally ill or disturbed detainees, especially when the inmates are there for prolonged periods.

Prison health care services also play a role in combating/preventing ill-treatment. To this extent, the CPT, in the Serbian country report (visit 2007) mentions that:

> "the medical examination of newly-arrived remand prisoners contain: (i) a full account of statements made by the person concerned which are relevant to the medical examination (including his description of his state of health and any allegations of ill-treatment), (ii) a full account of objective medical findings based on a thorough examination, and (iii) the doctor's conclusions in the light of (i) and (ii), indicating the degree of consistency between any allegations made and the objective medical findings".

71 Albania visit 2008, Cyprus visit 2004, Iceland visit 2004.
72 Croatia visit 2007, Poland visit 2004.
73 Lithuania visit 2004.

In the case of Liechtenstein (visit 2007), the CPT recommends examination by a doctor within 24 hours of their admission to a prison. To the authorities of the Netherlands Antilles (visit 2007), the CPR recommends to take urgent steps to organise health care at Bonaire Remand Prison. This establishment should be visited by a nurse on a daily basis.

With regard to the forensic psychiatric ward at the hospital of Warsaw-Mokotów Remand Prison, the CPT recommends to "introduce a more therapeutic material environment and develop a broader range of psycho-social therapeutic activities for patient".[74] The latter is especially needed when patients are there for prolonged periods.

Also in the Norwegian report, the CPT devotes a special paragraph on 'Medical services'.[75] All newly admitted prisoners should be "properly interviewed and physically examined by a medical doctor as soon as possible after admission".[76] This interview and examination should preferably be carried out on the day of admission. In this report, the CPT mentions that instead of a doctor, a nurse could carry out the medical screening. However, when this is the case, the interview cannot be disproportionately postponed (see also the report on the CPT's visit to Macedonia in 2008).

Regime (Activities)

The presumption of innocence and the principle that prisoners should be subject to no more restrictions than are strictly necessary to secure their safe confinement and the interest of justice should, in the CPT's view, be the starting point for considering regimes for remand prisoners.[77] Consequently, restrictions may only be imposed when this is strictly necessary and if only for as short as possible.

In the case of the country visit report on Bosnia Herzegovina (2007), the CPT devoted a heading to 'regime'. The CPT stresses that remand prisoners should be able to spend a "reasonable part" of the day outside their cells. They should be engaged in "purposeful activities", which should be of a "varied nature". The legislative framework on remand imprisonment should be in line with the CPT's recommendation with regard to the regime activities for remand prisoners.[78]

With regard to outdoor activities, the CPT mentions in its country report on its visit to Serbia (in 2007) that the remand prisoners in the institutions concerned "are offered the possibility to take outdoor exercise every day for at

[74] Poland visit 2004.

[75] In other reports, one can find more or less the same recommendations under the paragraph 'Conditions of detention'.

[76] Norway visit 2005.

[77] The Source Book, A synthesis of existing recommendations and standards ("jurisprudence") in respect of matters systematically addressed in the CPT's reports, CPT (2009)33, p. 46.

[78] Estonia visit 2003, Lithuania visit 2004.

least one hour". In case of bad weather, there should be shelter possibilities. Remand prisoners should have the right to have contact with a religious representative in private.[79]

Prisoners subject to a special regime

In many countries a special regime with serious restrictions is linked to solitary confinement by court order. If this is the case, the CPT criticises that pre-printed forms are used that do not specify the specific restrictions which can be imposed nor that it records the grounds which justify the imposition of restrictions. In its report on the visit to Denmark the CPT recommends the Danish authorities to review all placements of remand prisoners on a regular, maximum three-monthly, basis. In this respect, prisoners should be kept updated about these placements and have the right to lodge an appeal against it at a court.[80] If prisoners' special situation on the basis of which they are placed in a special regime has ended, they should without delay be transferred (back) to a normal prison.[81]

Solitary confinement of remand prisoners by court order and (other) restrictions

In many countries a special regime with serious restrictions is linked to solitary confinement by court order. If this is the case, the CPT criticises that pre-printed forms are used that do not specify the specific restrictions which can be imposed nor that it records the grounds which justify the imposition of restrictions.

With respect to the use of solitary confinement the CPT underlined in several reports that continued efforts should be made to ensure that remand prisoners are only placed in solitary confinement in exceptional circumstances which are strictly limited to the actual requirements of the case. Furthermore, as we can read in the report to the Danish authorities the CPT advises "that the authorities pursue their efforts to provide remand prisoners placed in judicially-imposed solitary confinement with increased staff contact and access to tuition, work and other activities, in order to counteract the negative effects of being placed in solitary confinement".

The CPT finds that the pre-printed form (as being used by the Swedish authorities) "which the prosecutor uses to request that the court remand a person in custody and grant the prosecutor the authority to impose restrictions (…) still does not specify the specific restrictions which the prosecutor intends to impose, nor does it record the grounds which the prosecutor considers justify the

[79] Serbia visit 2007.
[80] Denmark visit 2008.
[81] Finland visit 2008.

imposition of restrictions – as distinct from the grounds which justify remand".[82]

According to country visit report on Denmark (2008), "the issue of solitary confinement of remand prisoners by court order in the interest of the investigation has been central to the on-going dialogue between the CPT and the Danish authorities". Amendments to the Administration of Justice Act (AJA) entered into force and the CPT welcomed this already in an earlier country visit report (visit 2002). The amendments relate "to the conditions under which solitary confinement of remand prisoners may be ordered by a court, and the duration of such confinement". In 2006, stricter conditions for the use and duration of solitary confinement of remand prisoners were introduced, which resulted in further amendments to the AJA. The CPT recommends that the Danish authorities "make continued efforts to ensure that remand prisoners are only placed in solitary confinement in exceptional circumstances which are strictly limited to the actual requirements of the case". Furthermore, the CPT advises "that the authorities pursue their efforts to provide remand prisoners placed in judicially-imposed solitary confinement with increased staff contact and access to tuition, work and other activities, in order to counteract the negative effects of being placed in solitary confinement".

The Danish authorities were told no going far enough when they say that their AJA already provides sufficient safeguards with regard to the practice of police-imposed restrictions on remand prisoners' contact with the outside world. The Danish authorities mention that "the considerations underlying the imposition of restrictions regarding visits and exchange of letters are generally the same as those underlying the use of remand custody". As a consequence, the national authorities argue that "if the court finds that there are sufficient reasons to uphold a verdict concerning detention, there will generally also be reasons to uphold control of letters and visits". However, this line of reasoning was judged as "questionable and may lead to unacceptable situations". The CPT worries about the fact that this practice could mean that restrictions on remand prisoners' visits and correspondence is applied to wider extent than is necessary for the purpose of the criminal proceedings. As a result of its findings, the Committee stressed that "the use of police-imposed restrictions on remand prisoners' contact with the outside world should be limited to the strict minimum necessary for investigation purposes". For that reason the Danish authorities were called upon to implement as soon as possible:

> "that the police be given detailed instructions as regards recourse to prohibitions/restrictions concerning prisoners' correspondence and visits;
> that there be an obligation to state the reasons in writing for any such measure, and

[82] Sweden visit 2003.

> that, in the context of each periodic review by a court of the necessity to continue remand custody, the question of the necessity for the police to continue to impose particular restrictions upon a remand prisoners' visits and letters be considered as a separate issue".

Also the practice of prohibiting access to a telephone should be subjected to the same safeguards as stated above. Access to a telephone should be formally guaranteed[83] and possible on a regular basis.[84]

Torture and other forms of ill-treatment

The CPT standards prescribe that categories of persons from the very outset of their deprivation of liberty should enjoy the following fundamental rights: the right of detained persons to inform a close relative or another third party of their situation, to have access to a lawyer, and to have access to a doctor.[85] These are safeguards against ill-treatment. The transferring back of a remand prisoner from a prison to a police station should always be subject to the "express authorization of a prosecutor or judge".[86]

Another important safeguard to combat ill-treatment is the standard that legal provisions guarantee the right of prisoners to complain. The existence of an independent, impartial complaints committee is seen as an important safeguard to combat ill-treatment. For that reason competent authorities should always investigate the complaints of prisoners (also remand prisoners). Head's of prison should talk and listen to prisoners' complaints and improve the training of their staff. Moreover, the CPT notes that it should be made clear to all prisoners (thus, also remand prisoners) how they can file a complaint. To effectuate this right, writing material should be available to prisoners. The CPT provides for practical guidelines on how to make sure that the filing of complaints can be done in a confidential way.[87] Moreover, in the report on the visit to Poland in 2004, the CPT states that the country has to ensure that filing a complaint cannot have adversarial effects for prisoners.

intersentia

83 Lithuania visit 2004.

84 Germany visit 2005.

85 See e.g. Serbia visit 2007. See for "procedural safeguards in police custody" M.D. Evans & R. Morgan, *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Oxford, Oxford University Press 1998, p. 257–294; and also J. Murdoch, *The treatment of prisoners. European standards,* Strasbourg, Council of Europe Publishing 2006, p. 161–175.

86 This is – in the Serbian country report (visit 2007) – formulated as a safeguard against ill-treatment.

87 Estonia visit 2003, Poland visit 2004.

Other issues (of relevance to the CPT's mandate)[88]

In many reports, like in the country report on Estonia (visit 2003) the CPT recommends the authorities to establish uniform regulations "for all prisons on the question of the frequency and duration of visits to remand prisoners by family members or other persons". In principle, contact with the outside world should be the same for sentenced as well as for remand prisoners.[89] In the Georgian country report (visit 2007) the CPT refers to European Prison Rule 99. Rule 99 is about remand prisoners' contact with the outside rule. It entails that:

> "untried prisoners a) shall receive visits and be allowed to communicate with family and other persons in the same way as convicted persons, b) shall receive additional visits and have additional access to other forms of communication and c) shall have access to books, newspapers and other news media".

In the German report (visit 2005) the CPT mentions that the general visit entitlements for both sentenced and remand prisoners is at least two hours per month. All prisoners should also be allowed to cumulate visits when in a certain period they did not receive any visits. Or as formulated in the report on the visit to the Slovak Republic in 2007 "the objective should be to offer the equivalent of visits every week, of at least 30 minutes duration". It is not allowed for countries to perform a restrictive practice in respect of visits for remand prisoners.[90] Granting visits should be the norm and not the exception.[91]

Remand prisoners should also be allowed to send and receive letters without restrictions, except when those restrictions are necessary in the course of criminal proceedings and ordered by a competent investigator or the court for a set period of time.[92] It is forbidden for the prison director and its staff to read systematically read the correspondence between the remand prisoner and his/her lawyer.[93] Remand prisoners should be offered the same safeguards as sentenced prisoners during disciplinary procedures.

Intersentia

[88] Such as, *inter alia*, contact with the outside world, disciplinary punishment, complaint procedure.
[89] Poland visit 2004.
[90] Lithuania visit 2004.
[91] Serbia visit 2007.
[92] Georgia visit 2007.
[93] Serbia visit 2007.

4. RESULTS

The outline of findings in paragraph 3 with regard to pre-trial detention shows that the applied standards and observed shortcomings by the CPT mainly involve aspects such as:

- access to a lawyer and medical doctor
- right to notify a third party
- contact with the outside world
- overcrowding, cell occupancy
- sanitary and hygienic facilities
- quality and size of cells
- outdoor activities
- education and recreation
- medical services
- quality of the staff
- complaints procedures and external control by an independent body
- enforcement of pre-trial detention in police establishments
- means of restraint and solitary confinement.

Looking at the developments in Europe in the field of detention and imprisonment one can only establish that during the twenty years of its existence, the CPT has had a huge influence on humanizing the prison system, especially with respect to the acknowledgement and implementation of the standards regarding these aspects. Safeguards against ill-treatment and inhuman or degrading treatment have been introduced or strengthened, substandard inmate accommodation has been renovated or withdrawn from service, the quality of health care for detainees has been improved and out-of-cell activities have been enhanced. The recommendations of the visit reports are usually taken serious by the national authorities and only in five cases, the CPT had to take refuge to the most severe means available: the power under Article 12, paragraph 2 of the ECPT to make a public statement. The ground for these public statements was that the CPT was confronted with a failure to co-operate and/or a refusal to improve the situation in relation to widespread acts of torture or other deliberate forms of ill-treatment.

Apart from the impact of the CPT on preventing circumstances that can lead to a situation in which torture, ill-treatment or inhuman or degrading treatment can occur, the influence of the CPT can be seen in other aspects. One of them is, for example, the increasing significance of the CPT reports on the jurisdiction of the European Court of Human Rights in Strasbourg. In her study on the relationship between the CPT and this Court, M. Djurdjevic examined the 137 judgements in which the Court involved the reports of the CPT in its judgement.

Her conclusion was that the CPT increasingly acts as fact-finder for the Court and has, especially regarding the material circumstances of detention, a big influence on the decision-making of the Court.[94]

The 19th General Report of 2009 refers also to the influence on various Council of Europe instruments, such as the revised European Prison Rules (2006), the European Rules for juvenile offenders (2008). Also the establishment of a comparable preventive mechanism on a world wide scale, the UN Subcommittee on Prevention of Torture (SPT), can be considered as a result of CPT's activities during the last two decades. However, there is still a lot of work to do. Not without reason the CPT expresses in its last General Report the warning that: in spite of all these positive developments: "torture and other forms of ill-treatment of persons deprived of their liberty still exist in the Council of Europe area, and conditions of detention remain wretched in numerous establishments of various types; many published CPT reports, as well as judgements of the European Court of Human rights attest to this state of affairs".[95] The recently published study on pre-trial detention in the 27 Member States of the European Union shows that especially with respect to the treatment of remand prisoners in various countries bad practices still exist.

DOCUMENTS

- Rec. No. (99) 22 – Recommendation No. (99) 22 of the Committee of Ministers to the Member States concerning prison overcrowding and prison population inflation (at: www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp (last retrieved 1 July 2011)).
- Rec. No. (2006) 2 – Recommendation No. (2006) 2 of the Committee of Ministers to the Member States on the European Prison Rules (at: www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp (last retrieved 1 July 2011)).
- Commentary to Rec. No. (2006) 2 – Commentary to Recommendation No. (2006) 2 of the Committee of Ministers to the Member States on the European Prison Rules (at: www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp (last retrieved 1 July 2011)).

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[94] M. Djurdjevic, *Het verbod op torture, inhuman and degrading treatment or punishment, gewaarborgd door het EHRM en het CPT*, Thesis (Avans-Fontys University of Professional Education). Tilburg, Wolf Legal Publishers 2009 (also at: www.hbo-kennisbank.nl/nl/page/hbosearch.results/?meta_record_hbokennisbank_type=scriptie (search ('zoeken') for "CPT").

[95] 20 years of combating torture, 19th General report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg 2009.

intersentia

- Rec. No. (2006) 13 – Recommendation No. (2006) 13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions under which it takes place and the provision of safeguards against abuse (at: www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp (last retrieved 1 July 2011)).
- Explanatory Memorandum to Rec. No. (2006) 13 – Explanatory Memorandum to the Recommendation No. (2006) 13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions under which it takes place and the provision of safeguards against abuse (at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1032121&Site=CM (last retrieved 1 July 2011).
- Source Book 2009 – CPT's jurisprudence working group, *The Source Book. A synthesis of existing recommendations and standards ("jurisprudence") in respect of matters systematically addressed in the CPT's reports*, Strasbourg, 16 April 2009.
- Standard Minimum Rules for the Treatment of Prisoners (at: www2.ohchr.org/english/law/treatmentprisoners.htm (last retrieved 1 July 2011).
- Penal Reform International 2001 – Penal Reform International, *Making standards work. An international handbook on good prison practice*, 2001 (at: www.penalreform.org/publications/making-standards-work-international-handbook-good-prison-practice (last retrieved 1 July 2009).
- CPT country reports

WEBSITES

- European Union: http://europa.eu/index_nl.htm
- Council of Europe: www.coe.int/
- Penal Reform International: www.penalreform.org/
- CPT: www.cpt.coe.int/en/
- International Centre for Prison Studies/ICPS: www.kcl.ac.uk/schools/law/research/icps

PRE-TRIAL DETENTION FROM AN INSPECTOR OF PRISONS' VIEW

Michael Reilly*

1. INTRODUCTION

The role of an Inspector of Prisons obviously depends on the powers given to the relevant inspector. If the inspector of prisons is no more than an NGO, dependent on the good offices of a national government to enable him or her carry out the role of inspector, then this would be a very restrictive role and would in my view attract little or no public confidence. If, however, the inspector is appointed by a national government with an independent mandate the position of the inspector would be far stronger. Professor Andrew Coyle has stated that – *"prisons operate on the authority of citizens and their governments and these have a responsibility to monitor what happens inside prisons in their name"*.[1]

Why should an inspector of prisons be appointed and why is independent oversight of prisons necessary? Article 10 of the International Covenant on Civil and Political Rights confers an obligation on all countries that are State Parties to the Covenant to treat all persons deprived of their liberty *"with humanity and with respect for the inherent dignity of the human person"*.[2] Persons in pre-trial detention make up a proportion of such persons.

Independent oversight of prisons is mandated under international law. The most recent reference to this is in the Optional Protocol to the United Nations Convention Against Torture.[3] International best practice under Principle 29 of the Body of Principles for the Protection of all Persons under any form of

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* Michael Reilly is the Inspector of Prisons, Ireland, since 2008, and holds office for a period of 5 years. Prior to that he had been a Judge since 1982 both in the District Court and in the Special Criminal Court in Ireland.

[1] A. Coyle, *Revision of the European Prison Rules – A Contextual Report*, Strasbourg: Council of Europe publishing, 2006, p. 131.

[2] Article 10(1) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (entered into force 3 January 1976).

[3] Article 1, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A res. A/RES/57/199 (entered into force 4 February 2003).

Detention or Imprisonment and Rule 55 of the United Nations Standard Minimum Rules for the Treatment of Prisoners requires that a system of independent monitoring be established so that transparency and accountability of the prison system can be achieved. Therefore an independent inspectorate is vital in ensuring that prisoners' rights are not violated.

2. INSPECTORS OF PRISON IN OTHER JURISDICTIONS

There are inspectorates of prisons in many jurisdictions. Their mandates range from an examination of the efficiency of the particular prison service to an inspection of the conditions and treatment of prisoners or in some cases to an amalgam of both.

It is submitted that the United Kingdom prison inspectorate set the pace for the rest of the world in devising an appropriate and independent prison inspectorate.[4] There are comparable inspectorates in such places as Scotland, Ireland, South Africa, Norway and Western Australia.[5] While comparable, even these inspectorates may differ in emphasis, powers, independence and their reporting procedures. Inspectorates are to be found in other jurisdictions but do not have the independence of those in the countries mentioned above.

I do not wish in this paper, because of space constraints, to go into detail of the types of inspectorates that are found in these other countries. Suffice it to say that the inspection powers in certain countries may be vested in an office such as the Public Prosecutors Office. The role of Inspector of Prisons in Ireland, which I will deal with later in this paper, is somewhat more limited than the role of certain inspectors in other countries in that mine is limited to prisons.

Many states have an Ombudsman for Prisoners which is in reality an office of last resort as prisoners must (in general) exhaust the appropriate internal complaints systems before an Ombudsman for Prisoners can intervene.

There is an international cross jurisdiction aspect to the inspection of prisons. This derives authority from such organisations as the United Nations and the Council of Europe. A committee of the Council of Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), inspects 46 nations. The United Nations Special Rapporteur on Torture, with the consent of contracting member states, may inspect such member states. The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment creates an additional cross jurisdictional inspection process which I will refer to later.

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4 See R. Harding, Inspecting Prisons, in: Y. Jewkes (ed.), *Handbook on Prisons*, Oregon: Willan Publishing, 2007, p. 547.

5 Ibid.

3. INDEPENDENCE OF THE INSPECTOR OF PRISONS

I referred earlier to the fact that an inspector must be independent. How can an inspector be totally independent? To try to answer that question I must ask your indulgence as I must, for reasons that will become apparent, become parochial and retreat into the position as it pertains in Ireland so the question now is: is the Inspector of Prisons in Ireland independent and unfettered by political considerations?

In 2002 the first Inspector of Prisons was appointed in my country. He was appointed by the Minister for Justice of the day and reported to the said Minister. He did not have statutory backing and although he was given a list of powers he could not enforce these if he came up against the proverbial stone wall. In practice no obstacles were placed in his way and he carried out his functions in a totally impartial and independent manner.

In 2007 the Prisons Act created the statutory post of Inspector of Prisons for Ireland.[6] I was appointed under this Act and took up my position on 1st January 2008. The Inspector of Prisons in Ireland holds office for a period of 5 years.[7]

Is the Inspector of Prisons in Ireland independent in the performance of his/her duties? I say yes and for these reasons. Ireland is a multi party democracy where laws are enacted by a democratically elected government of the people. Prospective laws are scrutinised by our two Houses of Parliament before being passed into law.

Section 30(5) of the Prisons Act 2007, which created the position of Inspector of Prisons, states that the Inspector of Prisons is independent in the performance of his/her functions. I will come back to an examination of these functions later in this paper. In order to put the role of the Inspector into context it is sufficient to say that s/he must submit an Annual report, outlining what s/he has done during the year[8], a report on any matter arising out of the management or operation of a prison that the Minister might ask him or her to investigate[9] and comprehensive reports on any prisons which s/he has thoroughly inspected to the Minister for Justice, Equality and Law Reform.[10]

The Minister, as soon as is practicable after receiving his/her reports, is obliged under the Act to lay such reports before our Houses of Parliament and to publish

6 Section 30 Prisons Act 2007.
7 Section 30(3) Prisons Act 2007.
8 Section 32(1) Prisons Act 2007.
9 Section 31(2) Prisons Act 2007.
10 Section 32 (1) Prisons Act 2007.

such reports.[11] The Minister may omit any matter from any report so laid or published if he or she is of opinion:

1. that its disclosure may be prejudicial to the security of the prison or of the State, or
2. after consultation with the Secretary General to the Government, that its disclosure:
   - would be contrary to the public interest, or
   - may infringe the constitutional rights of any person.[12]

Where any matters are so omitted a statement to this effect must be attached to the report.[13]

How in this scenario do I consider that the Inspector of Prisons is independent in the discharge of his/her mandate? And: who inspects the inspector? Is s/he truly independent and balanced? Luckily in Ireland there are further checks and balances that come into play. No matter what political party is in power we have a robust opposition. Ireland also has a range of NGOs who take a keen interest in and report widely on the activities of organisations or regulatory bodies such as myself. Above all Ireland has a free press which, for the most part, is objective in reporting on matters of public interest and in this connection they have scrutinised various reports of the Inspector of Prisons that have come into the public domain.

The independence of the Inspector of Prisons is further strengthened by a set of standards that prisons are benchmarked against. These are the Inspector's standards[14](formulated and published by me). I will deal with these standards later in this paper and will place them in their particular context to further demonstrate the Inspector's independence.

If you asked me if the system under which the Inspector of Prisons is appointed, and under which he/she works, is transparently independent or could it be improved I would say that the most independent system that I could envisage would be for the Inspector to be appointed by Parliament, as opposed to the Government of the day, and then report directly to Parliament. There are precedents for this in Ireland. The Irish Ombudsman[15] and the Ombudsman for Children[16] report directly to Parliament. In Western Australia the Inspector of Custodial Services reports directly to Parliament.[17]

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11 Sections 31(3) & 32(3) Prisons Act 2007.
12 Sections 31(4) & 32(4) Prisons Act 2007.
13 Sections 31(5) & 32(4) Prisons Act 2007.
14 Inspector of Prisons, *Standards for the Inspection of Prisons in Ireland*, Office of the Inspector of Prisons, 2009 (at www.inspectorofprisons.gov.ie).
15 Section 6(7) Ombudsman Act 1980.
16 Section 13(7) Ombudsman for Children Act 2002.
17 See www.custodialinspector.wa.gov.au/go/home.

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4. PRE-TRIAL DETENTION

At this point I should say that in my opinion a method of inspection covering the entire time a person is in pre-trial detention from the moment of his arrest until his trial should be in place in every country. In Ireland this role is filled by three agencies – the Police Inspectorate[18], the Police Ombudsman's Office[19] and the Inspector of Prisons. It may be that in other countries there are additional players in this field. It is essential that all such agencies are in some way tied together and while fulfilling different roles are subject to one authority. In this regard I must draw attention to the Optional Protocol to the United Nations Convention Against Torture. Under this Protocol each country that has ratified the Protocol must establish a National Preventative Mechanism.[20] Many countries including Ireland have ratified the United Nations Convention Against Torture but have not ratified the Protocol. My country has signed the Protocol. I understand it is the intention of the Irish Government to ratify the Protocol in the not too distant future. Different countries have chosen different agencies as the National Preventative Mechanism. Generally, this agency is chosen having demonstrated some role in the independent monitoring of prisons or other places of detention. In England and Wales the Inspector of Prisons has assumed the lead role. I feel strongly that, for the reasons set out above, all countries should adopt the Protocol.

In addressing the role played by an Inspector of Prisons in relation to persons in pre-trial detention one must look at the types of institutions in which such persons are detained. Different countries have different ways of detaining such persons. I would not be so impertinent as to comment on other countries and the methods employed by them. This I will say however, it is recognised that the greatest potential for the infringement of human rights is when people are under some form of pre-trial detention.

To emphasise this point I can but quote from two eminent sources. J. Murdock has stated *"Detention regimes for pre-trial detainees are often poorer than conditions for those who have been found guilty and sentenced to imprisonment"*.[21] He goes on to say *"The practical reality…is that often detention conditions for untried prisoners are less favourable than those for convicted prisoners"*.[22] Andrew Coyle has stated that – *"Unfortunately in many (Council of Europe) member states their conditions are the most overcrowded; they have the*

18 Part 5, Garda Siochana Act 2005.

19 Part 3, Garda Siochana Act 2005.

20 Article 17, Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

21 J. Murdoch, *The Treatment of Prisoners- European Standards*, Strasbourg: Council of Europe Publishing, 2006, p. 175.

22 Ibid, p. 230.

worst accommodation and are given least access to the facilities of the prison. Pressure on accommodation means that in a number of states pre-trial prisoners are not segregated from convicted prisoners… Regime activities for pre-trial prisoners are limited in many countries".[23]

The CPT has also observed that activities in many pre-trial prisons in Council of Europe states are extremely limited.[24] The European Court of Human Rights in the case of *Iwanczuk v Poland*[25] has stated that pre-trial prisoners must be treated in a manner that is consistent with the presumption of innocence. The revised European Prison Rules state that *"the regime for un-convicted prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future"*.[26]

In Ireland when people are arrested on suspicion of having committed a crime they are held in police custody. Persons so arrested can be held, depending on the offence, for periods ranging from 6 hours to 7 days. Where the law provides for periods of detention in excess of 6 hours and for a maximum of up to 7 days such detention is subject to periodic review in the early stages by a senior police officer and later by the Courts.

Persons in police custody during these times can be questioned by the police subject to strict rules. At the expiry of the relevant time the persons so detained must either be released or charged. Once a person is charged they may not be further questioned and must, unless released on police bail, be brought to Court as soon as is practicable. Of course if they are charged prior to the expiry of the time limit the same rules apply. During these times these arrested persons are held in police stations.

As I stated earlier the Inspector of Prisons' statutory obligation under the Prisons Act 2007 is to inspect prisons. S/he has no authority to inspect police stations and therefore s/he cannot address the situation that pertains to prisoners while in pre-trial detention in police custody.

In Ireland after accused persons have been charged with an offence they are brought before a court forthwith and if not dealt with on that occasion, are either remanded in custody or released on bail. If remanded in custody they fall within the Inspector's remit.

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[23] A. Coyle, *Revision of the European Prison Rules- A Contextual Report*, Strasbourg: Council of Europe publishing, 2006, p. 125.

[24] Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report on the CPT's Activities covering the period 1 January to 31st December 1991*, CPT/Inf (92) 3 [EN], at para. 47 and also see the CPT's reports on individual countries on www.cpt.coe.int/en/.

[25] ECtHR 15 November 2001, Appl. 25196/94, par. 53.

[26] Rule 95.1, Recommendation No. R (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

What sort of prisons are used for those who are in pre-trial detention in Ireland? In a perfect world prisoners in pre-trial detention should be accommodated in facilities specifically dedicated for that purpose. Article 10(2) of the International Covenant on Civil and Political Rights states *"Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons"*.

In Ireland we have one prison which is exclusively used for the accommodation of pre-trial prisoners. It has a total bed capacity of 431 but it invariably has in excess of this capacity. Ten other prisons accommodate both pre-trial prisoners and convicted prisoners, even though a number are not specifically dedicated as remand prisons.[27]

Compared with certain other jurisdictions Ireland has a relatively low number of prisoners in pre-trial detention although this number is ever increasing. The Irish domestic courts are robust in vindicating the rights of persons to bail. In 1966 the Irish Supreme Court in the *O'Callaghan Case*[28] decided that bail could only be refused on specific grounds – a) that there would be a danger that the accused would not attend court for trial, or, b) that the accused would attempt to pervert the course of justice by interfering with witnesses or would destroy or conceal evidence. This decision was followed in the case of *Ryan v Director of Public Prosecutions*[29] when our Supreme Court again reiterated that bail could only be refused on the two grounds set out in the *O'Callaghan Case*.

As these cases had been decided by the Irish Supreme Court they represented the Constitutional position regarding the entitlement of accused persons to bail in pre-trial situations at that time. If this entitlement were to be restricted it would require an amendment to our Constitution. Our Constitution was duly amended by a vote of the people in 1996 and provided that: *"Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person"*.[30] This amendment to the Constitution was carefully drafted in order that it would not contravene international obligations. In fact it reflects Article 5(1)(c) of the European Convention on Human Rights[31] which allows for the deprivation of liberty *"when it is reasonably considered necessary to prevent a person committing an offence"*.

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27 See in this volume the chapter on Ireland, which explains in detail the numbers and average time spent in prison in Ireland while in pre-trial detention.

28 *People (Attorney General) v O' Callaghan* [1966] Irish Reports 501.

29 *Ryan v Director of Public Prosecutions* [1989] Irish Reports 399.

30 Article 40.4.6. of Bunreacht na hEireann (Constitution of Ireland) (as amended).

31 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950).

Subsequent to the above amendment to our Constitution our Parliament passed into law the Bail Act 1997 which came into effect in 2000.[32] Section 2(1) of the Act provides *"where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person"*. The court in considering such an application must take into consideration numbers of matters which I do not intend in this paper going into. Suffice is to say that they refer to matters that are deemed relevant to the application and the weight to be given same. The Act defines a 'serious offence' as an offence for which a person, if convicted (and who has not previously been convicted), could be imprisoned for 5 years or more.[33]

The reason that I have referred in some detail to our case law, our domestic law and our constitutional position is to show that Ireland has come from a position where bail could only be refused in very specific cases to the stage where the entitlement to bail is far more limited. This has meant that the numbers in pre-trial detention have increased. This has placed an extra burden on the Inspector of Prisons as s/he must endeavour to ensure, through his/her regulatory system, that such pre-trial prisoners are treated in accordance with best practice, international norms and his/her standards which I refer to later in this paper.

When pre-trial prisoners are accommodated in prisons with committal prisoners this poses difficulties not alone for the prison system but also for me as different considerations apply to such prisoners. I will deal with these difficulties a little later.

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5. THE ROLE OF THE INSPECTOR OF PRISONS

At this stage I should refer to the role of the Inspector of Prisons and what it entails. S/he must carry out regular inspections of prisons and for that purpose s/he may:[34]

- at any time enter any prison or any part of a prison,
- request and obtain from the governor a copy of any books, records, other documents (including documents stored in non legible form) or extracts therefrom kept there, and
- in the course of an inspection or arising out of an inspection bring any issues of concern to the notice of the Governor of the prison concerned, the

[32] Bail Act (Commencement) Order 2000 (S.I 118/2000).
[33] Section 1, Bail Act 1997.
[34] Section 31(1) Prisons Act 2007.

Director General of the Irish Prison Service, or the Minister or of each one of them, as the Inspector of Prisons considers appropriate.

S/he may also be asked by the Minister to investigate any matter arising out of the management or operation of a prison and s/he must submit a report to the Minister on any such investigation.[35] As I said earlier the Inspector of Prisons is obliged to submit an annual report on the performance of his/her functions during the previous year and a report on any prisons that s/he has investigated.[36]

When the Inspector of Prisons does a full investigation of a prison s/he is obliged to submit a report of such inspection to the Minister. In this report s/he must deal with, in particular, the following:[37]

- its general management, including the level of its effectiveness and efficiency,
- the conditions and general health and welfare of prisoners detained there,
- the general conduct and effectiveness of persons working there,
- compliance with national and international standards, including in particular the prison rules,
- programmes and other facilities available and the extent to which prisoners participate in them,
- security, and
- discipline.

It is not within the Inspector' remit to investigate individual complaints from prisoners. However, if s/he receives a number of similar complaints from prisoners s/he may choose to investigate the circumstances surrounding these complaints.[38]

6. STANDARDS OF THE INSPECTOR OF PRISONS

Ireland in common with most countries, owes duties to prisoners that are enshrined in international treaties and conventions that countries are parties to. In my experience as the Inspector of Prisons I have been amazed at the lack of awareness of many lawyers, many people employed in the management of prisons, people with an interest in prisoner welfare and the public at large who do not know of these international obligations.

35 Section 31(2) Prisons Act 2007.
36 Section 32(1) Prisons Act 2007.
37 Section 32(2) Prisons Act 2007.
38 Section 31(6) Prisons Act 2007.

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Ireland has international obligations towards prisoners under international treaties and covenants and has ratified the following relevant UN treaties:

- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of all Forms of Racial Discrimination
- The International Convention on the Elimination of all Forms of Discrimination against Women
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The Convention on the Rights of the Child.

Ireland has ratified the following relevant Council of Europe treaties:

- The European Convention on Human Rights
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The only treaty that has been fully incorporated into Irish domestic law is the European Convention on Human Rights by virtue of the European Convention on Human Rights Act 2003. Nevertheless, ratifying treaties indicates an intention on the State's behalf to implement the obligations contained in them.

Ireland also has obligations to prisoners under the Irish Constitution and its domestic laws. The decisions of the European Court of Human Rights and the reports of the CPT are also relevant. It is not an easy task to trawl through these instruments, decisions and reports to isolate a particular right that a prisoner may have that may be infringed by a national government. For this reason I decided in my capacity of the Inspector of Prisons to formulate and publish a set of standards against which I would benchmark all prisons in my country. These have been published[39] but lest anyone jump to the conclusion that they are a definitive work they are but a first step in this process. They are kept under review in light of the inspection experiences and developments both domestically and internationally.

These standards have been published in order that the Government, the Irish Prison Service, prison management, prison officers, prisoners, the many who provide services to prisoners, prison visitors and the general public would be aware of the standards that are expected to be implemented in Irish prisons. These standards are informed not only by Ireland's international obligations under international treaties and conventions as referred to above but also by relevant decisions of the Irish Courts and the European Court of Human Rights,

[39] Available on www.inspectorofprisons.gov.ie.

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non binding Instruments emanating from the United Nations and the Council of Europe, the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and my own observations of prisons.

The standards which are published in two parts number 1–229. Separate standards apply to pre-trial prisoners as opposed to sentenced prisoners, to juveniles as opposed to adults and to females as opposed to male prisoners. In saying this the vast bulk of standards are common to all classes of prisoners.

As I am addressing the question of pre-trial prisoners from the perspective of an Inspector of Prisons I should refer, even if briefly, to some of the standards that apply to pre-trial prisoners. I do not intend setting these out in detail but the following should be sufficient to indicate what I am referring to:

Pre-trial prisoners generally

- Pre-trial prisoners shall be accommodated in single cells and be separated from sentenced prisoners
- The size of the cell shall be suitable for its purpose
- Prisoners who are required to share cells shall be carefully selected and assessed as suitable for sharing accommodation
- Prisoners with mental health difficulties shall be entitled to appropriate care commensurate with that available in the community
- Relevant facilities must be provided to enable pre-trial prisoners prepare their defence and meet with their legal representatives
- Pre-trial prisoners shall be entitled to greater numbers of visits, correspondence and telephone calls than sentenced prisoners.
- Pre-trial prisoners shall not be obliged to work but shall be offered the opportunity to work
- Pre-trial prisoners shall have the opportunity to attend education

Juveniles

- Juveniles shall be detained separate to adult offenders.

Females

- Risk assessment and the categorising of pre-trial female prisoners shall take into account the particular risks and needs associated with female prisoners.
- Contact between female prisoners and their families, especially their children, shall be fostered, encouraged and facilitated.

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Having identified certain standards that apply exclusively to pre-trial prisoners it may be asked what are the factors which militate against the implementation of such standards. This is really the core of the issue. I am certain that when I outline some of these most will readily agree that almost every country is faced with the same problems, of which the following give cause for most concern:

- Overcrowding generally. In Ireland there are approximately 4,000 prisoners in the prisons. To accommodate this number prison cells designed for single cell occupancy are doubled up. The same has happened in greater occupancy cells. This means that pre-trial prisoners may not be accommodated in single cells and may be accommodated with sentenced prisoners.
- The majority of prisons in Ireland accommodate both pre-trial and sentenced prisoners. Because of overcrowding it is difficult to run parallel regimes in such institutions for both pre-trial and sentenced prisoners. It is my experience that most prisons are set up to provide for sentenced prisoners and therefore priority is often given to such prisoners where work training and schooling are concerned.
- A lack of any meaningful work or education for pre-trial prisoners.
- Because of their age and physical structure some prisons do not have essential facilities such as in cell sanitation.
- Vulnerable prisoners who require specialised care and monitoring may not receive same because of overcrowding and other issues. Staff dealing with such prisoners are not in all prisons specifically trained to deal with such prisoners. This applies to both pre-trial and sentenced prisoners.
- 7.6% of pre-trial prisoners in Ireland suffer from some form of serious mental illness.[40] This is 10 times higher than the prevalence of serious mental illness in the community.[41] In certain prisons such prisoners may not have equivalent access to mental health facilities as they might have in the community.
- If a risk assessment is carried out and a risk identified there should be stratification of such risk. This risk should then be managed. I accept that it is never possible to eliminate risk entirely.
- Protection prisoners. At any one time in the Irish prison system approximately 25% of all prisoners are on protection. In Cloverhill prison – it being the only dedicated pre-trial prison in my country – this figure increases to one third. Prisoners on protection can be locked up for up to 23 hours each day. The reasons for prisoners being on protection can vary – threats to their lives, membership of gangs, for the protection of others etc.

[40] S. Linehan *et al.*, Psychiatric morbidity in a cross-sectional sample of male remanded prisoners, 22(4) Irish Journal of Psychological Medicine (2005) 128.

[41] Ibid.

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- Prevalence of drugs. Pre-trial prisoners, by virtue of their status, move in and out of prison on a regular basis to attend court etc. This provides them with greater access to the general public and therefore greater opportunity to try to smuggle drugs, and other contraband, back to prison whether under duress or as willing couriers.
- In one of our prisons juvenile males aged 16 and 17 years are detained in the same prison as adults aged 18 to 21 years. Both pre-trial and sentenced juveniles are detained in this facility. Every effort is made to separate the juveniles from the adults but because of overcrowding this is not achieved. In this prison pre-trial and sentenced prisoners are accommodated together. When overcrowded, one can find pre-trial juveniles sharing accommodation with sentenced juveniles, with pre-trial adult prisoners or with sentenced adult prisoners. Similarly, sentenced juveniles may be accommodated with pre-trial or sentenced adults.
- In female prisons where overcrowding occurs and where there is no segregation of pre-trial and sentenced prisoners the standards that specifically apply to female prisoners may not be adhered to.
- A lack of awareness or training for prison officers when dealing with specific groups of prisoners.

These are but a number of the factors that militate against the implementation of standards. It is therefore important that an independent process is available to ensure that standards are maintained and if they are not to highlight this at the highest level.

On a bright note, I should tell you at this stage, that it is the intention of the Irish Government to transfer all juveniles to a dedicated facility for their age group which will be administered by the Irish Youth Justice Service and will be subject to inspection by agencies other than mine. Work on this facility is well advanced and consequently a transfer of this coterie of prisoners will take place in the not too distant future.

7. EFFECTIVENESS OF THE INSPECTOR OF PRISONS

How can an Inspector of Prisons carry out his/her role and ensure, as far as s/he can, that the standards that I have referred to are being adhered to? In the following I will explain how I – in my capacity as Inspector of Prisons – operate, hoping that my *modus operandi* might be of help to others embarking on setting up an inspectorate in another country.

It is of the utmost importance that any Inspector of Prisons has unfettered access to prisons, to prisoners, to management, to service providers to the prison and to the records of the prison 24/7 and 365 days a year. One must have statutory backing for this power. Of course common sense will dictate that all service providers and personnel will not be in each prison 24/7.

Side by side with announced visits to prisons I have made, and will make, ad hoc unannounced visits to all prisons not alone during business hours but also during off peak hours. By this I mean during the night and at week ends. These visits are not for the purpose of wrong-footing anyone but simply because in my view inspection systems which are entirely predictable as to timing no longer carry any measure of public credibility. The purpose of these visits is to ensure that standards in all prisons are maintained and are not dependent on the arrival or non arrival of the Inspector. Most of my visits are unannounced. If, during the course of these inspections, I discover matters of concern I bring these to the attention of the Governor of the prison concerned or to such other person as may be appropriate up to and including the Minister. I endeavour through negotiation, and provided there is cooperation, to deal with these concerns at a local level. If matters are of greater concern I will bring these to the attention of the Prison Service or to the Government Minister responsible, in the case of my country, the Minister for Justice, Equality and Law Reform.

As I have already said I also carry out detailed inspections of a number of prisons each year. I select the prisons on a random basis and do not follow any particular sequence. These detailed inspections are carried out over a number of months. During these months I visit the prison on numerous occasions both during the day and at night. I also visit at week ends. Most of these visits are unannounced and may entail a concentration on a specific area or problem. This detailed inspection entails an in depth analysis of all areas of the prison. I examine all appropriate records. I meet with prisoners, visitors, representatives of visiting committees, senior management, representatives of the prison officers, members of staff, chaplains, teachers, doctors, dentists, nurses, probation officers, addiction counsellors and others who wish to see me or who provide services to prisoners. Some of these meetings are structured with advance notice. If I encounter problems with the prison during this inspection process I endeavour, as I have already said, through negotiation to arrive at a resolution which sometimes may require input from the Prison Service or even intervention at Ministerial level.

My reports on individual prisons do not therefore reflect one particular point in time; rather they are reflective of an ongoing inspection and consultative process over a number of months. I am satisfied that such reports offer an accurate representation of the conditions of each individual prison.

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8. FINALLY

Of course there are problems in virtually all prisons not alone in Ireland but elsewhere. I am also conscious that all the Inspectors' standards will not be met in all prisons. It could, at this stage, be suggested that faced with these problems I should compromise my views and accommodate the exigencies of the moment. I am very clear that the answer to that particular suggestion is an emphatic 'no'.

Any Inspector of Prisons must always continue to be an independent voice continually monitoring all prisons, ensuring as far as practicable that standards are being maintained and where not, bringing this to the notice of the Minister and by extension to the public at large. The 'Court of Public Opinion' is perhaps the greatest deterrent against non compliance with standards and the greatest hope that a country will adhere to its obligations to its prisoners.

A perceived lack of resources or facilities can never be accepted as an excuse for depriving persons either on pre-trial detention or as sentenced prisoners of their basic human rights as provided for in international treaties and conventions, international or domestic jurisprudence, relevant laws or accepted best practice. Neither can a perceived lack of these resources or facilities be any excuse for an independent Inspector of Prisons not endeavouring to see that proper standards are maintained in prisons for which he or she has a responsibility.

On a positive note the Irish Government intends building a new prison (to be known as Thornton Hall) which will replace a number of older prisons. I am informed that this prison will provide greatly enhanced regimes for all prisoners including separate accommodation, educational and vocational training in addition to recreational facilities for all categories of prisoners including pre-trial prisoners. In this regard I would like to commend my Government on their initiative in this important field which should ensure that the obligations that my country owes to its prisoners are complied with and my standards are adhered to.

I will conclude by quoting Dame Anne Owers, DBE Inspector of Prisons for England and Wales who stated: *"Just because something has become normal it does not become normative"*.[42]

[42] HM Inspectorate of Prisons, *Expectations: Criteria for assessing the conditions in prisons and the treatment of prisoners*, April 2008, p. 1.

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EXECUTION OF PRE-TRIAL DETENTION AS REGARDS WOMEN IN POLAND

Lech Krzysztof Paprzycki & Jacek Pomiankiewicz*

1. INTRODUCTION

The basic legal act which stipulates the Polish Penitentiary System is the Act of June 6th 1997 – the Code of Execution of Criminal Sentences (CECS) which entered into force on 1st September 1998.[1,2] This code contains provisions regulating treatment of convicts from different categories, one of which are detained women, including pregnant women and mothers of children until 3 years of age.

The Code of Execution of Criminal Sentences and on its basis promulgated ordinances fully admit decisions of international conventions, which Poland ratified and accepted together with the accession to the European Union in 2004. They are, among others, the Standard Minimum Rules for the Treatment of Prisoners of 1957, the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights, and the European Prison Rules of 2006. Legal regulations concerning women take into account also the Convention on the Rights of the Child of 1989 and the recommendation 1469 (2000) accepted by Parliamentary Assembly of the Council of Europe concerning mothers and babies in prison.

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For further information on these authors, see the chapter on Poland.

1 The Law of 6 June 1997, published in: OJ 1997, No. 90, item 557 with subsequent amendments. On this law, see this volume's national report on Poland, section IV.

2 For an elaborate explanation of this law, see this volume's national report on Poland, section IV.

It should be emphasized that on the moment of entering into force a binding criminal law in 1998, the legal acts covered all areas of treatment of imprisoned women, those which constitute the subject of recommendations mentioned in the Project of the Report of the Committee on Women's Rights and Gender Equality of the European Parliament, concerning a detailed situation of women in prisons and the influence of imprisonment of Barents on social and family life (2007/2116(INI)).[3]

2. WOMEN IN PRISON: LEGAL BASES AND INTERNAL STRUCTURE

Generally, the rights of imprisoned women and men are equal, with exceptions resulting from gender differences. The only area which is regulated in detail having women in mind, is the execution of imprisonment of women who are mothers of children until 3 years of age. These separate issues are regulated by the rules of the Code of Execution of Criminal Sentences and executive regulations, mainly the order regulations for execution of imprisonment and temporary arrest. The most important are:

- women serve imprisonment separately from men (Art. 87 §1 CECS)
- convicted women serve imprisonment in a half-open prison, unless the degree of demoralization or safety reasons make it recommendable for them to serve imprisonment in a prison of a different type (Article 87 §2 CECS)
- pregnant or breast-feeding women are provided with specialist care (Article 87 §3 CECS).

Women are enjoying several rights and possibilities, the most important of which are:

- prison mother and child homes in which convicted women may care for their children until the third year of age (Article 87 §4 CECS)
- convicted women providing consistent care for their children of up to 15 years of age have the right to an additional visit of children, apart from the monthly limit (Article 105a §CECS)
- convicted pregnant women or women providing a consistent care for their children until the third years of age have the right to a longer walk with a child (Article 112 §1 CECS), have the right to make additional purchases of food products (Article 113a §1 CECS)

[3] I. Dybalska, *The woman in prison – Polish penitentiary system with regard to women in the period 1998 – 2008*, Warsaw 2009, p. 27–28.

- convicted women are provided with hot water at least once a day and a hot bath twice a week; see §30(4) Regulations for execution of imprisonment, and §32(5) Regulations for execution of temporary arrest[4]
- in case of pregnant or breast-feeding female convicts, the director may, upon request of the doctor or after getting familiar with the doctor's opinion, withdraw as much as necessary from the methods of execution of imprisonment, provided by the regulations, to the extent that results from the need to take into account the physical or psychical condition of these female convicts; see §27(1) Regulations for execution of imprisonment, and §29(1) Regulations for execution of temporary arrest
- pregnant women are transferred, two months before the predicted date of delivery, to the hospital obstetric ward in the remand prison or penal institution (in case of women on remand the administrative authority is informed about the transfer)
- towards women the following methods of direct force are not used: petards, batons, non-penetrating bullets
- towards pregnant and breast-feeding women the following methods are not used: incapacitating belts or straitjacket, water incapacitating methods, incapacitating net, chemical incapacitating means and dazzling light.[5]

3. WOMEN IN REMAND PRISON: STATUS AND PSYCHOLOGICAL ASPECTS

Women endure prison isolation in a more difficult and in a more complicated way than men. Experienced Polish prison officers say "*women are serving their sentence with the problems of the whole world*".[6]

Prison service officers – of whom 4,481 were women on a total of 27,549 officers (on 31 December 2009)[7] – often underline that work with female inmates is much different from the work with the male inmates and much more difficult. Women are more sensitive to the results of isolation which they endure it much worse than men, first of all due to their more delicate mental senses. They are more sensitive and prone to cry, they have a need of closeness and confiding in someone. Many imprisoned women worry about the break with their family, loss

4 The Regulation of the Minister of Justice of August 25th, 2003 about organization and order regulations for execution of imprisonment (The Journal of Laws No. 152, item 1493), The Regulation of the Minister of Justice of 25th August 2003 about organization and order regulations for execution of temporary arrest (The Journal of Laws No. 152, item 1494).

5 Article 19 item 4 of the Act of 26th April 1996 about Prison Service.

6 Ibidem, s. 37.

7 Data from Human Resources and Training Office at the Central Board of Prison Service in Warsaw from 12th January 2010. Apart from the prison service officers, on 31 December 2009 the prison system counted 1,927 civil workers, of whom 806 were women.

of their husband, concern for the closest persons left outside of the prison and care for keeping family ties. In the situation of prison isolation, women are deprived of their needs of love and safety. The proves of that are often relations (in a different forms – visits, correspondence) with closed persons.

Female inmates in interviews with the staff talk about a positive influence from relations with the family which reflect favourably on their well-being and help in their isolation. Most of them declare, that after being released they will go back to their family. While sending letters they care about aesthetic appearance of the letters and envelopes, which they decorate very elaborately, devoting for this activity many hours and creating a peculiar ritual.

Women (as opposed to the men) often send different gifts to their families, especially to their children. These may be toys bought in the prison shop, but more often the products they produced by themselves: doilies, sweaters, scarves, socks, specially decorated books. Sometimes, they even send small amounts of money they have earned. It shows the importance of the family in their life, a need of closeness and emotional contact. The substitute of the home are for them elaborately ordered numerous small cushions and doilies placed on the prison beds, shelves and cases as well as the photos of their children in decorated frames.

Women are also seeking support and emotional contact in prison society, among inmates and the staff. They adapt to prison conditions with difficulties, and if they do – they are strongly integrated with their daily environment. Unfortunately, in the Polish prison situation it isn't easy to respect these rules because of a big turnover connected with the overpopulation. It causes the necessity of existing so-called shared cells, where sometimes 7–9 women have to organize their life together. There they have one "toilet corner" only. A bathroom, a small kitchen, a room for social activities, a library point are for several dozen inmates from the whole wing.

The biological identity of women, their motherhood, and their stronger emotional relation with the family makes them a category of persons requiring a separate and specific treatment in prison isolation. That is why educational influence in prison starts as soon as possible. Female inmates have a possibility to participate in programs which help them in coming back to the society.

Female inmates in Polish prisons and remand prisons are making full use of all healthcare services available for detained persons. Taking into account specific health needs of women, a special gynaecological-maternity ward was created in prison 1 in Grudziądz.

Of the group of imprisoned women a substantial part are women who are the victims of domestic violence experienced from their partner. They usually suffered pathological forms of psychical, physical and sexual violence. These women never intended to kill the partner (husband, cohabitee). In prison they

have a sense of guilt and shame. In conversations they often underline that they loved their torturers. In the first phase of their detention in remand prison, psychological and educational staff try changing their way of thinking, so that women who experienced domestic violence are able to face the court procedure, describe traumatic situations which brought them to a tragic result – crime. They should understand that their crime was a result of a dramatic fate.

Work with this specific group of women is very difficult, because for a long time they are living in a double role: a role of a perpetrator of a cruel crime (a homicide), and a role of a tortured, humiliated and abused wife, cohabitee, daughter. Among women who are the victims of domestic violence often dominates the feeling of a learnt helplessness, low self-esteem, they are emotionally unstable, have a feeling of threat and posttraumatic stress disorder.

4. WOMEN IN PRISON AND IN REMAND PRISON: STATISTICS

General

On 4 January 2010 in all prisons and remand prisons the sentence were being served by 2,697 women, constituting 3.2% of the overall prison population, which is a stable proportion in the last few years. On the same date 280 persons served a life sentence, 8 of whom were women. The number of pre-trial detained was 438 (4.6% of the general population of pre-trial detainees).

As the statistics show, a female inmate can be found more often among pre-trial detainees than among convicted ones. In the group of female inmates – convicted constitute 83%, pre-trial detainees 16%, punished ones – 1%. The proportion among male inmates is the following: convicted 88%, pre-trial detained 11%, punished 1%.

It seems that the group of imprisoned women, taking into account their number, do not constitute a significant group of the Polish prison population. But the analysis of data for the period 1989–2009 proves that there was almost threefold increase in the comparison with 1989 because at that time the number of female inmates was only 847 (2.10% of a general prison population).[8] Since that time the number of female inmates has been increasing; the proportion in the last years is quite stable and amounts about 3% of the general prison population.

In Poland imprisoned women are serving their sentences in 22 penitentiary institutions (4 remand prisons, 4 prisons for women and 14 penitentiary institutions for men with separated units for women).

[8] The woman in prison…, p. 47–48.

Women

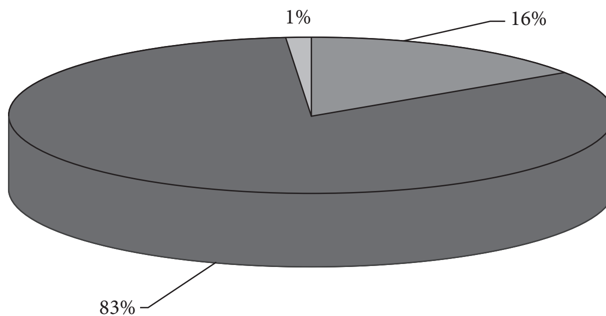
The population of female inmates in Polish penitentiary institutions was the following: almost 40% of the general prison population (at the end of 2008) constituted of young women at the age from 25 to 36 (986 persons). What stands out in the statistics is the proportionally high number of very young women kept in isolation; up to 24 years of age there were 288 persons (about 11.5% of the whole female prison population).

As far as the character of the crime is concerned, definitely the biggest group constitute women accused and convicted for the crimes against the property (theft, burglary, armed robbery) – more than half of all crimes – 50.5% (1250 persons). Only armed robberies and extortions constitute 27% (336 persons). On the second place are the crimes against life and health – 24% (602 persons). The murderers constitute more than 19% (475) of the whole female prison population. An inside, statistic picture of the population of women in Polish prisons additionally illustrate charts and graphs placed below.[9]

Chart no. 1. Prisoners serving a sentence in Polish prisons (4 January 2010)

Total of which were women	**84,003 prisoners** 2,697
Pre-trial detained of which were women	**9,460** 438
Convicted of which were women	**74,116** 2,236
Punished of which were women	**427** 23

Chart no. 2. The proportion in the population of women in Polish prisons, according to the following categories: pre-trial detained, convicted, punished (4 January 2010)



9 The charts, graphs and lists were worked out on the basis of data from Information and Statistics Office at the Central Board of Prison Service from 12th January 2010 and data published on a web portal of prison service www.sw.gov.pl/index.php/statystyki.

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Chart no. 3. The number of pre-trial detained, convicted and punished

Date	Total	Remand prisoners	Sentenced prisoners	Punished
31.01.2009	2 592	438	2 117	37
28.02.2009	2 630	441	2 141	48
31.03.2009	2 603	416	2 147	40
30.04.2009	2 624	417	2 181	26
31.05.2009	2 674	429	2 206	39
30.06.2009	2 687	418	2 233	36
31.07.2009	2 654	413	2 212	29
31.08.2009	2 687	428	2 223	36
30.09.2009	2 700	427	2 235	38
31.10.2009	2 729	425	2 264	40
30.11.2009	2 729	428	2 265	36
04.01.2010	2 697	438	2 236	23
on average	2 667	427	2 205	36

Chart no. 4. A structure of the population of detained women in 2009

Date	Total	Remand prisoners		Sentenced prisoners		Arrested	
		juveniles	adults	juveniles	adults	juveniles	adults
31.03.2009	2 603	49	367	39	2108	1	39
30.06.2009	2 687	41	377	38	2195	4	32
30.09.2009	2 700	29	398	46	2189	3	35

Chart no. 5. Population of women in Polish prisons according to the age (completed years) (31 December 2008)

Age	Number	Age	Number
Total	**2 513**		
15–16	1	43–45	176
17–18	20	46–48	174
19–21	73	49–51	177
22–24	194	52–54	147
25–27	245	55–57	92
28–30	270	58–60	56
31–33	243	61–63	19
34–36	228	64–66	10
37–39	182	67 and up	16
40–42	190		

Chart no. 6. Women serving their imprisonment according to the length of sentence in comparison with the general prison population (31 December 2008)

The length of sentence	Prisoners total	Women
Total	**70 359**	**1 952**
1 – 3 months	744	21
3 – 6 months	4 666	120
from 6 m. to 1 year	13 639	380
above 1 year to 1y. 6 m.	10 337	279
above 1 year 6 m to 2 years	11 530	278
above 2 years to 3 years	9 446	238
above 3 years to 5 years	9 028	196
above 5 years to 10 years	6 257	243
above 10 years to 15 years	3 096	152
25 years	1 396	39
life sentence	220	6

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Chart no. 7. Convicted people in Polish prisons according to the kind of crimes – the state of 31 December 2008

Crimes against:			all in all	including women
All in all			81 189	2 476
Including inadvertent			383	9
Peace, humankind as well as war crimes (Art. 117–126 CC)			0	
The Republic of Poland (Art. 127–139 CC)			1	
The country's defences (Art. 140–147 CC)			1	
Life and health (Art.148–162CC)	murders	148§1	3 600	418
		148§2	1 403	53
		148§3	26	3
		148§4	14	1
	the rest (Art. 149–162)		4 623	157
Universal security (Art. 163–172 CC)			267	7
Security in communication (Art. 173–180 CC)			7 596	68
Environment (Art. 181–188 CC)			22	
Freedom (Art. 189–193 CC)			1 150	22
Freedom of conscience and religion (Art. 194–196 CC)			0	
Freedom of sexuality and of decorousness (Art. 197–205 CC)	rapes, violation	197§1	1 363	4
		197§2	188	
		197§3	619	8
	the rest (Art. 198–205)		1 173	16
Family and care (Art. 206–211 CC)	harassment (Art. 207)		4 851	69
	maintenance (Art. 209)		1 933	35
	the rest (Art. 206,208,210,211)		67	11
Reverence and personal inviolability (Art. 212–217 CC)			33	1
Rights of carrying out gainful employment (Art. 218–221 CC)			9	3
Activity of state – run institutions and self-government (Art. 222–231 CC)			987	31
The judiciary (Art.232–247 CC)	escape of the prison (Art. 242§1 i 4)		48	
	non return from a pass (Art. 242§2)		50	1
	non return from a break (Art. 242§3)		42	1
	the rest (Art. 232–241, 243–247)		2 460	31
Election and referendum (Art. 248–251 CC)			1	
Public order	organised crime groups (258)		1 028	39
(Art. 252–257,259–264 CC)	the rest (252–257,259–264)		474	17
Protection of information (Art. 265–269 CC)			7	1
Reliability of documents (Art. 270–277 CC)			625	42
Property (Art. 278–295 CC)	thefts (278)		6 251	323
	burglaries (279)		12 047	123
	Robbery	280§1	11 221	261
		280§2	3 035	68
	extortion (282)		837	7
	the rest (281,283 – 295)		8 722	468
Economic turnover (Art. 296–309 CC)			327	24
Turnover of money and securities (Art. 310–316 CC)			530	26
Definite in military part (Art. 317–363 CC)			34	
Crimes definite in others deeds			3 524	137

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ELECTRONIC MONITORING AS AN ALTERNATIVE TO PRE-TRIAL DETENTION

Phillip Rapoza*

1. INTRODUCTION

The use of electronic monitoring as an alternative to physically detaining an accused prior to trial is rooted in a basic principle: that pre-trial detention should be used only as a last resort. That principal, however, suggests the availability of other non-custodial measures that can be employed short of the physical detention of the accused.

My purpose here is to discuss the electronic monitoring of an accused as an alternative to confinement in a prison or other place of detention prior to trial. In doing so, I will be approaching the issue in the following way. First, I will briefly review the topic of pre-trial detention, including the most commonly cited legal grounds for its use. I do so simply to provide a foundation for discussing the efficacy of electronic monitoring and its suitability as an alternative to detention. Second, I will discuss the practice of electronic monitoring: what technologies are available, how they are used and, generally, what does a pre-trial program involving the use of electronic monitoring look like? Third, I will discuss the extent to which a successful electronic monitoring program can in fact serve as an alternative to pre-trial detention. In this regard, I will discuss the degree to which the goals of pre-trial detention can be promoted by the use of such technology. Fourth, I will consider other benefits that could result from the use of electronic monitoring, not only for the accused, but also

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for society. These range from humanitarian advantages to more practical considerations such as cost savings and a reduction in prison overcrowding. Fifth and finally, I will review some of the limitations on the benefits of electronic monitoring, along with several reasons for caution or concern in the implementation of such a regime. In this regard, I will discuss a few of the perhaps unintended, but nonetheless possible, consequences of using such an alternative to pre-trial detention.

My analysis is informed by the relatively modest amount of academic literature on the topic as well as by the data emerging from the increasing use of electronic monitoring both internationally and in the United States, as well as in my home state of Massachusetts. To the extent that I will be citing to the Massachusetts experience, I will be doing so not out of an exercise in chauvinism, but rather to note the experiences of a jurisdiction in which electronic monitoring has been widely used.

2. AN OVERVIEW OF PRE-TRIAL DETENTION

Before discussing electronic monitoring, it is useful first to review the topic of pre-trial detention itself, including the most commonly cited legal grounds for its use.

Balancing the interests of the accused and of society

The criminal justice system starts with the premise that at the pre-trial stage an accused is presumed to be innocent of the charges against him. The inevitable consequence of this presumption is that, absent an adjudication of guilt, an accused should be allowed to remain at liberty unless there are significant countervailing reasons to place him in detention. These could include a risk of flight, the seriousness of the pending criminal charges, or legitimate concerns about the possible commission of new offenses or interference with an on-going investigation. Consequently, a tension can be said to exist between the interest of the accused in remaining at liberty and the interest of society in confining him to ensure that he neither absconds nor presents a risk either to those around him or to the judicial process itself.

In most countries, including the United States[1] and all members of the European Union, the law favors the release of the accused pending determination of guilt or innocence, although pre-trial detention remains an option, but only if

[1] In Massachusetts, for example, any person held under arrest for an offense other than an offense punishable by death has a right to be released on personal recognizance, unless the judicial officer determines that such a release will not reasonably assure reappearance of the person as required. Mass. Gen. Laws ch. 276 ‘ 58 (2002).

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less intrusive measures would be ineffective or inappropriate.[2] The European Court of Human Rights, for example, has stated that "pre-trial detention shall be used when it is strictly necessary and only as a measure of last resort."[3] This, in turn, reflects the widely recognized international standard ably stated in the International Covenant on Civil and Political Rights:

> "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should [the] occasion arise, for execution of the judgement."[4]

Resolution 17 on pre-trial detention adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, similarly states the matter as follows:

> "Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are left free."[5]

Nearly all jurisdictions thus recognize both the risk of flight and the risk of committing further offenses as grounds for imposing pre-trial detention.[6] In the United States, for example, the law at the federal level and in most states provides for pre-trial detention where it is necessary to ensure the appearance of an accused or it is required to ensure the safety of any other person or the community.[7] In a number of countries, however, pre-trial detention may be based solely on the seriousness of the offense with which the accused is charged or the risk of endangering public safety.[8]

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2 See *ABA Standards for Criminal Justice*, 2d ed. 1980, §10–1.1; A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009.

3 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 72.

4 International Covenant on Civil and Political Rights Art. 9(3), Mar. 23, 1976.

5 Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, August 27-Sept. 7, 1990.

6 See, *e.g.*, A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 71–72. See also Mass. Gen. Laws ch. 276 §57 (authority to deny bail where the accused presents a serious risk of flight).

7 See, *e.g.*, 18 U.S.C. ' 3142(e) (2006); Mass. Gen. Laws ch. 276 §57 (permitting bail if the judge "determines that such release will reasonably assure the appearance of the person before the court and will not endanger the safety of any other person or the community").

8 This ground for detention is only used for "very serious offences, such as terrorist attacks." A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 73.

It is also common to provide for pre-trial detention where there is a risk that the accused could interfere with the course of justice. For example, pre-trial detention may be used to prevent the accused from "tipping off other persons who might also be under investigation, colluding with other persons involved in the case [...] and destroying documents and other material forms of evidence."[9]

Although the grounds justifying pre-trial detention may vary somewhat among countries, there does appear to be a broad consensus about how to treat an accused who was at liberty prior to trial but who subsequently violated a material condition to which his original release was subject. In that instance, the view is fairly uniform that it is entirely appropriate to revisit the use of pre-trial detention in light of the changed circumstances.

Non-custodial measures

As I noted at the outset, the use of pre-trial detention should be a last resort in the absence of significant countervailing concerns about flight, public safety or the integrity of the judicial process. But as I also indicated, to suggest that pre-trial detention is a last resort suggests that there are measures to be considered as a first or second resort – in other words – non-custodial alternatives that will address those considerations while avoiding the physical detention of the accused.

In the United States, for example, the order of preference in which release and detention decisions are made is as follows: "first, release on personal recognizance or unsecured bond; second, release on condition or combination of conditions; third, temporary detention to permit revocation of conditional release, deportation, [or some other sanction]; and finally, pretrial detention."[10] In cases where release on personal recognizance – meaning the accused's promise to appear in court – is considered insufficient to ensure his appearance, the court may allow the accused to deposit a sum of money or to post a bond that could be subject to forfeiture, thus providing a form of security that he will appear at future judicial proceedings.[11] In those cases where an accused is allowed this alternative, he can avoid detention once he has satisfied this condition, commonly referred to as bail. Whether or not an accused will be permitted to provide bail as security to ensure his reappearance in court requires an individualized determination by a judge or magistrate.

In lieu of bail, or in conjunction with it, a judge or magistrate can order that the release of an accused be subject to additional conditions. For example, an accused may be required to report periodically to the court during the pre-trial

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9 Idem.

10 Krista Ward & Todd R. Wright, 'Pretrial Detention Based Solely on Community Danger: A Practical Dilemma', 1999 *Fed. Cts. L. Rev.* 2, 4.

11 Charles Alan Wright *et al.*, *Federal Practice and Procedure*, 2004, par. 762 (FPP §762).

stage of his case. Similarly, a judge may order the accused not to leave the jurisdiction of the court, to surrender his passport and to notify the authorities of any change in his residential address. In cases where issues such as substance abuse may be seen as a potential risk factor with respect to the likelihood of the accused appearing in court, drug or alcohol counseling may be required as a condition of release pending trial. If, on the other hand, such non-custodial measures are not viewed as adequate to address the likelihood that a particular accused will abscond, then pre-trial detention is much more likely to be considered appropriate.

When there is evidence that the release of the accused could pose a threat to a particular individual or to the community, additional restrictions may also be imposed as a condition of his release. In such circumstances, in addition to the conditions just mentioned, the judge or magistrate may consider ordering the accused to have no contact with a particular individual or to stay away from a designated address or location. In cases where there was a particular instrumentality alleged to have been employed in the commission of the charged offense, the court can set appropriate conditions, such as ordering the accused not to operate a motor vehicle or to surrender any firearms pending resolution of the charges against him. Similarly, the accused may be required, as a condition of remaining at liberty, to obey all laws and court orders, including abuse prevention orders and support orders.

Having covered with a broad brush the issue of pre-trial release, I turn to the legal framework in the US, and elsewhere, for the use of electronic monitoring as an alternative measure at the pre-trial stage. Federal law relating to the pre-trial status of the accused has traditionally focused on guaranteeing the presence of the accused at trial.[12] Although the technology for electronic monitoring has become increasingly available, federal law does not specify the use of electronic monitoring for that purpose. It does, however, broadly permit a judge or magistrate to "impose any other condition deemed reasonably necessary to assure appearance as required."[13] Under this provision a judge may, at his discretion, impose electronic monitoring as a condition of release.

The traditional focus on ensuring that the accused will appear in court is no longer the sole emphasis of federal law and in 1984, Congress addressed concerns that an accused may commit an offense during the period of his pre-trial release.[14] Under the Bail Reform Act of that year, a judge may consider the potential danger posed by the accused either to specific individuals or to the community at large when determining whether or not to detain him prior to trial.[15] Faced with concerns that an accused might commit additional offenses,

12 Douglas J. Klein, 'Note, Pretrial Detention Crisis: The Causes and the Cure', 52 *Wash. U. J. Urb. & Contemp. L.* 281 (1997).
13 18 U.S.C. §3146(a)(5).
14 Charles Alan Wright *et al.*, *Federal Practice and Procedure*, 2004, par. 761 (FPP §761).
15 Idem.

Congress further amended federal law to specifically require electronic monitoring of an accused as a condition of pre-trial release in federal cases involving crimes against minors, especially when the offense is of a violent or sexual nature.[16]

Judicially imposed conditions requiring electronic monitoring have been upheld by federal courts where a judge has made an individualized determination of the dangerousness of the accused.[17] Federal courts are divided, however, on whether it is constitutionally permissible to automatically impose electronic monitoring as a condition of release absent an individualized determination by a judge that such a measure is required. Some courts have held that a blanket requirement for electronic monitoring violates considerations of due process,[18] the constitutional provision prohibiting excessive bail,[19] and the separation of powers.[20] This last consideration, of course, goes to the issue of whether Congress intrudes on judicial independence by mandating electronic monitoring in cases that would otherwise be subject to a judge's sound discretion. By contrast, other courts have ruled that the requirement of electronic monitoring is not unconstitutional because it imposes what one judicial decision called "an incremental degree of intrusiveness," which that court ruled is not excessive in light of the government's interest in obtaining an additional safeguard against the risk of post-arrest criminal activity.[21] This significant constitutional question has not yet been resolved by the United States Supreme Court.

State law and practice

The law of the various states in the US regarding the pre-trial status of the accused is generally consistent with federal law. In certain instances, however, state law is more specific than its federal counterpart as to the alternative measures to detention that can be employed. The use of electronic monitoring at the pre-trial stage is thus specifically authorized, although not required, in states such as Connecticut, Florida, Georgia, Illinois, Minnesota, New York, North Carolina, North Dakota, Oklahoma, Utah, and Washington. In most of those states, electronic monitoring is just one of several possible alternatives to

[16] 18 U.S.C. §3142(c)(1)(B) as amended by the Adam Walsh Child Protection and Safety Act.

[17] See *United States* v. *Giordano*, 370 F. Supp. 2d 1256, 1270-1272 (S.D. Fla. 2005) (use of electronic monitoring as a condition of bail was permitted); *United States* v. *Simone*, 317 F. Supp. 2d 38, 50–51 (D. Mass. 2004) (imposing electronic monitoring as a condition of release instead of imposing pretrial detention).

[18] See U.S. Const. amend. V ("No person shall […] be deprived of life, liberty, or property, without due process of law […]").

[19] See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[20] See, *e.g.*, *United States* v. *Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

[21] See *United States* v. *Gardner*, 523 F. Supp. 2d 1025, 1030–31 (N.D. Cal. 2007).

detention that can be imposed by the court on an accused who is awaiting trial.[22] Moreover, the use of electronic monitoring is not limited to the purpose of ensuring the appearance of the accused in court. Rather, it is also available as an alternative in those cases where the defendant is charged with a serious crime and is seen as posing a danger to others.[23] In some instances, state laws detail how electronic monitoring can be used in conjunction with other restrictions on the accused, such as curfews, limitations on work hours, travel restrictions, and restrictions on the use of alcohol.[24]

International law and practice

Overall, US law and practice concerning alternative measures to detention is comparable in many respects to that of other nations. The imposition of conditions on the accused as an alternative to pre-trial detention is the rule, rather than the exception, in most countries that have focused on this issue. Similarly, there is an increasing use of electronic monitoring as an alternative to pre-trial detention and a number of countries have launched initiatives or have indicated an openness to its use. A recent report by the European Union, for example, found that electronic monitoring has been used as an alternative to detention in France, Hungary, Malta, the Netherlands, Poland, Slovakia, England, Scotland, and Wales.[25] Indeed, one commentator has described electronic monitoring as a "well-established" part of the penal and correctional system in England, Sweden, and the Netherlands.[26] It appears other nations such as Belgium, Germany, Italy, Portugal, Spain and Switzerland have introduced the use of pre-trial electronic monitoring through pilot projects.[27]

The point to be made in light of the above is that electronic monitoring is widely recognized as a viable alternative measure to pre-trial detention. This is not to say that its use is feasible in every location or that its use is appropriate or even preferable in every situation. Simply put, electronic monitoring should be viewed as one more tool which, in the right circumstances, can respect the liberty interests of an accused while supporting society's legitimate concern that he return to court and not endanger the public or the judicial process while on release.

22 *E.g.* Conn. Gen. Stat. , 54–64a (2009).
23 *E.g.* Fla. Stat. Ann. , 907.041 (West 2001).
24 *E.g.* Ga. Code Ann. 17–6–1.1 (Supp. 2009).
25 A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 93.
26 R. Haverkamp, M. Mayer & R. Lévy, 'Electronic Monitoring in Europe', 12 *Eur. J. Crime Crim. L & Crim. Just.* 36 (2004), p. 36.
27 Idem.

3. ELECTRONIC MONITORING – IN GENERAL

Let us now turn to a discussion of the practice of electronic monitoring itself: what technologies are available, how are they used and, generally, what does a pre-trial program involving the use of electronic monitoring look like?

At its most basic level, electronic monitoring is a technique for determining the location of an individual by use of a device attached to his person. The device transmits information, typically the location of the accused, to monitoring officers. As a form of pre-trial supervision, electronic monitoring can be used to enforce certain restrictions imposed by a judge or magistrate, such as the requirement that the accused remain at a particular monitored location (such as his home), that he be at a certain place at a certain time of day (for example, his workplace), or that he remain away from a certain location (such as the neighborhood of his alleged victim). Once the monitoring device is fitted to the accused, a supervising officer (who is generally an agent of the court or a pre-trial service program) monitors transmissions from the device to determine the location of the accused and whether he has violated any restriction placed on his movement.[28] If the monitoring system alerts the officer that the accused is in violation of any conditions of his release relative to his location, the officer must investigate the violation, take appropriate action, and contact the police if necessary.

In the United States, electronic monitoring has also become an increasingly popular sanction following conviction and the number of defendants supervised outside of prison while on house arrest has increased.[29] The extent to which electronic monitoring is used prior to trial is not as well documented, but it also appears to be on the rise.[30] There are several explanations for this trend. The use of such technology is now more widely perceived as in fact constituting, in properly selected cases, an effective alternative to pre-trial detention, both in terms of securing the appearance of the accused in court and also in deterring him from committing new offenses while charges are pending. Practical considerations such as alleviating prison overcrowding[31] and easing the financial

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28 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 2.

29 Idem, p. 1: "The number of persons in the United States supervised outside jail facilities by [electronic monitoring] has greatly increased with estimates ranging from 12,000 to 75,000." See also Ralph Kirland Gable & Robert S. Gable, 'Electronic Monitoring: Positive Intervention Strategies', 69 *Fed. Probation* 21 (2005), p. 21; John Howard Society of Alberta, *Electronic (Radio Frequency) and GPS Monitored Community Based Supervision Programs*, 2006 (at: www.johnhoward.ab.ca/pub/pdf/monitorupdate.pdf) (last visited 1 September 2011).

30 See Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release*, British and Irish Legal Technology Association, 1990 (March 2005), p. 2 (at: www.bileta.ac.uk/; see under: Conference Papers; 05th BILETA Annual Conference 1990) (last visited 1 September 2011).

31 Some commentators specifically credit mandatory minimum prison terms and the resulting overcrowding caused by an increase in prison populations as a major impetus for pretrial

burden of housing a rapidly growing prison population have also contributed to the increase in electronic monitoring.[32] Moreover, electronic monitoring programs have become more versatile and less costly as the underlying technology has advanced.[33] Finally, as the use of electronic monitoring expands, judges and magistrates making the initial decision whether to detain an accused have begun to develop a better understanding of the technology and a greater awareness of how its use can serve as an alternative to pre-trial detention. Although the evidence is largely anecdotal, as judges become more acquainted with the technology involved, they have demonstrated a greater willingness to release on electronic monitoring an accused who might otherwise have been detained as too likely to abscond subject to traditional conditions.[34] It has also been reported that some judges have begun to recognize that electronic monitoring can be used to lower or eliminate the requirement that an accused, especially one who is indigent or of limited financial means, make a cash bail payment or post a bond to guarantee his appearance at future judicial proceedings.[35]

Electronic monitoring – The technology

Electronic monitoring technology can be divided into two broad categories: technologies that verify whether the accused is physically at a predetermined location and technologies that track the movements of an accused wherever he might be. The system known as "range monitoring" is a common technology for verifying that the accused is present at a designated location. This approach permits a monitoring official to verify whether the accused is at the location in question, such as his home.

Within the "range monitoring" category there are two basic types of signaling technology. On the more technologically advanced end is what is called "continuous signaling" and on the more basic end of the spectrum is "programmed contact." Continuous signaling equipment requires that the accused wear a transmitter, usually on the ankle, that continuously transmits a signal to a base unit that contains a receiver.[36] The base unit, in turn, is attached

electronic monitoring. Ralph Kirland Gable & Robert S. Gable, 'Electronic Monitoring: Positive Intervention Strategies', 69 *Fed. Probation* 21 (2005), p. 21.

32 R. Haverkamp, M. Mayer & R. Lévy, 'Electronic Monitoring in Europe', 12 *Eur. J. Crime Crim. L & Crim. Just.* 36 (2004).

33 Ralph Kirland Gable & Robert S. Gable, 'Electronic Monitoring: Positive Intervention Strategies', 69 *Fed. Probation* 21 (2005), p. 21.

34 Conversation with Paul Lucci, Deputy Commissioner, Office of the Commissioner of Probation (20 January 2010).

35 Keith W. Cooprider & Judith Kerby, 'A Practical Application of Electronic Monitoring at the Pretrial Stage', 54 *Fed. Probation* 28 (1990), p. 29.

36 Annesley K. Schmidt, 'Electronic Monitoring: What Does the Literature Tell Us?', 62 *Fed. Probation* 10 (1998), p. 10. A common form of continuously signaling technology is radio frequency monitoring.

to a telephone at the monitored location. The base unit receives a continuous signal from the transmitter worn by the accused and relays that information to a computer at a central monitoring office, which is staffed 24 hours a day. When the accused moves outside the range of the base unit, the signal is broken and the central office is notified that the accused has left the premises.[37] If the accused leaves at a time not authorized by his approved schedule (which could include departures for work or medical treatment) the monitoring staff will immediately notify the police.

The second form of range monitoring operates at a much more basic level and is referred to as "programmed contact." This system does not involve continuous signaling between a device worn by the accused and a base unit. Rather, programmed contact monitoring involves periodic, random telephone calls by monitoring officers to a designated location, such as the home of the accused, to confirm his presence there.[38] When the accused receives the programmed call, he verifies his presence at the location by matching a transmitter on his ankle to the telephone receiver.[39] He then enters a code or provides voice verification to prove his identity.[40] These measures, of course, are to ensure that the person responding to the call is, in fact, the accused.

The obvious limitation on this form of monitoring is that it is only when the accused responds to the programmed contact that the monitoring official actually knows his whereabouts. The official is alerted if the accused fails to respond at the moment of the call to his home, but is unaware of the location of the accused at any other point in time. Despite the limitations of programmed contact monitoring, commentators continue to cite the appeal of this technology as being a less technically complex form of electronic monitoring.[41] It should be noted, however, that both this form of monitoring as well as its more advanced cousin, that of continuous monitoring, share a common limitation. Both require the existence of a land line providing phone service to the monitored location. For obvious reasons, the use of a portable phone is inconsistent with the purpose of this type of monitoring, which is to confirm the presence of the accused at a specific, fixed location. The latest advance in electronic monitoring is the use of global positioning (GPS) technology to determine the exact location of an

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37 Idem.

38 In the United States, the federal Office of Probation and Pretrial Services lists voice verification as the most basic level of location monitoring. See Office of Probation and Pretrial Services, Administrative Office of the United States Courts, *Judicial Officer's Reference on Alternatives to Detention and Conditions of Release*, Monograph 110, April 2009, p. 15 (at: www.fd.org/pdf_lib/Monograph_110_7_22_09.pdf) (last visited 1 September 2011).

39 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release,* British and Irish Legal Technology Association, 1990 (March 2005), p. 3.

40 Annesley K. Schmidt, 'Electronic Monitoring: What Does the Literature Tell Us?', 62 *Fed. Probation* 10 (1998), p. 11.

41 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release,* British and Irish Legal Technology Association, 1990 (March 2005), p. 3.

accused. In the United States, GPS monitoring has become the favored form of electronic monitoring nationwide.[42] GPS monitoring, in turn, can be either passive or active.

The first form, "passive GPS," records the location of the defendant while he is away from a base unit located at a designated location, usually his home. The accused is required to keep on his person a GPS monitor in the form of a hand held device about the size of a cell phone. The accused also wears an ankle bracelet that synchronizes with the GPS monitor to verify that the person holding the GPS device is, in fact, the accused, as confirmed by the electronic signals continuously exchanged between the GPS unit and the accused's ankle bracelet. When the accused returns to his residence, he must connect the GPS device to a docking station that is located there and that is connected to a phone line. The docked GPS device, in turn, forwards to the monitoring center the information it has accumulated concerning the movements of the accused while away from home. That information is then retrieved by monitoring staff.[43] In other words, information about the defendant's movements is transmitted after the fact.

The second form of GPS monitoring, referred to as "active GPS," is the most intensive form of location monitoring, as it continuously monitors the movements of the accused in real time. An active GPS tracking system, like the passive GPS system, requires the accused to have a handheld GPS device and a synchronized ankle band. Unlike passive GPS, however, an active GPS device worn by an accused sends a continuous signal to a central office where monitoring officials can track the movements of the accused in real time on a computer monitor that displays his location on a street map. Using satellite services such as Google Earth, it is possible to overlay photographic displays on these maps, permitting monitoring officials to determine not only where the accused is, but also to identify the nature of that location. This technology provides immediate notification to the monitoring official if the accused violates a condition of his release, such as going to a location from which he has been barred. Because the monitoring official is alerted in real time, he can take immediate corrective action.[44]

Like passive GPS monitoring, this technology relies on the availability of cell phone service, which provides the continuous link between the GPS device held by the accused and the monitoring office. Consequently, the use of either active

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[42] Away Trac Technologies, http://awaytrac.com (quoting John Hughes, Assistant Director of the Office of Probation & Pretrial Services, Administrative Office) (last visited 1 September 2011). "In fiscal year 2007, the AO estimates that some 50 probation and pretrial offices will use GPS to supervise offenders or defendants.".

[43] Office of Probation and Pretrial Services, Administrative Office of the United States Courts, *Judicial Officer's Reference on Alternatives to Detention and Conditions of Release*, Monograph 110, April 2009, p. 16.

[44] Idem.

or passive GPS monitoring is limited geographically to areas equipped with such coverage.

Selecting appropriate monitoring technology

The type of technology that is appropriate for a particular accused will depend on a number of considerations. The judge or magistrate must consider the risks posed by the particular accused and the corresponding purpose of the monitoring regime in his case. The most basic technology, programmed contact, is best suited for home confinement or enforcement of a curfew on low risk defendants.[45] Moreover, programmed contact can be implemented without the cost of expensive monitoring technology simply by using an existing phone line in the accused's residence. The obvious downside of this technology is that it is limited to verifying the presence of an accused at a predetermined location only at the moment the call is made.

Continuous signaling technology is most appropriate when there is little or no need for surveillance outside the monitored location, but there exists a heightened concern for containing the accused there.[46] A monitoring officer will be alerted whenever an accused leaves the range of the base unit, but thereafter the equipment provides no information about his location while he is out of range, which can significantly limit the technology's usefulness in particular cases.

Passive GPS is best suited for situations where the accused poses no risk to another or to the community.[47] The monitoring officers receive complete information about his location, but not in real time. Violations can only be enforced after the fact, making this technology less effective as a deterrent to criminal conduct or other prohibited activities.

Active GPS, the most intensive form of monitoring, is the most appropriate technology for monitoring an accused who may be considered to pose some risk of flight or to public safety.[48] If an accused is under house arrest but leaves the premises, active GPS monitoring will immediately alert the authorities as to his departure and his location thereafter. The same would occur when an accused approaches an exclusion zone from which he has been barred. This real time information, in turn, permits immediate notice to be given to the police to intercept and apprehend the accused.

One feature common to all forms of electronic monitoring is that the accused wears an ankle band or bracelet. What happens if the accused seeks to disable the device or to cut the band off his ankle? The design of the band is such that

45 Idem, p. 15.
46 Idem, p. 16.
47 Idem.
48 Idem.

wires imbedded in the strap connect to the device that it carries and any effort to tamper with either band or the device sends a corresponding signal to the monitoring center. There, officials will be notified that the accused is trying to make what we could call an "electronic escape," permitting them to take immediate action. In the event that an accused successfully removes the bracelet, however, he can no longer be located through electronic monitoring. That fact emphasizes the importance of proper screening of candidates for such monitoring and a determination of what risk factors they may present.

4. PROTECTING PERSONAL LIBERTIES

To what extent can a successful electronic monitoring program in fact serve as an alternative to pre-trial detention? In this regard, I will discuss the degree to which the goals of pre-trial detention can be satisfied by the use of such technology.

One of the fundamental goals when considering the issue of pre-trial detention is to achieve an appropriate balance between the potentially conflicting interests of the accused and of society. Electronic monitoring, as an exercise of government control, can either expand or contract the amount of liberty allowed to an accused, depending on what would otherwise have been his pre-trial status without the use of electronic monitoring. In those cases where the alternative would have been physical detention, electronic monitoring can be said to narrow the net of state control over the accused. On the other hand, the use of electronic monitoring as an additional condition on an accused who would otherwise have been at liberty pending trial, amounts to widening the net of state control over the accused. It is my purpose here to highlight the benefits of electronic monitoring in narrowing the net of state control over those participating in the program. The problem of electronic monitoring being used to widen the net of state control is discussed in a separate section.

From the perspective of the accused, being at liberty with a condition of electronic monitoring is far less restrictive than conventional pre-trial detention. Once on monitored release, the defendant is able to continue working, residing with or near his family, and living in the community. Whatever may be the restrictions placed on the movements of an accused or the intrusiveness inherent in being monitored, being subject to a regime of electronic monitoring is significantly less onerous than being physically confined in a pre-trial detention facility.

Let me provide you with just one piece of anecdotal evidence supporting this view. It comes from my own city of Boston and illustrates, quite well, I believe, the potential benefits to be realized from electronic monitoring. In the state of Massachusetts, where Boston is located, pre-trial detention decisions are often

made by a first instance judge at the district court level. Those detention decisions, in turn, can be appealed to a higher level judge at the superior court level. Last year the presiding judge of the superior court in Boston proposed to her colleagues that in reviewing detention decisions from the district court they should specifically consider, in appropriate cases, reducing the pre-trial order from detention to electronic monitoring. This was viewed as especially important in cases where the accused was in custody not because of a detention order made by the first instance judge, but because the accused was unable to pay the cash bail that was required to secure his return to court. As a result of this initiative, literally hundreds of accused individuals who would otherwise have been held in physical detention awaiting trial have been released on electronic monitoring. Such experiences underscore the potential that this technology has for vindicating the liberty interest of the accused and ensuring that pre-trial detention is used only when it is strictly necessary and only as a measure of last resort.

Ensuring reappearance

Thus, electronic monitoring may be good for the accused, but is it good for society? Does it adequately satisfy the goals of ensuring the attendance of the accused at judicial proceedings, deterring his commission of an offense while awaiting trial, and preventing his interference with the investigative process?

The first point to be made in this regard is that the results that can be achieved depend not only on the adequacy of the technology, but also on the care with which the accused is screened for participation in the program. The best technology in the world cannot achieve its intended results if deployed in inappropriate cases or with an accused whose profile is not suitable for the use of such measures. The effectiveness of electronic monitoring as an alternative to pre-trial detention thus largely depends on the quality of the screening and the risk assessment that is performed with respect to the accused. In the United States, federal judges are advised on the suitability of a particular accused for electronic monitoring by a pre-trial services department. On the state level, such information is supplied to trial judges by probation officers who work with the court. At both the state and federal levels, the prosecutor and defense counsel also have the right to be heard as to whether electronic monitoring should be employed.

Another point that is relevant here: electronic monitoring is exactly what its name implies. It is a technology that simply records and reports the location of an accused. It cannot, for example, guarantee that an accused will appear in court, but it can set certain parameters on his activities that will make it much more likely that he will do so rather than abscond. Similarly, when it comes to any danger the accused may present, such monitoring cannot directly modify

behavior, although the restrictions that it can place on the movements of an accused can have a deterrent effect on such conduct.

Noteworthy here is a product sold for dog owners called the "electric fence." Electrodes placed in the ground permit the creation of an invisible electronic perimeter around a home. The dog owner, who presumably loves his little Fido, then fits his canine friend with an electronic collar that is set to interact with the electrodes in the ground. When Fido sees a squirrel across the street and does what dogs do and chases it, as he encounters the electronic perimeter he receives an electric shock through his collar. We are told by people who are not required to wear such a collar – that the shock is harmless but nonetheless sufficient to convince Fido that he should stay home and let the squirrel go about its business. Needless to say, this is not how electronic monitoring works. Rather, any modification in behavior on the part of the accused is based primarily on the deterrent effect of knowing that someone, somewhere, knows where you are and, inferentially, what you are doing. This is reinforced by the fact that before contacting the police in the event of an apparent violation, monitoring officials will immediately contact the accused to determine why the signal has been lost or to alert him that he has entered a zone from which he has been excluded. Such contact may be by cell phone or, in the case of GPS monitoring, by a text message that will appear on the device carried by the accused. Such efforts reinforce the deterrent effect of the underlying technology.

Although electronic monitoring will not physically prevent an accused from fleeing, it does provide the means by which to detect immediately any violation of the restrictions on his movement. The technology can thus deter an accused from fleeing because he knows that he is being monitored and that law enforcement will be alerted as soon as such an attempt is made. Especially when an accused is subject to active GPS monitoring, the technology can significantly reduce the possibility of his getting a meaningful head start on his pursuers.

The utility of electronic monitoring in deterring flight and, as a consequence, in promoting attendance at court proceedings, has largely been borne out in Massachusetts where it is extremely rare for an accused on electronic monitoring either to abscond or simply to fail to appear for court. Indeed, it has been observed that the likelihood of an accused on electronic monitoring coming to court is significantly higher than the appearance rate for other less serious offenders who are at liberty on non-monitored release. Although the appearance rate for those who are in detention is 100%, those who have been diverted from detention to electronic monitoring appear for their court dates at virtually the same rate, which is a significant factor in favor of electronic monitoring as an alternative to pre-trial detention.

Protecting individuals and the community

The goal of deterring an accused from committing a new offense can also be advanced by the use of electronic monitoring. Electronic monitoring can be said to have deterred an accused if he chooses not to engage in criminal activity out of a fear of being detected or apprehended as a consequence of being monitored.

Electronic monitoring has certain advantages over non-monitored release when it comes to preventing or deterring the commission of a new offense.[49] If an accused is under home confinement, monitoring can be used to prevent crime to the extent that his sequestration there reduces the opportunity for criminal behavior. Moreover, should the accused attempt to leave his home, the police will be alerted and can intercept him immediately or shortly after he has left the premises. If the conditions of an accused's release allow a greater range of movement, through the use of GPS monitoring for example, then this technology similarly has the capacity to discourage new offenses. For example, if a judge has set an exclusion zone around a victim's town or the neighborhood where he or she lives, the GPS device will notify monitoring officials immediately should the accused enter those prohibited zones. Electronic monitoring may also have some preventive effect if the intended crime is preceded by some other violation that alerts monitoring officers, such as the removal of the ankle bracelet.

In sum, the deterrent effect with respect to both flight and the commission of new offenses has the potential to be similar, although the consequences of a breach may be different depending on the category. A failure to appear in court can frustrate the judicial process, but the commission of a new offense while an accused is on pre-trial release can be an even more serious matter involving injury or loss to others.

Accordingly, careful attention must be applied to the screening of candidates for electronic monitoring. In doing so it must be remembered that there are many accused who might abscond or fail to appear in court but who would never commit an offense while on release. Similarly, there are those who might engage in criminal activity while on release but who will routinely come to court. In order to maximize the deterrent effect of electronic monitoring close examination should be given to the risk factors involved in each case. There should be an individualized determination whether electronic monitoring alone – or perhaps in conjunction with other restrictions or conditions on the accused – will accomplish its intended goals. If the view is that it will not, then in such cases electronic monitoring will not be an appropriate alternative to pre-trial detention.

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49 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 10–12.

5. BENEFITS OF ELECTRONIC MONITORING FOR THE ACCUSED AND FOR SOCIETY

There are other benefits that could result from the use of electronic monitoring, not simply for the accused, but for society itself. In a sense, society as a whole benefits when electronic monitoring is used rather than detention, because such a choice reflects society's commitment to the principle that the defendant is presumed innocent of the charges against him. Moreover, its use vindicates the rule that pre-trial detention should be used only as a last resort. Beyond this, society can also be said to realize certain humanitarian advantages of electronic monitoring as well as some practical benefits such as cost savings and a reduction in prison overcrowding. Let us examine these briefly.

Humanitarian benefits

Electronic monitoring has what some commentators have called "humanitarian benefits," when compared with pre-trial detention. Releasing the accused on monitoring allows him to live with or near his family and to maintain or seek employment. Just as importantly, the accused can remain a contributing member of his community, not only economically, but also socially and civically.[50] On an individual or family level, the accused can continue to support himself and his family financially. As previously noted in a slightly different context, electronic monitoring only achieves these humanitarian benefits if it is used on individuals who would otherwise be held in detention. If it is used on individuals who would nonetheless have been released on personal recognizance or bail, then there is a no net gain in humanitarian benefits.

Reducing prison overcrowding

The use of electronic monitoring, especially at the post conviction stage, has been widely credited with helping to reduce prison overcrowding.[51] There appear to be no studies, however, examining whether electronic monitoring during the pre-trial phase has accomplished a comparable reduction in the number of accused held in pre-trial confinement. Nonetheless, the anecdotal evidence from Massachusetts would support the view that the diversion of pre-trial detainees into electronic monitoring programs in that state has had the effect of reducing the number of persons held in detention. Although electronic monitoring does present at least the theoretical possibility for producing such reductions, until it

50 Idem, p. 7.

51 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release*, British and Irish Legal Technology Association, 1990 (March 2005), p. 1; Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 1.

is systematically considered as an alternative to detention and its use becomes more widespread, the hard data concerning its effect on overcrowding in detention facilities is likely to be minimal.

If one of the benefits of electronic monitoring is to reduce overcrowding, it must first be recognized that only a certain segment of pre-trial detainees may be suitable for such a program. As noted earlier, concerns over the commission of new offenses may preclude the participation of violent or repeat offenders who present too high a risk and, thus, may not be suitable candidates for pre-trial electronic monitoring. In any event, measuring the impact of electronic monitoring on overcrowding requires a proper identification of those individuals who are or would be in detention but for their participation in electronic monitoring.

Cost savings

In several respects, electronic monitoring can be more cost-effective than detention. For example, recent US studies show that the cost of electronic monitoring ranges from $2,500 to $8,500 per year depending on the level of monitoring.[52] In comparison, incarceration costs tens of thousands of dollars per year.[53] In Massachusetts, the Department of Correction has reported that the average cost per year to house an inmate is currently $45,917, which is approximately the cost of one year of education at my alma mater, Yale University.[54] In addition to such direct savings, the state may also save indirectly by way of reduced welfare costs when pre-trial detainees are released on electronic monitoring and able to continue supporting their families.[55]

Savings to the state may be diminished somewhat, however, by the cost of acquiring necessary technology and equipment, training support staff, and paying personnel to conduct round-the-clock monitoring of those in the program. Research to date on the cost-effectiveness of electronic monitoring is thus mixed. In the late 1980s, an electronic monitoring program pilot program in Ontario, Canada was abandoned because it was found to exceed the cost of prison by over $200,000.[56] The number of monitoring officers required to run

52 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 5. *See also* John Howard Society of Alberta, *Electronic (Radio Frequency) and GPS Monitored Community Based Supervision Programs*, 2006, p. 19 (estimating that electronic monitoring costs between $1825 (US) and $5474 (US) per year).

53 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 5.

54 See General Information about the DOC, Massachusetts Department of Correction (at: www.mass.gov (last visited 21 January 2010).

55 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 5.

56 John Howard Society of Alberta, *Electronic (Radio Frequency) and GPS Monitored Community Based Supervision Programs*, 2006, p. 19.

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the program also proved costly because forty-four officers were needed to supervise one-hundred-seventy-five offenders.[57] More recent research, however, has found that the cost of initial capital investments in monitoring technology has decreased as more commercial producers have entered the electronic monitoring market. For example, cost estimates for implementing a GPS program are now similar to the costs previously associated with less advanced range monitoring systems.[58] However the calculation is done, at some point any jurisdiction considering the electronic monitoring of accused individuals at the pre-trial stage must determine whether the costs associated with such a program are commensurate with the benefits that may be realized.[59]

Some jurisdictions have sought to defray the cost of electronic monitoring by charging the accused for use of the equipment.[60] In Massachusetts, for example, the accused must pay $5.95 per day to be placed on electronic monitoring. That sum is the daily cost to the state for leasing the equipment used by the accused, but payment of that amount is waived in those cases where the defendant is indigent or otherwise unable to pay the charge. Consequently, no one is excluded from the program for financial reasons alone. According to those who support requiring such payments from those accused who are financially able to make them, the fee is justified by the benefits realized by the accused himself, considering that he is able to avoid detention and remain in the community.[61] The contrary view is that the cost of an accused remaining at liberty rather than being held in detention should not be shifted from the state to the individual involved.

6. LIMITATIONS ON THE BENEFITS OF ELECTRONIC MONITORING

I would like to conclude by reviewing some of the limitations on the usefulness of electronic monitoring, along with some reasons for caution or concern in the

57 Idem.

58 Idem.

59 See, *e.g.*, Stephen Shute, *Satellite Tracking of Offenders: A Study of the Pilots in England and Wales*, Research Summary, Ministry of Justice (2007), p. 15 (at: www.justice.gov.uk/publications/docs/satellite-tracking-of-offenders.pdf) (last visited 1 September 2011).

60 For example, the State of Massachusetts charges a defendant $5.95 per day (the daily lease costs) for use of the GPS monitor. Conversation with Paul Lucci, Deputy Commissioner, Office of the Commissioner of Probation. The State of Indiana in the United States operates a home detention program for offenders that charges the offender $75 initially and $12 per day for electronic monitoring. Marion County Community Corrections, Home Detention Component (at: www.indy.gov/eGov/County/Corrections/Services/Detention/Pages/ElectronicMonitoring.aspx) (last visited 1 September 2011).

61 John Howard Society of Alberta, *Electronic (Radio Frequency) and GPS Monitored Community Based Supervision Programs*, 2006, p. 20.

implementation of such a regime. In this regard, I will discuss some of the unintended, but nonetheless possible, consequences of using such an alternative to pre-trial detention.

In an earlier section, I discussed whether the use of electronic monitoring could be viewed as narrowing or widening the state's interference with the individual liberty of the accused. The concern, of course, is that electronic monitoring should only be used as an alternative to pre-trial detention and not as a new means for exercising control over an accused who would have been released pending trial and not held in confinement. Many commentators caution that electronic monitoring can be used to the detriment of the accused if he is a person who would otherwise have been on release pending trial but who now must submit to additional state control in the form of monitoring.[62]

One of the primary means for assessing the appropriate application of electronic monitoring is whether it widens or narrows the "net" of state control. One commentator defines "net widening" as "subjecting accused persons to more onerous pretrial conditions than would be applied in the absence of monitoring."[63]

To date there is little quantitative research on net widening at the pre-trial stage,[64] but it is nonetheless clear that "the selection criteria are […] the single most important factor in deciding whether [electronic monitoring] […] has a net-narrowing [or net-widening] effect."[65] Indeed, some countries have attempted to target their monitoring program by "imposing a requirement of electronic monitoring only in cases where [the magistrate] would otherwise [have] remand[ed] the defendant in custody."[66] One US commentator has noted the disturbing fact that "many […] new [electronic monitoring] programs have become more punitive options for offenders whom judges would normally not incarcerate."[67] Indeed, a trend appears to have emerged in Massachusetts in which prosecutors have broadly promoted the use of electronic monitoring of accused individuals, but with little effort to limit its application to those cases that otherwise would have involved pre-trial detention. It seems clear that the motivation is simply to place a larger number of people who are charged with

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62 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 4–5.

63 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release,* British and Irish Legal Technology Association, 1990 (March 2005), p. 1.

64 See, *e.g.*, John Howard Society of Alberta, *Electronic (Radio Frequency) and GPS Monitored Community Based Supervision Programs*, 2006, p. 18 ("The data remains ambivalent as to just how much of a problem 'net widening' represents.").

65 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release,* British and Irish Legal Technology Association, 1990 (March 2005), p. 4.

66 Idem.

67 Scott Vollum & Chris Hale, *Electronic Monitoring: A Research Review*, Corrections Compendium, July 2002, p. 4 (quoting from S. Mainprize, 'Electronic Monitoring in Corrections: Assessing Cost Effectiveness and the potential for Widening the Net of Social Control', 34 *Can. J. of Criminology* 161 (1992), p. 161–180).

crimes under increased scrutiny while they are on pre-trial release, even though such monitoring is not required to ensure their return to court or to promote public safety to any significant degree. Some US commentators have also argued that the issue of pre-trial detention can improperly be used by an aggressive prosecutor during plea bargaining.[68] The suggestion is that the extent of the accused's willingness to participate in such negotiations could affect the prosecutor's position before the judge on the question of whether the accused should be physically detained or released on pre-trial monitoring.[69] In that context, rather than serving its intended purpose, electronic monitoring simply constitutes another arrow in the prosecutor's quiver.

In this regard, I am reminded of the discussion surrounding the use of tasers when they were first introduced. The taser is something of a stun gun that fires an electrically charged dart to pacify a targeted individual. As originally described, the taser was promoted as an alternative to the use of firearms thereby reducing the level of violence in interactions between police and the public. All technologies, however, have unintended consequences and the taser was no exception. Tasers are now used in 14,000 of the 18,000 law enforcement agencies in the United States. *The Economist* recently quoted the CEO of Taser International as saying "Half the cops in America carry a Taser as well as a gun." But as the *Economist* article also related, instead of lowering the level of police violence, tasers have actually raised it by providing a means to use debilitating force in situations where even the most aggressive police officer would never have considered using a gun.

Could the expansion of electronic monitoring at the pre-trial stage lead to similar unintended consequences? In my humble opinion, there is no question that it could. Without a proper screening of candidates to identify those who would otherwise be placed in physical detention, the expanded use of electronic monitoring will inevitably lead to further net-widening. In that case, electronic monitoring, and all the intrusion it involves, could easily be imposed upon those who are accused of crimes but who otherwise would simply have been released on their promise to return to court.

Some commentators argue that fixed criteria should be used to ensure that monitoring does not widen the net of state control. For example, one suggestion is that pre-trial candidates for electronic monitoring should only be selected from the population of those already in detention.[70] This would assure a narrowing of the net because electronic monitoring in those circumstances would necessarily be used as a less restrictive alternative.

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68 Douglas J. Klein, 'Note, Pretrial Detention Crisis: The Causes and the Cure', 52 *Wash. U. J. Urb. & Contemp. L.* 281 (1997), p. 291.

69 Idem.

70 Patricia Hassett, *The Use of Electronic Monitoring for Pretrial Release,* British and Irish Legal Technology Association, 1990 (March 2005), p. 4.

Similarly, the law could specify that electronic monitoring should apply only after a judge has first made a written finding that no other less restrictive alternative to detention is appropriate in the circumstances.[71] In other words, electronic monitoring would only be available as an option once the traditional, less intrusive forms of release have been specifically ruled out, leaving only detention as an an alternative. Such a change in the law would not interfere with a judge's discretion to determine the pre-trial status of the defendant, but would simply specify the factors that must be considered when deciding whether or not to impose the condition of electronic monitoring.

7. CONCLUSION

I end where I began, with the question of whether the electronic monitoring of an accused can serve as an appropriate alternative to pre-trial detention. The answer to that inquiry is a complicated one and the experience with monitoring has been mixed. When properly employed in the right circumstances, electronic monitoring does have the potential to yield a number of benefits, including the possibility of permitting an accused who would otherwise be held in custody while awaiting trial to remain at liberty.

Regard for the liberty interest of an accused, however, must be juxtaposed with legitimate concerns relating to risk of flight and public safety. Needless to say, maintaining an equilibrium between those considerations is not easily accomplished. Time will tell whether or not the use of pre-trial electronic monitoring can achieve the appropriate balance.

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71 Idem.

THE IMPACT OF THE EUROPEAN ARREST WARRANT ON PRE-TRIAL DETENTION POLICY

Axel Boetticher*

1. INTRODUCTION

Advancing economic well-being, improving standards of living and of quality of life, freedom and social life, and safeguarding peace and security, are the focus of attention of many international and regional communities and organizations. That for example applies to the Southern African Development Community (SADC), which was established in Lusaka, Zambia on April 1, 1980, following the adoption of the Lusaka Declaration: "Towards Economic Liberation." And it also applies to the more known European Union, the vision of which is to build a unified economic and political community. But advancing economic well-being raises many concerns, also from the point of view of the criminal justice system. History taught us that open markets ask for open borders and freedom of establishment. This freedom raises new questions about social balance between rich and poor people. Social discrimination often is one the origin of criminality. Open borders lead to questions of transnational criminality and how to treat these crimes and international criminals. Do multinational trade of goods and persons bring new dangers to the public? How can the police, prosecutors and the courts adequately deal with these new challenges? The experience in Europe is that problems can only be solved by the community of civilized Member States that act on a common legal basis and that have an efficient criminal law and an independent justice that respects international standards of criminal law and criminal procedure watching the rights of defendants and detainees.

What is the link between the European Arrest Warrant (EAW) and pre-trial-detention policy? We will have to lay open that we also have to discuss new problems with transnational criminality in our economic and political European Community. Criminals cross the borders of all Members States to commit

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crimes and to vanish in their home countries after having finished their crimes. The police and the prosecutors have new difficulties to identify the persons charged with crimes, to take them in pre-trial-detention and to execute the main hearing. After the main hearing and the final sentence there are other problems how and in which country to execute the sentence. Questions arise within our Member States about the scope and notion of pre-trial detention, the grounds for pre-trial detention, review procedures, the length of pre-trial detention other relevant aspects such as the deductibility of pre-trial detention from the final sentence, the right to compensation for unlawful or unjustified detention, alternatives to pre-trial detention, and the execution of pre-trial detention. And of course there are new questions how to treat foreign defendants and how to protect the own citizens when they are defendants.

The aim of this chapter is to give an overview over an important instrument in the matter of transnational criminal law in Europe with its 27 Member States, the European Arrest Warrant (EAW). It shall also answer the question whether this instrument and the political discussion about this subject have an impact on the policy of pre-trial-detention in the EU.

Relevant in this respect is that the EAW implies a radical change from the traditional extradition system, which has been replaced by a system of surrender within an "Area of Freedom, Security and Justice", with an impact, in particular, on procedures, time limits and grounds for non-surrender of a person. By replacing the current extradition system by requiring only a decision of the national judicial authorities of the requesting State the most important procedural improvement is that there is no longer a governmental procedure of allowance. This means that *there should not be any longer a political aspect relative to questions of extradition.*

The EAW should be used in an efficient, effective and proportionate manner as a tool for the prevention and repression of crime, while safeguarding the human rights of suspects and convicted persons. The instrument, which is based upon the deprivation of personal liberty, is in principle designed to further the prosecution of more serious or more damaging crime which may substantially justify its use, or for purposes of enforcement of convictions. It is only intended to be used if an arrest warrant or any other enforceable judicial decision having the same effect has been issued at national level.

2. THE SOURCES AND RESOURCES OF THE EUROPEAN ARREST WARRANT

The European Council, *i.e.* the committee now representing the 27 governments of the Member States in the EU, decided to issue, in the realm of criminal justice

Framework Decisions on the basis of Article 34(2)(b) of the Amsterdam Treaty, the so-called Third Pillar. This means that the European Parliament was only asked for its advisory opinion but had ad that time no decision powers in this respect.

On 13 June 2002 the Council adopted the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD).[1] The Framework Decision defines the EAW as any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of a requested person, for the purpose of:

- Conducting a criminal prosecution.
  Example: a well organised gang from Poland arrives in a stolen polish car in Germany. They rob three jewellery stores, cross the border to France and Spain, where they again commit several crimes. Prosecutors from all the three countries issue an EAW. Who has first access? Which prosecutor and which court has the territorial and substantive competence for the case?
- Executing a detention order or a custodial sentence.
  Example: The General Prosecutor of Siena in Italy has issued an EAW against an Italian defendant, who left Italy and lives with his family in Germany for several years. In Italy several sentences with an amount of more than 6 years wait for him to be served. The defendant objects, the decisions have been rendered in his absence. He cannot go into an Italian prison, because he worked for the police, was in a witness-shelter-program and must fear for his life. Is that a ground to refuse the surrender?

In cases where the location of the requested person is not known, the EAW is distributed to all relevant SIRENE offices within the states that are part of the Schengen Information System I and II (SIS).

The INTERPOL channels are used for distribution to those EU Member States which are not part of the SIS for the time being: Bulgaria, Cyprus, Ireland, Romania and the United Kingdom. Article 9(1) of the Framework Decision allows for direct transmission of the EAW to the executing authority when the location of the requested person is known. Article 9(2) provides that the issuing judicial authority may, in any event, decide to issue an alert for the requested person in the SIS. An alert in the SIS will be equivalent to an EAW accompanied by the information set out in Article 8(1). For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert will be equivalent to an EAW pending receipt of the original in due and proper form by the executing judicial authority.

[1] OJ EC 18.7.2002, L 190/1.

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In accordance with Article 3 of the Council Decision of February 2002 one of the objectives of Eurojust is to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Thus, Eurojust can act as facilitator and coordinator in EAW and extradition cases. Article 17 of the Framework Decision stipulates the time limits and procedures for the decision to execute the EAW. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it should inform Eurojust of the reasons for the delay.

The European Judicial Network (EJN) has set up an IT tool (the European Judicial Atlas) that permits identification of the executing judicial authority to which the EAW should be directly transmitted.[2] The tool includes information on contact details of executing authorities; language in which the warrant should be issued; time limit for receiving the original warrant as of the date when the person to surrender has been arrested, where the arrest has followed an alert in the SIS; contact details of the issuing authorities; contact details of central authorities and their powers (*i.e.* for receipt and transmission of an EAW; assistance to competent authorities; requests for transit; urgent cases).

A Handbook was drawn up during the Portuguese and Slovenian Presidencies with the assistance of a number of practitioners working with the EAW across Europe, and also with the assistance of the European Judicial Network, Eurojust, the General Secretariat of the Council of the EU and the European Commission.[3]

An EAW Atlas is available on the EJN website[4] and also provides the information requested when data is entered on the location to which the EAW is to be transmitted (country, district, region, sub-region, locality, zip code/postcode). EJN contact points can also be contacted. At the moment the background information about the EAW, such as Declarations by the Member States on the scope of the Framework Decision, information on the legal procedure and other practical details known as "*Fiches Françaises,*" EAW forms in all EU official languages and national legislation can be found on websites.

A mechanism has been established for evaluating the application and implementation at national level of international undertakings in the fight against organised crime. Now we have the fourth round from 28 May 2009,

2 At: www.ejn-crimjust.europa.eu/.
3 Council of the European Union, Brussels 18 June 2008, 8216/1/08 REV 1.
4 At: www.ejn-crimjust.europa.eu/.

which is based on seven evaluation visits in the Member States.[5] All the Member States evaluation reports are available and publicly accessible.

The final report addresses the application in practice of the European Arrest Warrant and cooperation between Member States in this regard. In particular, the exercise's objectives were to evaluate the practical processes operated and encountered by Member States when acting both as issuing Member State and as executing Member State and to assess relevant training provisions and provision for defence.

In accordance with Article 34(1) EU thereof, Member States had the obligation to take the necessary legal measures to comply with the provisions of the Framework Decision by 31 December 2003. From 1 January 2004, this new system has, with a few exceptions, replaced former extradition arrangements with the new surrender regime. As far as surrender between Member States is concerned, the corresponding provisions of the following conventions have been replaced.

- The European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978;
- The European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;
- The Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;
- The Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;
- The Convention of 27 September 1996 relating to extradition between the Member States of the European Union;
- Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

3. THE IMPLEMENTATION OF THE EAW IN THE EU MEMBER STATES[6]

The implementation of the Framework Decision on the EAW and Surrender Proceedings between the Member States of the European Union brought legal

[5] Council of the European Union, Brussels 28 May 2009, 8302/4/09 REV 4.

[6] See Adam Górski & Piotr Hofmański (eds), *The European Arrest Warrant and its Implementation in the Member States of the European Union, Warszawa*: Wydawnictwo C.H.

problems in several member states, wherever constitutional law and constitutional rights of their own citizens were touched.[7]

As the European Council chose with the Framework Decision a form of action of European Community law which is situated outside the supranational decision-making structure of Community law[8] it required incorporation into national law by the Member States. The European Parliament, autonomous source of legitimisation of European law, is merely consulted during the law-making process (see Article 39(1) of the Treaty on European Union), which, in the area of the "Third Pillar", meets the requirements of the principle of democracy because the Member States legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation.

So the legislature of several member states were obliged in any case to use the latitude as concerns incorporation into national law that the Framework Decision leaves the Member States in a manner that is in line with their fundamental rights. The responsibility for ensuring that this incorporation is in conformity with the constitution of a member state is particularly high, in fact higher than in the case of the incorporation of European Community directives into national. This higher responsibility also results from the circumstance that the measures in question are from the European Union's "Third Pillar". The Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States is an act of secondary Union legislation that legally implements the objective established by the Treaty on European Union. Pursuant to Article 34(2)(b), the Treaty on European Union is binding as regards the "result to be achieved."

In the *German* system of law for example, the EAW amended the Law on International Judicial Assistance in Criminal Matters in its eighth part (§§78 IRG *et. seq.*). Herewith, the German legislator installed the EAW into the existing system of International extradition proceedings in Germany. General rules for International extradition only had to be amended for the specific requirements of European Arrest Warrants. Thus, introducing the European Arrest Warrant in Germany was only meant to divide between *International extradition* and *European extradition*.

BECK, 2008. The collection of contributions was given on a conference held in Krakow from 9th to 11th November 2006. The conference has been a part of a research project carried out by the Chair for Criminal Procedure, the Jagiellonian University, Krakow.

7 Idem.

8 See BVerfGE 89, 155, 196.

Germany

In Germany[9] the first German European Arrest Warrant Act came into effect on 23 August 2004[10] and was used on a regular basis. But: in a decision dated 18 July 2005.[11] The Second Senate of the Federal Constitutional Court declared the First German European Arrest Warrant Act unconstitutional and void.

The Court had to decide the case of a complainant who had German and Syrian citizenship and who was supposed to be extradited to the Kingdom of Spain for prosecution and has been in custody pending extradition since 15 October 2004. A "European Arrest Warrant" was issued against the complainant by the Central Court of Investigation in Criminal Matters (*Juzgado Central de Instrucción*) No. 5 of the *Audiencia Nacional* in Madrid on 16 September 2004. The complainant was charged with participation in a criminal association and with terrorism. The Second Senate nullified the First European Arrest Warrant Act of July 2004 for three main reasons.

(1) The EAW Act interfered with the first sentence of Article 16(2) of our Constitution, *i.e.* the Basic Law (GG): the right not to be extradited.
   - German legislators have not complied with the prerequisites of the qualified proviso of legality when implementing the Framework Decision.
   - The court's statement must be summarized herein, it needs to be emphasized that the extradition of Germans is only allowed to the extent that the principles of constitutionality are not infringed upon.
   - Beyond this, the Court stressed the principle of proportionality, which must be respected especially when fundamental rights are interfered with.

(2) It interfered with Article 19(4) GG by excluding recourse to a court against the grant of extradition to a European Member State. In Germany, the extradition procedure is split into a procedure for admissibility of extradition by the High Regional Courts and a procedure for granting extradition by the Offices for Prosecution at the High Regional Court.

(3) The proceedings for granting extradition are complemented by specified grounds for optional non-execution of EAW.
   - cases which mainly concern domestic aspects, (genuine domestic link) and where the extradition is in principle disproportionate and illegitimate,

9 See Arndt Sinn & Liane Wörner, 'Germany', in: Adam Górski & Piotr Hofmañski (eds), *The European Arrest Warrant and its Implementation in the Member States of the European Union, Warszawa*: Wydawnictwo C.H. BECK, 2008, p. 244–265.

10 BGBl I 2004, 1748.

11 BVerfGE 18 July 2005, 2 BvR 2236/04 (*European Arrest Warrant Act case*) (at: www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html).

- cases of a significant connection to a foreign country, where Germany has no concerns about the extradition of German citizens to a Member State, and
- cases where the criminal action takes place in Germany, whereas the site of the crime is abroad. These cases require a thorough assessment in each individual case. Here, it is obligatory to weigh the effectiveness of the prosecution on the one hand, against the fundamental rights of the defendant on the other. In the Senate's opinion, the First European Arrest Warrant Act did not meet this standard.

Simultaneously, the court clearly stated that the European Arrest Warrant Framework Decision itself does not contradict the German Constitution. The First German European Arrest Warrant Act did not meet these standards as set by the German Basic Law especially in regard of the principles of legal certainty and protection of public confidence and in regard of German nationals who are affected by extradition. On the other hand the German Federal High Constitutional Court said that in a case of extradition of a Danish citizen from Spain to Germany German national authorities *had and will have to* base their decisions on applicable European Framework Decisions. According to the *Pupino* decision of the European Court of Justice the German Federal Constitutional Court confirmed that decision, *as far as* and *as long as* the European Framework Decision does not contradict German constitutional law. As a consequence of the finding of constitutionality and deferring to the *Pupino* decision, the court allowed the German authorities to directly refer to those provisions of the Framework Decision, which are in themselves constitutional. The German court reasoned, according to the European Court *Pupino* decision, that the goal of the Framework Decision to simplify the "European transfer of criminals" could only be achieved in applying the Framework Decision directly, so that other member states do not bear the burden of unconstitutional German enactments. Therefore, the German Federal High Constitutional Court allowed the German authorities to issue a European Arrest Warrant according to the European standard formulary as provided by Article 8 FD and to use those ways of transmissions as they are provided in Articles 9 and 10 FD.

Meanwhile, the Second European Arrest Warrant Act entered into force on 2 August 2006. Again, it did not enter into force as a separate law, but rather provisions amended the German Act on International Assistance in Criminal Matters (IRG) in its eighth part (§§78 IRG *et seq.*). Thus, the extradition on the basis of European Arrest Warrants is seen as a specific form of extradition between the Member States of the EU.

The German proceedings for *international extradition* now consist of two stages.

Stage 1: The admissibility of European Arrest Warrants is certified by the High Regional Court (*Oberlandesgericht*).

Stage 2: If the High Regional Court has declared it being admissible, the responsible prosecutor, a State Attorney General (*Generalstaatsanwalt*), examines whether an EAW is to be granted; only the State Attorney General is empowered to grant a European Arrest Warrant and to have it executed.[12]

These decisions of granting European Arrest Warrants are now subject to appeal. The Second Act (§79 IRG new version) demands that the offices for prosecution need to name probable reasons for not-granting the European Arrest Warrant when asking for its admissibility in court. As a result, the probable reasons for not-granting European Arrest Warrants are considered by the High Regional Court when deciding about the admissibility. At the same time, the very provision which stated that the Prosecutor's Granting Decision was not reversible, was erased from the law (former §74 b IRG). Thus, the decision granting a European Arrest Warrant is now per se open to legal recourse as demanded by the German Constitution. Also, Granting Decisions can interfere with the (subjective) rights of the people. Conclusively, the High Regional Court now decides about the admissibility of European Arrest Warrants and about probable reasons not to grant them, as forwarded by the prosecution. And in addition, the High Regional Court decides about new reasons, which hinder *admissibility* and *grant*, as they are caused by a change of circumstances after the first decision (§33 IRG).

Furthermore, the new European Arrest Warrant Act installed a check routine for extraditions of German nationals (§§80(I) and 80(II) IRG). It complies with the requirements as stated by the Federal High Constitutional Court (complying with qualified proviso of legality) and with those of the European Union as stated in Article 5(3) and Article 4(6) FD. At the same time, the new law takes the right to family and marriage of Article 6 GG into account. As a result, German nationals can be extradited for prosecution, if the issuing Member State guarantees to offer the "*Back-Transfer*" for execution of sentences to Germany, and if the crime committed shows a decisive relation to the issuing Member State (§80 I No. 1 and 2 IRG *new*). Exceptionally, if such decisive relation cannot be proved, extradition is only admissible if the issuing Member State guarantees to offer the "Back-Transfer," if the crime shows no decisive relation to Germany, and if the crime is being punishable (as it or in translation) according to German law (§80(II) IRG).

[12] See Arndt Sinn & Liane Wörner, 'Germany', in: Adam Górski & Piotr Hofmañski (eds), *The European Arrest Warrant and its Implementation in the Member States of the European Union, Warszawa*: Wydawnictwo C.H. BECK, 2008, p. 258–259.

In the cases of *Extradition for prosecution* the new European Arrest Warrant Act installed procedural routine check for extraditions of German nationals (§§80(I) and 80(II) IRG). It complies with the requirements as stated by the Federal High Constitutional Court (complying with qualified proviso of legality) and with those of the European Union as stated in Article 5(3) and Article 4(6) FD. At the same time, the new law takes the right to family and marriage of Article 6 GG into account. As a result, German nationals can be extradited for prosecution, if the issuing Member State guarantees to offer the "*Back-Transfer*" for execution of sentences to Germany, and if the crime committed shows a decisive relation to the issuing Member State (§80 I No. 1 and 2 IRG *new*). Exceptionally, if such decisive relation cannot be proved, extradition is only admissible if the issuing Member State guarantees to offer the "Back-Transfer," if the crime shows no decisive relation to Germany, and if the crime is being punishable (as it or in translation) according to German law (§80 II IRG).

According to Germany's First and Second EAW Act, German nationals can be extradited for execution of sentences in principle if they affirmed to the extradition (§80(III) IRG). Due to a provision of the proceedings for extradition in International Assistance cases in general (§49(I)(3) IRG), they could not be back-transferred to Germany for execution if the sentenced crime was not punishable according to German criminal law. As a result, a German national was able to hinder the execution of sentences, if the crime was not punishable according to German law, simply by not consenting to his/her extradition. This directly controverts Article 4(6) FD. According to the Second European Arrest Warrant Act (§80(IV) IRG new version), whether or not the actual crime is punishable in Germany (according to §49(I)(3) IRG) is no longer considered. Indeed, the general renunciation of bilateral punishability, as a crime, is proportional and constitutional. Compared with the alternative – the national's extradition – the interference with the national's constitutional rights is of minor importance.

According to Germany's First and Second EAW Act, German nationals can be extradited for execution of sentences in principle if they affirmed to the extradition (§80 III IRG). Due to a provision of the proceedings for extradition in International Assistance cases in general (§49(I)(3) IRG), they could not be back-transferred to Germany for execution if the sentenced crime was not punishable according to German criminal law. As a result, a German national was able to hinder the execution of sentences, if the crime was not punishable according to German law, simply by not consenting to his/her extradition. This directly contradicts Article 4(6) FD. According to the Second European Arrest Warrant Act (§80(IV) IRG new version), whether or not the actual crime is punishable in Germany (according to §49(I)(3) IRG) is no longer considered. Indeed, the general renunciation of bilateral punishability as a crime is proportional and

constitutional. Compared with the alternative – the national's extradition – the interference with the national's constitutional rights is of minor importance.

When the affected person is an alien there is no longer a reason not to grant a European Arrest Warrant. The European Arrest Warrant Framework Decision only requires that certain non-nationals, especially in cases where they have their social hub in the extraditing Member State, must have rights comparable to national citizens (Article 5(3) and Article 4 No. 6 FD). This statement does not require a compulsory inadmissibility of extradition. Rather, it may invoke an option to not grant a European Arrest Warrant. Thus, aliens who can show that their social hub is in Germany by their place of residence, can only be extradited for prosecution if the requirements protecting German nationals (§80 I and II IRG) are fulfilled (§83 b II (a) IRG). Extradition for execution of sentences cannot be granted, if the alien does not consent or if his/her subjective right to be executed in Germany prevails (§83 II (b) IRG).

As part of another significant change, the Second European Arrest Warrant Act amended the former optional reason to dismiss granting a European Arrest Warrant in cases of lifelong sentences. The discussions in the law-making proceedings in Germany made clear that the extradition in cases of life sentences almost always interferes with the subjective rights of the affected person who were extradited to another member state to *execute sentencing*. They could only be back-transferred to Germany for execution or stay in Germany for those executions if the crime the person committed was punishable in both the issuing member state and Germany. The new provision allows extraditing German nationals, if they agree to be extradited, or rejecting the extradition, if Germany confirms to execute the sentence back in Germany. Article 4 No. 6 FD requires the possibility to either extradite nationals or at least to extradite them for prosecution and sentencing, but to execute back in the extraditing Member State (here: Germany). There is almost no scope of discretion. In order to thoroughly protect the affected person's subjective rights, the extradition in cases of life sentences is now configured as a compulsory requirement of proceedings of admissibility (Stage 1).

Finally, attention shall be directed to amendments of the simplified proceedings (§41 IRG). Changes of this provision were not due to the German Constitution, but to requirements of the European Arrest Warrant Framework Decision. The main goal of the Framework Decision was to simplify International proceedings for extradition within the European Union. Simplified proceedings allow extradition without the participation of the High Regional Court if the affected person – now according to the wording, the 'suspect' – consents to it, after officially being cautioned by a judge at the local court. Amendment was only seen as clarification.

Poland

In Poland[13], by a decision dated 27 April 2005, the Constitutional Tribunal deferred the effects of the partial annulment of the transposition law until 6 November 2006. The court had entertained certain doubts – as to whether surrendering a Polish citizen under the EAW falls within this constitutional ban. It has to be noted that during the drafting of Article 55, the possibility to provide for certain exceptions resulting from international agreements was debated at some length. Ultimately, the idea was dropped and the prohibition of extradition of Polish citizens was upheld in a categorical form. After having made amendments, Poland has surrendered its nationals since 7 November 2006 on condition that the offence for which surrender is requested was committed outside Poland and is an offence under Polish law.

The Netherlands

The Netherlands[14] agrees with the EAW on an abstract level. This State holds the view that the quandary has been solved in the FD itself, but this obviously does not terminate all problems. In Article 11 of the Dutch Act of Surrender, the priority of human rights is confirmed.

The execution of European Arrest Warrants is assigned to the District Court of Amsterdam, which serves as '*unus judex*'. The Court distinguishes between irreversible (or irreparable) and non irreversible violations. Furthermore, it is relevant whether the requested person has an effective remedy in the sense of Article 13 of the European Convention on Human Rights. With a view to speeding up proceedings, both the two-pronged decision making process, involving the Ministry of Justice, and appellate proceedings have been abolished. This development has made the District Court extremely conscious of its very high responsibility.

To highlight only two of the remaining problems:

– The Position of nationals and those aliens who are to be considered on the same par for the purpose of surrender. The Netherlands allows the extradition/surrender of its nationals, on the condition that they are allowed to return, in order to serve a foreign sentence in their home country (Article 6, s. 1 Act of Surrender). In that case, the rule of 'double criminality' still applies (because of the *nullum crimen* principle) and is re-introduced

[13] See Marian Grzybowski, 'Poland', in: Adam Górski & Piotr Hofmański (eds), *The European Arrest Warrant and its Implementation in the Member States of the European Union, Warszawa*: Wydawnictwo C.H. BECK, 2008, p. 319–332.

[14] See Harmen van der Wilt, 'The Netherlands', in: Adam Górski & Piotr Hofmański (eds), *The European Arrest Warrant and its Implementation in the Member States of the European Union, Warszawa*: Wydawnictwo C.H. BECK, 2008, p. 307–318.

through the back door. Article 6(5) equalizes aliens who possess a residence permit with Dutch nationals under two additional conditions.
- The relationship between surrender and human rights is a well known issue in extradition law. Should obligations stemming from a treaty on human rights prevail over obligations which ensue from an extradition treaty? On an abstract level, the quandary has been solved in the FD itself, but this obviously does not take care of all problems. In Article 11 of the Dutch Act of Surrender, the priority of human rights is confirmed (one may add: redundantly).

How should the Court decide in a concrete case? The issue has come to the fore, especially in case of undue delay. The District Court distinguishes between irreversible (or irreparable) and non irreversible violations. Furthermore, it is relevant whether the requested person has an effective remedy in the sense of Article 13 of the European Convention on Human Rights.

4. THE PROCEDURE

Substantial requirements

An EAW cannot be issued for all types of criminal acts. It can be issued by *the investigating state* for purposes of criminal prosecution in relation to acts punishable under domestic law of *the requested state* by a custodial sentence or detention order

- for a *maximum period of at least twelve months* (during the investigation, examining and trial stages, until the conviction is final) or
- for execution of a sentence or detention order of *at least four months* (Article 2(1) Framework Decision) (there is still a lack of clarity with regard to the four months: the sentence as it was given or the time that has still to be served).

Issuing the European Arrest Warrant

The European Arrest Warrant is now only a judicial decision delivered by a Member State for the arrest and surrender by another Member State of a requested person. In keeping with the underlying principles of mutual recognition, its objective is to allow the execution throughout the Union of decisions in criminal matters delivered by a judicial authority of a Member State. The issuing judicial authority may have recourse to points of contact within the European Judicial Network if s/he does not know who the competent executing

judicial authority is. Collecting the mandates coming from or destined for the State of execution within a central authority is still optional. The issuing judicial authority may in any case decide to identify the wanted person in the Schengen Information System.

The framework decision provides that the mandate be transmitted by any means. Consequently, where security conditions are guaranteed, it is possible to conceive of transmitting the mandate by e-mail. The mandate involves drafting a certificate that includes all relevant details. It is no longer necessary to forward a number of official documents to corroborate the request. The certificate must be translated into the official language of the State of execution.

The implementation of the EAW

Executing an Arrest Warrant includes taking the person into detention until the judicial authority of the State of execution has rendered a decision on his/her situation, namely, if there is a possibility of granting a measure of provisional freedom. The Framework Decision establishes that the authorities of the State of execution must inform the person detained:

– of the existence and content of the European Arrest Warrant
– of the possibility of consenting to being handed over to the authorities of the issuing State
– of the right to be assisted by a legal counsel and by an interpreter.

The judicial authority of the State of execution will make provisions for surrendering the person. It must verify that the necessary conditions for executing the mandate and for surrendering the person have been properly met. Communication between Member States is direct, *i.e.* from judge to judge. In contrast with the classic rules on extradition, the mechanism of the European Arrest Warrant abolishes the intervention of the diplomatic authorities, and even that of the Ministries of Justice.

Indeed, the abolition of all political intervention constitutes the main difference with extradition, a system where the executive power controls the procedure. It is the executive that takes a decision on the basis of political considerations as to the advisability of surrendering the extradited person.

The final decision on executing a European Arrest Warrant must be taken as quickly as possible: the framework decision provides for 60 days from the arrest of the wanted person. Here again, the mechanism differs significantly from that of extradition, which can take many years to fully execute.

The period of imprisonment the wanted person faces upon sentencing will be reduced by the issuing Member State by the amount of time that person spent in detention as a result of the enforcement of the European Arrest Warrant.

If a wanted person consents to the surrender, the procedure can be sped up. If this is the case, the final decision on the execution of the European Arrest Warrant is taken in 10 days. The maximum time limit between arresting the wanted person and the effective surrender of the person to the authorities in the issuing State is thereby reduced to 20 days. As regards cost, the Member State of execution bears the expenses incurred in its territory. All other expenses are borne by the issuing State.

Grounds for refusal of execution

The Framework Decision makes a distinction between compulsory and optional refusals. The framework decision provides that, in some cases, the authority in the State of execution has to refuse to surrender a person if:

- the case involves amnesty
- the person who is subject of the European Arrest Warrant cannot be criminally detained by virtue of his/her age
- a final judgment has already been pronounced based on the same facts against the wanted person in a Member State.
- The European Court has decided in a decision of 17 July 2008 (C 66/08) – in a case similar to that of the above mentioned Italian –that the defendant must not be surrendered in cases when s/he has settled down in one Member State and this state commits itself to execute the sentence on the basis of its national procedure law.

In other cases, the framework decision provides that the authority in the State of execution may raise objections to surrendering a person where:

- a certificate has not been produced or if the details on the certificate are incomplete or manifestly inaccurate
- the judicial authority of the State of execution either has decided not to start proceedings or has decided to terminate them, or a final judgment has been pronounced based on the same facts against the wanted person in a third country
- a non-EU State has already issued a final judgment against the wanted person for the same offence
- the time limit for prosecution has passed
- the wanted person is a national of or resident in the State of execution and the State of execution has already commenced proceedings against the wanted person for the same penalty. (This principle flows from the rule of non-extradition of nationals. The framework decision introduces a significant principle from positive law: *aut dedere, aut judicare, namely*, that the State who refuses to surrender the wanted person must execute a penalty.)

- there is no equivalent offence in the State of execution. (The Framework Decision establishes the principle of respect for double incrimination, the principle whereby the order can only be executed if the act is also a criminal offence in the State of execution. It nonetheless authorises an exception to this principle for 32 offences (enumerated in a "positive list"). This point was debated on numerous occasions by the Member States, which decided in the end not to support the option recommended by the Commission.).

5. THE IMPACT OF THE EAW ON PRE-TRIAL DETENTION

The European Arrest Warrant is influencing pre-trial detention in various ways. Positive impact of the EAW on pre-trial detention is mentioned in a Report of the Council of the European Union, dated on 28 May 2009.[15] The report finds that the practitioners who were interviewed in the member states (predominantly the police and prosecutors) have a very positive view of the EAW and its application and that "A very large majority of the authorities involved in the operation of the EAW are of the view that it has significant advantages compared with the traditional extradition system, and emphasise its benefits as a useful tool that speeds up the handling of cases while safeguarding individual rights."[16]

Although the evaluation exercise reveals that the provision of language-compliant EAWs within the strict deadlines imposed by some Member States has led to difficulties, it is nevertheless said that there is a significant shortening of the time limits for the surrender of the person should be mentioned as one of the most important added value of the new instrument. This is further underlined by the statistics which show that in the EU, a contested procedure for surrender *takes on average 43 days*. When a suspected or an already sentenced person agrees in a shortened procedure for surrender it *takes only 12 days on average*. National authorities are assuming the innovative nature of the EAW and are aware of the need to introduce a new judicial culture based on mutual trust, as a condition for the EAW system to deploy all its potential. Their willingness to see that the EAW system is effectively enforced is remarkable.

15 Council of the European Union, Brussels 28 May 2009, 8302/4/09 REV 4, p. 6.
16 Idem.

Number of issued European Arrest Warrants ('issued') and number of European Arrest Warrants resulting in the effective surrender of the person sought ('executed') from year 2005 to year 2009[17]

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	TOTAL
2005 *issued*			4	64		38	38	519	1914	29	121	44	44	500	42	42	1	373	975	1448	200		81	56	86	144	131	6894
2005 *executed*			0	19		10	12	54	162	6	57	3	10	69	24	23	0	30	73	112	38		10	14	37	10	63	836
2006 *issued*			168	52		42	53	450	1552	43		20	65	538	35	115	4	325	391	2421	102		67	111	69	137	129	6889
2006 *executed*			125	19		15	4	62	237	20		2	14	57	22	55	3	47	67	235	52		14	23	37	27	86	1223
2007 *issued*			435		1785	31	83	588	1028	35		20	97	316	44	373	3	403	495	3473	117	856	54	208	84	170	185	10883
2007 *executed*			66		506	14	16	59	345	14		4	16	60	15	84	1	17	47	434	45	235	8	71	43	22	99	2221
2008 *issued*			494	52	2149	46	119	623	1184	40		16	140	348	40	975	2		461	4829		2000	39	342	107	190		14196
2008 *executed*			141	26	624	22	10	93	400	13		3	22	68	22	205	1		28	617		448	11	81	44	40		2919
2009 *issued*	508		439	96	2433	46	116	489	1240	33		17	171	354	46	1038	7	530	292	4844	104	1900	27	485	129	263	220	15827
2009 *Executed*	73		67	51	777	21	19	99	420	16		3	40	84	26	149	2	0	37	1367	63	877	6	79	47	28	80	4431

[17] Source: European Commission, Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11 April 2011, COM(2011) 175 final, Annex I, p. 12.

The information gathered during the exercise shows (see the tables *infra*) that, in general, the EAW is operating efficiently. The basis for this conclusion is the increasing volume of requests, the percentage of them that result in effective surrender and the fact that the surrender deadlines are generally met. The improvement is even more striking when these variables are compared with those existing under the previous extradition regime. It appears, however, that there is still room for improvement. In that respect, one can envisage that the operation of the second generation Schengen Information System (SIS II) will significantly contribute to making the system more efficient, namely by helping to sort out some of the practical problems identified in the processing of EAWs.

The average time of surrender in cases where the person consented/did not consent to the surrender (time between the arrest and the decision on the surrender of the person sought) from year 2005 to year 2009[18]

	2005	2006	2007	2008	2009
Person did consent	14.7 days	14.2 days	17.1 days	16.5 days	16 days
Person did not consent	47.2 days	51 days	42.8 days	51.7 days	48.6 days
Percentage of 'consent surrenders'	51%	53%	55%	62%	54%

6. THE DRAWBACKS AND RISKS[19]

A working group under the leadership of professor Bernd Schünemann from Munich/Germany and professor Maria Kaiafa-Ghandi from the University of Thessaloniki pointed out the other side of the coin. On a conference in May 2006 in Thessaloniki, Greece, a group of law professors made a proposal for a complete European treaty on the regulation of trans-national criminal proceedings. They also made an appeal to the Commission, the European Council and the European Parliament, to recognize that there exist two fundamental problems pertaining to the European development of substantive criminal law.

First, on EU level, there is still a lack for a sufficient recognition of common basic principles of criminal law in the 27 member states: the aim of criminal law as an instrument of last resort (*ultima ratio* or *ultimum remedium principle*), the differences between the purpose and the height of penalties.

18 Source: Idem, p. 11.

19 Petter Asp, 'The European Arrest Warrant', in: Bernd Schünemann (ed.), *Ein Gesamtkonzept für die europäische Strafrechtspflege / A Programme for European Criminal Justice*, Köln: Carl Heymanns, 2006, p. 382.

Second, the substantial democratic deficit that characterises the EU procedure for adopting framework decisions and the need to enshrine basic rights on the EU level, make it unavoidable to conclude that national parliaments are not bound by the provisions of framework decisions. Every member state can change its domestic criminal law without consulting the other member states.

Kaiafa-Gbandi, who was a member of the working group, describes the main problem as follows: "The principle of mutual recognition makes criminal prosecution extraordinarily efficient by greatly simplifying judicial cooperation. One has to be aware that the principle of mutual recognition has a completely different function in the domain in which it originated. In economic law, the principle serves a broadening of citizens' economic freedom. In criminal law, in contrast, it is used as an instrument which allows Europe-wide encroachments on the civic freedoms guaranteed by the member States. […] Most of the relevant legal instruments provide for a standardised form of the decision sought to be recognized in order to simplify its recognition."[20]

The working group therefore designed a complete draft containing 35 Articles for trans-national Criminal Proceedings. In a Preamble they offer guiding principles, which can here be exposed only in extracts:

- Rejection of the principle of mutual recognition in its current form and its replacement with the model of the transnational procedural unity
- Binding regulation of power and early allocation of the proceedings to one member state as the investigating state, to avoid double prosecution
- That member state conducts the proceedings in accordance with its national substantive and procedural law, in strict compliance with its own rule of law, principles for pre-trial detention, and the principle of most preferential treatment for particularly burdensome measures, as well as a *general ordre public* proviso for coercive measures
- Protection of the interests of the defendant by way of the early involvement of a sort of "Eurodefence", as well as by the granting of rights of appeal to the defendant
- Universal recognition of the decisions made by the investigating state on the basis of theses provisions.

[20] Maria Kaifa-Gbandi, 'Recent Developments in Criminal Law in the EU and Rule-of-Law Deficits', in: Bernd Schünemann (ed.), *Ein Gesamtkonzept für die europäische Strafrechtspflege / A Programme for European Criminal Justice*, Köln: Carl Heymanns, 2006, p. 325.

The core underlying the EAW, production order and transfer request marks the contrast to Article 2 section 2 of the FD:

- Adherence to the double criminality requirement
- Requirement for European Grounds for arrest particularly with a European definition of flight risk; elimination of "stationary" custodial enforcement by the use of other (notably electronic) surveillance
- Allocation of powers of review to the investigating and the executing states
- Idea of the defendant-friendly "home-enforcement".

7. OUTLOOK

The discussion about the Treaty of Lisbon which has come in effect last year brought an increase of power to the European Parliament and therefore also brought a cautious change in the approach of the current problems about the EAW and pre-trial detention.

Based on several evaluation visits, on the individual evaluation reports of the Member States and the final report from 28 May 2009[21] we can see clearer now the varied interpretations of the current effects of the EAW, as the group from Thessaloniki had predicted it in 2006.[22] In the nearer future the EU with all its institutions has to bring the following different tracks together.

- From a prosecutor's perspective most EWAs go without any problem, but the problems arise in the stage of complicated cases for surrender. A major problem is the limited information about the details on each case. Judicial authorities should not use the EAW unless they can show that the individual case merits its use and they have already tried less stringent tools and not been successful with them.
- From a judge's perspective the number of EWAs has grown to such an extent and has related to minor cases (like shoplifting) that the executing member states incur huge costs of police time, court time, costs of providing legal representation to the arrested person plus the costs of interpreting that the average cost for enforcing an EAW to the point of surrender is € 25.000 per case. It is therefore necessary to come to an obligatory proportionality check in the issuing member state.
- From a defence lawyer's perspective there is still no balance in legal protection. Minimum standards for procedural rights must not only be set but also be applied in practice. Experts, defence lawyers included, should

21 Council of the European Union, Brussels 28 May 2009, 8302/4/09 REV 4.
22 Unofficial Report from the meeting of experts, Brussels, 5 November 2009.

discuss standards of European defence in EAW cases in permanent working groups.

– Ministries of Justice fear on one hand that the Framework Decision (FD) as legal basis for the EAW could loose its substance, if for example the proportionality test should come as an obligation in the way of amending the Framework decision. On the other hand from the Ministries perspective there are still different views on the gravity of offences and the applicable level of punishment. So it is very difficult to fit in rigid rules what proportionality is and what factors (circumstances of the crime, the accused person´s conduct and the height of the offence) the issuing Member State has to take into account when deciding if the EAW is appropriate or not.

The fourth Report from 28 May 2009[23] contains many practical recommendations predominantly to the Member States but also to the Council and their members:

– The evaluation of the practice in several Member States has brought the knowledge that there is a need for requirement of proportionality. Basically the proportionality test was an additional check of whether or not the requested threshold is met. But the idea of proportionality has several aspects, most important are the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective sought by less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.
– The experts make a fundamental request to some Member States to assure that the procedure of the EAW is governed in all respects by a judicial authority only. There are still non-judicial central – that means: political – authorities who continue to play a dominant role in cardinal aspects of the surrender procedure far beyond the administrative tasks assigned in the Framework Decision.
– Although nearly all the Member States have incorporated specific provisions to guaranty direct contacts between the judicial authorities involved in the case, many EAWs must be channelled through the central authorities. This means that necessary and additional information is communicated via police channels or central authorities. Such practice may hamper the development of a real European judicial culture based on the dialogue between judicial authorities working on the case.
– In the majority of Member States a faxed copy of the EAW suffices as a basis for deciding on temporary detention and starting the analysis of the case.

[23] Council of the European Union, Brussels 28 May 2009, 8302/4/09 REV 4.

Within this group of countries there is a significant number that require the original EAW (or a certified copy) for a decision on surrender. There is also a number in which EAW proceedings are not initiated unless EAW is available. Acceptance of emailed EAWs appears to be rather exceptional. That means prolongation of detention.

- The evaluation reveals that the provision of language-compliant EAWs within the strict deadlines imposed by some Member States led to difficulties, especially when combined with the requirement to serve the originals. The experts give the recommendation of setting manageable time limits and to have a limited number of vehicular languages identified for issuing EAWs and supplying supplementary information.
- Not less important is the operation of the speciality rule in practice. Problems originate manly deficiencies in the flow of information and the absence of mechanisms to check the conditions of surrender in good time, especially in those cases where there is more than one case.
- Last but not least the findings put forward that there is much room for systematic training on EAW procedure and languages, not only for judges, prosecutors and judicial staff but also for defence lawyers.

The Report from 5 November 2009[24] of the Experts special meeting on proportionality encourages the judicial authorities to use alternatives instead of issuing an EAW:

- Using less constraining instruments of mutual legal assistance where possible
- Using videoconferencing for suspects
- Obtaining the presence of suspects at the trial via other means such as a European Summons Order
- Using the Schengen Information System to establish the place of residence of a suspect
- Using a European Supervision Order
- Using a future European Evidence Warrant
- To amend the part in the handbook about proportionality
- More activity from the executive and issuing authorities to find solutions; *e.g.* a judge could hear the opinion of a fellow judge in another Member State before deciding.

On 30 November 2009 the Council of the European Union adopted a resolution on a roadmap for strengthening procedural rights of suspected or accused

[24] Meeting of Experts, Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant. The issue of proportionality, Brussels, 5 November 2009, pp. 15 (not officially published).

persons in criminal proceedings.[25] In the resolution several important findings are made, such as:

- Recent studies show that there is wide support among experts for European Union action on procedural rights, through legislation and other measures, and that there is a need for enhanced mutual trust between the judicial authorities in the Member States.
- These sentiments are echoed by the European Parliament. In its Communication for the Stockholm programme the European Commission observes that strengthening the rights of defence is vital in order to maintain mutual trust between the Member States and public confidence in the European Union.
- Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual.
- Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work, or live in the European Union.

Annexed to the Resolution is a more precise "Roadmap for strengthening procedural rights of suspected or accuse persons in criminal proceedings."[26] This Annex formulates several measures (A to F).

A. There is a huge lack in the field of Translation and Interpretation. The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

B. There is deficit on Information on Rights and Information about the Charges. A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, *e.g.* by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him/her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his/her defence, it being understood that this should not prejudice the due course of the criminal proceedings.

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25 OJ EU 4.12.2009, C 295/1.
26 Idem, see Annex.

C. The defendants must have sufficient Legal Advice and Legal Aid. The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.

D. There is a failing of Communication with Relatives, Employers and Consular Authorities. A suspected or accused person who is deprived of his/her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his/her liberty in a State other than his/her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

E. There is a need of Special Safeguards for Suspected or Accused Persons who are Vulnerable.

F. The Roadmap presses the need for a Green Paper on pre-trial detention, because the time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European standards. Appropriate measures in this context should be examined in a Green Paper. Literature already offers an important basis to create such Green Book. Particularly noteworthy in this respect is A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, which contains reports on all EU Member States. The discussion about pre-trial detention in Europe has started in a new stage.

8. FINALLY

Hopefully the history about the EU discussion concerning the European Arrest Warrant and its influence on the pre-trial detention policy may be one day taken into consideration outside Europe. Both the EAWs successes and drawbacks as regards pre-trial detention might be instructive in this respect.

PART THREE
NATIONAL REPORTS

3ème PARTIE
RAPPORTS NATIONAUX

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PRE-TRIAL DETENTION IN THE ARGENTINE REPUBLIC

Julio Enrique Aparicio & Roberto Patricio Ortenzi*

I. INTRODUCTION

Given the federal, republican, representative system of government adopted by the Argentine Republic under its Constitution, the enactment of criminal procedural rules lies within the powers of the provinces, which, in exercising such power, are entitled to pass their own codes of procedure, including the criminal code. For time and length reasons, this report will refer only to the federal jurisdiction, to the jurisdiction of the City of Buenos Aires and to the jurisdiction of the Province of Buenos Aires; there are no considerable differences in the way coercive measures involving deprivation of liberty have been regulated in the rest of the provinces.

For a better understanding hereof, it is worth explaining that in Argentina, as regards the enforcement of substantive rules – in this case the Criminal Code, which applies to the whole country along with specific criminal rules – there are different jurisdictions: the federal jurisdiction, the jurisdiction of the City of Buenos Aires and the jurisdiction pertaining to each province. Above them all there is the Supreme Court of Justice of the Argentine Republic. To put it briefly, the *federal jurisdiction* covers those crimes considered to be of federal nature, regardless of the place of the Argentine territory where such crimes have been committed, for concerning the Nation (for example, forgery of currency, crimes against the Constitution, drug smuggling, gathering of arms and war munitions, among others); the *jurisdiction of the City of Buenos Aires* covers those crimes committed within the territory of the City of Buenos Aires, and the *provincial jurisdiction* covers the crimes committed within the territory of each province (that is, in the provinces of Buenos Aires, Córdoba, Mendoza, Santa Fe, Tucumán, etcetera). Hereinafter, the Federal Code of Criminal Procedure, which applies to both the federal jurisdiction and to the jurisdiction of the City of

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Buenos Aires, will be referred to as "FCCP", and the Code of Criminal Procedure of the Province of Buenos Aires will be referred to as "BACCP".

It is relevant to state that this report shall only refer to those persons considered of age pursuant to criminal rules (that is, older than 18) and what shall be herein understood by *defendant*: within a criminal procedure, a person becomes a defendant with the sole statement that such person "has been involved" in any way, in a criminal action. However, a mere report or criminal complaint concerning the action are not enough; there shall be, in addition, a judicial act entailing the proper commencement of the preliminary investigation (in the case of the federal jurisdiction and of the jurisdiction of the City of Buenos Aires) or of the preparatory criminal investigation (in the case of the jurisdiction of the Province of Buenos Aires), whether on the law enforcement officials' (police) or on the prosecutor's initiative.

Four judgments of the Argentine Supreme Court of Justice will be succinctly mentioned – so as not to exceed the extension limit set for this report –, in the section concerning pre-sentence coercive measures. As for scholars, among the several Argentine authors, the following can be specially brought up (without specifying their works for the brevity reasons already explained): Eugenio Zaffaroni, Alejandro C. Carrió, Gregorio Badeni, Enrique Clariá Olmedo, Federico Domínguez, Julio Virgolini, Ciro Annicchiarico, Osvaldo Gozaíni.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

The Argentine Republic is member of the several international organisations. These include the United Nations (UN)[1] and the Organization for American States (OAS).[2] Argentina is furthermore a member of, for example, the International Penal and Penitentiary Foundation,[3] the Financial Action Task Force (FATF),[4] GAFISUD,[5] and the Inter-American Children's Institute.[6]

1 Argentina is one of the UNO 51 founding members in San Francisco, United States of America, on October 24, 1945.
2 Argentina is among the 21 countries which gave birth to the OAS in Bogotá, Colombia, on April 30, 1948.
3 Argentina was part of the International Penal and Penitentiary Commission and was one of the countries which automatically became part of the IPPF, on December 1, 1950.
4 Argentina is one of the 29 members of the FATF. In South America there are only 2 members. It was created in 1989 by the G7.
5 Argentina is among its founding members. It was created on December 8, 2000, in Cartagena de Indias, Colombia, by ten South American countries.
6 Formed prior to the OAS, to which it now belongs. Argentina was one of its founding members, on June 9, 1927.

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Argentina is a contracting party to the following international human rights treaties and conventions: the International Covenant on Civil and Political Rights and its Optional Protocol,[7] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[8] the Convention on the Rights of the Child,[9] the American Convention on Human Rights (Pact of San José, Costa Rica),[10] and the Inter-American Children's Institute[11] (formed prior to the OAS, to which it now belongs).

II.2. INCORPORATION OF TREATIES AND CONVENTIONS INTO THE ARGENTINE DOMESTIC LEGAL ORDER

Sections 31, and 75, subsection 22, of the Argentine Constitution – pursuant to the 1994 reform – establish the status in the Argentine legal order of those international treaties specifically mentioned and the steps to be followed in connection with future treaties. Pursuant to section 31, international treaties are established as the highest law of the Nation, as it states that "this Constitution, the laws of the Nation enacted by Congress, and treaties with foreign countries shall be the highest law of the Nation; and the authorities of each province shall be bound thereby […]". In turn, section 75, subsection 22, lists the treaties and concordats which are granted such highest status. These are: the American Declaration of the Rights and Duties of Men; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child.

[7] The Argentine Republic approved this pact by means of Law No. 23313, passed on April 17, 1986; enacted on May 6, 1986; and published in the official gazette on May 13, 1986.

[8] The Argentine Republic approved this convention by means of Law No. 23338, passed on July 30, 1986; enacted on August 19, 1986; and published in the official gazette on February 26, 1987.

[9] The Argentine Republic approved this convention by means of Law No. 23849, passed on September 27, 1990; enacted on October 16, 1990; and published in the official gazette on October 22, 1990.

[10] The Argentine Republic approved this convention by means of Law No. 23054, passed on March 1, 1984; enacted on March 19, 1984; and published in the official gazette on March 27, 1984.

[11] Argentina was one of its founding members, on June 9, 1927.

Such treaties, as approved, are stated to have constitutional status, not to repeal any section of the first part of the Constitution and to be deemed complementary to the rights and safeguards enshrined in the Constitution. Furthermore, they shall only be denounced, if applicable, by the National Executive Branch, after approval by two-thirds of all the members of Congress (Chamber of Deputies and Senate). As regards the rest of the treaties and conventions on human rights, the final part of the section sets forth that following approval by Congress, they shall require the vote of two-thirds of all the members of the Chamber of Deputies and of the Senate to have constitutional status.

II.3. RESERVATIONS ON PRE-TRIAL DETENTION

Mainly in section 7 of the American Convention on Human Rights (Pact of San José, Costa Rica), which deals with personal liberty, and which – as already mentioned – has been incorporated to the Argentine legal order with constitutional status, in section 75, subsection 22 of the Argentine Constitution. There are also reservations in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, incorporated to the Argentine legal order with the same status.

II.4. ENFORCEMENT OF HUMAN RIGHTS

Given that the Universal Declaration of Human Rights has constitutional status, human rights are protected through national and provincial laws, which, in that regard, shall comply with the Argentine Constitution, and are enforced by means of the decisions rendered by the federal courts and the courts in and for the City of Buenos Aires and the Province of Buenos Aires, in each particular case brought to them.

II.5. CITIZENS' RIGHT TO APPEAL TO INTERNATIONAL BODIES

Most importantly, cases can be referred to Inter-American Court of Human Rights by the Inter-American Commission on Human Rights, with headquarters in Washington, United States of America. This Court was established in 1959 and its current structure is regulated by – among other documents – the American Convention on Human Rights, the statute and regulations of which (including its powers and proceedings) have been approved in 1979 and 1980, respectively. One of its main functions is that of receiving complaints or applications from people, groups of people, or organisations alleging violations

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of human rights committed in state parties to the OAS. The complaint or application must be lodged with the Commission, which shall try to make the parties reach an agreement. Failing so, it shall be evaluated whether it is possible to refer the case to the Inter-American Court of Human Rights, and, if so, the Commission shall carry out the relevant presentation.

II.6. NATIONAL HUMAN RIGHTS FRAMEWORK

The Argentine Constitution, in section 18, under chapter I – Declarations, Rights and Guarantees –, establishes that "No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried. Nobody may be compelled to testify against himself, nor be arrested except by virtue of a written warrant issued by a competent authority. The defence by trial of persons and rights may not be violated. The domicile may not be violated, as well as the written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed. Death penalty for political causes, any kind of tortures and whipping, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measure taken with the pretext of precaution which may lead to mortify them beyond the demands of security, shall render liable the judge who authorizes it".

Thus, the Argentine Constitution sets forth the guarantees of due process, which shall be respected in order to deprive a person from his liberty, as well as the conditions which must be met by the facilities where detainees – whether pending trial or sentenced – are confined. Further, procedural rules both at the national and provincial level provide the necessary tools to protect human rights.

Several decisions have been entered by the Argentine Supreme Court of Justice regarding the above-mentioned section. Among them, there is the case *Daray* (CSJN 317:1985; LL 1995-II-349), in which it was pointed out, among other things, that "every criminal proceedings must be carried out in accordance with a pre-existing law which at the same time empowers and restricts the State in exercising procedural coercion" (whereas clause No. 11).

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

First of all, it should be pointed out that, under the system of constitutional safeguards established by the Argentine Constitution, liberty shall be the general

rule through the course of the criminal proceedings and any restriction thereof shall only take place in exceptional circumstances and during a reasonable term, after which the defendant shall be released under any form of guarantee, such as personal recognisance.

Pursuant to procedural rules, the length of the proceedings shall be reasonable and shall not involve undue delays; whether the length is reasonable depends on the complexity of the case, on the number of people involved in the crime under investigation and on the fact that delays are not attributable to the judicial body, to the Office of the Public Prosecutor or to the parties' lawyers. The proceedings shall never exceed three years. Such term having elapsed, if the defendant is still deprived of liberty, the judge shall order the termination of the coercive measure and that the defendant remains in liberty during pendency of the proceedings.

The federal and provincial procedural criminal codes provide the legal framework which makes it possible to exercise the right of defence at trial, enshrined by the Argentine Constitution and by the provincial constitutions.

In the Argentine criminal procedural legal system there are various forms of deprivation of liberty which may be imposed on suspects of crimes, during the proceedings and prior to a final sentence depriving them of liberty. What follows is a succinct explanation thereof.

III.1. ARREST

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It takes place when, at the first stage of the investigation of an action in which several people are involved, it is not possible to identify the responsible parties and the witnesses, and delaying action appears to be detrimental to the proper development of the investigation. Were it to be indispensable, it may be ordered, with respect to the people involved in the action, by the judge, in the federal jurisdiction and in the jurisdiction of the City of Buenos Aires, and by the prosecutor, in the jurisdiction of the Province of Buenos Aires, and in the latter case, the order shall be promptly reviewed by the pre-trial investigation judge. This measure shall be applied during the term strictly necessary to take statements, which, in the federal jurisdiction and in the jurisdiction of the City of Buenos Aires, shall not exceed eight hours, except in extraordinary circumstances, in which case such term may be extended for eight additional hours and, in the Province of Buenos Aires, shall not exceed twelve hours, and may be extended for six extra hours by a well-founded decision by the judge (pursuant to sections 281 and 149 of the FCCP and BACCP, respectively).

III.2. APPREHENSION

Within the Province of Buenos Aires (as per section 153 of the BACCP), this measure shall be applied by law enforcement officials, on their own initiative or at the request of the prosecutor, whenever:

a. The person is caught *in flagrante delicto* and the crime in question is one against public order which carries a penalty of deprivation of liberty; a person is said to be caught *in flagrante delicto* when he is caught in the very act of committing the crime, immediately afterwards, while being pursued by the police, the victim or a citizen, or when he has in his possession objects which give rise to suspicion of the commission of a crime (pursuant to sections 154 of the BACCP, and 285 of the FCCP).
b. The person, being duly deprived of liberty, escapes.
c. Detention is applicable but there is no written order by the judge with the relevant jurisdiction and waiting for such an order implies a risk that the suspect may flee.

In the Province of Buenos Aires, any law enforcement officer who has carried out an apprehension shall report so to the pre-trial investigation judge and to the prosecutor and shall promptly make the suspect appear before the relevant prosecutor (pursuant to sections 155 and 296 of the BACCP). Apprehension by a private individual is also admitted in the cases of *in flagrante delicto* and escape by a person who is duly deprived of liberty. In such cases, the individual shall promptly turn the person over to the relevant police or judicial authority (as per section 156 of the BACCP).

III.3. WARRANTLESS ARREST

It applies both to the federal jurisdiction and to the jurisdiction of the City of Buenos Aires. It is a coercive measure similar to apprehension. Under section 284 of the FCCP, it may be applied by law enforcement officers, even without a warrant, in the same situations as apprehension. The law enforcement officer who has carried out a warrantless arrest shall promptly make the suspect appear before the relevant judicial authority, within a term not to exceed six hours (as per section 286 of the FCCP). Warrantless arrest by a private individual is also admitted in the cases of *in flagrante delicto* and escape by a person who is duly deprived of liberty. In such cases, the individual shall promptly turn the person over to the relevant police or judicial authority (as per section 287 of the FCCP).

III.4. DETENTION

This coercive measure may be applied in the federal jurisdiction and in the jurisdiction of the City of Buenos Aires. The judge may order it, by a well-founded decision, when the crime in question carries a penalty of deprivation of liberty and it is impossible to apply a measure other than that, and when the requirements to take the pre-trial statement to the suspect have been met, that is to say, when there are sufficient grounds to believe that the suspect may have committed the crime. As a general rule, the warrant shall be written; however, in the event of extreme urgency, the judge may issue it by oral or telegraphic means, which circumstance shall be recorded (pursuant to section 283 of the FCCP). The judge shall render a decision regarding the suspect's situation within ten days as of the pre-trial statement by the suspect. This coercive measure is aimed at ensuring that the final penalty will be served and, therefore, that the intervention of justice will not turn out to be ineffective.

In the jurisdiction of the Province of Buenos Aires, this coercive measure may be applied (pursuant to section 151 of the BACCP) in the same cases provided for in the above-mentioned rules; however, in the Province of Buenos Aires, the warrant shall only be issued at the request of the prosecutor and the pre-trial investigation judge shall issue it by a written and well-founded decision, should he deem it appropriate, except in the event of urgency, in which case it may be issued by other technical means.

The fact that it has been reported that a person has committed a crime is not enough for that person to be detained. He shall not be detained, either, if the crime he is being accused of carries a penalty which does not exceed, in average (of the minimum and the maximum provided for such crime) three years of deprivation of liberty or, in the case of joinder of crimes, none of the crimes exceeds such amount, and if based on the characteristics and personal background of the suspect it appears that he may be entitled to conditional release.

Concerning detention in the street, in the case *Daray* it was determined – among other things – that in order for a detention to be appropriate, "it is necessary to have strong evidence of guilt," and that a detention "for inquiring into somebody's criminal history carried out by the police does not constitute a blanket authorization to detain any citizen at the police authorities' will," which criteria have been followed in several lower courts' decisions.

III.5. PREVENTIVE DETENTION

As in the case of the above explained coercive measures, preventive detention functions, as well, as a precautionary measure to ensure the completion of the

investigation and to prevent a possible sentence of deprivation of liberty from becoming futile. Given that in this case, in comparison with the prior ones, the restriction to personal liberty is greater, the burden of ensuring the lesser harm possible is increased, especially regarding length, in accordance with the presumption of innocence which applies along the whole criminal proceedings, up to the final sentence.

In the federal jurisdiction and in the jurisdiction of the City of Buenos Aires, under sections 312 and 319 of the FCCP, the judge shall order the preventive detention of the defendant when entering the formal accusation if: a. The crime – or joinder of crimes – in question carries a penalty of deprivation of liberty and the judge deems, *prima facie*, that conditional release shall not pertain; b. In spite of conditional release being applicable, release from prison is not deemed to be appropriate on the basis of a presumption of non-appearance in the proceedings or action to prejudice the investigation into the crime by the defendant. Such presumption shall derive from an objective and provisional assessment of the characteristics of the crime, the chances of recidivism, the personal characteristics of the defendant, or the fact of him having been released from prison in prior proceedings. Preventive detention shall be ordered by the judge, except that he confirmed the conditional release already granted.

The formal accusation (which is an unavoidable requirement for ordering preventive detention) shall be issued by the judge within the term of ten days as of the pre-trial statement (when the defendant is entitled to raise his defence or to refuse to make any statement, which shall not imply any kind of presumption to his detriment), as long as there are sufficient elements to deem that there has been a crime and that the accused may have been involved in the perpetration thereof (according to section 306 of the FCCP).

In the Province of Buenos Aires, as opposed to the federal jurisdiction and to the jurisdiction of the City of Buenos Aires, the formal accusation does not constitute a prerequisite for preventive detention. Therefore, pursuant to section 157 of the BACCP, detention will turn into preventive detention whenever the following requirements come together: there are sufficient elements to believe that the crime has been committed; the defendant has been asked to make a statement, pursuant to section 308 (before the judge or prosecutor) (notwithstanding whether he actually made the statement or refused to do so); there are sufficient elements or clear signs to believe that the defendant may be a criminally-responsible perpetrator of the crime or contributor thereto; and there are clear signs to presume non-appearance in the proceedings or action to prejudice the investigation into the crime, which may be inferred from an objective and provisional assessment of the characteristics of the crime, from the personal characteristics of the defendant, from the chances of recidivism for

intentional crimes, or from the fact of the defendant having been released from prison in prior proceedings.

The risk of non-appearance in the proceedings can be inferred, among other possibilities, from the fact that the defendant has not established a place of residence in the country, from the seriousness of the possible penalty, from the seriousness of the repairable damage, from the behaviour of the defendant in the proceedings in question or in prior ones, etcetera. Regarding the risk of action to prejudice the investigation into the crime, it shall be taken into account whether there is founded suspicion that the defendant will destroy, hide, eliminate or forge evidence; will exert influence on other people accused of the same crime, on witnesses, or on experts so that they do not declare the truth or behave wrongfully or reluctantly; or will induce others to engage in such a behaviour.

Pursuant to section 158 of the BACCP, the decision ordering the preventive detention shall be entered by the pre-trial investigation judge within the fifth day as of the request of the prosecutor filed within a term of fifteen days, which may be extended for another fifteen days, as of the date when the detention became effective, and such decision shall include the following information: a. Evidence showing that there has been a crime and that the defendant was the perpetrator thereof or was otherwise involved in the perpetration thereof; b. The relevant part of the statement of the defendant, in the event that it has been taken into account; c. Brief mention of the content of the testimony of witnesses, or of experts' reports, if any; d. Other means of evidence, if any.

When it comes to limitations to preventive detention, in the case *Bramajo, Hernán J. s/ Recurso de hecho* (Argentine Supreme Court of Justice; September 12, 1996) it has been said, in the 12th whereas clause, that "The fact that Law No. 24390 sets terms within which liberty under a guarantee is possible does not mean that it is in contradiction to section 7, subsection 5, of the American Convention on Human Rights, given that the Commission does not forbid states parties from setting terms of length of detention without a sentence, but the application thereof without taking into account other circumstances. Thus, in the report of case 10037 of Argentina, the Commission said that '[…] state parties are not bound (by the Convention) to set a valid term for all cases, regardless of the circumstances […], so the concept of *reasonable term* is subject to the evaluation of the seriousness of the crime, for the purposes of determining whether the detention has ceased to be reasonable.'"

III.6. HABEAS CORPUS

The Argentine Constitution provides for the *habeas corpus* in the last paragraph of section 43, under which any person may file such proceedings whenever the right harmed, limited, altered or threatened involves physical liberty, or in the

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event of an unlawful worsening of the form of detention or conditions thereof, or of forced disappearance of people. *Habeas corpus* proceedings may be instituted by the party concerned or by any other person on the former's behalf, and the judge shall promptly render a decision, even under state of siege. The procedural rules of each jurisdiction provide for the procedure to be followed in order to bring this action in the jurisdiction in question. Therefore, *habeas corpus* operates in Argentina as a device to protect the right to personal liberty, to put an end to the unlawful worsening of detention conditions, and to find people who have been made to disappear by means of force.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

People under arrest, apprehended people and warrantless-arrested people are kept at police facilities. Detention also takes place at police facilities. However, defendants under preventive detention are kept, both in the federal jurisdiction and in the jurisdiction of the City of Buenos Aires, in the facilities of the Federal Penitentiary Service, or in provincial facilities when there are not federal facilities in the area. In the Province of Buenos Aires, part of the preventive detention is nevertheless actually served in police facilities and, later on, the defendant is taken to penitentiaries within the Province. In the Penitentiary Service of the Province of Buenos Aires there already exist premises specifically fitted to accommodate defendants on preventive detention, and there are more under construction. Defendants under preventive detention, except in the case that they are under home detention, shall be accommodated separately from sentenced prisoners (as per section 165 of the BACCP); however, this rarely happens in practice, since both groups are kept in the same facilities, though held in different areas. Defendants shall be separated according to sex, age, education level, background, and nature of the crime they have been accused of and they may obtain, on their account, any material comforts as long as they are not in contradiction with the penitentiary system, as well as medical assistance, regardless of the fact that they shall be entitled to free medical care within the facilities where they are kept. They are also entitled to receive regular intimate visits, regardless of their sex, pursuant to the relevant regulations, and to use means of correspondence, as permitted by law. In the event of death or serious illness of a close relative of the defendant, the judge may allow the latter, by means of a well-founded decision, to leave the prison facilities guarded by the relevant police custody and during the term deemed convenient, so that he may fulfil his moral duties (as per section 313 of the FCCP).

Preventive detention may also take place at the defendant's place of residence (home detention), if the defendant meets the requirements set by the Criminal Code for this form of preventive detention, that is, in the event that the penalty for the crime in question does not exceed six-month prison and the defendant is a decent woman or, regardless of sex, older than sixty (pursuant to sections 314 of the FCCP, and 10 of the Criminal Code). Furthermore, pursuant to section 33 of the Law on the Execution of Penalties of Deprivation of Liberty (Law No. 24660), people older than 70 or who are suffering from a terminal disease at its final stage may be allowed to remain under home detention, by a decision of the judge with relevant jurisdiction, upon request by a relative, a person or an institution willing to undertake the custody of the defendant, and there being a medical, psychological and social report duly justifying such situation. Such section shall apply to those who are under preventive detention pursuant to section 11 of that same law. The judge may also order that preventive detention be served at the detainee's domicile, in the cases of sick people who cannot undergo their medical treatment in prison, disabled people, pregnant women, and mothers with children younger than five or who have a disabled person under their charge.

In the case *Verbitsky*, on the situation of the prisons in the Province of Buenos Aires, (appeal filed by Centro de Estudios Legales y Sociales – CELS –, represented by Horacio Verbitsky, legal representation by attorney-in-law Rodrigo Diego Borda, appealed decision rendered by the Supreme Court of Justice in and for the Province of Buenos Aires, case previously heard by the Court of Review [Tribunal de Casación], Clerk's Office No. III in and for the Province of Buenos Aires), the Argentine Supreme Court of Justice stated that the United Nations Minimum Rules for the Treatment of Prisoners, adopted by Law No. 24660, set the basic guidelines to which the whole detention must conform. The Argentine Supreme Court of Justice further decided that the Supreme Court of Justice in and for the Province of Buenos Aires, through the judges with competent jurisdiction, put an end, within a term of 60 days, to detention of minors and sick people in police stations; that the Supreme Court of Justice in and for the Province of Buenos Aires and all courts of the province, within the scope of their competence and with the relevant urgency, put an end to any situation of worsening of detention implying cruel, inhuman, degrading treatment, or any other kind of treatment liable to carrying international liability for the federal State; that the Executive Branch of the Province of Buenos Aires, through the detentions enforcement authority, submit to the relevant judges, within a term of 30 days, a detailed report stating the specific conditions in which detention is being executed (characteristics of cell, number of beds, hygiene conditions, access to health services, etc.), so that they can properly appraise whether it is necessary for the detention to continue, or whether

precautionary measures or lesser forms of execution of sentence should be applied. Furthermore, it was decided that notice of any significant change in the situation informed shall be given within five days; every 60 days, the Executive Branch of the Province of Buenos Aires, shall inform the Court on the measures adopted for improving the situation of the detained persons throughout the whole province; it urged the Executive and Legislative Branches of the Province of Buenos Aires to adapt their rules of criminal procedure regarding preventive detention and release from prison, and their legislation on criminal and penitentiary execution, to constitutional and international standards; it entrusted the Executive Branch of the Province of Buenos Aires with convening, through the Ministry of Justice, a round-table to which the plaintiff and the remaining organisations taking part as *amicus curie* should be invited – notwithstanding that other sectors of the civil society could also be invited – and having to report to the Court, every 60 days, on any progress.

Defendants who are deprived of liberty prior to final sentence (and after it) and who do not understand Spanish shall always be entitled to be assisted by an interpreter of their own language. Concerning accommodation of defendants who are deprived of liberty, the specific facilities where they are kept (police facilities or penitentiaries) will be pointed out when dealing with each particular form of deprivation of liberty. The different facilities where persons deprived of liberty are kept have their own regulations which set out the rules concerning the defendant's rights – mostly applied at penitentiaries – among which there are the following: right to education; to health care; to have contact with the outside world by means of newspapers, magazines, radio, television and telephone; and to wear his own clothes. As regards the defence of the rights of the defendant, he shall be entitled to be represented by any registered lawyer of his choice or by the Public Defender.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

There are various alternatives to preventive detention. In the Province of Buenos Aires, the pre-trial investigation judge, who is entitled to set such conditions as he deems relevant, decides in which way the preventive detention shall be carried out. In order for alternatives to preventive detention to apply, the following requirements shall be met: the defendant shall be older than 70, suffer from a terminal disease at its final stage, be a pregnant woman or be a mother of children younger than 5, and it shall be reasonably possible to prevent the risk of non-appearance or of action to prejudice the investigation, by means of a measure less detrimental to the defendant or of any technique or electronic or computerized system which permits controlling that the limitations on liberty

are not exceeded. Therefore, it applies to all the cases dealt with in section 10 of the Criminal Code. The defendant shall abide by the restrictions imposed on him concerning housing or area, as well as any other restriction deemed necessary. The defendant shall be given due notice of any such restriction and, also, of the fact that failure to comply therewith shall bring about termination of the alternative for preventive detention (section 159 BACCP).

Forms: Section 160 of the BACCP deals with the condition(s) under which an alternative to preventive detention may apply. However, it is not a close list, which means that there may be other conditions, at the judge's discretion. Therefore, depending on the circumstances of the case, the defendant may be released subject to one or several of the following conditions: a. The undertaking to remain under the custody of a person or institution that shall regularly report to the relevant authority; b. The undertaking to appear regularly before the relevant authority; c. The prohibition of leaving certain area, of attending certain places, or of communicating with certain people; d. A bond given by the defendant or by a third party; e. Personal recognisance to appear in the criminal proceedings, if that was enough or if another alternative was impossible; f. Should the proceedings be concerned with a crime provided for in Law No. 23184 (that is, crimes connected with sport activities), or any other crime designated in the Criminal Code which occurred because of or during a sports show, prohibition of attending any kind of sport shows of the same nature. This measure shall apply within a range of 500 meters around the arena or premises where the game took place, prior to, during, and following the game.

Under section 163 of the BACCP, which states that coercive measures may be lessen in the same cases provided for in the above-mentioned section 159 (defendant older than 70, suffering from a terminal disease at its final stage, pregnant or mother of children younger than five, and as long as the risk of non-appearance or of action to prejudice the investigation could be reasonably prevented), the judge may – even on his own initiative – lessen the effects of the coercive measure ordered, as long as that does not imply the failure of the purpose sought by the measure.

However, section 163 further establishes that apart from the cases included in section 159 – which have already been mentioned –, the coercive measure may be lessen as an exception, after the prosecutor has been given notice, when on the basis of an objective and provisional assessment of the characteristics of the crime, of the personal characteristics of the defendant, or of any other relevant circumstances, the presumption of non-appearance or of action to prejudice the investigation could be reasonably prevented by means of a measure less detrimental to the defendant. The decision ordering or denying the lessening may be appealed, but the lessening of the coercive measure shall become effective when the decision ordering it becomes final.

If it should be justified and the defendant should consent to it, the judge may order the home detention under the specified custody; or the imprisonment with permission to leave daily for working purposes, and/or permission to leave regularly for family reasons, under the custody of a person or institution that expressly undertakes to be responsible and to regularly submit reports with the relevant authority; or the entrance in an educational or therapeutic institution, whether public or private, which shall contribute to the improvement of the defendant.

VI. CONCLUSION

Even though it is true that the Argentine Constitution and the laws regulating the exercise of rights pertaining to the criminal sphere have a legal structure which tends to the integral protection of the rights of both perpetrators and victims, it is also true that abiding by the law proves difficult because of budgetary reasons, building infrastructure and insufficiency of staff, all of which are present in the judicial system, in the federal and provincial police, and in the federal and provincial penitentiary systems. By way of example, there are very few prisons accommodating only sentenced prisoners or accused; therefore, in order to abide by the law, they have to be kept in the same building but in separated areas. Another example: though criminal procedures have been streamlined, there remains an important task in that regard, and that is the creation of more bodies to decompress the current heavy flow of cases which have to be investigated and decided, and to promote a greater streamlining in the course of proceedings.

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LA DÉTENTION AVANT JUGEMENT EN DROIT BELGE

Vincent Seron*

I. INTRODUCTION

La détention préventive existe de longue date en droit belge. Initialement prévue par le Code d'instruction criminelle de 1808, elle se justifiait alors par «l'impérieuse nécessité d'empêcher un délinquant de poursuivre l'accomplissement de ses desseins, de se soustraire par la fuite à l'exécution de la peine qui sera prononcée contre lui ou enfin de faire disparaître le corps du délit ou les preuves, de subordonner ou de menacer les témoins».[1]

Depuis, les modifications opérées au fil des décennies ont fait évoluer cette justification initiale en attribuant en quelque sorte à la détention provisoire «un rôle de régulation sociale qui ne lui appartient pas au premier chef»[2] et qui appelle depuis moult années au changement. Ainsi que nous aurons l'occasion de le voir au sein de cette contribution, l'ampleur du champ couvert par la détention préventive et les difficultés engendrées par le système en vigueur constituent dès lors, encore à l'heure actuelle, une préoccupation majeure sur le plan du droit national.

II. CADRE LÉGAL : NORMES INTERNATIONALES ET DE DROITS DE L'HOMME

Parmi les *organisations internationales* liées aux droits de l'homme, l'État belge est actuellement notamment membre des Nations Unies (depuis 1981), du

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1 A. Maréchal, *Novelles*, Procédure pénale, t. I., vol. I, Larcier, 1946, pp. 445, n° 50 (cité par M. Franchimont, A. Jacobs et A. Masset, *Manuel de procédure pénale*, 3e éd., Bruxelles, Larcier, p. 590).

2 H.-D. Bosly, D. Vandermeersch et M.-A. Beernaert, *Droit de la procédure pénale*, 5e éd., Bruxelles, La Charte, 2008, pp. 963-964 (cité par cité par M. Franchimont, A. Jacobs et A. Masset, *op. cit.*, p. 593).

Conseil de l'Europe (depuis 1949, membre fondateur) et de l'Union européenne (depuis 1957, membre fondateur).

S'agissant des *instruments internationaux*, la Belgique est entre autres partie aux conventions et pactes suivants : la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales et le protocole additionnel à cette Convention (approuvés par la loi du 13 mai 1955), le Pacte international relatif aux droits civils et politiques (approuvé par la loi du 15 mai 1981[3]), la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (approuvée par la loi du 9 juin 1999[4]), la Convention relative aux droits de l'enfant (approuvée par la loi du 25 novembre 1991) et la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (approuvée par la loi du 23 juillet 1991) et les Protocoles y relatifs I et II (ratifiés le 12 septembre 1996 et entrés en vigueur le 1er mars 2002).

La mise en conformité du droit belge avec ces instruments s'est réalisée à travers l'adoption de dispositifs législatifs visant à adapter les cadres légaux existants aux dispositions normatives prévues par lesdits instruments.

Notons enfin que sur un plan *constitutionnel*, l'article 12 de la Constitution belge prévoit que, lors d'une arrestation – que ce soit ou non en cas de flagrant crime ou de flagrant délit –, la privation de liberté ne peut en aucun cas dépasser *vingt-quatre heures*.[5]

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

Cette section a pour objectif d'aborder les principaux traits régissant la détention préventive en droit pénal belge. Après une mise en exergue des conditions dans

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3 A l'exemple de ce qui est prévu pour la Convention européenne des droits de l'homme, toute personne considérant que les droits reconnus par le Pacte ont été violés peut dès lors intenter un recours judiciaire devant les juridictions belges. La Belgique a par ailleurs, par une loi du 16 mars 1994, approuvé le protocole facultatif permettant à des particuliers (en ce compris les prévenus) qui s'estiment victimes de violations, d'adresser au *Comité des droits de l'homme* des communications écrites qui seront examinées. Ce mécanisme permet la dualité des recours internationaux (par ex. devant la Cour EDH) en excluant toutefois leur simultanéité. Précisons enfin, qu'en ce qui concerne la réserve formulée par la Belgique au sujet de l'article 10 du Pacte (séparation des prévenus et des condamnés), le Comité des droits de l'homme a souligné que les récentes évolutions législatives (voy. *infra*) montrent que la Belgique entend répondre aux dispositions de l'article 10 (Comité des droits de l'homme, *Examen des rapports présentés par les États parties en vertu de l'article 40 du Pacte. Cinquième rapport périodique, Belgique*, CCPR/C/BEL/5, 17 juillet 2009).

4 Le 24 octobre 2005, la Belgique a par ailleurs signé le protocole optionnel à la Convention. L'examen, par le *Comité contre la torture*, des plaintes émanant d'un particulier est quant à lui rare étant donné le fait que la Convention exclut la compétence du Comité pour les plaintes qui ont déjà fait l'objet d'un examen par une autre instance internationale.

5 Voy. également les articles 1 et 2 de la loi du 20 juillet 1990 relative à la détention préventive (abrégée ci-après « LDP »).

lesquelles peut s'effectuer une arrestation judiciaire, nous aborderons la détention préventive à proprement parler, à travers ses différents aspects tels que les conditions de délivrance du mandat, le maintien de la détention, l'assistance de l'avocat ou les voies de recours.

III.1. L'ARRESTATION JUDICIAIRE

Distincte de l'arrestation *administrative* – c'est-à-dire une mesure administrative prise en vue du maintien de l'ordre, de la sécurité et de la paix publique –, l'arrestation *judiciaire* de personnes constitue un acte de police judiciaire en ce sens qu'elle permet la mise de ces personnes à disposition de l'autorité judiciaire.[6]

Dans l'hypothèse d'un *flagrant crime ou délit*, les agents de la force publique mettent immédiatement à la disposition de l'officier de police judiciaire toute personne soupçonnée dont ils ont empêché la fuite. Le délai de vingt-quatre heures prévu prend cours à partir du moment où cette personne ne dispose plus, à la suite de l'intervention de l'agent de la force publique, de la liberté d'aller et de venir. Par ailleurs, tout particulier qui retient une personne prise en flagrant crime ou en flagrant délit doit immédiatement dénoncer les faits à un agent de la force publique. Le délai de vingt-quatre heures prévu prend cours à partir du moment de cette dénonciation. Dès que l'officier de police judiciaire a procédé à une arrestation, il en informe immédiatement le procureur du Roi. Si l'infraction fait l'objet d'une instruction, l'information est communiquée au juge d'instruction.[7]

Hors *flagrant crime ou délit*, une personne à l'égard de laquelle il existe des indices sérieux de culpabilité relatifs à un crime ou à un délit ne peut être mise à la disposition de la justice que si la décision de privation de liberté est prise par le *procureur du Roi*.[8] Dans le cas de figure où cette personne tente de fuir ou tente de se soustraire à la surveillance d'un agent de la force publique, des mesures conservatoires peuvent être prises en attendant que le procureur du Roi, informé immédiatement par les moyens de communication les plus rapides, prenne une décision. La personne arrêtée ou retenue est mise en liberté dès que la mesure a cessé d'être nécessaire. La privation de liberté ne peut en aucun cas dépasser vingt-quatre heures à compter de la notification de la décision ou, si des mesures conservatoires contraignantes ont été prises, à compter du moment où la personne ne dispose plus de la liberté d'aller et de venir.[9]

Lors de l'arrestation, est établi un procès-verbal mentionnant notamment l'heure précise de la privation de liberté effective, avec l'indication détaillée des

[6] M. Franchimont, A. Jacobs et A. Masset, *op. cit.*, p. 303.

[7] Art. 1 LDP.

[8] Lorsque le juge d'instruction est saisi, il exerce les compétences attribuées au procureur du Roi.

[9] Art. 2 LDP.

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circonstances dans lesquelles la privation de liberté s'est réalisée ainsi que les heures d'interrogatoire.[10] Il est à noter que la loi n'impose pas la présence d'un avocat dès le début de la détention d'un suspect par les services de police.[11]

Précisons enfin que depuis 2007, à la suite de l'insertion des articles 33*bis* à 33*septies* dans la loi du 5 août 1992 relative à la fonction de police, les personnes faisant l'objet d'une arrestation par les services de police disposent désormais de certaines garanties juridiques. A titre d'exemple, toute personne privée de liberté (privation qui fait l'objet d'une inscription dans un *registre des privations de liberté*[12]) a ainsi le droit, pendant toute la durée de sa privation de liberté, de recevoir une quantité suffisante d'eau potable, d'utiliser des sanitaires adéquats et, compte tenu du moment, de recevoir un repas.[13]

III.2. LA DÉTENTION PRÉVENTIVE ET LE MANDAT D'ARRÊT

Mise en perspective

En Belgique, les conditions de détention préventive sont, depuis près d'une vingtaine d'années, définies par les dispositions de la loi du 20 juillet 1990 sur la détention préventive. Cette loi constitue incontestablement le changement le plus important dans le domaine depuis deux décennies, après les apports de la loi du 13 mars 1973 – qui constitue la base légale pour introduire une demande d'indemnisation en cas de détention irrégulière ou inopérante – modifiant la loi du 20 avril 1874 relative à la détention préventive.[14]

Son objectif principal était limiter la possibilité du recours à la détention préventive aux situations exceptionnelles, de renforcer les garanties liées aux

[10] Voy. les articles 1, 2 et 16, § 7 de la LDP.

[11] Voy. *infra* le point consacré à l'assistance de l'avocat.

[12] Ce registre est le compte-rendu du déroulement chronologique de la privation de liberté de son début, jusqu'à sa fin ou jusqu'au moment du transfert de la personne concernée aux autorités ou aux services compétents (art. 33*bis* loi sur la fonction de police).

[13] Art. 33*sexies* loi sur la fonction de police.

[14] La jurisprudence de la Cour européenne des droits de l'homme a lourdement pesé dans les modifications législatives opérées en 1990 puisque c'est un arrêt de condamnation de la Belgique prononcée dans l'affaire *Lamy c. Belgique* par la Cour qui a précipité l'abrogation de la loi du 20 avril 1874 et son remplacement par la loi du 20 juillet 1990. Cet arrêt condamnait en effet l'État belge en ce que la législation de 1874 ne permettait pas au détenu placé en détention préventive ni à son conseil de consulter le dossier d'instruction avant la première comparution devant la chambre du conseil. Voy. M. Franchimont, A. Jacobs et A. Masset, *op. cit.*, p. 595. Pour un détail de la loi du 20 juillet 1990 voy. entre autres B. Dejemeppe (sld.), *La détention préventive*, Bruxelles, Larcier, 1992; *La loi du 20 juillet 1990 relative à la détention préventive: et après?*, Actes du colloque organisé par la Conférence libre du jeune Barreau de Liège et la Fondation François Piedbœuf le 6 mai 1994, Ed. du jeune Barreau de Liège, 1995.

droits de la défense et d'instaurer des mesures alternatives à la détention provisoire.

Les modifications opérées par la réforme de la loi 31 mai 2005 ont quant à elles été principalement de cinq ordres, à savoir : renforcer l'autorité et l'indépendance du juge d'instruction en ce qui concerne la mise en liberté ; procéder à une limitation du contrôle mensuel de la détention préventive ; instaurer des sanctions en cas de non-respect des formalités ; réviser la durée de la liberté sous conditions et renforcer le contrôle sur les détentions préventives de longue durée.[15]

Conditions de délivrance du mandat d'arrêt

En Belgique, le juge d'instruction a seul compétence pour décider du placement en détention provisoire. Il peut agir de sa propre initiative ou à la demande du parquet.

Le magistrat instructeur ne peut décerner un mandat d'arrêt que s'il existe des *indices sérieux de culpabilité* à charge du suspect.[16] Le mandat d'arrêt ne peut par ailleurs être délivré qu'en cas *d'absolue nécessité pour la sécurité publique* seulement, et si le fait est de nature à entraîner pour l'inculpé un *emprisonnement* correctionnel principal d'un an ou une peine plus grave.[17] Si le maximum de la peine applicable ne dépasse pas quinze ans de réclusion, le mandat ne peut être décerné que s'il existe de *sérieuses raisons* de craindre que l'inculpé, s'il était laissé en liberté, commette de nouveaux crimes ou délits, se soustraie à l'action de la justice, tente de faire disparaître des preuves ou entre en collusion avec des tiers.[18]

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[15] Concernant cette réforme, voy. notamment D. Vandermeersch, « La détention préventive revisitée. Les modifications aux règles relatives à la détention préventive apportées par la loi du 31 mai 2005 », *J.T.*, 2005, pp. 477-480 ; P. Chomé, « Réforme de la loi sur la détention préventive et de certaines dispositions du Code d'instruction criminelle », *Journ. proc.*, n° 507, 23 septembre 2005, pp. 8-13.

[16] Art. 16, § 4 LDP. Sur les notions d'indices et de charges en procédure pénale, voy. A. Jacobs, note sous Corr. Verviers, 11 juillet 2000, *J.L.M.B.*, 2001, pp. 262-266.

[17] A cet égard, force est de constater que le relèvement, par la loi du 20 juillet 1990, du seuil minimal d'emprisonnement de 3 mois à 1 an n'a quasi eu aucun effet quantitatif sur l'application de la détention préventive.

[18] Art. 16, § 1er LDP. A titre d'exemple, une étude menée par l'Institut national de criminalistique et de criminologie montre qu'en 2003, la détention préventive était majoritairement mobilisée dans le cadre d'infractions contre la propriété, que celles-ci aient été commises avec ou sans violence. On y recourait également largement dans un contentieux sans victimes directes, à savoir en matière de drogues (toutes infractions confondues). Les délits « d'astuce » (fraudes, escroqueries, etc.) constituaient le quatrième groupe d'infractions les plus représentées dans les mandats d'arrêts exécutés. Cela va sans dire que la détention préventive était fréquemment appliquée dans les cas d'atteintes directes à l'intégrité physique telles que les homicides, coups et blessures volontaires, viols et attentats à la pudeur. Voy. A. Jonckheere *et al.*, « Garantir l'usage exceptionnel de la détention préventive : du seuil de peine à une lise d'infractions comme critère de gravité ? », *Rev. dr. pén.*, 2007, pp. 50-63.

Cette mesure ne peut être prise dans le but d'exercer une répression immédiate ou toute autre forme de contrainte.

Le mandat d'arrêt – qui est valable *cinq jours* à dater de son exécution – fait l'objet d'une exécution immédiate et n'est susceptible ni d'appel, ni de pourvoi en cassation.[19]

Assistance de l'avocat

A l'heure actuelle, en droit belge, l'avocat n'intervient lors des interrogatoires ni par les services de police, ni par le parquet, ni par le juge d'instruction[20], alors que, « les procès-verbaux de ces auditions sont soumis au juge du fond et peuvent fonder, même de manière exclusive, une condamnation ».[21]

Les conséquences de l'arrêt *Salduz c. Turquie* rendu par la Cour européenne des droits de l'homme le 27 novembre 2008 n'ont toutefois pas été sans poser difficulté sur le plan du droit national. En effet, suivant cet arrêt, prononcé à l'unanimité des juges de la Grande Chambre, l'assistance d'un avocat doit, en principe, être garantie dès le premier interrogatoire du suspect par la police[22], allant ainsi à l'encontre de qui est actuellement prévu par notre procédure pénale. Face à l'inertie du législateur, la situation actuelle complique pourtant considérablement les missions du pouvoir judiciaire, « tiraillées entre les exigences du droit international directement applicable et leur impact pratique sur le fonctionnement du système national. Coincées entre Charybde et Scylla, ces autorités doivent cependant assurer, dans la mesure du possible et sous peine de recours en masse devant la Cour européenne des droits de l'homme, le respect de la Convention ».[23]

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19 Art. 19, § 1er LDP.

20 Immédiatement après la première audition par le juge d'instruction, l'inculpé peut cependant s'entretenir librement avec son avocat (art. 20, § 1er LDP). « En matière de détention préventive, l'interrogatoire de l'inculpé a toujours été considéré comme une formalité substantielle. Si le législateur du 20 juillet 1990 a dû renoncer à organiser un véritable débat contradictoire en présence de l'avocat de l'inculpé, il a souhaité introduire une certaine contradiction lors de l'interrogatoire par le juge d'instruction en l'obligeant à informer l'inculpé sur les faits et sur la possibilité de la délivrance d'un mandat d'arrêt et à l'entendre en ses observations à ce sujet » (F. Tulkens et D. Vandermeersch, « L'évolution des droits de la défense depuis un siècle », *in* H.-D. Bosly *et al.* (sld.), *Cent ans de publication de droit pénal et de criminologie. Le centenaire de la Revue de droit pénal et de criminologie*, Bruxelles, La Charte, 2007, p. 187).

21 A. Jacobs, « Un bouleversement de la procédure pénale en vue : la présence de l'avocat dès l'arrestation judiciaire du suspect ? », *J.L.M.B*, 2009, p. 203.

22 Suivant l'opinion concordante du juge Zagrebelsky, l'arrêt de la Cour doit même être interprété comme exigeant l'assistance de l'avocat dès le début de la garde à vue, indépendamment des interrogatoires. Voy., dans le même sens, l'arrêt *Brusco c. France* en date du 14 octobre 2010 où la Cour rappelle que la personne placée en garde à vue a le droit d'être assistée d'un avocat dès le début de cette mesure ainsi que pendant les interrogatoires.

23 J. van Meerbeeck, « Le droit à l'assistance d'un avocat à l'aune de la jurisprudence *Salduz* : le pouvoir judiciaire entre Charybde et Scylla. Après l'arrêt de la Cour de cassation du 24 février

Relevons cependant, à l'exemple d'Ann Jacobs, que « si la présence de l'avocat dès la mise en cause du suspect apparaît assurément comme une garantie du droit au silence et contre les mauvais traitements, il faut toutefois être attentif à ce que l'avocat ne soit pas pris en otage en étant privé de la possibilité de faire valoir par la suite tout argument ou critique qu'il aurait pu soutenir à ce moment. D'autre part, il ne faut pas non plus sous-estimer l'impact financier de l'intervention de l'avocat dès les premiers stades du procès à l'égard du justiciable et le renforcement des inégalités sociales ».[24]

Assistance d'un interprète

Lors de l'audition préalable du suspect par le juge d'instruction, l'interrogatoire a lieu dans la langue de la procédure ; si la personne interrogée souhaite s'exprimer dans une autre langue, soit il est fait appel à un interprète juré, soit les déclarations sont notées dans la langue utilisée, soit il est demandé à l'intéressé de noter lui-même ses déclarations dans sa langue. Une traduction du mandat d'arrêt dans une langue comprise par l'intéressé n'est pas requise pour rendre ce mandat d'arrêt ou sa signification valables.[25]

Maintien de la détention préventive

Ainsi que nous l'avons précédemment souligné, le mandat d'arrêt délivré par le juge d'instruction est valable pour une durée maximale de cinq jours à compter de son exécution.

Avant l'expiration de ce délai – et sans préjudicier au droit du juge d'instruction de donner mainlevée du mandat d'arrêt par une ordonnance motivée –, la chambre du conseil[26], sur le rapport du juge d'instruction, le procureur du Roi, l'inculpé et son conseil entendus, décide s'il y a lieu ou non de maintenir la détention préventive.[27]

Au cours de son examen, la chambre du conseil doit s'assurer de la régularité du mandat, d'une part, et juger de la nécessité du maintien de la détention au regard des critères prévus par la loi sur la détention préventive, d'autre part.

2010», *J.T.*, 2010, p. 388. Sur la jurisprudence *Salduz* et ses implications sur le droit belge de la procédure pénale, voy. notamment M.-A. Beernaert, « *Salduz* et le droit à l'assistance d'un avocat dès les premiers interrogatoires de police », *Rev. dr. pén.*, 2009, pp. 971-988 ; A. Kettels, « L'assistance de l'avocat dès l'arrestation ou comment repenser la phase préparatoire du procès pénal sur un mode plus accusatoire », *Rev. dr. pén.*, 2009, pp. 989-1012.

24 A. Jacobs, « Un bouleversement de la procédure pénale en vue : la présence de l'avocat dès l'arrestation judiciaire du suspect ? », *op. cit.*, p. 203.

25 M. Franchimont, A. Jacobs et A. Masset, *op. cit.*, p. 602.

26 La *chambre du conseil* est une juridiction d'instruction intégrée au tribunal de première instance. Elle exerce plusieurs missions, dont les plus courantes sont liées à la détention préventive et à la fin de l'instruction.

27 Art. 21, § 1er LDP.

Comparution mensuelle et trimestrielle – Si la chambre du conseil estime que la détention préventive doit être maintenue, son ordonnance de maintien en détention est valable pour une durée de *un mois* à dater du jour où elle est rendue.[28]

Tant qu'il n'est pas mis fin à la détention préventive et que l'instruction n'est pas terminée, la chambre du conseil est appelée à statuer mensuellement sur le maintien de cette détention. Il est néanmoins prévu que si le ou les faits pour lesquels la chambre du conseil est saisie sont constitutifs de crimes qui ne peuvent faire l'objet d'une correctionnalisation, la chambre du conseil est amenée à statuer de manière *trimestrielle*, à partir de la première confirmation mensuelle.[29] Pendant cette période, la personne placée en détention préventive peut adresser tous les mois une demande de mise en liberté à la chambre du conseil.[30]

Sur requête de l'inculpé ou de son conseil, le juge d'instruction convoque l'inculpé dans les dix jours qui précèdent chaque comparution en chambre du conseil, pour un interrogatoire récapitulatif.

S'inculpé se trouve dans l'impossibilité de se présenter à l'audience, la chambre du conseil autorise son avocat à le représenter. Dans l'hypothèse où l'avocat ne se présente pas ou s'il ne demande pas l'autorisation de représenter son client, la chambre du conseil peut statuer en l'absence de l'inculpé et de son conseil. Il en va de même lorsque l'inculpé refuse de comparaître.[31] Notons également que – dans le cas de figure où la qualification des faits visés au mandat d'arrêt lui paraît inadéquate –, la chambre du conseil peut, à tous les stades de la procédure, modifier cette qualification (sans pour autant y substituer d'autres faits) après avoir donné aux parties l'occasion de s'en expliquer.[32]

Comparution à huis-clos et en audience publique – La procédure se déroule en principe à huis-clos, ce dont il est fait mention dans la décision.[33] Le législateur a cependant prévu qu'au terme d'un délai de six mois de privation de liberté si le maximum de la peine applicable ne dépasse pas quinze ans de réclusion ou après un an dans le cas contraire, l'inculpé aura la possibilité, lors de sa comparution devant la chambre du conseil ou devant la chambre des mises en accusations[34],

[28] Art. 21, § 6 LDP. Introduite en 2005, cette limitation du contrôle mensuel pour les crimes non correctionnalisables résultait du constat que de tels faits requièrent une instruction plus longue.

[29] Art. 22, al. 2 LDP.

[30] Art. 22*bis* LDP.

[31] Art. 23, al. 1er 2° LDP.

[32] Art. 23, al. 1er 3° LDP.

[33] Art. 23, al. 1er 1° LDP.

[34] La *chambre des mises en accusation* est la juridiction d'instruction chargée de l'appel des décisions rendues par la chambre du conseil. Elle est également la juridiction compétente pour renvoyer un prévenu devant la cour d'assises.

de demander de comparaître en audience publique. Ainsi que le dispose l'article 24 de la loi sur la détention préventive, cette requête ne pourra être rejetée, par décision motivée, que si cette publicité met en danger l'ordre, les mœurs ou la sécurité nationale; si les intérêts des mineurs ou la protection de la vie privée des victimes ou des autres inculpés l'exigent; ou si la publicité est de nature à porter atteinte aux intérêts de la justice en raison des dangers qu'elle entraîne pour la sécurité des victimes ou des témoins.

Mainlevée du mandat d'arrêt

Au regard du caractère exceptionnel qui doit caractériser le mandat d'arrêt, *avant* la comparution, dans les cinq jours, de l'inculpé devant la chambre du conseil, le juge d'instruction peut donner mainlevée du mandat d'arrêt, par une ordonnance motivée qu'il communique immédiatement au procureur du Roi.

Il en va de même *après* la première comparution devant la chambre du conseil intervenue dans les cinq jours, en d'autres termes, au cours de l'instruction. Le procureur du Roi peut en outre requérir à tout moment du juge d'instruction la mainlevée du mandat d'arrêt. Ces ordonnances ne sont susceptibles d'aucun recours.[35]

Le règlement de la procédure peut avoir une incidence sur la mesure privative de liberté et donner lieu à la mainlevée du mandat d'arrêt.[36]

Il en va également ainsi de la requête de *mise en liberté provisoire*, actuellement réglementée par l'article 27 de la loi relative à la détention préventive.[37] Elle peut être accordée lorsque la détention préventive n'est plus soumise au contrôle de la chambre du conseil et de celle des mises en accusation, soit que le maintien en détention préventive ait fait l'objet d'une ordonnance distincte de l'ordonnance de renvoi, soit qu'une ordonnance de prise de corps ait été prononcée en application de l'article 133 du Code d'instruction criminelle et de l'article 26, §5 de la loi sur la détention préventive (qui prévoit le prononcé d'une prise de corps accompagnée éventuellement d'une exécution immédiate).

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[35] Art. 25 LDP. Soulignons, qu'avant l'entrée en vigueur de la loi du 31 mai 2005, le procureur du Roi avait la possibilité de former opposition à l'égard de l'ordonnance de mainlevée prise après la comparution de l'inculpé devant la chambre du conseil.

[36] Voy. les hypothèses visées à l'article 26 LDP et M. Franchimont, A. Jacobs et A. Masset, *op. cit.*, pp. 634-635.

[37] Sur ce point voy. F. Close, « La motivation du rejet de la requête de mise en liberté déposée par le condamné sous le coup d'une arrestation immédiate », *J.L.M.B.*, 2006, pp. 1749-1751.

Cette requête peut être adressée :

- au *tribunal correctionnel* ou au *tribunal de police* saisi, depuis l'ordonnance de renvoi jusqu'au jugement ;
- au *tribunal correctionnel* siégeant en *appel* ou à la *cour d'appel*, depuis l'appel jusqu'à la décision d'appel ;
- à la *chambre des mises en accusation* : soit depuis l'ordonnance de transmission des pièces (art. 133 du Code d'instruction criminelle) jusqu'à ce que la cour d'assises ait statué de manière définitive ; soit pendant l'instance en règlement de juges, lorsque l'inculpé fait l'objet d'une détention en exécution d'une ordonnance de prise de corps décernée par la chambre du conseil ; soit pendant l'instance (devant la chambre des mises en accusation) prévue aux articles 135, 235 et 235*bis* du Code d'instruction criminelle.

III.3. LES VOIES DE RECOURS

L'appel

En application de l'article 30 de la loi sur la détention préventive, l'inculpé, le prévenu ou l'accusé ainsi que le ministère public ont la possibilité d'interjeter appel, devant la chambre des mises en accusation, des ordonnances rendues par la chambre du conseil.[38] L'appel doit être interjeté endéans les 24 heures, délai qui court contre le ministère public à compter du jour de la décision et contre l'inculpé, le prévenu ou l'accusé, du jour où elle lui est signifiée. Pourvu qu'elle intervienne dans les 15 jours de la déclaration d'appel, l'inculpé reste en détention jusqu'à la décision sur l'appel. L'inculpé est remis en liberté si la décision n'est pas rendue dans ce délai.

Lorsque la chambre des mises en accusation décide qu'il y a lieu de maintenir – au regard des circonstances de la cause au moment de sa décision – la détention préventive, la détention préventive est maintenue pour une durée d'un mois à partir de la décision ou pour une durée de trois mois à la partir de la décision, s'il est fait appel de l'ordonnance de la chambre du conseil.

Le pourvoi en cassation

Les décisions par lesquelles la détention préventive est maintenue peuvent faire l'objet d'un pourvoi en cassation dans un délai de 24 heures qui court à compter du jour où la décision est signifiée à l'inculpé.

38 S'il s'agit d'un jugement du tribunal correctionnel ou du tribunal de police (*cf. supra*), il est statué sur l'appel, selon le cas, par la cour d'appel ou par le tribunal correctionnel siégeant en appel.

IV. ÉLÉMENTS FACTUELS SUR LA DÉTENTION ET DROITS DES PERSONNES DÉTENUES AVANT JUGEMENT[39, 40]

Après un parcours des normes régissant la détention préventive, la présente section se veut un condensé du cadre et des pratiques au sein desquels s'inscrit la détention provisoire en Belgique. Seront ainsi successivement analysés les éléments liés à la démographie carcérale, à la répartition des détenus dans les établissements de police et pénitentiaires, aux conditions de vie en prison, aux questions traitant de la sécurité et de la protection des détenus, aux soins de santé ainsi qu'au traitement des plaintes.

IV.1. APERÇU DÉMOGRAPHIQUE

A l'heure actuelle, avec un peu plus d'un tiers de détenus, la catégorie des prévenus constitue une part importante de la population carcérale belge aux côtés des condamnés et des internés.[41] Au 1er mars 2009, sur un total de 10.159 détenus, on dénombrait ainsi 5.433 condamnés pour 3.557 prévenus.[42]

Entre 1980 et 2005, la population en détention préventive s'est multipliée par 2,5 et la durée moyenne en détention préventive a doublé au cours de cette même période.[43] Les travaux menés par Charlotte Vanneste démontrent cependant que « si l'on examine de plus près la nature du mouvement inflatoire belge depuis le début des années 1980, on constate clairement que le gonflement de la population pénitentiaire n'est pas dû à l'incarcération d'un plus grand nombre de personnes

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[39] Nous tenons à adresser nos plus vifs remerciements à Monsieur Laurent Sempot, Attaché à la Direction générale des établissements pénitentiaires pour toutes les informations dont il a pu nous faire part dans le cadre de cette section.

[40] Depuis 2005, le droit pénitentiaire belge est en pleine mutation. S'agissant du statut juridique interne des détenus, *la loi de principes du 12 janvier 2005 concernant l'administration pénitentiaire ainsi que le statut juridique des détenus* (ci-après « loi de principes ») est venue modifier de manière substantielle la réglementation disparate existante. Ce cadre législatif n'est toutefois entré en vigueur que de manière très partielle et nombre de dispositions ne seront applicables qu'à une date encore à fixer par le pouvoir exécutif. Afin de faciliter la compréhension du présent rapport, nous avons néanmoins jugé utile de ne pas opérer de distinction systématique entre le régime – transitoire – actuellement en vigueur et celui qui sera d'application à l'avenir. Précisons par ailleurs que les principes de base applicables au traitement des détenus condamnés ont été définis dans l'esprit des règles pénitentiaires européennes (dans leur mouture de 1987) et des exigences posées par la Convention européenne des droits de l'homme.

[41] Les autres détenus, à savoir essentiellement les mineurs d'âge et les étrangers à la disposition de l'Office des étrangers, ne forment qu'une toute petite minorité de la population carcérale.

[42] Service public fédéral Justice, *Justice en chiffres*, 2009, p. 50.

[43] Au cours de cette période, la population des condamnés a quant à elle quasiment doublé, et parmi les condamnés, c'est l'augmentation des condamnés exécutant de longues peines, de cinq ans et plus, qui est la plus marquante.

mais bien au fait que les durées de détention ont considérablement augmenté, traduisant ainsi plutôt une sévérité pénale accrue ».[44]

Suivant les analyses du service public fédéral Justice, « entre mars 1998 et mars 2009, près de 2.000 détenus sont venus s'ajouter à la population carcérale sur base journalière. Un peu plus de la moitié de l'augmentation (1.100 détenus) a été constatée lors des cinq premières années (jusqu'en 2003). Au cours de cette première période, l'essentiel de la croissance (900 détenus) a concerné les prévenus en attente de jugement définitif. Par contre, depuis 2003, sur les 850 détenus supplémentaires, les trois-quarts appartiennent à la catégorie des condamnés définitifs et un bon tiers sont des internés ; dans le même temps, le nombre des prévenus a diminué d'environ 125 unités ».[45] Notons toutefois que, depuis 2007, un accroissement du nombre de prévenus incarcérés est constaté.

Contrairement aux objectifs fixés par les diverses modifications législatives, le recours à la détention préventive n'a dès lors rien d'exceptionnel. « Est-ce à dire que légiférer en la matière serait inutile ? Comme l'indiquait déjà le professeur Franchimont en 1989, la véritable réforme de la détention préventive se situe moins dans la modification des textes que dans une conversion profonde des mentalités ».[46] Nous sommes deux décennies plus tard… et son propos est toujours autant d'actualité.

IV.2. RÉPARTITION ET ACCUEIL

Sériation

Établissements de police – S'agissant des lieux de détention existant au sein des services de police, les personnes sont généralement placées soit dans des *cellules de police* (à savoir l'infrastructure destinée à la détention d'une personne pour une durée maximale d'en principe 24 heures[47]) soit dans des *cellules d'attente* (à savoir l'infrastructure destinée à la détention d'une personne pour une durée maximale de 3 heures[48]).

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44 Voy. Ch. Vanneste, « La population carcérale à Bruxelles », in *Le détenu un citoyen comme un autre!*, Actes du colloque tenu au parlement bruxellois le 13 mars 2008 ; *Les chiffres des prisons. Des logiques économiques à leur traduction pénale*, Paris, L'Harmattan, Déviance et Société, 2001.

45 Service Public Federal Justice, *Justice en chiffres, op. cit.*, p. 49.

46 L. Kennes, *op. cit.*, p. 321.

47 Une cellule de police doit disposer d'une superficie au sol de minimum 4,5 m², être équipée d'un lit solidement fixé afin de permettre de séjourner dans des conditions dignes avec au moins une couverture, un matelas et un gobelet et, lorsqu'elle est destinée aux détentions dépassant 24 heures, une superficie au sol d'au moins 7 m² et être équipée d'une table et d'un siège ancrés au sol. Chaque cellule de police doit par ailleurs contenir une toilette.

48 Une cellule d'attente a une superficie au sol d'au moins 4 m² et est au minimum équipée d'un siège ancré au sol.

Les aspects liés aux normes minimales, à l'implantation et à l'usage des lieux de détention utilisés par les services de police sont actuellement réglés par un arrêté royal en date du 14 septembre 2007.[49] Il est à relever que l'instauration de ce cadre réglementaire fait notamment suite aux recommandations du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants.[50]

Établissements pénitentiaires – Selon leur régime juridique, les établissements pénitentiaires peuvent quant à eux être répartis en deux catégories à savoir les maisons d'arrêt et les établissements pour peines.

Les maisons d'arrêt accueillent principalement les individus placés en détention préventive suite à un mandat d'arrêt du juge d'instruction. Dans les maisons pour peines sont incarcérées les personnes qui ont été condamnées à exécuter une peine privative de liberté ou qui subissent une autre mesure. Cette distinction est cependant devenue très théorique en raison notamment de la surpopulation persistante. De plus en plus d'établissements font office à la fois de maison d'arrêt et de maison pour peine, soit par vocation, soit à cause de la surpopulation.

Les articles 10 à 13 de la loi de principes opèrent une distinction entre les condamnés et les inculpés. Inscrit à l'article 10, le principe de la présomption d'innocence suppose que les inculpés doivent être traités de manière à ne donner aucunement l'impression que leur privation de liberté présente un caractère punitif.[51] Dans un sens analogue, il est prévu que, durant l'exécution de la

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49 Précisons cependant que l'arrêté royal, d'une part, ne règle pas la manière dont les personnes privées de liberté doivent être traitées et, d'autre part, comporte une disposition transitoire stipulant que les lieux existants ainsi que ceux non encore existants mais dont l'adjudication des travaux est antérieure à l'entrée en vigueur de l'arrêté, doivent être adaptés aux normes minimales du présent arrêté au plus tard endéans les *20 ans* de son entrée en vigueur, à l'exception des dispositions de l'article 11 (qui traite notamment des normes minimales des cellules) auxquelles ils doivent répondre, selon le cas, endéans les trois ans de la réception des travaux ou de l'entrée en vigueur de l'arrêté. Dans son rapport complémentaire au rapport annuel 2007-2008, le Comité permanent de contrôle des services de police mettait en évidence que, sur le plan de l'infrastructure, bon nombre de cellules ne correspondaient pas aux nouvelles normes et que, trop fréquemment encore, le personnel de terrain méconnaissait les directives internes, voire les modifications légales et réglementaires.

50 Conseil de l'Europe, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Belgique, du 25 novembre au 7 décembre 2001*, CPT/Inf (2002) 25, Strasbourg, 17 octobre 2002, § 157. L'adoption de normes minimales relatives aux lieux de détention utilisés par la police ainsi que l'obligation de tenir un registre chronologique des privations de liberté était également sollicitée par le Comité contre la torture des Nations Unies (voy. Comité contre la torture, *Examen des rapports présentés par les États parties en vertu de l'article 19 de la Convention. Observations finales du Comité contre la torture: Belgique*, CCPR/C/BEL/5, 17 juillet 2009).

51 Article 10, § 2 loi de principes. Cet article s'inspire notamment de l'article 10, 2, a) du Pacte international relatif aux droits civils et politiques. Dans la pratique actuelle, de façon

mesure privative de liberté, le régime est adapté aux exigences du respect de ce principe.[52]

Sauf mention écrite contraire de leur part en vue de participer à des activités communes, les inculpés sont maintenus à l'écart des condamnés.[53] Ils doivent par ailleurs bénéficier des facilités nécessaires (compatibles avec l'ordre et la sécurité) afin de faire valoir au mieux leur droit de défense dans la procédure juridique qui les concerne.[54]

S'agissant des *mineurs* de moins de dix-huit ans, il n'existe pas de dispositions spécifiques prévoyant qu'ils soient logés, au sein de la prison, séparément des autres détenus. Ce cas de figure reste néanmoins peu fréquent en Belgique étant donné que ne sont concernés par ces mesures que des jeunes (de seize ans ou plus) ayant fait l'objet d'une mesure de dessaisissement par le tribunal de la jeunesse. A cet égard, il convient par ailleurs de relever que, dans un avenir proche, les délinquants mineurs ayant fait l'objet d'une mesure de dessaisissement en attente d'une mesure de condamnation ou ayant été condamnés à une peine d'emprisonnement ou de réclusion seront détenus dans un centre fédéral fermé leur étant spécialement réservé.

Notons enfin qu'aucune formation particulière n'est dispensée au personnel de surveillance exerçant leur fonction dans une maison d'arrêt afin de les sensibiliser au statut et besoins spécifiques des prévenus.

Information des prévenus

Actuellement, les prévenus sont en principe informés à leur arrivée des règles internes à l'institution, des voies d'obtention d'informations et de recours ainsi que des possibilités d'aide offerte, notamment médico-sociales.

L'article 19 de la loi de principes dispose à cet effet que lors de son accueil, le détenu doit être informé de ses droits et de ses devoirs, des règles en vigueur dans la prison ou dans la section, du rôle du personnel ainsi que des possibilités existant sur place ou accessibles à partir de là en matière d'aide médicale, juridique, psychosociale et familiale, en matière de soutien moral, philosophique ou religieux ainsi qu'en matière d'aide sociale.[55]

paradoxale, le régime appliqué aux inculpés et prévenus faisant l'objet d'une mesure privative de liberté est néanmoins souvent plus strict que celui appliqué aux détenus condamnés.

52 Article 13, § 1er loi de principes.

53 Article 11. Cet objectif semble toutefois, au regard des conditions de détention actuelles (surpopulation, vétusté des locaux), difficilement atteignable.

54 Art. 12 loi de principes.

55 Dans la mesure du possible les modalités nécessaires seront fixées par arrêté royal afin que ces informations soient données au détenu dans une langue qu'il comprend ou de manière intelligible.

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IV.3. CONDITIONS DE VIE

Droit au respect et à la dignité humaine

En application de l'article 5, §1er de la loi de principes – traduction législative de l'article 10.1 du Pacte international relatif aux droits civils et politiques –, le principe du *respect* implique que « l'exécution de la peine ou mesure privative de liberté s'effectue dans des conditions psychosociales, physiques et matérielles qui respectent la dignité humaine, permettent de préserver ou d'accroître chez le détenu le respect de soi et sollicitent son sens des responsabilités personnelles et sociales ».

Conditions de vie physiques et matérielles

Politique d'occupation des cellules – En Belgique, le système carcéral est basé sur le régime cellulaire. Les prisons disposent de cellules individuelles[56] ou doubles, de trios et de quatuors. La grande majorité de ces cellules sont individuelles mais, en pratique, elles hébergent souvent plus d'un détenu au vu de la surpopulation existant dans les prisons hébergeant des prévenus.

Les prévenus hébergés seuls en cellule sont donc relativement rares et sont souvent des détenus isolés pour des raisons d'ordre et de sécurité, ou pour des raisons disciplinaires.

Aucune évaluation préalable des personnes placées en détention préventive amenées à partager leur cellule n'est effectuée afin de s'assurer que cette occupation commune ne présente aucun risque. Dans le même sens, aucune mesure structurelle n'existe pour prévenir d'éventuelles altercations entre prévenus. Dans la mesure du possible, l'administration pénitentiaire évite toutefois de placer dans une même cellule des détenus qui présenteraient un risque de conflit entre eux (par exemple des détenus fumeurs et non-fumeurs).

Droit à l'hygiène – Sauf certains cas exceptionnels (notamment deux ailes à la prison de Forest), tous les détenus ont une toilette et de l'eau courante en cellule. L'accès à la douche dépend de nombreux acteurs (détenus travailleurs ou non, taux de surpopulation, etc.) mais est, en principe, de minimum deux douches par semaine.

La loi de principes dispose quant à elle, en application des règles 20 et 21 des Règles pénitentiaires européennes, que le détenu doit avoir la possibilité de soigner son apparence et son hygiène corporelle.[57]

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[56] Il n'existe aucune disposition réglementaire relative à la taille des cellules. L'administration pénitentiaire estime néanmoins qu'une cellule individuelle doit mesurer au minimum 8 m^2.

[57] Art. 44.

Droit au port de vêtements personnels – Actuellement, le fait de porter ses propres vêtements est déjà autorisé dans certains établissements pénitentiaires. *De lege ferenda*, cette possibilité sera un droit étendu à l'ensemble des prisons belges, en application de l'article 43 de la loi de principes qui prévoit qu'en prison, le détenu a le droit de porter ses propres vêtements et chaussures pour autant que ceux-ci répondent aux normes dictées par une cohabitation forcée avec autrui sur le plan de l'hygiène, de la bienséance, de l'ordre ou de la sécurité.[58] La suppression de l'uniforme pénitentiaire, contenue dans cette règle, répond au principe de normalisation prôné par la loi.

Contacts avec le monde extérieur

Actuellement, tous les détenus (prévenus et condamnés) ont, en principe, le droit d'entretenir des contacts avec le monde extérieur, que ce soit via la correspondance, le téléphone ou les visites.

S'agissant des visites, la loi de principes prévoit que sauf les exceptions prévues par la loi, les inculpés ont le droit de recevoir des visites chaque jour. La durée minimale d'une visite est d'une heure.[59]

Les parents et alliés en ligne directe, le tuteur, le conjoint, le cohabitant légal ou de fait, les frères, les sœurs, les oncles et les tantes sont admis à rendre visite aux détenus après avoir justifié de leur identité.[60] Le directeur ne peut leur interdire la visite qu'à titre provisoire, lorsqu'il existe des indices personnalisés que la visite pourrait présenter un grave danger pour le maintien de l'ordre ou de la sécurité et lorsque les modalités de visite ne suffisent pas à écarter ce danger.[61] En pratique, cette interdiction est extrêmement rare et porte sur des personnes en particulier, et non sur l'ensemble de la famille.

Précisons que lorsque la personne inculpée est placée en détention préventive, le juge d'instruction peut interdire au détenu de recevoir des visites et ordonner une mise au secret privant le détenu de tout contact avec l'extérieur (excepté avec son avocat) pendant une durée limitée de trois jours, non renouvelable.

Travail et activités de loisirs

En application de l'article 81 de la loi de principes, le détenu a le droit de participer au travail *disponible* dans la prison. L'administration pénitentiaire veille à l'offre ou à la possibilité d'offre d'un travail qui permette aux détenus de donner un sens à la période de détention, de préserver, renforcer ou d'acquérir

[58] La prison mettra toutefois des chaussures et des vêtements adéquats à la disposition des détenus qui ne souhaitent pas porter leurs propres vêtements et chaussures.

[59] Art. 58 loi de principes.

[60] Concernant les enfants mineurs du détenu, ils peuvent venir à la visite accompagnés d'un adulte.

[61] Art. 59 loi de principes.

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l'aptitude à exercer après leur libération une activité assurant leur subsistance, d'adoucir leur détention, d'assumer des responsabilités, le cas échéant, vis-à-vis de leurs proches parents et des victimes, et, s'il y a lieu, de payer intégralement ou partiellement des dettes dans la perspective d'une réparation ou de leur réinsertion.

Le détenu a droit à des exercices physiques et à des activités sportives pendant au moins deux heures par semaine, ainsi qu'à une promenade quotidienne ou à une autre activité récréative d'au moins une heure en plein air. Sauf exceptions prévues par la loi, il a le droit de participer à des activités communes de détente durant les heures fixées par le règlement d'ordre intérieur.[62]

S'agissant des prévenus, il n'existe pas de statistiques permettant d'établir le taux moyen de détenus travailleurs dans la prison, le taux variant de 25 % à 100 % en fonction de l'établissement. De manière générale, l'offre de travail disponible en prison est largement inférieure à la demande.

IV.4. ORDRE, SÉCURITÉ ET PROTECTION DES DÉTENUS

Protection des détenus vulnérables

Aucune disposition particulière n'est prévue aux fins de protéger certaines catégories de prévenus vulnérables (délinquants sexuels, anciens policiers, …). Une attention particulière peut néanmoins être portée à certains détenus qui, pour des raisons diverses, nécessitent une protection particulière. Il s'agit cependant plutôt de décisions individuelles plutôt que des décisions structurelles. Seule « exception » : certains établissements prévoient une section particulière où des délinquants sexuels peuvent être hébergés à leur demande. Ils peuvent cependant demander à être hébergés avec les autres détenus.

Mesures de sécurité particulières

S'il n'existe pas en tant que tels des groupes spécifiques de prévenus (terroristes, délinquants « dangereux », etc.) placés dans des établissements ou sections d'établissements spécifiques, la loi prévoit cependant un système de *régime de sécurité particulier individuel* (plus communément connu sous l'appellation de régime « extra »).

L'instauration d'un tel régime porte, en principe, sur des détenus en particulier, et non sur des catégories de détenus. Ces régimes sont imposés sur la

62 Art. 79 loi de principes. Au-delà des périodes d'activités au sens large, il est difficile de préciser un nombre moyen d'heures que les détenus ont le droit de passer en dehors de leur cellule, ce nombre dépendant de toute une série de facteurs et notamment du régime de détention en vigueur au sein de l'établissement.

base du comportement du détenu et des risques éventuels qu'il représente pour la sécurité interne ou externe. L'existence de cette menace doit résulter de circonstances concrètes ou de l'attitude du détenu et non de suppositions ou de la condamnation dont le détenu a fait l'objet. Ce placement doit enfin être subsidiaire (c'est-à-dire qu'il est apparu que les autres mesures de contrôle ou de sécurité ponctuelles ont été insuffisantes) et peut uniquement être décidé lorsque la sécurité ne peut être préservée d'aucune autre manière et pour la durée strictement nécessaire à cet effet.[63]

IV.5. SOINS DE SANTÉ ET PROTECTION DE LA SANTÉ

Équivalence des soins

La loi de principes est sous-tendue par une approche du statut juridique du détenu centrée sur sa qualité de citoyen. Dans cette optique, elle formule en son article 88 deux conditions que doivent rencontrer les soins de santé accordés aux détenus. D'une part, une norme d'équivalence entre les soins de santé en milieu pénitentiaire et ceux prodigués dans la société libre. D'autre part, complément et renforcement dans le contexte carcéral du principe d'équivalence, une norme suivant laquelle les soins médicaux doivent être adaptés aux besoins médicaux spécifiques du détenu.[64]

Dans la lignée du principe d'équivalence et à la lumière du principe de normalisation, le détenu dispose, pendant son maintien en détention, du droit à une poursuite comparable des soins de santé dispensés avant son incarcération – par exemple un traitement à la méthadone pour les détenus souffrant de problèmes d'addiction[65] –, en tenant compte du contexte de la détention, lequel peut requérir une adaptation du traitement). A cet effet, il doit être conduit auprès du médecin attaché à l'établissement le plus rapidement possible après son incarcération et, par la suite, à chaque fois qu'il en fait la demande.

[63] Art. 116 loi de principes. Cette disposition répond notamment à la critique émise par le CPT quant à l'absence de base légale concernant le régime cellulaire strict « extra » au cours de son avant-dernière visite périodique sur le territoire belge. Voy. Conseil de l'Europe, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 18 au 27 avril 2005*, CPT/Inf (2006) 15, Strasbourg, 20 avril 2006, § 86.

[64] Une assistance sociale et psychologique peut également être mise en place pour les détenus qui le souhaitent mais force est de constater qu'en pratique ce soutien est difficile à fournir en raison du personnel trop peu nombreux.

[65] Précisons cependant qu'il n'existe pas de politique globale de réduction des risques liés à l'usage de la drogue en prison.

Isolement cellulaire et soins santé

La loi de principes prévoit la visite régulière du médecin aux détenus placés en isolement cellulaire, que ce soit pour des raisons d'ordre et de sécurité[66], ou pour des raisons disciplinaires.[67]

La loi dispose par ailleurs que le placement sous régime de sécurité particulier individuel – qui a pour conséquence que le détenu est isolé de la communauté[68] – ne peut être ordonné que moyennant un avis médical quant à la compatibilité du régime avec l'état de santé du détenu. Le détenu faisant l'objet d'un tel placement reçoit par ailleurs, au moins une fois par semaine, la visite du directeur et d'un médecin-conseil, lesquels s'assurent de l'état du détenu et vérifient si celui-ci n'a pas de plaintes ou d'observations à formuler.[69]

Prévention du suicide

En 2008, sur 15 suicides accomplis[70], 6 ont été constatés chez les prévenus.[71] Actuellement, aucune mesure spécifique n'est appliquée aux fins de prévenir les suicides de détenus placés en détention préventive. Cette problématique est néanmoins une source d'attention pour l'administration pénitentiaire qui met généralement en place des mesures particulières (tel un suivi spécialisé ou une surveillance rapprochée) à l'égard de tout détenu qui présente des tendances suicidaires. Cette matière a par ailleurs été intégrée au sein du programme de la formation de base des agents, et fera l'objet d'un module spécifique dans la nouvelle formation de base qui débutera en 2010.

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66 Placement en *cellule sécurisée*, art. 112 loi de principes. Cette mesure de sécurité particulière ne peut être maintenue plus de sept jours. Elle ne peut être prolongée (au maximum trois fois) sans décision motivée du directeur, après avoir entendu le détenu. Lors d'un tel placement, le détenu est suivi minutieusement par le directeur et par un médecin-conseil, qui, à cette fin, lui rendent régulièrement visite, s'assurent de son état et vérifient si celui-ci n'a pas de plaintes ou d'observations à formuler (art. 113, § 2 loi de principes).

67 Placement en *cellule de punition*, art. 137 loi de principes. Le directeur et un médecin-conseil rendent quotidiennement visite au détenu pour s'assurer de son état et de sa situation et pour vérifier s'il n'a pas de plaintes ou d'observations à formuler.

68 Voir *supra*.

69 Art. 118 loi de principes.

70 Les tentatives de suicide ne font pas l'objet d'un enregistrement dans les banques de données de l'administration pénitentiaire.

71 Question n° 453 du 30 janvier 2009, *Questions et Réponses*, Ch. repr., sess. ord. 2008-2009, n° 61, 6 mai 2009. Voy. notamment sur ce point M. Vanderveken, « Décès par suicide dans les prisons belges : un indicateur de santé alarmant », *in* D. Heirbaut, X. Rousseaux et K. Velle (éds), *Histoire politique et sociale de la justice en Belgique de 1830 à nos jours*, Bruxelles, La Charte, 2004, spéc. pp. 122-124 où, sur la base d'une analyse de l'évolution du taux de suicide de 1895 à 2002, l'auteur observe un rapport de simultanéité entre les périodes de surpopulation carcérale et celles d'un accroissement des taux de suicides en milieu carcéral.

IV.6. TRAITEMENT DES PLAINTES ET RECOURS OUVERTS AUX PRÉVENUS

Le droit de plainte figure incontestablement au titre des dispositions fondamentales qui doivent être reconnues aux détenus. Ainsi qu'a pu le relever à moult reprises le CPT au cours de ses visites sur notre territoire, aucune disposition légale ne prévoyait une possibilité formelle pour le détenu de formuler une plainte. Or, les procédures de plainte et d'inspection efficaces constituent des garanties fondamentales contre les mauvais traitements dans les prisons. Il s'avérait par conséquent nécessaire que les détenus puissent disposer de voies de recours appropriées, tant au sein du milieu carcéral qu'en dehors de celui-ci, et bénéficient de la possibilité d'un accès confidentiel à une autorité *ad hoc*.

Face à ces critiques récurrentes, le législateur a, par le biais de la loi de principes, instauré un droit de plainte formel, faisant l'objet d'une procédure contradictoire avec une possibilité de recours au cas où un détenu incarcéré dans une prison ne souhaiterait pas adhérer à une décision prise à son égard par le directeur ou au nom de celui-ci

Le texte législatif prévoit ainsi une procédure de traitement des plaintes par une commission des plaintes et une commission d'appel, émanations respectives des commissions de surveillance et du Conseil central de surveillance. Dans la mesure où la plainte est déclarée fondée, chaque commission de plainte a le pouvoir d'ordonner au directeur la prise d'une nouvelle décision, de se substituer à la décision annulée, voire d'annuler complètement ou partiellement la décision attaquée.[72]

Des possibilités de recours contre la décision de la commission des plaintes sont offertes tant au directeur qu'au plaignant devant la commission d'appel du Conseil central de surveillance.[73]

Indépendamment de ce droit de plainte, à l'instar de tout citoyen, tout détenu a également le droit de recourir aux juridictions de droit commun et plus spécifiquement introduire une action en référé. La compétence du juge des référés s'étend à la surveillance du bon équilibre de la sécurité carcérale et de la protection de l'intégrité des détenus et la sauvegarde de leur dignité humaine.[74]

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72 Art. 158, § 3 loi de principes. Par ailleurs, « dans la mesure où il ne peut être remédié aux conséquences de la décision annulée, la commission des plaintes détermine, après avoir entendu le directeur, s'il y a lieu d'accorder au plaignant une quelconque compensation à l'exclusion de toute indemnisation financière » (art. 158, § 4, al. 2).

73 Art. 159 et suivants loi de principes.

74 Voy. notamment nos développements *in* V. Seron et J. Detienne, « Politique pénitentiaire et droits des détenus en Belgique », *in* P. J.P. Tak et M. Jendly (éds), *Prison policy and prisoners' rights. The protection of prisoners' fundamental rights in international and domestic law – Politiques pénitentiaires et droits des détenus. La protection des droits fondamentaux des*

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Dans le cas où un traitement subi constituerait une infraction pénale, une plainte pénale peut être par ailleurs déposée ; tout fonctionnaire a d'ailleurs l'obligation légale d'informer le ministère public de toute infraction constatée dans l'exercice de ses fonctions.

Enfin, dans les cas où l'action pénale n'est pas ouverte, le détenu possède une action civile en réparation du dommage qui lui est causé par une faute de l'administration pénitentiaire

V. ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

En droit pénal belge, seules deux alternatives à la détention préventive sont possibles et légalement prévues : la mise en liberté sous *conditions* et la mise en liberté sous *caution*. S'il est à noter que certaines autres tendances semblent se dessiner depuis quelques années – à savoir notamment la volonté de recourir, pour certains types de faits, à la surveillance électronique (qui, à l'heure actuelle, constitue une modalité d'exécution de la peine privative de liberté) comme alternative à la détention préventive[75] – nous ne détaillerons toutefois que celles qui sont actuellement en vigueur.

V.1. LA MISE EN LIBERTÉ SOUS CONDITIONS

Depuis 1990, *dans les cas où la détention préventive peut être ordonnée ou maintenue* dans les conditions que nous avons détaillée *supra*[76], le juge

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détenus en droit national et international, Fondation internationale pénale et pénitentiaire, Nimègue, Wolf Legal Publishers, 2008, pp. 262 et suivantes.

75 C'est ainsi que, récemment encore, une proposition de loi en date du 9 septembre 2010 a été déposée en vue de modifier la loi du 20 juillet 1990 relative à la détention préventive, afin d'instaurer une surveillance électronique (*Doc. parl.,* Sén., sess. extr. 2010, n° 134/1, 9 septembre 2010. Cette proposition reprend le texte d'une proposition déjà été déposée au Sénat le 5 mars 2008 (*Doc. parl.,* Sén., sess. ord. 2007-2008, n° 613/1). Une proposition de loi allant dans un sens analogue a également été déposée à la Chambre le 29 juillet 2010 (*Doc. parl.,* Ch. repr., sess. extr. 2010, n° 31/001).

76 Comme le soulignent, à juste titre, M. Franchimont et *al.* (*op. cit.*, p. 647), « le maintien ou la mise en liberté sous conditions consiste donc bien en une alternative à la détention préventive : cette mesure ne peut intervenir que si, à son défaut, la détention préventive aurait pu être ordonnée. La mise en liberté sous conditions doit donc tendre aux mêmes objectifs que la détention provisoire ». L'alternative à la détention préventive s'applique dès lors uniquement aux personnes ayant commis *un délit de nature à entraîner un emprisonnement correctionnel de un an ou une peine plus lourde*. In abstracto, elle peut donc se voir prononcées en cas de suspicion de meurtre, homicide involontaire, homicide par négligence ; d'agression ou autre atteinte non létale à l'intégrité corporelle ; de vol et de détournement de fonds ; de fraude, falsification, contrefaçon et blanchiment d'argent ; d'activité terroriste ; d'atteinte à l'ordre public ; d'infraction liée aux stupéfiants ; d'infraction liée aux armes ou d'infraction routière.

d'instruction[77] peut, soit d'office, soit sur réquisition du ministère public, soit à la demande de l'inculpé, laisser l'intéressé en liberté en lui imposant de respecter une ou plusieurs *conditions*, pendant le temps qu'il détermine et pour un délai – renouvelable – de maximum trois mois.[78]

Afin de déterminer les conditions, le juge d'instruction peut faire procéder par le service des maisons de Justice de l'arrondissement judiciaire du lieu de résidence de l'intéressé à une enquête sociale ou un rapport d'information succinct contenant les éléments pertinents de nature à éclairer l'autorité qui a adressé la demande sur l'opportunité de la mesure ou de la peine envisagée.[79]

Les conditions imposées par le juge d'instruction doivent viser les mêmes objectifs que la détention préventive, à savoir le fait qu'il existe de sérieux raisons de craindre que l'inculpé, s'il était laissé en liberté, commette de nouveaux crimes ou délits, se soustraie à l'action de la justice, tente de faire disparaître des preuves ou entre en collusion avec des tiers. Ces conditions peuvent revêtir la forme d'obligations (par exemple se présenter à toute convocation) ou d'interdictions (par exemple de fréquenter certains lieux). Les dites conditions peuvent, en application de l'article 36 de la loi sur la détention préventive, être retirées, modifiées ou prolongées. Des conditions nouvelles peuvent également se voir imposées.

Elles peuvent également consister en une guidance ou un traitement.[80] Dans cette hypothèse, la personne ou le service chargé de la guidance ou du traitement doit adresser au juge ou à la juridiction ainsi qu'à l'assistant de justice, un rapport de suivi sur la guidance ou le traitement.[81] Ce rapport porte notamment sur les présences effectives du prévenu aux consultations, ses absences injustifiées, la cessation du traitement ou de la guidance et les situations comportant un risque sérieux pour les tiers. Un rapport sera adressé dans le mois qui suit la libération, et chaque fois que cette personne ou ce service l'estime utile, ou sur invitation du juge et de la juridiction.[82]

[77] La juridiction d'instruction (chambre du conseil ou des mises en accusation) qui règle la procédure peut également octroyer une mise en liberté sous conditions, de même que certaines juridictions de jugement.

[78] Article 35 LDP.

[79] La réalisation de ces enquêtes et rapports dans le cadre des alternatives à la détention préventive constitue cependant une part minime des activités de l'assistant de justice. Aussi, en 2009, ce type de tâches équivalait à 3 % des mandats d'enquête sociale et de rapport d'information succinct ordonnés en matière pénale (Service public fédéral Justice, *Justice en chiffres*, 2010, p. 65).

[80] Dans cette hypothèse, ce sont les assistants de justice du service des maisons de Justice qui assurent le suivi des conditions imposées et informent le juge ou la juridiction de la manière dont les conditions sont respectées.

[81] En 2009, on dénombrait 4949 nouveaux dossiers de guidances, suivis et médiations pénales dans le cadre des alternatives à la détention préventive. Le nombre de nouveaux mandats « libération sous conditions » a connu une constante et régulière progression. En dix ans, il est ainsi passé de 1914 mandats en 1999, à 4949 nouveaux mandats en 2009, soit une progression de 159 % ((Service public fédéral Justice, *Justice en chiffres*, 2010, pp. 66 et 68).

[82] Art. 36, § 6 LDP.

Au cours de la liberté sous conditions, l'inculpé a des entretiens réguliers avec l'assistant de justice. L'objectif de ces entrevues est d'éviter la récidive et de faire respecter à l'intéressé les conditions fixées. L'assistant de justice peut éventuellement réorienter celui-ci vers un service d'aide sociale.

Quinze jours avant la fin de la période d'épreuve, l'assistant de justice transmet un rapport d'évaluation à l'autorité qui en a fait la demande. Cette autorité peut alors décider soit de remettre l'inculpé en détention, soit de prolonger de 3 mois le délai de la libération sous conditions, soit de le libérer.

V.2. LA MISE EN LIBERTÉ SOUS CAUTION

En vertu de l'article 35, §4 de la loi sur la détention préventive, le juge (ou la juridiction d'instruction) peut également exiger le paiement préalable – et intégral – d'une *caution* dont il fixe le montant, notamment dans le cas de figure où il estime, sur la base de sérieux soupçons, que des fonds ou des valeurs tirés de l'infraction ont été placés à l'étranger ou dissimulés. Ce cautionnement sera restitué si l'inculpé s'est présenté à tous les actes de la procédure et pour l'exécution du jugement.[83]

VI. CONCLUSION

Si les volontés de modifier la détention préventive se sont succédé au fil du temps afin de lutter contre ses abus et de pallier les inconvénients occasionnés par celle-ci, force a été – et est – de constater l'inadéquation des changements apportés en la matière. La première, en date du 18 février 1852, avait exigé des « circonstances graves et exceptionnelles » Celle du 20 juillet 1990, une « absolue nécessité ». A l'instar de R. de Béco, l'on est en droit de se demander où se situe la différence.[84] Relevons par ailleurs, qu'outre le fait que la détention préventive est en effet devenue systématique pour la quasi-totalité des infractions du Code pénal qui donnent lieu à une peine d'emprisonnement ferme, les diverses réformes en la matière n'ont pas permis de diminuer de manière significative le recours à cette mesure.[85]

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83 Suivant la jurisprudence, « il n'est pas contradictoire de considérer qu'en raison du risque de fuite, la sécurité publique impose le maintien de la détention sauf versement d'un cautionnement, tout en fixant celui-ci à une somme telle que le danger de non-représentation s'en trouve très réduit sinon annihilé » (Cass., 24 avril 1996, *J.L.M.B.*, 1996, p. 1729, cité par M. Franchimont et *al.*, *op. cit.*, p. 651).

84 R. de Béco, « Pour une réforme en profondeur de la loi relative à la détention préventive », *J.T.*, 2010, p. 600.

85 Dans ce sens, voy entre autres, L. Kennes, « L'exceptionnelle détention préventive », *J.T.*, 2007, p. 321 ; H.-D. Bosly, D. Vandermeersch et M.-A. Beernaert, *Droit de la procédure pénale*, *op. cit.*, pp. 963-964.

Au final, quand on connaît le taux de surpopulation des établissements pénitentiaires belges, et spécifiquement des maisons d'arrêt, il est regrettable de constater que ces souhaits répétés de recourir de manière moindre à la détention avant jugement, ne constituent que des déclarations d'intention, des événements verbaux, doublés de quelque chose qui ressemble à un mensonge car ces vœux se donnent pour plus que ce qu'il ne sont réellement…[86]

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[86] L. François, « La forme des droits de l'homme », *R.T.D.H.,* 1990, p. 46.

LA DÉTENTION AVANT JUGEMENT EN CHINE : DE RIEN À LA CRÉATION, DU RETARD AU PROGRÈS

Xiaowei ZHANG*

I. INTRODUCTION

Au cours de trois décades, soit, à partir de la fondation de la République populaire de Chine en 1949 jusqu'à 1979, du fait de mouvements politiques successifs, la Chine n'avait pas élaboré des lois complètes en matière de droit pénal et de procédure pénale. Depuis de nombreuses années, les autorités judiciaires s'étaient habituées à traiter des affaires pénales par les dispositifs de fortune transitoires selon lequel « le jugement des affaires se fonde sur la politique criminelle et se guide sur les interprétations judiciaires ».[1] La détention avant jugement avait également connue une période de désordre. Le système pénal chinois s'est constitué à partir de 1979 avec les promulgations de lois portant sur le droit pénal et la procédure pénale (le 6 juillet). Le Code de procédure pénale, entré en vigueur le 1er janvier 1980, était le premier code de procédure pénale après la fondation du pays.

Ce texte abordera le système de la détention avant jugement en Chine, organisé par le *Code de procédure pénale* de 1979 et le *Code révisé de procédure pénale* de 1997. Il y a un consensus général selon lequel « la réforme du système de procédure pénale de 1997 a totalement transformé la structure de la législation chinoise, tout en intégrant formellement le respect des droits de l'homme

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1 CHEN, Haoran, *Généralités du droit pénal appliqué*, Edition de l'Université des sciences physiques et appliqués de Chine orientale, 2005, p.15.

fondamentaux dans le système de justice pénal. Néanmoins, l'application et la réalisation de cette réforme n'ont pu se faire du jour au lendemain. »[2]

II. CADRE LÉGAL : NORMES INTERNATIONALES ET DE DROITS DE L'HOMME

II.1. INSTRUMENTS INTERNATIONAUX DES DROITS DE L'HOMME

La Chine est membre permanent du Conseil de sécurité des Nations Unies. Néanmoins, avant le rétablissement de la République populaire de Chine dans son siège légitime aux Nations Unies en 1971, elle n'avait signé aucune convention internationale relevant de la sauvegarde des droits de l'homme. C'est à partir de cette date que la Chine signa ou ratifia successivement les instruments internationaux des droits de l'homme ci-dessous.

Le Gouvernement chinois ratifia la *Convention contre la torture et autre peines ou traitements cruels, inhumains ou dégradants* en 1988.

Le Gouvernement chinois signa le 29 août 1990 la *Convention relative aux droits de l'enfant*, le 29 décembre 1991 l'Assemblée populaire nationale la ratifia et adressa la ratification aux Nations Unies le 2 mars 1992. Le Gouvernement chinois déclara que la Chine allait remplir les engagements découlant de l'article 6 de la Convention, sous la condition de se conformer à l'article 25 de la Constitution concernant la planification des naissances, en vertu de l'article 2 de la *Loi sur la Protection des mineurs de la République populaire de Chine* (adoptée par l'Assemblée populaire nationale le 4 septembre 1990).[3] La *Convention relative aux droits de l'enfant* est entrée en vigueur en Chine le 2 avril 1992. La Chine signa le 5 octobre 1998 le *Pacte international relatif aux droits civils et politiques*. Le 6 septembre 2000, le Gouvernement chinois signa au siège des Nations Unies à New York le *Protocole additionnel à la Convention relative aux droits de l'enfant visant la traite des enfants, la prostitution des enfants et la pornographie des enfants*. Le 15 mars 2001, le représentant chinois signa à New York le *Protocole sur l'interdiction de l'emploi des enfants soldats*. Enfin, le 29 août 2002, l'Assemblée populaire nationale ratifia ce protocole.

Après la ratification par la Chine de la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* et la signature du *Pacte*

[2] Peter Burns, *La Chine et la Convention internationale contre la torture*, 1er discours des "Conférences d'experts célèbres sur les lois pénales" organisées par l'Université normale de Pékin, le 26 août 2005, 2006-05-16 (www.criminallawbnu.cn/criminal/).

[3] La décision votée par la vingt-troisième réunion du Comité permanent de la septième session de l'Assemblée nationale populaire de la république populaire de Chine, le 29 décembre 1991.

international relatif aux droits civils et politiques, le Gouvernement chinois a incorporé l'esprit de ces instruments internationaux dans notre droit interne par le complément et l'amendement de lois pertinentes[4], telles que *le Code pénal, le Code de procédure pénale, la Loi sur la prison, la Loi de police et le Règlement de la cellule de police.*

Le système juridique chinois ne s'accorde pas directement aux conventions internationales article par article. Après la signature d'une convention internationale, l'État n'a pas eu la nécessité de l'adoption d'une loi spéciale apparentée, mais il a néanmoins procédé au remaniement et au complément de lois pertinentes pour marquer l'esprit de ces instruments internationaux.

Le Gouvernement chinois n'a émis aucune réserve relative à la détention (avant jugement) à la signature de ces instruments.

Conformément à la *Constitution chinoise* et aux autres lois, les conventions internationales ratifiées par l'Etat s'appliquent en Chine par deux voies : la première, par la procédure de législation interne, l'effet juridique de ces instruments internationaux s'ordonnant à l'échelon du pays ; la deuxième, par l'intégration directement applicable de ces instruments internationaux dans les affaires concrètes. Ainsi, les droits fondamentaux contenus dans ces instruments internationaux peuvent être directement applicables par les tribunaux nationaux. Les contenus et les articles compris dans ces instruments internationaux ratifiés par le Gouvernement chinois s'expriment pour une grande partie dans les droits nationaux qui reflètent ces droits fondamentaux.

Toutefois, les citoyens chinois ne disposent pas de voies de recours devant les organes judiciaires supranationaux.

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II.2. DROITS DE L'HOMME AU NIVEAU NATIONAL/ DROITS CIVILS

Selon l'article 37 de la *Constitution*, la liberté personnelle du citoyen de la République populaire de Chine est inviolable. Nul, sans l'autorisation ou la décision du parquet populaire ou la décision du tribunal populaire, ne peut être arrêté par l'organe de la sécurité publique. La détention illégale et d'autres façons illégales telles que la privation illégale ou la limitation illégale de la liberté personnelle du citoyen sont interdites. L'investigation illégale du corps du citoyen est interdite.

[4] *Le 3è Rapport de la République populaire de Chine sur l'état de l'application de la « Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants »*, CAT/C/39/Add.2, 20 décembre 2009 (www.fmprc.gov.cn/chn/gxh/zlb/tyfg/t4832.htm).

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

Le *Code révisé de procédure pénale*, entré en vigueur le 1er janvier 1997, reste marqué par des dispositions détaillées sur les mesures de contrainte applicables avant jugement, tout en supprimant le *Règlement de l'arrestation et de la détention de la République populaire de Chine*.

En Chine, les mesures de contrainte applicables avant jugement comprennent :
1) L'assignation forcée (ou comparution forcée de la personne soupçonnée) ;
2) La surveillance de la résidence de la personne soupçonnée ;
3) La liberté sous caution ;
4) La garde à vue ;
5) L'arrestation.

Parmi ces mesures, l'application des trois premières n'entraine pas la privation de liberté complète. Donc, les différentes modalités de privation de liberté avant jugement prévues dans mon pays sont en fait la garde à vue et l'arrestation, et les trois premières, l'assignation forcée (ou comparution forcée du suspect), la surveillance de la résidence du suspect et la liberté sous caution sont en général utilisées comme les alternatives à la garde à vue et à l'arrestation.

Garde à vue

Selon l'article 61 du *Code de procédure pénale*, les organes de sécurité publique (soit « la police chinoise ») peuvent détenir au préalable (en détention provisoire, ou en détention sans mandat) les personnes surprises en flagrant délit ou suspectées de crimes graves dans les cas suivants :
1) Si la personne est en train de se préparer pour un crime, commet un crime, ou si elle est découverte immédiatement après avoir commis un crime. Ici, un crime signifie homicide, blessure intentionnelle, viol, vol, pillage, etc., passible d'une peine ;
2) Si la personne est identifiée comme étant le criminel par une victime ou un témoin oculaire ;
3) Si une preuve de culpabilité est découverte sur elle ou à sa résidence ;
4) Si le suspect tente de se suicider ou de s'enfuir après avoir commis un crime ;
5) S'il est probable que la personne a détruit, falsifié des preuves ou est de connivence pour s'accorder avec le co-auteur ;
6) Si la personne soupçonnée ne dit pas son vrai nom et son adresse, et son identité est inconnue ;
7) Si la personne est soupçonnée d'avoir commis des crimes en plusieurs endroits, plusieurs fois, ou en groupe.

8) La sécurité publique est également autorisée à placer en détention provisoire un suspect criminel poursuivi par l'internet.

Pourtant, si la sécurité publique n'a pas obtenu des preuves valables de sa culpabilité, la personne détenue doit être immédiatement libérée. Cela signifie que l'intervalle entre la garde à vue et la détention provisoire est de 24 heures.

Les cas ou les motifs ci-dessus indiquent que les infractions des suspects criminels peuvent être passibles d'une peine obligatoire. La sécurité publique peut ordonner la détention provisoire si la personne soupçonnée n'a pas une résidence fixe dans sa localité et peut être condamnée à la réclusion.

En outre, quand un suspect qui est susceptible d'être menacé par d'autres individus, ou bien risque sa sécurité personnelle, peut se voir appliquer une mesure de « détention protectrice ». Cette mesure de « détention protectrice », différente du terme « détention préventive » en Occident, est prise dans le but de protéger le suspect. Dans la pratique judiciaire, il existe un certain nombre de suspects, coauteurs d'un crime ou confrontés à des circonstances compliquées, qui demandent à l'organe de sécurité publique de prendre une mesure de détention protectrice à son égard. Par exemple, si un délateur se trouve en situation susceptible d'encourir des représailles des autres, la sécurité publique peut le placer en détention protectrice.

Arrestation

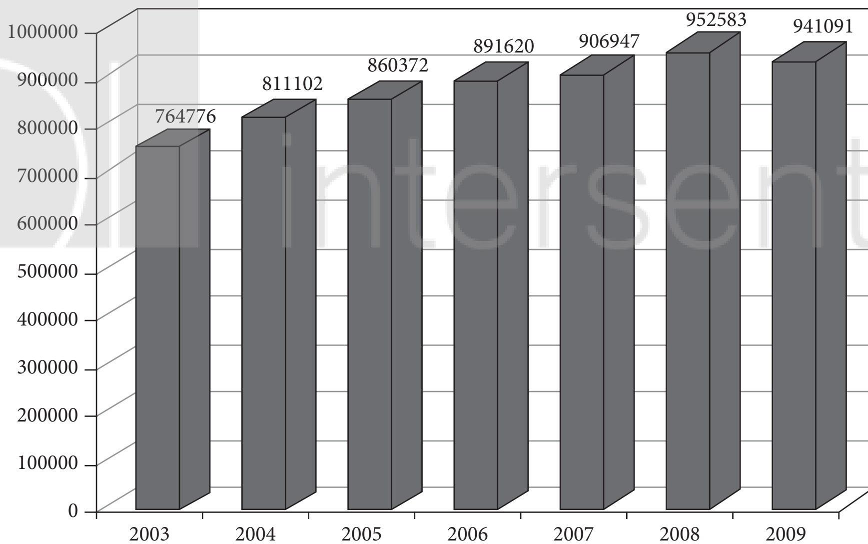
Selon l'article 59 de la *Procédure pénale*, « l'organe de sécurité publique qui souhaite procéder à une arrestation doit obtenir l'autorisation du parquet populaire ou la décision du tribunal populaire ». L'article 67 prévoit que « le procureur général prend la décision sur l'examen et l'autorisation de l'arrestation du suspect criminel au nom du parquet populaire. Les affaires graves doivent être soumises au comité des procureurs pour discussion et décision ». Ainsi, l'article 68 dispose que « après l'examen d'une affaire soumise par l'organe de sécurité publique pour une demande d'autorisation d'arrestation, le parquet populaire doit décider selon les cas, d'après les conditions des affaires, soit d'autoriser l'arrestation, soit la refuser. Dès que l'arrestation est décidée, l'organe de sécurité publique doit y procéder immédiatement et avertir le parquet du résultat sans délai ». Si le parquet n'autorise pas l'arrestation, la personne détenue doit être immédiatement libérée. « Le parquet populaire doit décider l'autorisation de l'arrestation ou bien son refus dans les 7 jours à partir du jour où il a reçu la demande de l'organe de sécurité publique pour autoriser l'arrestation ». L'article 71 dispose que « quand l'organe de sécurité publique procède à une arrestation, il est tenu de présenter un mandat d'arrêt. Selon l'article 72, « l'interrogatoire de la personne doit être conduit dans les 24 heures par le tribunal populaire, le parquet populaire ou par l'organe de sécurité publique ». L'article 73 dispose que « Si le tribunal populaire, le parquet populaire

ou la sécurité publique découvrent que les mesures de contrainte prises sur la personne soupçonnée ou l'inculpé sont inadaptées, ces mesures doivent être annulées ou modifiées immédiatement». L'article 75 dispose enfin que «Si les mesures de contrainte adoptées par le tribunal populaire, le parquet populaire ou la sécurité publique ont excédé la durée prévue par la loi, le suspect criminel ou l'accusé, ses représentants légaux, ses proches, ou ses avocats ou autres défenseurs choisis par le suspect criminel ou l'accusé ont le droit de demander l'annulation de ces mesures de contrainte».

Nombre de personnes placées en détention

En 2009, il y avait en Chine 941.091 personnes placées en détention avant jugement. La figure suivante illustre le nombre de personnes placées en détention avant jugement en Chine de 2003 à 2009.[5] La Figure I signifie la population carcérale totale (à l'exception des détenus avant jugement) en Chine de 2003 à 2009.

Figure I. Nombre de personnes placées en détention avant jugement en Chine, 2003-2009

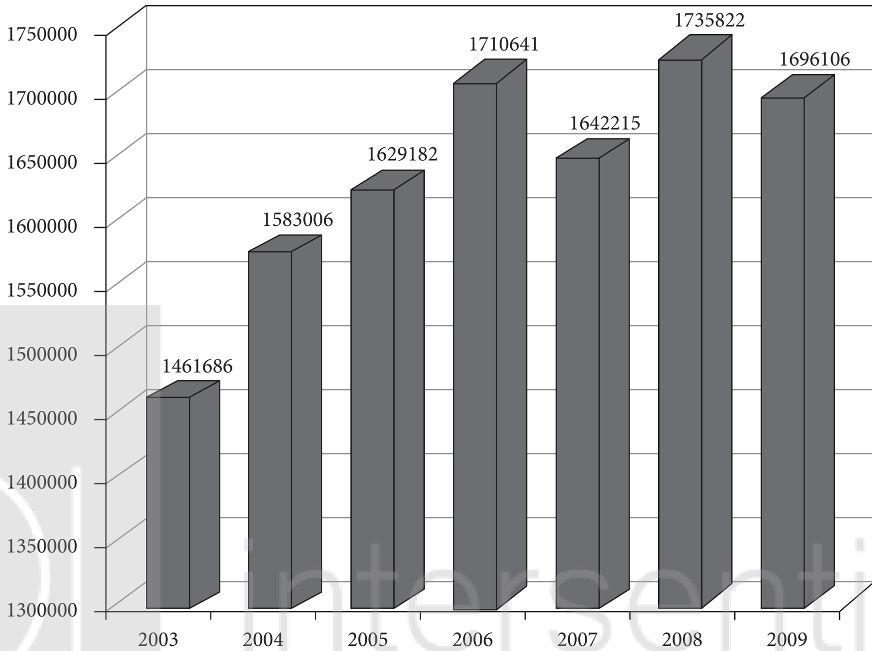


Conformément aux dispositions du *Code de procédure pénale chinoise*, la détention d'un suspect depuis la détention à l'arrestation, jusqu'à la prononciation de l'arrêt de la Cour d'appel ne peut excéder 8 mois et 15 jours. Néanmoins, les détenus en prison sont comptés par année. Ces deux catégories

[5] Source: *Rapports sur les activités du Parquet populaire suprême de la République populaire de Chine*, mars 2004-2010.

de personnes sont respectivement placées dans les endroits différents. C'est pourquoi je ne peux pas répondre exactement à la question « quelle est la population carcérale totale (y compris les détenus avant jugement) à la même date ». Bien sûr, nous avons une façon simple de combiner les chiffres de la Figure I avec ceux de la Figure II, mais ces chiffres ne sont pas bien précisés.

Figure II. Population carcérale en Chine, sans les détenus avant jugement, 2003-2009



La durée moyenne de la détention avant jugement est d'environ 90 jours, cette durée ne comprend pas la durée de la détention du défendeur qui a fait appel jusqu' à la prononciation de l'arrêt de la Cour d'appel. A partir de 2008, la procédure des procès criminels a gagné en célérité et la durée moyenne de la détention avant jugement est diminuée d'autant. La durée de détention de certains suspects a considérablement diminué. Par exemple, pour une affaire bien connue en Chine en décembre 2009, l'affaire d'une bande de la « société noire » (soit « criminalité organisée ») jugée à Chong Qing (municipalité du sud-ouest de la Chine relevant directement du gouvernement central), la plus courte durée de détention d'un suspect dans cette affaire a été de 18 jours.[6]

6 *Legal Daily*, 8 January, 2010.

III.1. L'INTERVALLE ENTRE L'ARRESTATION ET LA GARDE À VUE OU LA DÉTENTION PROVISOIRE

Quant aux suspects criminels ordinaires, l'intervalle entre l'arrestation et la garde à vue prévue par la loi est de 3 à 7 jours. L'article 69 dispose que « Si l'organe de sécurité publique estime nécessaire l'arrestation du détenu (soit en garde à vue), il doit en informer le parquet dans les 3 jours pour demander un examen et obtenir une autorisation. Dans les cas particuliers, la durée limitée de la demande pour l'examen et l'autorisation peut être prolongée d'un à quatre jours ». Mais conformément aux dispositions particulières du *Code de procédure pénale*, pour les personnes soupçonnées d'avoir commis des crimes interrégionaux dans plusieurs lieux, en plusieurs fois ou en groupe, la durée de l'intervalle entre la garde à vue et l'arrestation peut être prolongée de 30 jours. La plus longue durée est portée à 30 jours pour la simple raison que notre immense pays possède des régions qui diffèrent considérablement du point de vue des communications et des transports, et du niveau économique. Par exemple, dans certaines régions géographiquement désavantagées de l'arrière-pays et les régions reculées, les communications et les transports sont assez malcommodes. Certains suspects de ces régions se sont généralement déplacés dans les villes côtières du sud-est et les régions économiquement plus développées pour opérer des infractions. L'enquête pour rassembler des preuves envers ces suspects, connus sous le nom de « population flottante », nécessite plus de temps.

Selon les dispositions du *Code de procédure pénale chinoise*, la décision de la détention provisoire et celle de la garde à vue sont toutes prises par les organes de sécurité publique, et l'arrestation est autorisée par les parquets et les tribunaux populaires. C'est-à-dire qu'en Chine, les décisions de la garde à vue et celle de la détention provisoire ne sont pas prises par un juge/tribunal.

III.2. CAS, MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

Si une personne est soupçonnée d'une infraction qui n'est passible que de la mise sous surveillance, détention pénale ou de certaine peine accessoire, telle que l'amende, la privation des droits politiques, elle ne peut pas être placée en détention provisoire. Néanmoins, si cette personne est arrêtée sur place pendant sa commission d'un crime, elle peut être placée en détention provisoire avec une durée de 24 heures au plus.

En général, les motifs principaux pour placer une personne en détention provisoire sont les suivants :

1) Empêcher un flagrant délit ;
2) Arrêter la personne qui continue à commettre d'autres infractions ;

3) Prévenir une connivence du suspect criminel avec les autres co-auteurs ou la destruction de preuves ;
4) Arrêter le suspect qui s'enfuit ou sort du pays illégalement ;
5) Arrêter le suspect qui menace encore sa victime.

D'habitude, les motifs principaux pour placer une personne en garde à vue sont :
1) Pour faciliter l'interrogatoire et l'enquête des faits incriminés, et aussi pour prévenir le suspect qui pourrait échapper au procès ;
2) Pour prévenir le suspect qui pourrait commettre d'autres crimes plus graves.

Le degré minimum de suspicion requis pour placer une personne en garde à vue est le suivant : soit le suspect a commis un crime qui peut être passible d'une réclusion de plus de 6 mois avec les faits révélés et les preuves nécessaires ; soit il est en train de commettre un crime qui peut être condamné à la réclusion.

Le degré minimum de suspicion requis pour placer une personne en détention provisoire vise les cas suivants : le suspect pris en flagrant délit, celui qui porte les preuves ou le butin de sa culpabilité sur lui, celui qui est identifié comme suspect poursuivi sur place ou poursuivi sur l'internet. La détention provisoire peut être ordonnée contre celui qui est découvert comme le suspect poursuivi ou poursuivi sur l'internet dans le cas d'être demandé de montrer ses papiers à la sortie et à l'entrée du pays, à l'embarquement dans l'avion et à l'hébergement, etc. Un mandat d'arrêt ou un mandat d'arrêt sur l'internet est toujours lancé par l'organe de sécurité publique qui est responsable de cette affaire.

III.3. PROTECTION CONTRE LES PRIVATIONS DE LIBERTÉ ILLÉGALES OU EXCESSIVEMENT LONGUES

La durée limitée est prévue explicitement par le *Code de procédure pénale chinoise* en matière de la détention avant jugement. Les organes judiciaires examinent attentivement si les suspects peuvent être privés de leur liberté. Ce genre d'examen se divise en deux étapes : l'examen de la détention au début et celui de la détention en cours, lesquelles sont généralement soumises à l'examen par la sécurité publique elle-même et le parquet.

En outre, une institution spécialisée établie au Parquet populaire suprême est compétente pour soumettre à l'examen le problème de la détention excessive. Si une détention excessive est constatée, le Parquet suprême a l'obligation de libérer le détenu immédiatement. Le Parquet suprême a effectué cet examen une fois par an à l'échelle nationale depuis 2002. Les parquets locaux sont responsables de soumettre à l'examen chaque affaire de détention avant jugement pour vérifier leur durée. Pour effectuer cet examen régulièrement et successivement, les autorités de parquets nationaux ont fait installer, à partir de 1996, 78 parquets dans les cellules de police (pour les cellules qui ont une grande quantité de

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détenus), et 3404 bureaux de contrôle pour les petites cellules de police. Tous les établissements de détention sont accrédités par les autorités de parquet.

En Chine, les organes de sécurité publique possèdent eux-mêmes les organes de contrôle qui sont compétents pour examiner les conditions de détention. Les parquets en tant que les organes de surveillance juridique, peuvent initier directement la procédure d'examen. En outre, les tribunaux peuvent également initier la procédure d'examen si la possibilité d'une durée excessive de la détention est découverte en procès. De plus, le détenu et ses proches peuvent aussi demander un réexamen du dossier à la sécurité publique ou au parquet en raison de la durée excessive de la détention à l'encontre de la loi. De fait, l'initiative de cette procédure de l'examen se caractérise par deux voies, par les autorités compétentes elles-mêmes et sur demande.

*Selon les dispositions du présent Code de procédure pénale, la décision pour la détention avant jugement ne s'effectue pas au cours du procès, mais par décision de la police et du parquet. Ainsi, un suspect/prévenu ne peut pas engager une procédure de mise en liberté, il ne peut que deman*der un réexamen, conformément à la loi, à l'autorité qui effectue la détention avant jugement ou à l'autorité de l'échelon supérieur. Le parquet statue par écrit sur la décision de mise en liberté ou non à l'égard du réexamen.

Si les faits d'accusation ne sont pas avérés, ou si l'organe de sécurité publique ou le parquet effectuent la détention de façon illégale, l'organe de sécurité publique ou le parquet sont compétents pour ordonner la libération. Le chef de la sécurité publique décide de la libération dans le cas où la sécurité publique a décidé de la détention. Si le chef de la sécurité publique ne décrète pas la libération, l'organe de parquet peut décider de la libération conformément à la procédure de supervision juridique. Mais, la cour peut également décider de la libération.

Si le suspect/prévenu croit qu'il ne doit pas être détenu ou qu'il est en détention excessive, il peut demander un réexamen à tout moment, et autant de fois qu'il le souhaite. Pourtant, le *Code de Procédure pénale* ne comporte pas de dispositions en ce sens. Par exemple, à qui le suspect/prévenu doit-il soumettre sa demande ? Par qui la libération sera décidée ?

Les critères de cet examen se situent sur le plan du fond et procédural. Sur le fond du droit, il est nécessaire d'examiner si le détenu a commis un crime qui peut être passible d'emprisonnement avec les faits révélés et les preuves de culpabilité nécessaires. Du point de vue de la procédure, il est nécessaire d'examiner si la procédure s'accorde avec la loi, si l'autorité possède un mandat légal et si la détention est excessive.

Le placement en détention provisoire ne peut se prolonger que si l'arrestation a été autorisée par le parquet. Il en va de même pour le placement en garde à vue. La garde à vue ordonnée est basée sur la suspicion d'un crime, et l'arrestation est subordonnée à l'ouverture nécessaire d'un procès. Selon les dispositions du *Code de procédure pénale chinois*, c'est seulement avec l'arrestation autorisée que le prévenu peut engager une procédure. Ainsi, il n'y a que le placement en arrestation

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qui peut durer jusqu'à la prononciation de la décision de première instance ou jusqu'au délai d'appel interjeté par le prévenu. Selon notre *Code de procédure pénale*, un jugement en première instance doit se terminer dans les 90 jours à partir du jour de l'arrestation. Le délai d'appel contre une décision pénale est de 10 jours.

III.4. INFORMATION, REPRÉSENTATION LÉGALE, INTERPRÈTE, INFORMATIONS AUX TIERS

Toute personne peut avoir accès aux informations suivantes:

1) les chefs d'accusation et les faits de culpabilité;
2) ses droits fondamentaux au moment de sa privation de liberté;
3) les noms des organes et de ceux qui sont chargés d'enquêter et de poursuivre;
4) les dispositions juridiques à l'appui de la poursuite;
5) les modalités d'assistance juridique.

Selon le *Code de procédure pénale*, au début de la détention ou de l'arrestation, le suspect doit être informé des raisons concrètes de la détention ou de l'arrestation. Cette information se présente automatiquement sans la nécessité de la demande du suspect. Aucune condition des raisons de la détention et de l'arrestation n'est exigée quand le suspect en est informée. A la fin de l'enquête, l'organe de sécurité publique ou le parquet doivent immédiatement informer le prévenu du chef d'accusation et des faits de culpabilité.

Le *Code de procédure pénale* n'exige pas qu'un suspect soit représenté par un avocat. En Chine, il y a généralement trois cas en pratique:

1) Le cas où le suspect refuse la représentation de l'avocat et il assure sa défense lui-même. Si l'infraction dont il est accusée est passible d'une réclusion de moins de 3 ans, la loi lui permet de se défendre sans avocat;
2) Le cas où le suspect n'a pas été désigné d'avocat, du fait de ses conditions économiques ou autres, et si le chef d'accusation est passible d'emprisonnement de plus de 3 ans, le tribunal populaire peut désigner un des avocats chargés de l'aide juridictionnelle. Le suspect peut cependant la refuser;
3) Le cas où le suspect, par lui-même, prend un avocat qu'il est autorisé à consulter; l'avocat désigné peut plaider en faveur de son client détenu. Dans le système du procès pénal chinois, le suspect criminel a toujours le droit de se défendre ou d'être assisté de son avocat pour se défendre. Selon les statistiques, actuellement, l'intervention de l'avocat ou du défenseur dans le procès pénal chinois est de 42,8 %.[7]

[7] Voir: LegalDaily, 2008-06-14 (www.legaldaily.com).

Les suspects/prévenus ont droit à un interprète et aussi à des services de traduction des documents lors de leur détention avant jugement. Actuellement, la plupart des organes de sécurité publique et de parquet chinois sont équipés d'interprètes et de volontaires qui connaissent les langues des différentes régions locales, les langues des minorités et les langues étrangères. Par exemple, les organes de sécurité publique de Shanghai sont équipés d'interprètes volontaires anglais, français, espagnol, japonais, russe, allemand et arabe, etc., en tout, 8 langues étrangères.

Aux termes des dispositions du *Code de procédure pénale*, après le placement en garde à vue (article 64) ou l'arrestation (article 71) des suspects/prévenus, dans les 24 heures, les organes de sécurité publique doivent notifier à leurs familles ou aux unités auxquelles ils appartiennent, la raison de leur arrestation ou le placement en garde à vue/détention provisoire et le lieu où ils sont détenus, sauf le cas où cette notification pourrait entraver l'enquête ou le cas où il serait impossible de les en informer. Les suspects/prévenus ont également le droit de demander aux organes chargés de leurs affaires d'informer leurs familles ou leurs unités au moment de leur arrestation ou placement en garde à vue/détention provisoire. Selon l'article 108 du *Règlement du Ministère de la Sécurité publique relatif au traitement des organes de sécurité publique sur la procédure des affaires criminelles*, après la détention d'un suspect, il est obligatoire d'établir une « notification de détention » et de la fournir à sa famille ou à son unité.

III.5. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

Les conventions internationales ratifiées par le Gouvernement chinois ont influencé la législation et la juridiction chinoises de la façon suivante :

Les principes de ces instruments sont traités comme les bases de la législation et la réformation des lois

Conformément à l'esprit des principes des droits internationaux tel que le « Pacte international relatif aux droits civils et politiques », les autorités législatives chinoises ont affirmé explicitement, en 1996, dans le Code révisé de procédure pénale, les principes de base tels que l'indépendance judiciaire, la présomption d'innocence, l'interdiction de la torture, l'interdiction des mauvais traitements pour obtenir des aveux, et les systèmes essentiels tels que la procédure de la protection spéciale relative aux mineurs criminels, le pouvoir de supervision du procès pénal exercé par le parquet, etc. En 1994, la *Loi de compensation d'Etat de la République populaire de Chine* a prévu, par l'esprit des principes des conventions internationales, les systèmes tels que la compensation d'État pour ceux qui sont faussement détenus ou arrêtés et les poursuites en responsabilité des officiers judiciaires compétents. La *Loi de l'avocat* de 1996, qui s'inspire de

l'esprit des droits internationaux, a affirmé la protection du droit de la défense de l'inculpé. Cette loi a aussi établi le système de l'aide juridictionnelle pour l'inculpé qui est incapable d'assumer les frais d'avocat.

Le système de la justice criminelle a été amélioré par les critères des conventions internationales

Selon les dispositions de la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, les autorités judiciaires chinoises ont supprimé, depuis 1996, le système de détention pour enquête en tous lieux. Comme je l'ai précédemment mentionné, les organes judiciaires pénaux ont réformé les modalités de l'audience du procès pénal et les modalités d'exécution de la peine de mort. A présent, la plupart des exécutions de peine de mort en Chine sont effectuées par injection. La cessation de l'emploi de la fusillade s'est appliquée depuis dix années de suite dans les grandes villes comme Pékin, Shanghai, et Canton.

III.6. DÉVELOPPEMENTS LES PLUS IMPORTANTS

A mesure qu'un développement rapide de l'économie s'est réalisé, l'établissement et la réforme du système juridique a considérablement progressé dans ces 10-15 dernières années. Les développements les plus importants sont en matière de procédure pénale relative à la détention avant jugement. Les réformes se sont manifestées dans les aspects suivants :

Révision et amélioration du Code de procédure pénale

Le 17 mars 1996, la quatrième réunion de la huitième session de l'Assemblée nationale populaire a voté la *Décision relative à la réforme du Code de procédure pénale*. Le Code révisé de procédure pénale chinois est entré en vigueur le 1er janvier 1997. Le Code porte sur les cinq aspects suivants pour renforcer la sauvegarde des suspects criminels, des prévenus et des détenus susceptibles de torture et autres peines ou traitements cruels, inhumains ou dégradants :

1) L'établissement du principe selon lequel « la culpabilité ne peut pas être déterminée sans la sentence du tribunal populaire » (art. 12 du *Code de procédure pénale*) ;
2) L'intervention de l'avocat ou du défenseur dans le procès pénal dès la période de la détention ou de l'arrestation ;
3) La réforme des modalités de l'audience permettant à la partie civile et à la défense d'intervenir pour garantir l'objectivité du procès ;

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4) Le contrôle de l'application de la peine de mort et la modification concernant l'exécution de la peine de mort.[8]
5) La suppression du système de détention pour enquête ;

Depuis de nombreuses années, les organes de sécurité publique avaient coutume d'employer une mesure administrative appelée la détention pour enquête. Cette mesure de contrainte jouait un rôle important dans la répression des infractions, mais des problèmes et des abus subsistaient. Le Code révisé de procédure pénale de 1996, tout en supprimant le système de détention pour enquête, a modifié les conditions et la durée de détention pour qu'elles répondent au besoin de poursuite des infractions. Par exemple, « ceux qui n'ont ni nom ni adresse ni lieu d'origine avéré » pouvaient autrefois principalement faire l'objet d'une détention pour enquête ; comme les modalités et la durée de l'enquête ne sont pas limitées par la loi, la détention pour enquête était souvent prolongée, notamment pour « les personnes itinérantes, soupçonnées d'avoir été plusieurs fois auteurs ou coauteurs des crimes », et ces trois types de personnes étaient souvent maltraités. Ce système inhumain de détention pour enquête a été supprimé par le nouveau Code. *Le Code révisé de procédure pénale* prévoit qu'il est interdit d'utiliser dans le procès criminel la détention pour enquête ou ces modalités déguisées.

Révision et amélioration du Code pénal

Le 14 mars 1997, la cinquième réunion de la huitième session de l'Assemblée nationale populaire a remanié le *Code pénal* entré en vigueur en 1980. Ce Code révisé renforce la protection des droits de la personne. Par rapport aux dispositions de l'ancien *Code pénal* visant la prohibition de la torture, le *Code pénal* révisé complète et améliore les dispositions concernant la protection des droits de la personne. Les principales modifications portent sur deux aspects suivants :
1) A certains crimes prévus par le *Code pénal* en 1980 tels que le crime d'extorsion des aveux en recourant à la torture, aux châtiments corporels et aux brutalités infligées aux détenus, le nouveau code ajoute le crime d'extorsion de preuves par force, commis par les officiers de justice. Cette modification a résolu le problème selon lequel l'acte de violence utilisé par les officiers de justice envers le témoin en vue d'obtenir un témoignage ne pouvait pas être punissable, parce que l'ancien Code ne le prévoyait pas comme un crime ;
2) L' aggravation des sanctions contre le crime d'extorsion des aveux en recourant à la torture, l'acte de violence dans le but d'obtenir un témoignage

[8] Le *Code pénal* chinois de 1979 prévoyait l'exécution de la peine de mort par fusillade. Le *Code de procédure pénale* révisé prévoit que l'exécution de la peine de mort peut désormais s'effectuer par fusillade ou par injection. En outre, elle peut avoir lieu non seulement sur le lieu d'exécution mais à l'intérieur de la prison. Ce qui est plus humain.

du témoin, le crime du châtiment corporel et des brutalités infligées aux détenus. Ces peines, plus sévères qu'auparavant, sont explicitement stipulées dans le *Code pénal* révisé. Les auteurs de ces trois crimes qui ont causé des blessures, des infirmités ou des morts peuvent être condamnés à la peine de mort, la réclusion perpétuelle ou une peine de plus de 10 ans.

Avant la réforme de procédure pénale en 1996, il y avait en Chine le problème de la torture pour obtenir des aveux en matière de procédure pénale, du fait que certains fonctionnaires de police dans les régions reculées et montagneuses, à court de moyens d'investigations efficaces, s'appuyaient excessivement sur les aveux des suspects. Une fois que les suspects refusaient de répondre ou n'étaient pas en coopératifs avec l'interrogatoire, les fonctionnaires chargés des affaires étaient susceptibles d'utiliser la torture pour obtenir des aveux. A partir de 1996, les organes des parquets chinois ont renforcé les enquêtes et les poursuites en justice à l'égard de la torture. D'après les statistiques, en 1996, les organes des parquets à l'échelle nationale avaient 409 dossiers établis pour la poursuite en justice à l'égard de torture ; en 1997, 412 dossiers établis. En 1998, 150 affaires criminelles de torture ont été jugées par les tribunaux en Chine. Après cette date, les crimes de torture ont progressivement diminués.[9]

Limitation de l'abus d'armes par la police

En 1996, le conseil des Affaires d'Etat a promulgué *La règle sur l'emploi d'instruments de police (bâton, menottes etc.) et d'arme par l'agent de police*. Cette règle précise en termes explicites dans quel cas l'emploi d'instruments de police et d'arme est possible. L'article 14 de cette *Règle* prévoit qu'un policier populaire qui a utilisé des instruments de police ou des armes à l'encontre de la loi, causant des blessés et des morts, ou la perte de biens, fait l'objet de poursuite en responsabilité par la loi ; si son acte ne constitue pas un crime, il peut être puni d'une sanction administrative. Pour des personnes blessées ou mortes ou des personnes qui ont perdu leurs biens, l'organe auquel ce policier populaire appartient doit verser des indemnités pour les dommages causés selon les dispositions pertinentes de la *Compensation des dommages de l'Etat*.

Amélioration du système judiciaire

En juin 1998, la Cour populaire suprême a élaboré et promulgué des *Moyens des poursuites de responsabilité pour les personnes judiciaires qui jugent à l'encontre de la loi (appliqués à l'essai)* et *Moyens des sanctions disciplinaires contre l'acte de*

[9] *Le 3ᵉ Rapport de la République populaire de Chine sur l'état de l'application de la « Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants »*, 20 décembre 2009.

jugement de la cour populaire (appliqués à l'essai). La Cour suprême interdit aux juges d'avoir recours à 13 actions conformément à la *Loi sur les juges*. Les 13 actions prévues comprennent l'extorsion des aveux en recourant à la torture, l'interdiction de la violation des droits et des intérêts légitimes des citoyens par abus de pouvoir, etc.[10]

Formation des magistrats

A partir de mars 1998, les organes judiciaires chinois doivent faire l'objet d'une formation à l'échelon national. Cette formation vise à diminuer les violations de la loi, qui pourraient survenir au cours de la procédure, y compris les actes de torture. Sur la base de cette formation, un certain nombre de magistrats qui avaient conduit des procès à l'encontre de la loi et de la discipline ont été sanctionnés. Ensuite, le système d'inspecteur a été instauré dans les cours chinoises. Ce système a non seulement renforcé le contrôle et la surveillance, mais aussi a permis de sanctionner le travail des magistrats effectué en violation de la loi et de la discipline.[11]

Renforcement de l'audience publique, face à la surveillance de la société et des medias

Les cours chinoises considèrent toujours l'audience publique comme une garantie importante de la justice, la prévention de la corruption et la prohibition de la torture. La Cour suprême a exigé explicitement que tous les procès soient tenus en audience publique sauf pour les affaires concernant les secrets d'État, les secrets privés et les mineurs. L'audience publique permet à l'accusé de profiter de l'occasion pour révéler les infractions des magistrats pendant le procès comme l'emploi de la torture, ou les mauvais traitements pour obtenir des aveux, etc.[12]

La réduction considérable du nombre de la détention avant jugement

A partir de 1996, les organes du parquet à échelle nationale ont redressé un grand nombre de fausses accusations et le problème de la détention illégale avant jugement. A partir de 1994 jusqu'à 2009, sur une période de 15 ans, 271.629 personnes n'ont pas été autorisées à être arrêtées et 25.638 personnes n'ont pas été déférées au tribunal. A la même période, 12.806 objections ont été formulées par les parquets du pays contre les infractions dans le procès criminel. En même temps, les parquets ont réexaminé 47.590 affaires de plaintes criminelles et ils

10 People's daily online, 1998-09-24 (http ://english.peopledaily.com.cn/).

11 *La Loi relative à l'organisation de la cour populaire de la République populaire de Chine* (la troisième révision en 2006), l'art. 30,.

12 *Règlementation sur l'application du système de l'audience publique en toute rigueur* promulguée par la Cour populaire suprême, le 8 mars 1999.

ont réglé par la loi 762 demandes de compensation pour des procès criminels et accordé une indemnisation dans 179 affaires criminelles.[13]

IV. ELÉMENTS FACTUELS SUR LA DÉTENTION (ÉTABLISSEMENTS) ET DROITS DES PERSONNES DÉTENUES AVANT JUGEMENT

La Chine a toujours appliqué le système consistant à séparer les accusés en attente d'être jugés et les détenus qui subissent leur peine. Selon la *Loi sur la prison*, les personnes condamnées purgent leur peine dans la prison, tandis que les personnes, soit en détention provisoire, soit en garde à vue et soit en arrestation sont toutes envoyées dans les cellules de police par le *Règlement de la cellule de police de la République populaire de Chine*. Ces deux catégories de personnes sont séparées strictement.

IV.1. CATÉGORIES ET HÉBERGEMENT

Selon l'article 14 du *Règlement de la cellule de police de la République populaire de Chine*, « Les mineurs détenus sont logés séparément des adultes détenus ». Aux termes de la disposition du *Droit de la Protection pour les mineurs*, les personnes de moins de 18 ans sont les mineurs. Les mineurs peuvent être placés en garde à vue ou en détention provisoire à partir de l'âge de 14 ans. La loi chinoise exige que, pour les affaires criminelles concernant les mineurs de moins de 18 ans, il faut prendre différentes mesures, eu égard à leurs caractères corporels et psychologiques ; et leurs parents, tuteurs ou enseignants doivent être avertis de leur présence sur place sauf le cas où cet avertissement pourrait empêcher l'enquête ou dans le cas d'une impossibilité de les avertir ; l'interrogatoire peut se dérouler soit dans les établissements de police, soit dans les résidences des mineurs, soit dans leurs unités, écoles ou autres lieux convenables.

Les femmes suspectes sont détenues dans des endroits distincts de ceux des hommes.

Conformément à l'article 10 du *Règlement de la cellule de police de la République populaire de Chine*, dans les cellules de police on doit d'abord procéder à un examen médical des personnes détenues. Les personnes ne peuvent pas être détenues dans les cas suivants :

1) ceux qui ont des troubles psychiques ou une maladie contagieuse aiguë, y compris les porteurs du virus HIV ;

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[13] *Le 3è Rapport de la République populaire de Chine sur l'état de l'application de la « Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants »*, 20 décembre 2009.

2) ceux qui ont d'autres maladies graves dont la vie est en danger ou ceux qui ne peuvent pas se gérer seuls si en détention ;
3) celles qui sont enceintes ou qui nourrissent un(e) bébé de moins d'un an.

Dans une cellule de police de la province Zhejiang (près de Shanghai), il y avait une transsexuelle qui avait été placée à son gré dans une cellule de police pour les femmes détenues. Cette transsexuelle avait pourtant encouru la protestation des femmes détenues. Finalement, on a été obligé de la mettre en liberté sous caution. Néanmoins, il n'y a pas de dispositions obligatoires par la loi chinoise à cet égard.

La loi chinoise n'impose pas de placer les groupes spécifiques de prévenus dans des établissements spécifiques, en pratique, non plus. Pourtant, selon le *Règlement de la cellule de police de la République populaire de Chine*, du matériel (soit menottes et entraves) peut être utilisé pour les détenus condamnés à la peine de mort ; et il est permis d'utiliser ce matériel avec l'autorisation du directeur de la cellule de police, pour les détenus susceptibles de commettre un attentat, de se révolter, de s'enfuir ou de se suicider.

Selon le *Règlement de la cellule de police*, le standard de la surface d'habitation pour les détenus doit être adapté pour ne pas influer sur leur vie quotidienne. En général, la surface moyenne de la cellule par personne en détention provisoire et en garde à vue est de 2-3 mètres carrés. Le *Règlement de la cellule de police* dispose aussi que la cellule doit être aérée, éclairée et protégée contre l'humidité, les coups de chaleur et de froid. Les institutions de police doivent procéder à un examen régulier pour que les cellules soient maintenues disponibles ainsi que pour prévenir les incendies et autres calamités naturelles.

La cellule occupée par une seule personne n'existe pas en pratique en Chine. La politique consacrée à la détention est de garantir les droits des détenus et de prévenir que les détenus ne se blessent ou ne se suicident. En Chine, une cellule est occupée par 4-6 détenus, dans certaines régions, par 6-8 détenus. Les autorités compétentes pensent que ce genre de cellules facilite le contrôle et la gestion, ainsi que l'application de la politique susmentionnée. Pour une personne qui présente un risque suicidaire ou un risque de se blesser, les autorités pertinentes ont coutume de prendre des mesures particulières, notamment de lui fournir un expert psychologique, mais de ne pas la séparer des autres détenus. Les cellules individuelles établies sont principalement destinées aux suspects qui ont commis un attentat lors de leur détention comme une mesure de confinement provisoire.

La gestion des cellules de police en Chine à l'égard des cellules partagées est assez sévère. Généralement, les cellules sont préalablement évaluées en fonction de trois critères tels que la sécurité, l'hygiène et les facilités de l'enquête criminelle afin de s'assurer qu'il n'y a aucun risque. Du point de vue pratique, les cellules de police en Chine ont pu éviter dans l'ensemble que les prévenus ne se

battent ainsi que d'autres risques liés à la sécurité. La proportion de suicides et de blessure par soi-même dans les cellules de police en Chine est faible. En 2009, quatre incidents de suicide de suspects ont eu lieu dans les quatre cellules de police et des suspects se sont évadés des trois cellules de police à l'échelon national.[14] La survenance de ces incidents a été due à un contrôle défaillant ou à la torture pour obtenir des aveux.

IV.2. INFORMATION

En Chine, dès que les suspects sont placés en détention provisoire, en garde à vue et en arrestation dans la cellule de police, ils commencent par écouter les instructions obligatoires. Le contenu essentiel des instructions est d'informer les prévenus des règles administratives, des disciplines obligatoires et des réquisitions de leur vie quotidienne à l'institution. L'article 29 du *Règlement de la cellule de police* dispose qu'au moment où un proche parent d'un prévenu est gravement malade ou mort, ce prévenu doit en être informé immédiatement.

IV.3. DROIT À UN TRAITEMENT HUMAIN

Cette obligation internationale est expressément codifiée dans les lois chinoises actuelles. L'article 4 du *Règlement de la cellule de police de la République populaire de Chine* dispose explicitement que la gestion administrative de l'institution insiste sur la politique de combiner la surveillance stricte avec l'éducation, sur la gestion légale, scientifique et civilisée afin de sauvegarder les droits légaux des prévenus. Le châtiment corporel et les brutalités aux prévenus sont formellement interdits. Ici, « les droits légaux des prévenus », garantis par la *Constitution de la République populaire de Chine*, signifient les droits des citoyens, une personnalité non dégradée et un traitement humain en vertu des règles minima des Nations Unies.

L'article 23 du *Règlement de la cellule de police de la République populaire de Chine* précise que pour les prévenus de minorités et d'étrangers, il faut, en considération de leur coutume et mœurs, leur accorder des soins particuliers. Par exemple, fournir aux prévenus islamiques l'alimentation islamique.

En Chine, les cellules de police sont généralement équipées d'installations sanitaires et d'eau propre aux besoins quotidiens de prévenus sans limite d'emploi. Selon les *dispositions détaillées du Règlement de la cellule de police*, dans les régions développées, sur la côte sud du pays, les personnes en détention provisoire et en garde à vue peuvent prendre une douche d'eau chaude une ou

[14] *Rapport du Parquet populaire suprême de la République populaire de Chine 2010* (www.spp.gov.cn/).

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deux fois par semaine ; dans les régions sous-développées, dans le centre et dans le nord du pays, elles peuvent prendre une douche d'eau chaude une fois par semaine. Mais dans les régions très arriérées, elles n'ont pas accès à la douche d'eau chaude. Il n'y a pourtant pas de limite pour prendre une douche d'eau froide en été ou dans les régions torrides.

L'article 24 du *Règlement de la cellule de police* dispose que les prévenus doivent porter leurs propres sous-vêtements et leur literie individuelle. Le prévenu qui ne peut être muni de ses propres vêtements en obtient de l'institution. Ainsi les prévenus en principe peuvent porter leurs propres vêtements. Actuellement, afin de faciliter l'administration, de réduire les dépenses et de respecter le mode de vie individuel, la plupart des personnes en détention provisoire, en garde à vue et en arrestation doivent s'habiller en uniforme sauf pour les sous-vêtements. Les prévenus ont accès au lavage et leurs proches peuvent leur fournir des sous-vêtements lavés.

Aux termes de l'article 28 du *Règlement de la cellule de police*, les prévenus en détention peuvent, avec l'autorisation des organes chargés, communiquer avec les membres de leur famille et les recevoir. L'article 29 dispose que si le conjoint du prévenu, ses parents ou ses enfants sont dangereusement malades, il est permis au détenu avec l'autorisation de la sécurité publique, sous contrôle strict, de leur rendre visite chez eux. Le contact entre le prévenu et ses proches est interdit au motif que de telles visites sont susceptibles d'interférer avec l'administration de la justice. C'est ainsi que, sauf les personnes accusées de crimes graves, ou bien celles qui ont tendance à commettre des violences lors de leur détention, les détenus ont le droit recevoir des visites des membres de la famille. Néanmoins, le système de visites régulières ne s'est pas établi dans les établissements de détention, sauf le cas de la prison. Pour des raisons de sécurité et pour prévenir le risque de connivence entre le prévenu et l'extérieur, dans la pratique, plus de 90 % de prévenus n'ont pas le droit de recevoir les visites de famille. Les cellules de police ont coutume de refuser les visites de famille au moyen de rejet d'une demande du prévenu.

Conformément à l'article 25 du *Règlement de la cellule de police*, les prévenus sont autorisés à passer une heure à deux heures par jour hors de leur cellule. La plupart des cellules de police sont équipées de facilités sportives simples.

En outre, selon l'article 34 du *Règlement de la cellule de police*, les cellules de police peuvent organiser un travail convenant aux prévenus, y compris le travail hors de la cellule, à condition qu'ils soient en sécurité et que ce travail n'interfère pas dans le procès pénal. Ce genre de travail ne compte pas dans les heures passées hors de la cellule. Dans les cellules de police à l'échelon national, en moyenne, de 35 à 50 % de prévenus ont la possibilité de travailler.

IV.4. PROTECTION ET SOIN DES DÉTENUS EN DÉTENTION PROVISOIRE

A présent, dans les cellules de police, on a pris les mesures suivantes pour prévenir toute altercation entre les détenus en détention :

1) Donner aux prévenus une éducation sur le système légal, la moralité et le travail ;
2) Encourager et citer à l'ordre du jour ceux qui respectent les règles de l'institution, se comportent bien, ne se querellent pas, ne se battent pas.
3) Humaniser le traitement de celui qui a accompli des services méritoires ;
4) Accorder un avertissement ou réprimander celui qui s'est querellé ou battu avec d'autres, ou celui qui a violé les règles de l'institution ; dans le cas grave, ordonner à ce prévenu d'attester par écrit son repentir ; dans le cas le plus grave, le mettre aux arrêts avec l'autorisation du directeur de la cellule de police.

Les mesures spécifiques prises pour prévenir les suicides en détention sont ci-dessous :

1) Interdire aux prévenus de porter et utiliser des outils métalliques et autres outils dangereux, tels que corde, ceinture que les prévenus pourraient utiliser pour se pendre ;
2) Séparer strictement le lieu d'hébergement, des activités et de travail et éviter des outils de travail portés en dehors du lieu de travail ;
3) Désigner une personne chargée de la sécurité de l'établissement pour inspecter régulièrement jour et nuit ;
4) Mener une intervention psychologique pour les prévenus grâce à l'aide régulière des experts.

En Chine, les taux de suicides dans les établissements de détention sont relativement faibles. La plupart des suicidaires sont des officiers corrompus.

Pour répondre à cette question, il importe de distinguer deux cas, du fait que le système d'assurance médicale ne s'est pas généralisé en Chine, ceux qui bénéficiaient d'une complète assurance médicale avant d'être détenu, les soins dont ils bénéficient en période de leur détention sont généralement inférieurs à ceux qu'ils avaient auparavant. Mais dans la majorité des cas, 60-70 % environ de suspects criminels sont en provenance de campagnes ou de régions sous-développées, ce groupe de suspects n'a jamais bénéficié de traitement d'une complète assurance socio-médicale. Par conséquent, les soins dont ils bénéficient durant leur détention sont probablement supérieurs à ceux qu'ils avaient auparavant.

Selon l'article 26 du *Règlement de la cellule de police de la République populaire de Chine*, la cellule de police doit s'équiper des instruments médicaux

nécessaires et des médicaments d'usage courant. Si le détenu souffre d'une maladie, il faut le soigner à temps ; si une maladie nécessite le traitement à l'hôpital, l'hôpital local doit en être responsable ; le détenu peut obtenir par la loi sa liberté sous caution dans le cas d'une maladie grave. Les prévenus en Chine ont accès auprès d'aide médico-sociale.

A présent, le système de détention en Chine ne comprend que les programmes et traitements accessibles aux prévenus souffrant de problèmes d'addiction de drogues illicites, tel que le traitement d'abstention aux héroïnomanes et toxicomanes de stimulant de type amphétamine lors de leur détention. En revanche, les programmes et traitements spéciaux aux alcooliques et autres ne sont pas encore établis.

A partir de l'automne 2009, toutes les cellules de police du pays ont été complètement désinfectées avec des mesures de contrôle de la communication avec l'extérieur de l'institution pour prévenir la transmission de la grippe A-H1N1. Jusqu'à présent, il n'y a pas eu de reportages sur la transmission de la grippe dans une cellule de police en Chine.

En Chine, l'isolement cellulaire dans les cellules de police n'est imposé qu'aux suspects qui ont violé les règles de l'institution et ont commis un attentat contre d'autres lors de leur détention. La mise d'un suspect aux arrêts provisoires signifie une punition. Un professionnel de santé n'est pas systématiquement sollicité pour faire une telle évaluation.

A partir de 1996, dans tous le pays, 2.902 stages de cours de formation professionnelle ont été organisés s'agissant de la détention avant jugement, et les entrées de cette formation ont atteint 180.000 personnes. Au surplus, le Ministère de la Justice a établi en juin 1997, un examen autodidacte relatif à la spécialité de surveillant de prison et de détention. Jusqu'à la fin de 1998, le nombre des entrées s'est élevé à 180.000 (personnes).[15]

IV.5. VOIES DE RECOURS

Conformément aux dispositions de la loi, les prévenus n'ont que le droit de déposer plainte quand ils prétendent ne pas devoir être détenus, mais pas le droit de déposer plainte relativement à leurs conditions de détention. En pratique, à l'insatisfaction des conditions de détention, les prévenus peuvent seulement former une objection, soit à leurs surveillants, soit aux procureurs désignés à l'établissement de détention, soit aux policiers chargés de leurs affaires. Les lois n'exigent pas pourtant une réponse nécessaire à cette objection.

[15] *Le 3è Rapport de la République populaire de Chine sur l'état de l'application de la « Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants »*, 20 décembre 2009.

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Actuellement, les autorités du parquet ont créé «la boîte aux lettres du procureur général». Dans la plupart des cellules de police, les suspects en détention provisoire, en garde à vue et en arrestation peuvent porter plainte via cette boîte. Les personnes désignées par les parquets ouvrent cette boîte et prennent les lettres, et les cellules de police n'en ont pas le droit. Les suspects peuvent théoriquement déposer leurs plaintes quelconques à «la boîte aux lettres du procureur général». Mais en pratique, les plaintes reçues et étudiées comprennent essentiellement trois aspects: 1. Le suspect croit que son comportement ne constitue pas en un crime ou seulement un délit; 2. Les fonctionnaires de police ou les procureurs ont utilisé la torture pour obtenir des aveux; 3. Les fonctionnaires chargés de l'affaire ont maltraité le détenu. Le procureur général décide par lui-même, par la suite, si cette plainte nécessite d'être étudiée. C'est ainsi que la fonction de «la boîte aux lettres du procureur général» n'est pas une procédure inutile et vaine.

Durant le procès, le prévenu peut invoquer la violation de droits relatifs à sa détention. Pourtant, ce qui peut être accepté par le tribunal est principalement la torture pour obtenir des aveux. En revanche, les arguments et plaintes relatifs à de mauvaises conditions de logement et de nourriture ne sont généralement pas acceptés par le tribunal.

IV.6. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

La législation et la pratique relatives au système de la détention avant jugement ont été influencées par le droit international dans les aspects suivants:

1) En 1990 et en 1991, le *Règlement de la cellule de police de la République populaire de Chine* et ses *Dispositions détaillées* et autres lois spécialisées ont été élaborés afin de garantir les droits des suspects criminels et des prévenus;
2) A partir de 1990, les lois exigent que, pour placer les suspects étrangers et les suspects de Hong Kong et de Macao, il faut appliquer strictement le droit international s'agissant les conventions internationales pertinentes, les traités consulaires bilatéraux et les lois de Hong Kong et de Macao;
3) Dans les cellules de police, les détenus sont classés par sexe, âge et chefs d'accusation, ainsi que par délinquant primaire et récidiviste;
4) Les cellules de police fournissent aux détenus des conditions essentielles d'existence et des soins médicaux.

Je cite l'exemple de la province de Henan (dans le centre du pays), l'économie est sous- développée et le standard de l'alimentation pour les détenus ne doit pas être inférieur à 115 yuans (17 US dollars) par personne par mois. Cela équivaut à 15 kilos de riz, 2 kilos de viande, 2 kilos d'œuf et 6 kilos de légumes. Les frais des articles d'usage courant ne sont pas inférieurs à 35 yuans (plus de 5 US

dollars). Les frais d'hospitalisation et d'obsèques de mort de maladie pour les détenus sont complètement remboursés.[16]

IV.7. DÉVELOPPEMENTS LES PLUS IMPORTANTS

Les développements les plus importants de ces 10-15 dernières années que la Chine a connu dans ces domaines, sauf les points susmentionnés, portent essentiellement sur trois points :

1) Préciser et unifier le système de la détention avant jugement et les mesures et modalités d'application par le *Code de procédure pénale*. Annuler le *Règlement de l'arrestation et de la détention de la République populaire de Chine* susceptible d'être dévoyé ;
2) Renforcer législativement la supervision et le contrôle de l'établissement de la détention. Le Ministère de la Sécurité publique a promulgué les critères d'application à l'égard de la détention avant jugement ;
3) Eliminer dans l'ensemble le problème de la détention excessive et illégale ; diminuer considérablement la torture pour obtenir des aveux lors de détention.

Ces évolutions en matière de loi et de système d'application ne s'appliquent pas à l'égard des crimes déterminés ou de suspects spécifiques, mais ont pour but d'améliorer l'établissement du système juridique. Il n'est pas facile d'avoir entrepris des reformes et des améliorations à notre époque où la société a connu un grand changement économique et a généré une criminalité nouvelle, dans ses caractères comme dans ses tendances.

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V. ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

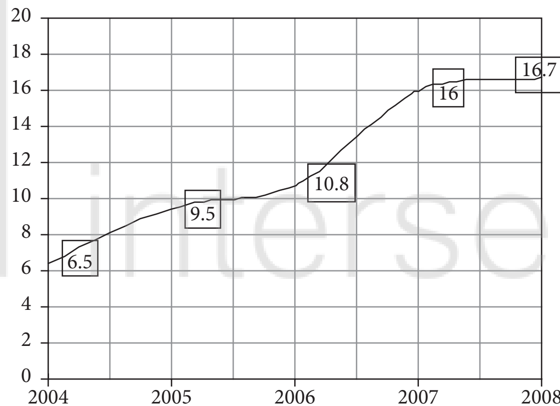
L'article 50 du *Code de procédure pénale de Chine* prévoit que « le tribunal populaire, le parquet populaire et l'organe de la sécurité publique effectuent, selon les circonstances des affaires, l'assignation forcée, la liberté sous caution ou en résidence surveillée, à l'égard d'un suspect criminel ou prévenu ». Ces trois mesures sont les alternatives à la détention avant jugement.

[16] Bureau des Finances de Zhengzhou : *Circulaire de l'uniformisation du standard des frais accordés aux détenus dans les cellules de police*, 31 juillet 2008 (http://zfxxgk.zzcz.gov.cn/zwgk/common) ; Selon les statistiques du Bureau d'Etat des statistiques, en 2007, le revenu mensuel par habitant à Zhengzhou (chef-lieu de province de Henan) était de 1174 yuans (172 US dollars), 12 novembre 2009 (www.jinshui.gov.cn/jswwzz/).

La procédure pénale précise que la liberté sous caution ne doit pas dépasser douze mois et que la surveillance de la résidence ne doit pas dépasser six mois (l'art. 58). Il n'y a pas d'alternatives qui ne soient pas prévues par la loi.

Selon les statistiques du Parquet populaire suprême, le nombre d' alternatives prises pour les suspects criminels s'est accru d'année en année depuis 2004 à l'échelon national. En 2004, 56.084 personnes soupçonnées susceptibles d'être passibles d'une réclusion ont été prises par les alternatives à la détention avant jugement, telles que la liberté sous caution et la surveillance de la résidence, Ce chiffre constitue une faible proportion, 6,5 % de toutes les affaires poursuivies au pénal ; en 2005, ce chiffre a augmenté, 90.432 personnes soupçonnées, soit 9,5 % du total ; en 2006, ce chiffre a été de 107.466 personnes, soit 10,8 % du total ; en 2007, ce chiffre a été de 149.007 personnes, soit 16 % du total ; en 2008, ce chiffre a encore augmenté, 191.314 personnes, soit 16,7 % du total (voir la Figure III. Statistiques concernant les mesures alternatives à la détention avant jugement en Chine 2004-2008).[17]

Figure III. Statistiques concernant les mesures alternatives à la détention avant jugement en Chine (2004-2008)



V.1. CAS, MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

Dans le système juridique chinois, les alternatives à la détention avant jugement comme la surveillance de la résidence et la liberté sous caution peuvent être ordonnées aux suspects criminels suivants :

[17] Faite sur la base des statistiques de *Rapports sur les activités du Parquet populaire suprême de la République populaire de Chine*, 9 mars 2005, 11 mars 2006, 13 mars 2007, 10 mars 2008, 17 mars 2009.

1) Celui qui est accusé d'une infraction sans gravité, passible en général d'une peine de moins de trois ans;
2) Celui qui ne se montre pas dangereux et qui n'a pas la possibilité de détruire des preuves;
3) Celui qui a une résidence fixe ou une occupation stable et dont on peut assurer la surveillance de la résidence;
4) Celui qui a une personne qui veut être sa personne garante (qui veut se porter garante) ou qui peut verser une caution.

Dans le cas des poursuites privées, à la demande du plaideur, l'inculpé peut être placé en une alternative nommée «contrôle de frontière», c'est-à-dire que le tribunal ordonne à l'organe d'administration frontalière de lui interdire de sortir du pays.

En Chine, les organes de la justice pénale ne peuvent généralement pas ordonner une alternative à la détention avant jugement à l'égard du suspect qui a commis un délit de violence ou qui est une personne dangereuse; et en cas de suspicion d'homicide involontaire, homicide par négligence, une alternative peut parfois être ordonnée.

Selon la loi pénale chinoise, viol, indécence forcée (attentats aux mœurs) et blessures intentionnelles constituent des crimes de violence aggravée. Les prévenus accusés d'un crime de violence, en général, ne peuvent pas être placés en une alternative.

Actuellement en Chine, 70 % de crimes de vol ont été commis par les suspects itinérants dont la plupart n'a ni résidence fixe ni emploi stable dans le lieu de commission d'un délit. Si ces suspects ne peuvent pas trouver une personne garante ou une caution, une alternative ne peut pas être ordonnée à son égard.

Dans le cas où ce groupe de crimes est avec des circonstances atténuantes, punissable d'une peine de moins de trois ans par la loi, une alternative peut être ordonnée. Selon le *Code pénal chinois*, le blanchiment d'argent repose sur la commission de délits prédicatifs (trafic de stupéfiants, fausse monnaie, crime organisé, corruption, etc.), Or une majorité des délits prédicatifs sont des crimes aggravés. Par conséquent, leurs auteurs peuvent rarement être placés en une alternative.

Les crimes susmentionnés sont tous des crimes graves, une alternative n'est toujours pas ordonnée à leur égard.

Selon le *Code de procédure pénale*, à l'égard des suspects criminels qui ont commis des infractions routières, mais s'il n'y a pas eu de morts et de blessés, les alternatives à la détention avant jugement peuvent être utilisées telles que l'assignation, la surveillance de la résidence et la liberté sous caution.

L'infraction liée à la prostitution et aux services d'escorte se forme en deux types prévus par la loi chinoise: le premier désigne l'infraction de prostitution organisée, obtenir que des femmes se livrent à la prostitution et les y contraindre.

Dans le cas où il n'y a pas de contexte de bande de criminalité organisée, les auteurs peuvent être parfois mis en une alternative. Le deuxième désigne la prostitution et les services d'escorte contrôlés et opérés par les bandes de criminalité organisée. En ce cas, aucune mesure alternative ne peut être ordonnée à l'égard de ces auteurs.

En Chine, pour une personne soupçonnée d'une infraction qui n'est pas passible d'emprisonnement, les autorités compétentes doivent la soumettre à une mesure alternative dans les cas suivants :

1) L'infraction est en cas de circonstances atténuantes, passible de la mise sous surveillance, la contravention et la détention pénale ;
2) Le suspect se livre à la justice ou dénonce d'autres suspects ;
3) La femme est supposée enceinte ;
4) Le mineur suspect.

Dans le cas où un chef d'accusation justifiée par les faits incriminés, établis par un faisceau de preuves, est punissable d'une mise sous surveillance, la contravention et la détention pénale.

Quand une mesure alternative est ordonnée, les trois mesures ci-dessous doivent être prises en considération :

1. Le suspect doit signer un bulletin de garantie dans lequel il se porte garant qu'il ne s'enfuira pas, ni agira de connivence avec des autres, et devra se présenter immédiatement devant l'autorité compétente une fois reçue la citation à comparaître ;
2. L'organe qui ordonne une alternative doit expédier une notification d'exécution au bureau de la sécurité publique du quartier de juridiction auquel le suspect appartient ;
3. L'autorité compétente doit avertir les parties intéressées des aspects juridiquement positifs et négatifs.

V.2. SUIVI DES MESURES ALTERNATIVES

Selon le *Code de procédure pénale*, les alternatives à la détention avant jugement comme la surveillance de la résidence et la liberté sous caution sont appliquées et soumises à un examen régulier par les organes de sécurité publique. Les organes de sécurité publique procèdent à un examen mensuel sur l'état d'application des alternatives.

« La résidence surveillée » et « la liberté sous caution » sont soumises à examen en fonction de deux critères :

1) En vertu de dispositions de la loi- »la surveillance de la résidence ne doit pas dépasser six mois et la liberté sous caution ne doit pas dépasser douze mois » (art. 58), la sécurité publique examine si la durée de ces mesures est dépassée ;

2) En vertu de règles de surveillance-»la personne dont la résidence est surveillée ne peut la quitter sans permission de l'autorité chargée de la surveillance» et «la personne doit se présenter à temps devant la justice au moment où elle est assignée» (art. 57), les suspects font l'objet de cet examen.

Aux termes du *Code de procédure pénale*, dans le cas où la personne soupçonnée quitte sa résidence surveillée sans permission, ne se présente pas devant la justice dès l'assignation, interrompt le témoignage du témoin et détruit des preuves, une mesure alternative peut être annulée et transformée en arrestation.

V.3. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

Au début de la réforme et l'ouverture du pays, plus précisément, depuis le 1 janvier 1980, dans le procès pénal en Chine, les autorités judiciaires avaient coutume d'employer la détention avant jugement pour une majorité de suspects criminels et rarement les mesures alternatives avaient été utilisées. Il est à noter que, ayant été influencé par le droit international tels que le *Pacte international relatif aux droits civils et politiques* et la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, «le *Code révisé de procédure pénale* de 1997 a réformé entièrement le système de la détention avant jugement, contribuant à créer des conditions favorables à l'emploi des mesures alternatives.»[18] Par exemple, la liberté sous caution avait autrefois été décidée par les autorités judiciaires. De nos jours, les suspects criminels, prévenus et leurs proches ont le droit d'adresser directement une requête de la liberté sous caution comme une mesure alternative (art. 52).

V.4. DÉVELOPPEMENTS LES PLUS IMPORTANTS

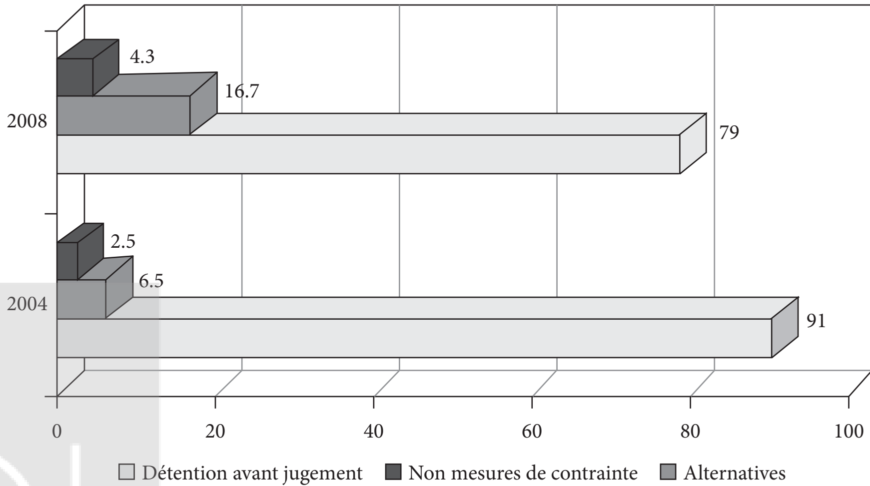
Les développements les plus importants de ces 10-15 dernières années que la Chine a connu en matière d'alternatives à la détention avant jugement concernent trois points:

1) Compléter et améliorer le système initial de la liberté sous caution. La *procédure pénale* ajoute la permission de la liberté sous caution payée par le suspect criminel ou l'accusé;
2) En pratique judiciaire le taux des alternatives à la détention avant jugement a augmenté;

[18] CHEN Guang-zhong, ZHANG Jian-wei, «*Pacte international relatif aux droits civils et politiques et la réforme de la loi de procédure pénale de notre pays*», Science juridique de la Chine, 2007, No. 1.

3) A mesure que s'est propagé le système de corrections communautaires et que s'est introduite progressivement la justice restaurative, telle que le système de démarche de réconciliation, les taux de détention avant jugement dans le procès pénal en Chine se sont abaissés (voir la Figure IV suivante).

Figure IV. Taux comparé d'emploi des alternatives à la détention avant jugement : nombre d'alternatives employées en proportion du nombre de poursuites, 2004-2008, en pourcentage



VI. CONCLUSION

Il est incontestable que le système pénal chinois a considérablement évolué et a connu des progrès importants depuis 1979. Pourtant, des problèmes demeurent assez lourds dans le domaine de la procédure pénale. Par exemple, d'après un reportage non-official, le problème de la détention excessive et de la torture pour obtenir des aveux n'a pas vraiment disparu des pratiques au sein des organes de sécurité publique. Le Ministère de la sécurité publique, par conséquent, a apporté une série d'améliorations en 2009. Et surtout en mai 2010, le Ministère de la sécurité publique a décidé de procéder à la visite périodique de 150 cellules de police à l'échelle nationale par le public.[19]

La Chine d'aujourd'hui, intégrée dans le processus de mondialisation, a connu des progrès remarquables dans le domaine économique, surtout en 2010, le taux de croissance économique a atteint 10,3 %.[20] Aujourd'hui « la Chine s'affirme comme un acteur majeur d'une mondialisation qui n'est pas seulement

[19] Weekend du Sud, le 10 juin 2010, A6.

[20] Bureau d'Etat des statistiques de Chine, 2010, (www.stats.gov.cn/tjdt/zygg/tztg/t20110119_402699252.htm).

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économique mais aussi politique, culturelle et juridique. »[21] On peut espérer que des développements économiques dans notre société pourront entraîner des développements politiques et juridiques, surtout dans le domaine de justice pénale. Il y a toujours un écart entre l'idéal et la réalité. Notre ambition vise à le réduire.

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[21] Mireille Delmas Marty, *La question des droits de l'homme en Chine*, Etudes et commentaires, droit et liberté fondamentaux, Recueil Dalloz-2008-No.31, p. 2186.

PRE-TRIAL DETENTION IN DENMARK

William Rentzmann*

I. INTRODUCTION

This national chapter concerning pre-trial detention includes a review of Danish law with a detailed account of Denmark's obligations under public international law. A description of case-law and practice has been included where deemed relevant. In addition to a review of the legal conditions for pre-trial detention, an account is also given of the standards for conditions of detention and detention facilities and rights of pre-trial detainees.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

The following is a general outline of Denmark's membership of relevant international organisations, ratification of various conventions, and several other issues that concern the international and human rights framework that is relevant to Denmark.

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Denmark is a member of a number of international organisations. Accordingly, Denmark has been a member of the United Nations (U.N.) since its foundation

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in 1945. Denmark has also been a member of the Council of Europe (COE) since its foundation in 1949. In addition, Denmark has been a member of the European Union (EU) since 1973.

Denmark has ratified a number of key international conventions over the years. In December 1971, Denmark thus ratified the U.N. 1966 *International Covenant on Civil and Political Rights*. The covenant entered into force in March 1976. At its ratification, Denmark made reservations concerning the requirement in Article 10(3), second sentence, that juvenile offenders must be segregated from adult offenders.

In 1987, Denmark ratified the U.N. 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The convention entered into force in Denmark in August 1991. In 1989, Denmark ratified the 1987 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT). The convention entered into force in Denmark in 1991. In 1991, Denmark ratified the U.N. 1989 *Convention on the Rights of the Child*. The convention entered into force in Denmark in August 1991.

As stated above, Denmark has ratified the conventions referred to. This means that Denmark is bound by the conventions under international law and must meet the obligations undertaken by the State. In this way, the conventions are a relevant source of law in Danish law which can be invoked before the courts and be applied by the courts and other law enforcement authorities.

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II.2. RELATIONSHIP BETWEEN PUBLIC INTERNATIONAL LAW AND NATIONAL LAW

Descriptions of the relationship between public international law and national law traditionally distinguish between monism and dualism. According to *monism*, public international law and national law are in principle considered parts of the same legal system. In states with a monistic conception of law, rules of public international law, including conventions which are binding on the state, will in principle be part of the contracting state's legal system. Consequently, rules of public international law can be invoked before and applied directly in the legal system of that contracting state. According to *dualism*, public international law and national law are in principle considered as different and distinct legal systems. In states with a dualistic conception of law, rules of public international law, including conventions, will consequently not directly be part of the contracting state's legal order, and such rules therefore cannot be directly invoked before or applied in the contracting state's legal system. Hence, such states must take special national implementation steps to include public international law into national law.

It should be noted that the said distinction is of no significance to the extent to which a state is obliged to implement international conventions ratified, et cetera. According to both conceptions of law, the state will have a duty to loyally observe and meet the obligations under public international law undertaken by that state. In Denmark, the constitutional point of departure is that rules of public international law are not simply part of Danish law. Consequently, provisions of a convention which is binding on Denmark will usually not be directly enforceable by Danish courts or administrative authorities. This will require special implementation measures.

It is standard Danish constitutional practice that conventions and other treaties aiming to regulate relations between a state and the persons under its jurisdiction, or mutually between citizens, may be implemented in three ways: (1) by establishing harmony of norms, (2) by rewriting, and (3) by incorporation.

In the assessment of whether *harmony of norms* exists, the substantive rules of the treaty are compared with the current state of national law. If, as a result of the construction of the treaty and the national rules, the treaty obligations can be met on the basis of current law, the state need not take any further implementation steps. Implementation has thus taken place by establishing harmony of norms.

If, by contrast, the construction implies that national legislation is not in accordance with the treaty, current national rules must be amended in order to meet the obligations under the treaty. The state has a free hand concerning the *rewriting* process as long as the final outcome of the rewriting process ensures implementation of the treaty.

The concept of *incorporation* is applied to the cases where a binding national enactment prescribes that the treaty become a part of national law in the form in which it was ratified. An example of this is the European Convention on Human Rights, which was incorporated by enactment in 1992 as described below.

Denmark is traditionally considered to adhere to the dualistic principle. This does not mean, however, that rules of public international law, including conventions, which are binding on Denmark, cannot be invoked before and applied by the Danish courts and other law enforcement authorities. It may be said with some justice that the dualistic perception in Danish law seems to be undergoing a softening. Legal literature therefore sometimes applies the designation 'practical monism', according to which public international law is a source of law also in national law, and courts and other law enforcement authorities can apply public international law also without express authority.

International conventions, et cetera, implemented in Danish law by *incorporation*, whether by enactment or based on statutory authorisation, can be invoked before and applied by Danish courts and other law enforcement authorities as a consequence of the incorporation.

International conventions implemented in Danish law by *rewriting* can be included in the construction and application of the rules aiming to implement the convention. In such cases, the international convention is, in principle, applied indirectly.

Not only conventions that have been implemented in Danish law by being rewritten or incorporated are relevant sources of law in Danish law. Also conventions, et cetera, that have not been specifically implemented because *harmony of norms* has been established can be invoked before and applied by Danish courts and other law enforcement authorities.

In legal literature, the description of the status of international conventions, et cetera, in Danish law particularly deals with (1) the rule of construction, (2) the rule of presumption, and (3) the rule of instruction. These terms reflect an attempt to describe the state of law in Denmark, where it can be established that international conventions, et cetera, can be invoked before and applied by Danish courts and other law enforcement authorities despite Denmark's status as a so-called dualistic country.

According to the *rule of construction*, Danish rules of law whose construction is in doubt must be construed in a way that will bring them into accordance with Denmark's international obligations.

The *rule of presumption* implies that the law enforcement authorities and the courts must presume that the Danish Parliament would not act in contravention of Denmark's obligations under public international law, and that the law enforcement authorities and the courts therefore have to apply the national rules in a way that avoids breaches of public international law.

The *rule of instruction* reflects the duty of administrative authorities to include obligations under public international law when exercising their discretionary powers.

Although Danish courts and other law enforcement authorities have a duty, as far as possible, to apply also non-incorporated conventions in their construction and application of Danish law, the legal status of the non-incorporated conventions in Danish legislation can hardly be considered fully clarified in all situations. It is a particular cause for doubt where the limits of application of such conventions actually are. Doubts may thus arise as to how Danish courts and other law enforcement authorities are to react in cases where an obvious conflict is assumed to exist between a non-incorporated convention and a statute, to mention an example, or where Danish law has no authority to fulfil a claim based on public international law.

It is assumed in literature that international human rights conventions not separately implemented in Danish law by either rewriting or incorporation will generally be highly significant in the construction and application of Danish law,

but that it can hardly be claimed under current law that such conventions are unconditionally decisive, that is, that such conventions do not unconditionally take precedence over other sources of law.[1]

In 1953, Denmark ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In 1992, the convention was incorporated into Danish law by statute. The convention has since been a part of Danish law in line with other Danish legislation.

As a consequence of Denmark's ratification of the ECHR, citizens can complain of the Danish state to the European Court of Human Rights in Strasbourg if they believe that public authorities have infringed rights protected by the convention. However, complaints to the European Court of Human Rights presuppose that all domestic remedies have been exhausted, see Article 35 of the convention in that respect.

II.3. NATIONAL HUMAN RIGHTS FRAMEWORK

Denmark is characterised by a polity in which the sovereign's powers are limited and defined through a constitution, and in which these powers are exercised through ministers who assume responsibility for the exercise of power (constitutional monarchy). On 5 June 1849, the Danish King signed the Danish Constitutional Act. The latest amendment to the Constitutional Act was in 1953. The Constitutional Act includes a number of rules on the basic principles and functions of the regime, for example the principle of the separation of powers, see section 3 of the Constitutional Act. The Constitutional Act also includes a number of provisions on the constitutional rights and freedoms of the citizens. In this connection, reference is made first and foremost to section 71(1)-(5) of the Constitutional Act which reads as follows:

> Section 71
> "Subsection 1. Personal freedom is inviolable. No Danish citizen may be subjected to any form of imprisonment on account of his political or religious convictions or his origin.
> Subsection 2. Imprisonment may only take place with authority in an Act.
> Subsection 3. Anyone who is taken into custody must appear before a judge within 24 hours. If the person taken into custody cannot immediately be released, the judge

[1] The above has been drafted entirely on the basis of Chapter 2, sections 1–4, of Report No. 1407 of 8 October 2001 on Incorporation of Human Rights Conventions into Danish Law. The report was submitted by a committee on incorporation of human rights conventions into Danish legislation (the Incorporation Committee) appointed by the Ministry of Justice. The report contains a number of references to relevant legal literature, case-law and practice, et cetera. It should be noted that the above is not an exhaustive account of the status of conventions, et cetera, in Danish law. The report is accessible at: http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/bet1407/word/bet1407.doc.

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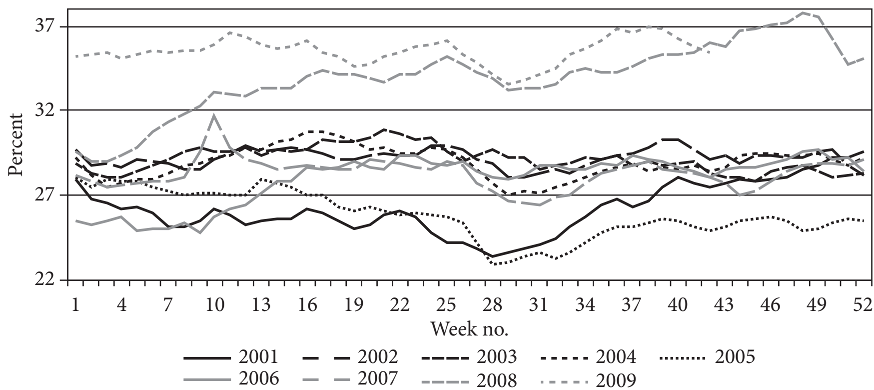
must decide, by means of a reasoned decision, which must be made as soon as possible and at the latest within three days, whether he is to be imprisoned and, if he can be released on bail, the judge must determine the nature and size of the bail. This provision may be derogated from by an Act for Greenland insofar as this may be regarded as necessary according to local conditions.
Subsection 4. The decision made by the judge may immediately be brought before a higher court by the person in question.
Subsection 5. No one may be subjected to remand for an offence that can only entail punishment by a fine or simple detention."

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

This section describes current Danish law concerning arrest and pre-trial detention. In this connection, the description discusses the development in recent years and recommendations from a number of international bodies.

Danish legislation distinguishes between two phases of pre-trial deprivation of liberty: The arrest performed by the police and the custody on remand ordered by the court. As at 13 October 2009 1354 prisoners were held in custody on remand. The total prison population was 3820 persons. The estimated average time in days spent in prison by non-sentenced prisoners over the past 3 years is as follows: 2007: 63 days; 2008: 73 days; 2009 (until August): 66 days. The development in the number of remand prisoners, including in relation to the total number of prisoners over the past ten years, is illustrated below.

Occupancy by remand prisoners as a percentage of total occupancy



Source: 'Monday graphs'.

Average yearly occupancy by remand prisoners and total occupancy

	Occupancy by remand prisoners	Total occupancy	Occupancy by remand prisoners as a percentage of total occupancy
1999	901	3,477	26%
2000	887	3,382	26%
2001	849	3,236	26%
2002	1,003	3,435	29%
2003	1,060	3,641	29%
2004	1,089	3,767	29%
2005	1,044	4,041	26%
2006	1,098	3,932	28%
2007	1,033	3,646	28%
2008	1,199	3,530	34%
2009*	1,293	3,656	35%

Source: 2008 statistics of the Prison and Probation Service, for 2009 'Monday graphs'.

III.1. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

According to section 755 of the Danish Administration of Justice Act, the police have the authority to arrest a person. As a basic principle, the police may arrest a person who they have reasonable cause to suspect of having committed a criminal offence subject to public prosecution, if the arrest is deemed necessary to prevent further criminal offences, to ensure his or her presence for the time being or to prevent his or her communication with others. Upon request from the police, the court may issue an arrest warrant. As an example of the practical scope of application, it is stated in the *travaux préparatoires* that it may be practical in cases in which a person who is charged along with several other persons in a major group of cases which are tried in the court of a single judicial district is to be arrested in a remote judicial district from which he cannot be transferred in time for a preliminary examination in the relevant court within 24 hours. In such cases, it is practical that the relevant court issues an arrest warrant so that the detainee may be brought before the judge in the other judicial district who may uphold the arrest in order to transfer the detainee to the relevant court. However, this provision is used only as an exception.

All persons employed by the police have the authority to make arrests. However, the actual decision to make an arrest will typically be made by a police constable who comes across a person deemed to meet the conditions for arrest

pursuant to section 755 of the Administration of Justice Act. The specific circumstances of the individual case dictate who makes decisions to arrest a person. The decision may thus also be made by a superior police officer or the public prosecutor. The decision to arrest a person is formally taken the moment when the person is deprived of his or her liberty. In this connection there is no difference between police custody and arrest. Under section 758 of the Administration of Justice Act, the police must inform the suspect of the charges against him or her and the time of the arrest as soon as possible. In practice, 'as soon as possible' is interpreted to mean that the police must inform the suspect of the charges against him or her and the time of the arrest immediately in connection with the arrest.[2]

If the suspect is not released within 24 hours of the arrest, he or she must be brought before a judge. This principle is enshrined in the Constitutional Act and is also stated in section 760 of the Administration of Justice Act. The decision to request the court to remand the suspect in custody is normally taken by the Prosecution Service. The court will then decide if the conditions for remanding the suspect in custody are met.

III.2. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS

Custody on remand may be ordered in all criminal cases where there is a reasonable suspicion that the suspect has committed an offence subject to public prosecution and where the offence is punishable by law by a maximum sentence of at least 18 months of imprisonment. Custody on remand is not available if the likely sentence for the specific offence is a fine or imprisonment for not more than 30 days or if the custody on remand is in other ways considered to be disproportionate, see section 762 of the Administration of Justice Act.

Custody on remand may be used on the following grounds: Risk of absconding; risk of re-offending or risk of obstruction of the investigation. In some specific, serious cases, custody on remand can also be used when the suspect should be deprived of his or her liberty for law enforcement reasons.

When custody on remand is requested because of the risk of absconding, risk of re-offending or the risk of obstruction of the investigation, the level of suspicion required is 'reasonable suspicion'. When custody on remand is used in the interests of the enforcement of the law, the required level of suspicion is 'substantial suspicion'. In everyday discussion, the latter type of custody on remand is termed 'preventive detention'. The rules on preventive detention are laid down in section 762(2)(i) and (ii) of the Administration of Justice Act. Under paragraph (i), a suspect may be remanded in custody where there is substantial

2 See also the 5th paragraph on p. 9.

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suspicion that he or she has committed an offence that is subject to public prosecution and is punishable by law by imprisonment for six years or more, and it is deemed that for law enforcement reasons the suspect should not be at large in view of the information on the gravity of the offence.

Under section 762(2)(ii) of the Administration of Justice Act, a suspect may also be remanded in custody where there is substantial suspicion that he or she has committed one of a number of specified offences if the offence is likely to result in a sentence of at least 60 days' imprisonment, and it is deemed that for law enforcement reasons the suspect should not be at large in view of the information on the gravity of the offence. Since 2008, custody on remand for law enforcement reasons may now also be applied in cases concerning sexual abuse of children under the age of 15.

The court's most important consideration is that arrest or custody on remand must never be disproportionate to the interference with the affairs of the suspect, to the significance of the case or to the likely sentence.

The person in respect of whom custody on remand is sought must appear in person before the deciding court. If the suspect cannot appear before the court within 24 hours after his or her arrest, the suspect will be presented to the court in absentia. The suspect must then be brought before the court within 24 hours after the hindrance for his or her attendance has ceased, see section 764 of the Administration of Justice Act.

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III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

According to section 767 of the Administration of Justice Act, the court order must specify a maximum period of custody on remand. This period must be as short as possible and must not exceed four weeks. The period may be extended by the court, but not by more than four weeks at a time. The Prosecution Service will take the initiative to extend the period of custody on remand.

As mentioned above, all court decisions ordering custody on remand specify a limited period. If the Prosecution Service does not initiate proceedings to have the period extended, the suspect will be released automatically when the period ends.

The suspect has the right to appear before the court when the court is to decide on the extension of the period. The suspect can then argue his or her case before the court. At these court hearings, the suspect will always have defence counsel assigned to him or her. The detainee has the right to challenge the grounds for custody on remand during the court hearing held to decide the question of custody on remand. A decision on custody on remand made by the judge may immediately be appealed to a higher court by the detainee (and by his

or her defence counsel). Any appeal must be submitted within 14 days of the decision rendered by the court of first instance. The principle of *habeas corpus* is also enshrined in section 71 of the Constitutional Act, according to which anyone taken into custody must appear before a judge within 24 hours.

In cases where the custody on remand turns out to be wrongful, for example where the accused is acquitted, the person is entitled to financial compensation from the State.

The relevant criteria for the review of the custody on remand are the conditions described above.[3] Furthermore, the court has an obligation to terminate the custody on remand when prosecution is abandoned or where the conditions for custody on remand are no longer met. If the court finds that the investigation does not progress at the requisite speed and that custody on remand is unreasonable, the court must release the person.

Section 768a of the Administration of Justice Act specifies absolute maximum periods of custody on remand. According to this provision, unless exceptional circumstances prevail, custody on remand must not exceed six months where the charge concerns an offence punishable by imprisonment for less than six years; and one year where the charge concerns an offence punishable by more than six years' imprisonment. For persons under the age of 18, the corresponding time limits are four months and eight months.

After the question of guilt has been decided by the court, the court may determine, upon request, whether the defendant is to be remanded in custody during appeal or until enforcement of the sentence can commence, see section 769 of the Administration of Justice Act. In cases where the court has ordered custody on remand pending an appeal, the provisions on review of custody on remand as described above will apply correspondingly.

III.4. INFORMATION, LEGAL REPRESENTATION, INTERPRETER, INFORMING OTHERS

According to section 758 of the Administration of Justice Act, the police must inform the arrested person of the charge and the time of the arrest as soon as possible. In practice, 'as soon as possible' is interpreted to mean that the police must inform the arrested person of the charge and the time of the arrest immediately in connection with the arrest.[4]

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3 See *supra* in this section (under: Cases, grounds, level of suspicion and other considerations).

4 See the 2nd paragraph on p. 7.

When the Prosecution Service requests the court to order custody on remand, the suspect must be presented before the court in person. During the court hearing held to decide on the question of custody on remand, the suspect must have access to the assistance of defence counsel, see section 764 of the Administration of Justice Act. In practice, defence counsel will always be assigned to represent the suspect during this court hearing.

As a basic principle, an interpreter will be used during court hearings concerning custody on remand where the suspect does not speak Danish. In exceptional cases, the court may decide not to call an interpreter, but only where the court understands the language of the suspect, see section 149 of the Administration of Justice Act.

A person deprived of his or her liberty will have the right to have his or her family contacted to let them know of his or her arrest. For reasons of the proper administration of justice, notification of the family of the arrested person may be delayed. All arrested persons are given written information describing their procedural rights, including the right to defence, the right to notification of relatives, access to medical assistance, the right to contact embassies, et cetera.

III.5. INTERNATIONAL INSTRUMENTS AND DECISIONS

One significant amendment to the Administration of Justice Act has been made in the light of a decision from the European Court of Human Rights. In the case of *Hauschildt v. Denmark*, the European Court of Human Rights held in April 1989 that Denmark had violated the defendant's right to a fair trial as stated in Article 6(1) of the European Human Rights Convention.

The case concerned the impartiality of judges in a case where a District Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case of appeal had already had to deal with the case at an earlier stage of the proceedings and had given various pre-trial decisions with regard to the question of custody on remand during the investigative phase. The decision on custody on remand had been taken on the basis of the judges being satisfied that there was 'substantial suspicion' that the accused had committed the crimes with which he was charged.

The decision of the Court led to an amendment in 1990 of the Administration of Justice Act. According to the amended provisions, a judge who has rendered a decision on custody on remand based on a notion of 'substantial suspicion' cannot afterwards take part in deciding the question of whether or not the accused person is guilty.

III.6. MOST IMPORTANT DEVELOPMENTS

The Administration of Justice Act was adopted in 1916 and entered into force in 1919. Since 1919, the legislator has amended the very comprehensive set of regulations numerous times.

Relative to the criminal justice developments within the most recent 10–15 years, two trends emerge, in particular. Firstly, it is a characteristic that the possibility of custody on remand has been gradually increased for law enforcement reasons. In everyday discussion, this type of custody on remand is termed 'preventive detention'. The rules on preventive detention are laid down in section 762(2)(i) and (ii) of the Administration of Justice Act. Under paragraph (i), a suspect may be remanded in custody where there is substantial suspicion that he or she has committed an offence that is subject to public prosecution and is punishable by law by imprisonment for six years or more, and it is deemed that for law enforcement reasons the suspect should not be at large in view of the information on the gravity of the offence.

Under section 762(2)(ii) of the Administration of Justice Act, a suspect may also be remanded in custody where there is substantial suspicion that he or she has committed one of a number of specified offences if the offence is likely to result in a sentence of at least 60 days' imprisonment, and it is deemed that for law enforcement reasons the suspect should not be at large in view of the information on the gravity of the offence.

An amendment of section 762(2)(ii) of the Administration of Justice Act in June 2008 extended the right to remand suspects in custody for law enforcement reasons so that custody on remand may now also be applied in cases concerning sexual abuse of children under the age of 15.

The Administration of Justice Act was furthermore amended in order to reduce the number of cases of custody on remand extending for more than three months. The amendments that entered into force on 1 July 2008 had the following main features:

- Time limits that indicate that, unless exceptional circumstances prevail, custody on remand must not exceed six months where the charge concerns an offence punishable by imprisonment for less than six years; and one year where the charge concerns an offence punishable by more than six years' imprisonment.
- For persons under the age of 18 years the corresponding time limits are four months and eight months.
- A request for continued custody on remand must be made in writing and must state the reasons for the request.

Solitary confinement

Moreover, the use of solitary confinement by the State, particularly as concerns the scope and length of it, has been the subject of on-going comprehensive debate. Several international bodies – the U.N. Committee against Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – have furthermore recommended in connection with their visits to Denmark that Denmark apply solitary confinement in very particular circumstances only, and that an absolute limit to the length of solitary confinement be laid down. In addition, the Standing Committee on Administration of Criminal Justice of the Ministry of Justice has submitted recommendations in this field. The recommendations must be seen in light of the serious nature of the measure and the harmful effects on health proved to result from the measure.

With a view to reducing the use and length of solitary confinement, the legislator therefore implemented an amendment of the Administration of Justice Act in 2000, clarifying and setting out stricter conditions for placing a person in solitary confinement and maintaining such confinement, and in certain fields absolute limits were introduced as regards the length of solitary confinement.

On the same occasion, a provision was added on administrative rules to be provided for the treatment of prisoners held in solitary confinement in order to counter the negative effects of solitary confinement (increased staff contact, extended right to visits and offers of regular and long conversations with chaplains, doctors, psychologists or others). Reference is made to section 776 of the Administration of Justice Act.

In December 2006, the Administration of Justice Act was amended so as to further restrict the use of solitary confinement, based on new recommendations from the Standing Committee on Administration of Criminal Justice, the United Nations Committee against Torture, the European Committee for the Prevention of Torture and the United Nations Human Rights and Rights of the Child Committees. However, the legislator found that it was still necessary to maintain the possibility of placing suspects in solitary confinement for crime fighting reasons.

The amendments that entered into force on 1 January 2007 had the following main features:

- Strict time limits so that, unless exceptional circumstances prevail, solitary confinement must not exceed two weeks where the charge concerns a criminal offence punishable by less than four years' imprisonment; four weeks where the charge concerns an offence punishable by more than four and less than six years' imprisonment; and eight weeks where the charge concerns an offence punishable by six or more years' imprisonment. For

persons under the age of 18, the solitary confinement cannot exceed two weeks where the charge concerns an offence punishable by less than four years' imprisonment; four weeks where the charge concerns an offence punishable by more than four and less than six years' imprisonment; and more than four weeks in exceptional cases only.
- Persons under the age of 18 may only be held in solitary confinement if most exceptional circumstances make it necessary.
- If the local prosecutor wishes to request a court order for solitary confinement beyond eight weeks (four weeks where the case concerns a person under the age of 18), the Director of Public Prosecutions must approve the request beforehand.
- A request for continued solitary confinement must be made in writing and must state the reasons for the request.

Additionally, an absolute upper limit for solitary confinement of six months was introduced for offences punishable by law by six or more years' imprisonment unless the charge concerns an intentional violation of Parts 12 or 13 (terrorism, et cetera) of the Criminal Code, or a violation of section 191 (aggravated drug offences) or section 237 (homicide) of the Criminal Code, see section 770c(4) of the Administration of Justice Act.

These amendments have proved to be effective. Thus, in 2007, the number of cases where solitary confinement was used had dropped by 42.6 per cent, as compared to 2006.

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III.7. RECOMMENDATIONS OF INTERNATIONAL HUMAN RIGHTS BODIES REGARDING THE USE OF SOLITARY CONFINEMENT IN DENMARK AFTER THE 2006 AMENDMENT OF THE ADMINISTRATION OF JUSTICE ACT

The CPT carried out its latest visit to Denmark from 11 to 20 February 2008. The CPT's report of 25 September 2008 regarding its visit to Denmark states as follows in the section on the Committee's recommendations on page 65:

"*Solitary confinement by court order and other restrictions*
Recommendations

- the Danish authorities to make continued efforts to ensure that remand prisoners are only placed in solitary confinement in exceptional circumstances which are strictly limited to the actual requirements of the case (paragraph 42);
- the Danish authorities to pursue their efforts to provide remand prisoners placed in judicially-imposed solitary confinement with increased staff contact and

> access to tuition, work and other activities, in order to counteract the negative effects of being placed in solitary confinement (paragraph 42);(..)"

The U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, conducted his latest mission to Denmark from 2 to 9 May 2008. The following appears from paragraph 44 of the Special Rapporteur's report of 18 February 2009:[5]

> "44. The Special Rapporteur, in a recent report (A/63/175, paragraphs 77–85), pointed out that he shares the concern of the Human Rights Committee, the Committee against Torture and the Committee on the rights of the child, which have recommended that the use of solitary confinement be minimized. Regarding Denmark, the Committee against Torture called on the Government to reduce the use of solitary confinement under strict supervision and with a possibility of judicial review, and recommended that Denmark should aim to abolish the practice, particularly during pre-trial detention."

It further appears from paragraph 74:

> "74. Notwithstanding the Government's efforts to reduce the use of solitary confinement, the Special Rapporteur, in line with the opinions expressed by the Committee against Torture and the European Committee for the Prevention of Torture, is concerned by the extensive recourse to this practice during criminal investigations in pre-trial detention, in order to manage certain categories of convicted prisoners or as a form of punishment for disciplinary infractions.
> Whereas solitary confinement may be used in very exceptional cases and for as short a time as possible, its prolonged use may lead to severe mental suffering, which in particular circumstances may be qualified as inhuman treatment. If prolonged pre-trial detention is used as a means of coercion to extort information or a confession, it may amount to torture."

Additionally, the following appears from paragraph 78:

> "78. The Special Rapporteur recommends that the Government:
> (..)
> (b). Further reduce the use of solitary confinement, based on unequivocal evidence of its negative mental health effects upon detainees;(..)"

Moreover, on 30 October 2008, the U.N. Human Rights Committee adopted its conclusions on Denmark's 5th periodic report on the implementation of the International Covenant on Civil and Political Rights in Denmark. In

[5] GENERAL, A/HRC/10/44/Add 2, 18 February 2009.

'Concluding observations of The Human Rights Committee',[6] the following appears from paragraph 11:

> "11. The Committee remains concerned about the use of long-term solitary confinement during pre-trial detention, and in particular about the possibility of unlimited prolongation of such a measure with regard to persons charged with a crime under Parts 12 and 13 of the Criminal Code, including persons under 18 years of age. (Articles 7, 9 and 10).
> The State Party should review its legislation and practice in relation to solitary confinement during pre-trial detention, with a view to ensuring that such measure is used only in exceptional circumstances and for a limited period of time."

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

The following describes the conditions under which pre-trial detention is practised in Denmark. Pre-trial detainees' rights, et cetera, during the deprivation of liberty are also explained.

IV.1. FACILITIES

Persons under arrest are usually placed in a holding room at the local police station. Detainees may, however, also be placed in a local prison proper. It should be noted in that connection that, in several Danish towns, the local police station is located in the immediate vicinity of a local prison. The choice between the two said localities generally depends on the space available at the time and a specific assessment of the arrested person.

In cases where the court has issued a remand order, the detainee is usually placed in a local prison. On a national level, the Danish Prison and Probation Service disposes of 36 local prisons, of which Copenhagen Prisons is the largest one with room for about 530 inmates. The local prisons predominantly only accommodate remand prisoners. In practice, however, persons who have received a final sentence often remain in a local prison until they can be transferred to an enforcement institution (a state prison).[7]

The Prison and Probation Service has also fitted out remand units in some of the closed enforcement institutions (Nyborg, Vridsløselille and East Jutland

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[6] CCPR/C/DNK/CO5.

[7] See p. 6 from which it appears that 1354 persons were held in custody on remand as at 13 October 2009. This figure does not include persons whose judgments are final and who are awaiting transfer from a local prison to an enforcement institution.

State Prisons). Such units house remand prisoners on the same footing as the local prisons. Additionally, the remand units are used in connection with the placing of remand prisoners who are deemed unsuitable for housing in an ordinary local prison on grounds of order and security as the remand units of the closed prisons are assumed to be better geared to house difficult clients, for one reason because both the dynamic and the static security is higher in a closed prison than in a local prison.

IV.2. CATEGORIES AND ACCOMMODATION

As stated above, the local prisons predominantly only accommodate remand prisoners. However, in practice it is impossible to avoid the need for sentenced prisoners to remain in the local prison for a period until they can be transferred to an enforcement institution. Therefore, detainees under arrest and remand prisoners cannot always be kept separate from sentenced prisoners.

There are several reasons for this. Firstly, the Prosecution Service will need some processing time after the date of a final judgment in connection with issuing an enforcement order. The Prosecution Service usually sends the documents of the case and the enforcement order to the local prison currently holding the sentenced prisoner. The local prison will then commence enforcement of the sentence imposed.

Subsequently, the local prison submits the documents of the case to the Department of Prisons and Probation under the Ministry of Justice, which then determines where the person is to serve the prison sentence imposed. When a decision on the place of enforcement has been made, further time may pass due to space problems in the relevant institution before the person can be transferred from the local prison to the enforcement institution.

Remand prisoners under the age of 18

By way of introduction, it should be noted that at present children under the age of 15 are *never* accommodated in local or state prisons. However, in that connection it should be noted that the Danish Government is currently planning to reduce the age of criminal responsibility to 14 years.

Denmark ratified the United Nations Convention on the Rights of the Child in 1991. According to Article 37(c) of the Convention, States Parties must ensure that every child deprived of liberty must be separated from adults unless it is considered in the child's best interest not to do so.

Further, Rule 11.1 of the European Prison Rules[8] prescribes that children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose. If children are nevertheless exceptionally held in a prison for adults, there must be special regulations that take account of their status and needs, see Rule 11.2.

The European Prison Rules are not legally binding on the member states of the Council of Europe. However, the Danish Prison and Probation Service has always endeavoured to observe the rules and ensure accordance between them and the national prison rules.

Consequently, 15–17-year-olds held in custody are normally accommodated in a secure residential institution. Deviations from this rule may occur in case of a particularly serious crime, or if temporary accommodation in a local prison is necessary due to lack of places in the secure residential institutions. In the latter case, the detainee must be transferred to the secure residential institution as soon as a place becomes available.

Moreover, a 15–17-year-old remand prisoner may be transferred from a secure residential institution to a local prison if the secure residential institution is no longer able to accommodate the young prisoner due to his or her behaviour.

The Minister of Justice has laid down detailed rules on the treatment of 15–17-year-olds accommodated in the institutions of the Prison and Probation Service.[9]

As set out in section 2(1) of the relevant Executive Order, the 15–17-year-olds in the individual prison must be placed in the unit best able, upon specific assessment, to protect the young remand prisoner against unfortunate influences from fellow inmates. According to section 2(2) of the Executive Order, 15–17-year-olds may not share living quarters with over-17-year-old inmates except with the approval of the Department of Prisons and Probation under the Ministry of Justice.

The prison must also consider, on an on-going basis, whether there are inmates with whom the 15–17-year-old can associate. When association is allowed in the presence of staff, it is incumbent on the staff to be particularly aware that the 15–17-year-old is not subjected to unfortunate influences. 15–17-year-olds may be allowed association with inmates over the age of 17 without the presence of staff if it is in the interest of the young inmate and association is specifically assessed not to present any risk to the young prisoner of being subjected to unfortunate influences. Please see section 2(3) to (5) of the Executive Order.

8 Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.

9 Executive Order No. 390 of 17 May 2001.

In the Greater Copenhagen area, the Prison and Probation Service has chosen to accommodate remand prisoners under the age of 18 in a separate unit of Copenhagen Prisons in order to provide better facilities for the young prisoners and to prevent their *de facto* solitary confinement. The Prison and Probation Service focuses in particular on exploiting the possibilities given by the above-mentioned Executive Order. Thus, a socio-educational assistant is attached to the unit of Copenhagen Prisons, and the young remand prisoners are able to have outdoor exercise and to associate with inmates of their own age. In addition, the Department of Prisons and Probation grants funds for extra school lessons for the young remand prisoners.

Specially vulnerable groups of remand prisoners

The Prison and Probation Service has made no special arrangements for homosexual and transsexual remand prisoners by setting up separate units or the like. A prisoner of such sexual orientation will always be able to go into voluntary solitary confinement, however.

Nor has the Prison and Probation Service made any special arrangements for persons suspected of a sexual offence, including offences against children. Normally, such prisoners are thus placed in the same unit as other remand prisoners. However, the local prison staff are highly aware of advising this category of inmates on the importance of care due to the nature of the suspected offence. Such prisoners are also advised about the possibility of voluntary solitary confinement.

No special arrangements have been made to protect HIV-infected remand prisoners. Such prisoners are therefore placed in ordinary local prison units. Like all other prisoners, this group of inmates will have access to health care assistance in the local prison. It is also possible for them to go into voluntary solitary confinement.

Due consideration is given to former policemen or prison officers when they are accommodated. A prison officer will thus never be placed in the institution of his or her former service. Both categories of remand prisoners will be placed in a local prison specifically assessed not to present any risks. Like all other remand prisoners, they will be able to go into voluntary solitary confinement.

Special groups of remand prisoners

Under section 770(2), first sentence, of the Administration of Justice Act, remand prisoners are placed in custody (a local prison) at the place where the criminal proceedings are conducted, if possible. Placement in or transfer to another remand prison than the place where the criminal proceedings are conducted may occur if required for security reasons or in other special circumstances, see

section 10(1)(ii) and (iii) of the Custody Order.[10] *'Security reasons'* may include a special risk that the remand prisoner will abscond. *'Special circumstances'* may include cases where placement or transfer is considered necessary to prevent outrages against fellow prisoners.[11]

According to firm practice, remand prisoners belonging to the group of *'negatively strong inmates'* are placed in special units of selected local prisons to prevent outrages against fellow inmates. The term *'negatively strong inmates'* particularly aims at those groups of inmates who are able to establish such a position of power in the prisons that they constitute a highly negative controlling factor relative to fellow inmates. *'Outrages'* mean not only physical assaults or threats to that effect, but also economic exploitation and interference with the freedom of action of fellow inmates within the legal framework of the prison.[12] In that way, this category of remand prisoners is kept completely segregated from other inmates of the local prison. This category of prisoners includes outlaw motorcycle gangs and their supporters.[13] Examples are members and supporters of the worldwide organisations Hells Angels and Bandidos.

Additionally, remand prisoners who are specifically assessed to be dangerous, negatively strongly controlling or prone to abscond are placed in or transferred to local prisons or local prison units specially suited to accommodate this category of inmates. In that connection, upon specific assessment, special measures may be taken against such inmates, such as restricted access to association with other prisoners. Such measures must be prescribed by law.

Cell size, et cetera

Danish law does not expressly specify any requirements applicable to the size of cells in Danish local or state prisons. Rules 18.1 and 18.2 of the European Prison Rules give detailed recommendations on the fitting out of the prisoners' living quarters, but no express requirements as to cell size. However, according to Rule 18.3, national law must set specific minimum requirements in respect of the matters referred to in Rules 18.1 and 18.2.

The following further appears from the commentary of the Committee of Ministers of the Council of Europe on Rule 18.3:

> "Rule 18 includes some new elements. The first, in Rule 18.3, is intended to compel governments to declare by way of national law specific standards, which can be

10 Executive Order No. 738 of 25 June 2007 of the Ministry of Justice on Remand Prisoners in Custody (Custody Order).

11 See para. 25 of Guidelines No. 37 of 25 June 2007 issued by the Department of Prisons under the Ministry of Justice on the Executive Order on Remand Prisoners in Custody (Custody Guidelines).

12 See the definition in para. 19 of Guidelines No. 7 of 23 January 2009 (Placement and Transfer Guidelines) issued by the Department of Prisons and Probation under the Ministry of Justice.

13 See the definition in para. 18 of the Guidelines.

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> enforced. Such standards would have to meet wider considerations of human dignity as well as practical ones of health and hygiene. The CPT, by commenting on conditions and space available in prisons in various countries has begun to indicate some minimum standards. These are considered to be 4m2 for prisoners in shared accommodation and 6m2 for a prison cell. These minima are, related however, to wider analyses of specific prison systems, including studies of how much time prisoners actually spend in their cells. These minima should not be regarded as the norm. Although the CPT has never laid down such a norm directly, indications are that it would consider 9 to 10m2 as a desirable size for a cell for one prisoner. This is an area in which the CPT could make an on-going contribution that would build on what has already been laid down in this regard. What is required is a detailed examination of what size of cell is acceptable for the accommodation of various numbers of persons. Attention needs to be paid to the number of hours that prisoners spend locked in the cells, when determining appropriate sizes. Even for prisoners who spend a large amount of time out of their cells, there must be a clear minimum space, which meets standards of human dignity."[14]

At present, no express minimum cell size requirements have been laid down. However, in all Danish local and state prisons, the cells exceed 6 m^2.

In the Danish prison system, the norm for remand prisoners is accommodation in single occupancy cells. However, the Prison and Probation Service disposes of a number of double occupancy cells, though only very few detainees are placed in double occupancy cells. The Prison and Probation Service does not know the exact number of inmates placed in double occupancy cells. Such cells may be used, for example, if it is deemed expedient, upon a specific assessment, to place prisoners in association with each other where the relevant remand prisoners have a great need of association or in other cases. Where a double occupancy cell is used, it will always be specifically assessed whether the relevant prisoners are suited to associate with each other.

Moreover, in situations of sudden urgency it may be necessary to accommodate two persons in the same cell for a short period due to an extraordinary number of detainees and/or remand prisoners.

IV.3. INFORMATION

As soon as possible after being placed in an institution, a remand prisoner must be advised by the institution about his or her rights, duties and other matters during the prison stay. This appears from section 21 of the Custody Order issued by the Ministry of Justice. This rule implies that, as soon as possible after a remand prisoner's admission to an institution, the institution must give the

14 CM Documents CM(2005) 163 Addendum, 2 November 2005. Internet: www.coe.int/t/cm/.

prisoner a thorough briefing of the rules for his or her stay in the institution as well as of other matters.

In practice, an admission interview is conducted with the remand prisoner shortly after admission in order to provide the above briefing and to identify any urgent social and/or health issues. In that connection, the remand prisoner will receive a copy of the house rules and an everyday programme for the relevant unit. The prisoner will also be informed of how to acquaint himself or herself with the rules governing the rights and duties of remand prisoners.

The Department of Prisons and Probation has drafted some guidelines for detainees and remand prisoners: *'Information about arrest and remand custody'*.[15] The guidelines are given to the prisoner in connection with his or her admission. They provide a variety of relevant information on the right to visits, assistance related to social problems and health care, et cetera, as well as guidelines on complaints. The guidelines have been translated into a large number of languages.

IV.4. RIGHTS TO HUMANE TREATMENT

The international obligation mentioned is not expressly codified in Danish legislation.

Generally, remand prisoners can take a bath every day. During the day, remand prisoners will also be allowed to use the toilet as needed. A call system is installed in the cell and can be activated by a remand prisoner if he or she needs to go to the toilet. The local prison staff will then see to it that the prisoner gets an opportunity to go to the toilet as soon as possible.

All prisoners may wear their own clothes. This may be seen as an outcome of the so-called normalisation principle of the Prison and Probation Service. The principle implies that conditions for inmates must be arranged so as to correspond to conditions in the general community to the extent possible.[16]

IV.5. REMAND PRISONERS' CONTACT WITH COMMUNITY OUTSIDE INSTITUTION, ET CETERA

A remand prisoner is entitled to contact with the general community outside the institution. This may take place by way of correspondence by letter, telephone conversations, visits and, in special cases, escorted leaves from the institution.

[15] The guidelines are available at: www.kriminalforsorgen.dk.

[16] In 1993 the Prison and Probation Service prepared a programme of principles for its work. According to this programme, enforcement of sentences must be based on the principle of 'normalisation' and other principles.

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Correspondence by letter

A remand prisoner thus has the right to receive and send letters subject to certain restrictions. Under section 772(1) of the Administration of Justice Act, the police may examine the letters before receipt or dispatch. The police must surrender or send the letters as soon as possible unless their contents may harm the investigation or the maintenance of peace and order in the remand prison. If the police withhold a letter, the question of continued withholding must promptly be submitted to the court for decision.

The institution may open and seal letters to and from remand prisoners without any court order to prevent smuggling in and out. Letters to and from remand prisoners may only be perused if deemed necessary by the institution for reasons of order or security. Reference is made to section 66(1) and (2) of the Custody Order.

Under section 772(2) of the Administration of Justice Act, a remand prisoner is furthermore entitled to unchecked correspondence by letter with the court, his or her counsel, the Minister of Justice, the Director-General of the Prison and Probation Service and the Parliamentary Ombudsman. In addition, a remand prisoner is entitled to unchecked correspondence by letter with the European Court of Human Rights, the European Committee for the Prevention of Torture and others, see section 69(2) of the Custody Order.

Telephone conversations

If connection through correspondence by letter cannot be awaited without substantial nuisance, and to the extent possible in practice, a remand prisoner may be allowed to have telephone conversations, see section 75(1) of the Custody Order.

The right to telephone conversations may, however, be denied if the police oppose it in view of the purpose of the custody, or if the institution finds it necessary for reasons of order or security, see section 75(2) and (3) of the Custody Order. A request by a remand prisoner to call his or her counsel is generally granted. A remand prisoner's telephone conversations with counsel are *not* overheard or monitored.

Visits

Moreover, a remand prisoner has the right to visits as often as permitted by the circumstances and subject to certain restrictions. The length of visits must be at least half an hour, and longer visits must be allowed to the extent permitted by the circumstances, see sections 39 to 40 of the Custody Order.

Remand prisoners held in solitary confinement by court order should be permitted to have extended visits. This group of remand prisoners should thus

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be permitted to visits at least once a week, and the length of visits must be at least one hour. Longer visits must be allowed to the extent permitted by the circumstances, see section 40(2), cf. section 84, of the Custody Order.

Pursuant to section 771(1) of the Administration of Justice Act, the police may oppose visits to the remand prisoner in view of the purpose of the custody. The remand prisoner may demand that such refusal of visits be submitted to the court for decision. Under the same provision of the Act, the police may demand that visits must be made subject to control (supervised visits) in view of the purpose of the custody.

Furthermore, the institution may prohibit visits from specified persons if found necessary for reasons of order or security in the individual case, see section 42 of the Custody Order, for example if there is a risk that drugs will be smuggled into the institution.

Visits are generally not supervised. The institution may decide that visits must be supervised by staff of the institution if found necessary for reasons of order or security in the individual case. It may be relevant to consider supervised visits in cases where unsupervised visits are questionable for reasons of order or security on the one hand, while for example the visitor's close relations with the remand prisoner on the other hand speak in favour of granting the visiting order. In the case of visits by closely related persons, permission to supervised visits should thus be considered.

The Department of Prisons and Probation has no available statistics on the number of refusals of visits by family members.

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Leaves

When particular circumstances make it appropriate, the institution may, with police consent, grant a short-term escorted leave to a remand prisoner under section 771(2) of the Administration of Justice Act, see section 32 of the Custody Order. '*Particular circumstances*' may, for example, be the serious illness or funeral of a closely related person. When deciding whether to grant a leave, the risk of abuse should be taken into account. In view of the above, the possibilities for a short-term leave from the institution are very limited for remand prisoners, and only escorted leaves are granted.

Leisure time and occupation

To the extent possible, the institution must offer activities to remand prisoners in their leisure time. Furthermore, a remand prisoner is entitled to spend at least one hour every day in the open air unless this would be incompatible with the handling of security by the institution, see section 29(2) and (3) of the Custody Order.

Remand prisoners have no duty of occupation, but must be offered occupation under the rules of the Executive Order issued by the Ministry of Justice on the

Occupation of Inmates in the Institutions of the Prison and Probation Service, see section 28 of the Custody Order. Occupation may be in the form of work in the inmate's cell or in workshops if the local prison has such premises.

It has not been possible to procure exact information on the current occupation rate among remand prisoners in the Danish local prisons. Based on the available figures, it is estimated that the Prison and Probation Service can offer occupation to around 51 and 54 per cent of the remand prisoners as at 13 October 2009.

IV.6. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Prevention of assaults among inmates

Reference is made to the paragraph about 'special groups of remand prisoners' in section 12 concerning categories and accommodation. The measures are mainly aimed at preventing inmates from assaulting other inmates.

Suicide prevention

For many years, the prevention of suicide and other self-mutilation in the institutions of the Prison and Probation Service has been a focus area. The measures launched in the area include:

- Electronic reporting scheme according to which the institutions report cases of suicide, attempted suicide, self-mutilation, hunger strike and death.
- The basic training programme for prison officers includes a theme day on the topic of suicide, and some of the local prison staff have received supplementary training in suicide prevention.
- A folder has been distributed to the staff about risk factors, suicide risk behaviour and information on how to help. The folder is currently being revised.
- Better and clearer registration in the client system of the Prison and Probation Service of whether inmates are deemed suicidal or have previously attempted to commit suicide.
- Guidelines for passing on medical records in connection with transfers between institutions so that the receiving institution can take the appropriate measures as early as possible.
- Procedure to ensure that inmates take the medicine prescribed to them.
- Following an application to the Ministry of Social Affairs, the Staff Training Centre of the Prison and Probation Service has for several years received funds for projects aimed at improving the prevention of suicides and suicide attempts among inmates. This has resulted in more supplementary training courses for state and local prison staff.

Health care

Remand prisoners are entitled to medical treatment and other health care under section 45(1) of the Danish Sentence Enforcement Act, see section 31 of the Custody Order.

Denmark applies the principle that the Prison and Probation Service should not establish its own treatment system for treating mentally ill and somatically ill inmates. Ill inmates should be treated through the general health care system, which offers a wide range of different treatment options covering individual treatment needs. All inmates are entitled to the same health care services as the citizens outside the institutions of the Prison and Probation Service.

However, for economic and security reasons, a health care scheme has been established for state and local prisons.

All state and local prisons have an arrangement with a prison doctor, usually a local general practitioner, who is at the institution once or twice a week. All state prisons and the largest local prisons employ a nurse on either a full-time or part-time basis.

When assessing an inmate's treatment need, the doctor may consider whether the treatment can be postponed until after the release, provided that the postponement will not lead to further serious health deterioration.

Inmates of the institutions of the Prison and Probation Service are entitled to hospital treatment like all other Danish citizens. This is laid down in Executive Order No. 594 of 11 June 2009 on the right to hospital treatment, et cetera, issued by the Ministry of Health. Also, inmates of the institutions of the Prison and Probation Service have a right to choose their preferred hospital, although this right may be restricted for security or enforcement reasons. The individual prison doctor refers an inmate for treatment at the hospital, and the hospital assesses whether the inmate requires hospitalisation.

Dental treatment

Remand prisoners have limited access to dental treatment. Remand prisoners and inmates serving a prison sentence or held in safe custody in one of the institutions of the Prison and Probation Service for three months or longer are offered a dental examination after three months, provided the person concerned has not had a dental examination for the past 30 months. Furthermore, inmates are offered a dental examination if deemed necessary by the attending dentist. Other than the above, remand prisoners are only entitled to emergency treatment which cannot be postponed until the inmate is released and which is necessary, according to a dental assessment, because of pain or other complaints or in view of the inmate's health condition.

Addiction treatment

Remand prisoners are not covered by the guarantee of treatment for misuse of drugs or alcohol according to which all inmates who otherwise meet the conditions must be offered treatment within two weeks of having made a request to that effect. However, pre-treatment programmes have been established in most local prisons aimed at motivating inmates to undergo a proper treatment course if they have to serve a sentence. If the inmate is not sentenced to prison, but is released instead, further treatment must be offered by the local authorities.

Welfare support

As set out in section 30 of the Custody Order, the institution must counsel and assist a remand prisoner to limit the employment, social and personal drawbacks following from the custody. In this connection, the institution must arrange for contact with persons, institutions and authorities that can provide assistance under other legislation.

In all Danish local prisons, the inmates have access to welfare assistance. In most cases, this is provided by social workers employed with one of the local offices of the Prison and Probation Service. In cooperation with other local prison staff, they can assist the inmates in arranging for contact with authorities, et cetera, as mentioned above. According to the guidelines for detainees and remand prisoners mentioned earlier, inmates will receive a visit from a social worker.

Exclusion from association

Remand prisoners who are excluded from association with other inmates by decision of the institution (administrative decision) are not automatically examined by health care staff before they are placed in solitary confinement with a view to assessing whether they are fit to sustain such punishment. If the remand prisoner shows any signs that give rise to concern on that occasion, the local prison staff will arrange to have the remand prisoner examined by health care staff upon specific assessment.

The Ministry of Justice has laid down detailed rules on the treatment of inmates, including remand prisoners, who are excluded from association with other inmates. The rules include the following.

To reduce the particular stress and risk of disturbance of the mental health connected with exclusion from association with other inmates, the staff must at all times be particularly aware of whether remand prisoners excluded from association for more than two weeks need more staff contact, or medical or psychiatric attendance. The staff should be aware that this need increases with

the length of the exclusion period. This also applies to remand prisoners held in solitary confinement by court order.

In relation to inmates who have been excluded from association for more than two weeks, the staff must be particularly aware of whether, with reference to the inmate's situation as related to order and security considerations, more lenient measures can be applied, for example in the form of:

- association with one or more other inmates in the cell or during outdoor exercise
- possibility of working together with other inmates
- leisure-time activities with one or more other inmates or with staff.

Furthermore, inmates who have been excluded from association for more than two weeks must be offered:

- regular and long conversations with, for example, a chaplain, doctor or psychologist
- television free of charge, and
- special access to individual tuition and work, including other approved activities, which may contribute to reducing the particular stress and risk of disturbance of the mental health connected with exclusion from association with other inmates.

The rules include further requirements for treatment of inmates who have been excluded from association for more than three months, for inmates under the age of 18 who have been excluded from association for a consecutive period of more than four weeks, and inmates over the age of 18 who have been excluded from association for more than six months.

Solitary confinement by court order

Sections 82 to 86 of the Custody Order lay down express rules on staff contact, et cetera, television free of charge and occupation for inmates held in solitary confinement by court order. Those rules are largely identical to the above-mentioned rules regarding exclusion from association with other inmates.

According to these rules, remand prisoners held in solitary confinement for more than two weeks must be offered regular and long conversations with, for example, a chaplain, doctor or psychologist during the continued confinement. As mentioned above under the section about visits, remand prisoners held in solitary confinement must also be offered increased access to visits. Moreover, remand prisoners under the age of 18 held in solitary confinement for more than four weeks and remand prisoners over the age of 18 held in solitary confinement

for more than six months must be offered an additional three hours of activation with staff contact every day.

Staff training

The training programme of the Prison and Probation Service for prison officers does not include specific training in handling pre-trial detainees.

It is a general training programme focusing on all phases of the deprivation of liberty, such as arrest, custody on remand, serving of a sentence and release. The training programme also focuses on psychology and communication, including conversation techniques, to prepare the staff for working with different categories of inmates.

IV.7. COMPLAINTS BY PRE-TRIAL DETAINEES

Under section 97(1) of the Remand Custody Order, remand prisoners may appeal any decision made by the institution to the Minister of Justice, meaning in practice the Department of Prisons and Probation under the Ministry of Justice. Unlike convicted persons, remand prisoners are not subject to a time limit for the submission of an appeal.

Furthermore, section 98 of the Remand Custody Order includes a reproduction of section 778 of the Administration of Justice Act concerning the remand prisoners' possibilities of submitting complaints of prison staff behaviour with the court. It thus appears from section 778(1) of the Administration of Justice Act that such complaints must be filed with the relevant (local) prison director or with the Department of Prisons and Probation. If the complaint has been dismissed or no final decision has been made within two weeks of submission, the complaint may be brought before the court of the district in which the remand prison (local prison) is located.

Under section 778(2), the court may refuse to initiate an inquiry if the complaint is deemed manifestly unfounded, if it relates to insignificant matters or if it is submitted more than four weeks after the event complained of.

If the court admits the case, the court may prepare a report of the inquiry once it has been completed. The report will be sent to the complainant, to the person complained of, and to the (local) prison director as well as to the Department of Prisons and Probation, see section 778(3) of the Administration of Justice Act. It should be noted that the court cannot institute or order the institution of disciplinary cases or criminal proceedings against the person complained of.

IV.8. INTERNATIONAL INSTRUMENTS AND DECISIONS

To some degree, Danish law has been influenced by international instruments. One example of this is Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules. The rules are mentioned above.

IV.9. MOST IMPORTANT DEVELOPMENTS

As for the most important developments in the last 10–15 years, an example to be mentioned is that significant attempts have been made in recent years to ensure remand prisoners' access to tuition or other occupation during the deprivation of liberty to counter any negative consequences thereof.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

Danish legislation provides alternatives to custody on remand. Section 765 of the Administration of Justice Act provides a non-exhaustive list of possible alternatives to custody on remand: Submission to supervision; observation of stipulations as to residence, work, use of spare time, and association with certain persons; residence in a suitable home or institution; submission to psychiatric treatment or addiction treatment; reporting to the police at specific times; depositing of passport or other identification papers; and putting up of bail determined by the court to ensure the person's presence at court hearings and the enforcement of any sentence. Unfortunately, there are no statistics available on the use of alternatives to custody on remand.

Cases, grounds, level of suspicion and other considerations

According to section 765 of the Administration of Justice Act, alternatives to custody on remand may be used under the same conditions as custody on remand. Section 765 thus states that, where the conditions for custody on remand are fulfilled, but the purpose of the custody can be attained through less interfering measures, the court may render a decision of an alternative to custody on remand. The court's main consideration when deciding on the use of an alternative to custody on remand is whether the purpose of the custody can be attained through less interfering measures. Furthermore, alternatives can only be ordered with the consent of the person in question. Alternatives to custody on remand are reviewed according to the same rules as apply to the review of custody, see section 767 of the Administration of Justice Act.

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International instruments and decisions

In November 2008, the European Council (JHA) agreed on the Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The purpose of the Framework Decision is to set up a scheme according to which member states of the European Union are obliged to mutually recognise and, where applicable, execute decisions taken in another member state on alternatives to custody on remand, thereby avoiding the custody on remand of a suspect who is not a resident of the country where the alleged offence is committed, solely for the purpose of avoiding the risk that the suspect will abscond. Implementation of the Framework Decision into Danish legislation will require amendments to the Administration of Justice Act.

Most important developments

In relation to the above, there have been no other notable tendencies in recent years relating to the use of other alternatives to custody on remand. Rather, the efforts of legislators and authorities have been targeted at limiting custody on remand, including solitary confinement, and the duration hereof to the widest extent possible.

VI. CONCLUSION

As appears from the above, in recent years Danish law has in certain aspects been affected by measures in relation to pre-trial detention that wide the possibilities for the authorities as regards detaining persons (particularly in terms of the grounds for custody on remand). However, in accordance with Danish legal tradition changes have taken place in stages as a gradual process, and seen in an international context the changes that have taken place are probably best described as having been very moderate.

Furthermore, there has been no general tendency only towards more severe measures. Thus, law amendments have also been made in recent years, some upon recommendation from several international bodies, which aim to limit the duration of custody on remand, including the use of solitary confinement, and a number of measures have also been taken to limit the special strain and risk of disturbance of the mental health connected with solitary confinement, for example access to regular, long talks with psychologists, doctors or priests.

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PRE-TRIAL DETENTION, THE TREATMENT OF TERROR SUSPECTS, AND THE HUMAN RIGHTS ACT: A CRITICAL ANALYSIS OF THE POSITION IN ENGLAND AND WALES

Stephen Cameron Shute & Paul David Mora*

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I. INTRODUCTION

This chapter analyses the law that governs the detention of persons in England and Wales who are held pre-trial on suspicion of having committed a criminal offence and assesses the extent to which these legal procedures meet the obligations that have been imposed upon the United Kingdom by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Following a brief discussion of the international human rights framework in part II, the early parts of the chapter – parts III and IV – focus on pre-trial detention without charge. As the discussion will reveal, changes made by the United Kingdom government to the law in this area in an attempt to curb international terrorism resulted in greater restrictions to the right to individual liberty than had previously been tolerated by the ordinary criminal law. Following these changes, a person arrested on suspicion of having committed a terrorist offence in England and Wales was able to be lawfully detained without charge for a maximum period of 28 days, whereas a person arrested on suspicion of having committed any other indictable offence could only be lawfully detained without charge for a maximum period of 96 hours. Furthermore, in the aftermath of the terrorist attacks made against the United States on 11 September 2001, the United Kingdom government introduced measures to allow for a period of *indefinite* preventive detention without trial or charge of any foreign national suspected of involvement in international terrorism if that person was

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considered to pose a threat to national security. Challenges under the Human Rights Act to that exceptional curtailment of the right to liberty and its eventual repeal are also considered in part IV of the chapter.

On the international stage, following the establishment of baseline standards for the treatment of detained persons, efforts turned to how these standards might be effectively guaranteed. Under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which has been ratified by the 47 member states of the Council of Europe, a new extra-judicial body – the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – was created in 1989 with a brief, set out in Article 1, to examine the treatment of persons deprived of their liberty. CPT delegations carry out periodic visits to places in signatory states – such as prisons, police stations, holding centres for immigration detainees, and psychiatric hospitals – where individuals are held in detention. The aim of these visits is to strengthen the protection against torture or inhuman or degrading treatment or punishment afforded to detainees. Following each visit, the CPT makes recommendations to the signatory state in the form of a detailed report. Since its establishment, the CPT has made numerous visits to the United Kingdom and several have been specifically concerned with the treatment of terror suspects who are held in detention without trial or charge. Part V of this chapter considers in detail the recommendations that the CPT has made to the United Kingdom government concerning its treatment of terror suspects held in such facilities. That analysis is followed by a critical discussion in part VI of the measures – known as 'control orders' – which were introduced into United Kingdom law to replace indefinite detention without trial or charge of foreign nationals suspected of involvement in international terrorism.

Part VII of the chapter then moves on to the English law relating to the detention of persons who have been charged with a criminal offence but not yet tried. Again, the compatibility of such detention with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms is considered. The final substantive section of the chapter – part VIII – focuses on the use of conditional bail as an alternative to pre-trial detention.

In most cases, the legal position on pre-trial detention discussed in this chapter relates to England and Wales and the chapter does not seek to address the particular processes and procedures that apply to pre-trial detention in other parts of the United Kingdom. It should be noted, though, that the provisions that were introduced into the United Kingdom to allow for the indefinite preventive detention without charge of foreign nationals who were suspected of international terrorism applied to Scotland and Northern Ireland as well as to England and Wales, and the obligations created by the European Convention for

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the Protection of Human Rights and Fundamental Freedoms apply, of course, to all parts of the United Kingdom.

II. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The United Kingdom is a founding member of both the United Nations and the Council of Europe, joining each on 24 October 1945 and 5 May 1949 respectively. On 1 January 1973, the United Kingdom also joined the European Union, several years after the European Economic Community was first established by the Treaty of Rome in 1957. In addition, the United Kingdom is party to several international human rights treaties, including the United Nations International Covenant on Civil and Political Rights (ICCPR),[1] the United Nations Convention against Torture (CAT),[2] the United Nations Convention on the Rights of the Child,[3] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[4] and, as mentioned above, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[5]

Of the international instruments that the United Kingdom has ratified, only the ECHR has been directly incorporated into its domestic law. The United Kingdom does not have a written constitution or a formal 'bill of rights' of the kind found in many other countries, Nonetheless, under section 6(1) of the Human Rights Act 1998 (HRA), which came into force on 2 October 2000, it is unlawful in the United Kingdom for any public authority to act in a manner which is incompatible with a right guaranteed by the Convention. In instances where a public authority has acted or proposes to act incompatibly with the ECHR, section 7(1) of the HRA allows an individual to bring proceedings against that authority before a national court. Judicial remedies which are considered to be just and appropriate may be awarded by a court under section 8 of the HRA and section 3(1) imposes an obligation on national courts to interpret primary and subordinate legislation, so far as it is possible to do so, compatibly with the demands of the ECHR. If a court is unable to re-interpret primary legislation in that way, then it must issue a declaration of incompatibility under section 4 of

1 Signed on 16 September 1968, and ratified on 20 May 1976. The United Kingdom has not ratified the Optional Protocol to the ICCPR to allow the possibility of individual complaints being made to the UN Human Rights Committee.

2 Signed on 15 March 1985, and ratified on 8 December 1988. The United Kingdom has not accepted the competence of the Committee against Torture under Article 22 of the CAT to receive individual complaints for alleged breaches of the CAT.

3 Signed on 19 April 1990, and ratified on 16 December 1991.

4 Signed on 4 November 1950, and ratified on 8 March 1951.

5 Signed on 26 November 1987, and ratified on 24 June 1988.

the HRA. According to section 4(6), a declaration of incompatibility does not affect the validity, continuing operation, or enforcement of the provision in respect of which the declaration is given.

III. DETENTION WITHOUT CHARGE IN POLICE CUSTODY

III.1. THE GENERAL POSITION IN ENGLISH LAW

Once an individual has been arrested by a police officer on suspicion of having committed a criminal offence, section 30(1A) of the Police and Criminal Evidence Act 1984 (PACE) provides that that individual must be taken to a police station as soon as is practicable following their arrest unless they are released on what has become known as 'street bail'.[6] Delay in taking arrested persons to a police station will only be permitted if their presence is required elsewhere in order to carry out an investigation.[7] Upon arrival at the police station, an arrested individual must be presented to a 'custody officer', who shall be a police officer of at least the rank of sergeant.[8] According to section 37(1) of PACE, the custody officer has responsibility (subject to amendments to PACE contained in section 37A which require the police to consult with the Director of Public Prosecutions[9]) for determining whether there is sufficient evidence to charge a detained person for the offence for which they have been arrested. Once charged, PACE provides that the custody officer must either order the individual to be released on bail on condition that they attend a police station or court at a later date or require the charged person to remain in police custody until they can be brought before a court.[10]

If the custody officer determines that there is insufficient evidence to charge an arrested individual, the general rule is that that person must be released, either with or without bail. But this general rule is subject to a significant exception where the custody officer has reasonable grounds for believing that the arrested individual's detention is necessary in order 'to secure or preserve evidence' relating to the offence for which the individual has been arrested or

6 The power, known colloquially – and in Code C of PACE – as 'street bail', for a police officer to release an arrested person at the scene of a suspected crime (on condition that person either attends court or appears at a police station at a later date) without taking them to a police station was introduced by section 4 of the Criminal Justice Act 2003, amending section 30 of PACE.

7 Section 30(10A) of PACE.

8 As defined by section 36(3) of PACE. The role of the custody officer is to guarantee the rights and general welfare of detainees while they are being held at a police station.

9 Section 37B of PACE.

10 Section 38(1) of PACE.

has reasonable grounds for believing that the individual's detention is necessary in order to obtain such evidence through 'questioning him'. In these circumstances, the custody officer has the power to authorise the detention of the arrested person in police custody without charge.[11]

When a custody officer determines that an arrested person should be detained in a police station without charge, section 40(1) of PACE stipulates that this detention must be reviewed periodically by a 'review officer'. At each stage this officer, who must be a police officer of at least the rank of inspector and not directly involved with the investigation of the case,[12] is required by section 40(8) of PACE to determine whether there is sufficient evidence to charge the individual. The first review by the review officer must take place no later than six hours after the detention without charge was first authorised by the custody officer.[13] The second review shall be no later than nine hours after this first review and subsequent reviews shall be at regular intervals of no more than nine hours.[14] Again, at each stage the arrested person may be detained without charge if the review officer has reasonable grounds for believing that their detention is necessary in order 'to secure or preserve evidence' relating to the offence for which that individual is under arrest or to obtain such evidence through 'questioning'. Section 40(4) of PACE provides that reviews may be postponed if it is not practicable to carry them out at the required time. PACE gives two examples of the circumstances in which a review may justifiably be postponed. These examples are not intended to be exhaustive. The first example is where a person is being questioned and the review officer is satisfied that it would be prejudicial to the investigation to interrupt this questioning.[15] The second example is where the review officer is not 'readily available'.[16] Where a review is postponed, section 40(5) of PACE requires that it be carried out as soon as is practicable thereafter. Significantly, section 40(6) of PACE also stipulates that postponement of a review must not affect the time at which any subsequent review is carried out.

Under section 41(1) of PACE, the general rule is that no individual should be kept in police detention for more than 24 hours without being charged. At this point, a detainee who remains in police custody must be released by a custody officer, either with or without bail,[17] unless one of the exceptions contained in sections 42 and 43 of PACE applies.[18] Section 42(1) of PACE provides that a police

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11 Section 37(2) and (3) of PACE.

12 See section 40(1)(b) and (2) of PACE. But, where an arrested person has been charged, the 'review officer' will be the 'custody officer': see section 40(1)(a).

13 Section 40(3)(a) of PACE.

14 Section 40(3)(b) and (c) of PACE.

15 Section 40(4)(b)(i) of PACE.

16 Section 40(4)(b)(ii) of PACE.

17 Section 41(7) of PACE.

18 PACE specifies that the period of detention should be calculated either from the moment when the person suspected of having committed a criminal offence first arrived at a police

officer of the rank of superintendent or above may authorise a further 12 hours of detention without charge if there are reasonable grounds for believing that continued detention is necessary in order 'to secure or preserve evidence' or obtain such evidence through 'questioning'. For this power to apply, an arrested individual must have been held for an indictable offence and the authorising officer must be 'satisfied' that the investigation is being conducted both 'diligently and expeditiously'.[19] The severity of the offences to which this provision applies was watered down in 2003 by a legislative amendment to PACE contained in the Criminal Justice Act 2003. When it was enacted in 1984 the original version of PACE only allowed detention beyond 24 hours if an offender was being held for a 'serious arrestable offence'. Section 7 of the Criminal Justice Act 2003, however, without any strong evidence base to justify the change, diluted this restriction to an 'arrestable' offence. Section 111 of, and schedule 7 to, the Serious Organised Crime and Police Act 2005 further amended it to an 'indictable offence'.

After 36 hours have elapsed, any further detention of a suspected offender in police custody without charge must be authorised by a magistrates' court.[20] Placing decision-making power in the hands of the court thus introduces an important check into the system. It allows for independent scrutiny of whether periods of further detention of a suspect are properly warranted. It would clearly be inappropriate for such detention to be able to be authorised by the police themselves, as they have a strong vested interest in the outcome of the investigation and might be tempted to detain suspects for an unjustifiably long period. Under section 43(1) of PACE, a magistrates' court may issue a 'warrant of further detention' if it is satisfied that there are reasonable grounds for believing that the period of further detention without charge is 'justified'. As in the other situations described above, such further detention will only be permitted if there are reasonable grounds for believing that it is necessary in order 'to secure or preserve evidence' or to obtain such evidence through 'questioning'[21] and the court is satisfied that the investigation is being conducted diligently and expeditiously.[22] Where it is not practicable for the magistrates' court to sit at the expiry of the 36 hours, section 43(5)(b) of PACE permits an application to be made up to six hours after the 36 hours have elapsed. Accordingly, a person may be detained without charge for a total of 42 hours before being brought before a judge.

station following their arrest or from the moment when that person was arrested at a police station if they attended voluntarily: see section 41(2)(c) and (d) of PACE. The period of detention is thus calculated differently from periodic reviews, which begin when the detention is first authorised by the custody officer.

19 Section 42(b) and (c) of PACE (as amended).

20 A magistrates' court is defined by section 45(1) of PACE as a court consisting of two or more justices of the peace sitting otherwise than in open court.

21 Section 43(4)(a) of PACE. Section 43(5)(a) of PACE allows for the application by the police for a warrant of further detention without charge to be made at any time before the expiry of the 36 hours.

22 Section 43(4)(c) of PACE.

Once seized of a case, the magistrates' court may issue a warrant of further detention without charge for such period as it thinks fit having regard to the evidence before it, so long as this period is no longer than 36 hours.[23] Where an application for a warrant of further detention is refused by the court, section 43(15) of PACE requires that the person to whom the application relates either be charged or released with or without bail. Thereafter, no further application will be permitted unless new evidence comes to light.[24] Where a warrant of further detention without charge is granted but expires, a new application may be made to the magistrates' court under section 44(1) of PACE. The magistrates' court may then extend the warrant of further detention for a period of up to 36 hours but the warrant cannot be extended for a period longer than 96 hours from the time the individual first arrived at the police station following their arrest or was arrested at a police station if attending voluntary.[25] Where an application for the extension to a warrant is refused, section 44(7) of PACE requires that the person to whom the application relates either be charged or released with or without bail.

Taken as a whole, the provisions described above – with an absolute limit of 96 hours detention and a series of accompanying legislative safeguards – strike a reasonable balance between the legitimate interests of the state to be able to investigate crime effectively on the one hand and the rights of citizens not to be detained without charge for excessively long periods on the other. The same cannot be said, however, of the legislation that has been introduced in the last decade into the United Kingdom to govern the pre-charge detention of those suspected of terrorist activity. For this group of detainees, United Kingdom legislation allowed for a much longer maximum period of detention without charge: up to 28 days. Furthermore, for foreign nationals suspected of involvement in international terrorism, United Kingdom legislation also allowed – until its repeal in 2005 – for the possibility of indefinite detention without charge. The compatibility of these measures with the ECHR is analysed below, after a discussion of the procedural and treatment rights that pre-charge detainees are afforded by English law while they are being detained.

III.2. THE TREATMENT OF DETAINEES PRE-CHARGE: RIGHTS AND GUARANTEES

All citizens have a legitimate expectation that they will not be detained by the state without being given a proper explanation of the grounds for that detention. Section 28(3) of PACE thus provides that an arrest will not be lawful unless an

23 Section 43(11) and 43(12) of PACE.
24 Section 43(17) of PACE.
25 Section 44(3)(b) of PACE.

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arrested person is informed of the grounds of their arrest at the time they are arrested or as soon as is practicable thereafter. PACE also stipulates, as we have seen, that an arrested person must be taken to a police station as soon as is practicable after their arrest and, once there, must be presented to a custody officer.[26] Should the custody officer then authorize that the individual be detained in police custody without charge, section 37(4) of PACE states that the custody officer must, as soon as is practicable, make a 'written record of the grounds for the detention' in the presence of the arrestee, who should also be informed by the custody officer what those grounds are.[27]

As well as through primary legislation in PACE, the treatment by police officers of persons detained without charge in police stations is also governed by Code C of the PACE Codes of Practice. Entitled 'Detention, Treatment and Questioning of Persons by Police Officers', Code C establishes a baseline set of rights which are designed to protect detainees who, because of their powerlessness and vulnerability, might otherwise be open to maltreatment by the police. Paragraph 3.1 of the Code states that a person who is brought to a police station under arrest, or is arrested at the station having gone there voluntarily, must be informed by the custody officer of the following three rights: the right to have someone informed of their arrest; the right to consult privately with a solicitor and have free independent legal advice made available to them; and the right to consult the PACE Codes of Practice. An arrestee must also, under paragraph 3.2, be given a 'written notice' setting out not only the above three rights but also the arrangements for obtaining legal advice, a copy of the custody record, and the terms of the caution.[28] In addition, another written notice must provide details of the provision made for visits and contact with outside parties; reasonable standards of physical comfort; adequate food and drink; and access to toilets and washing facilities, clothing, medical attention, and exercise when practicable.[29] This notice of entitlements must also mention the provisions relating to the conduct of interviews; the circumstances in which an appropriate adult should be available to assist the detainee; and the detainee's statutory rights to make representations whenever the period of their detention is reviewed.[30] Translations of the notice should be available in Welsh, the main minority ethnic languages, and the principal European languages.[31] Audio versions of the notice should also be made available.[32]

As indicated above, all persons arrested and held in police custody have the right not to be held incommunicado, and paragraph 5.1 of Code C duly provides

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[26] Section 30(1) of PACE.
[27] Section 37(5) of PACE.
[28] Par. 3.2, Code C of PACE.
[29] Par. 3A ('Notes for guidance'), Code C of PACE.
[30] *Id.*
[31] Par. 3B ('Notes for guidance'), Code C of PACE.
[32] *Id.*

that individuals detained in police custody may, on request, have one person 'informed at public expense of their whereabouts' as soon as is practicable after they have been detained. If that person cannot be contacted, the detainee may choose up to two others and, if they cannot be contacted, the person in charge of the detention or investigation of the case has the discretion to allow further attempts to be made. The detainee also has the right to legal advice: under paragraph 6.1 of Code C, all detainees must be informed that 'free independent legal advice' is available and that they may at any time consult and communicate privately with a solicitor, whether in person or in writing or by telephone. No police officer shall, at any time, do or say anything with the intention of dissuading a detainee from obtaining such legal advice.[33]

Both the right not to be held incommunicado and the right to legal advice may be delayed if Annex B of Code C – 'Delay in Notifying Arrest or Allowing Access to Legal Advice' – applies.[34] According to paragraph 1 of Annex B, a senior police officer – of the rank of inspector or above for rights specified in paragraph 5 or superintendent or above for rights specified in paragraph 6 – may authorise the delay of either right if the individual has been detained without charge in connection with an indictable offence and if the officer has 'reasonable grounds for believing' that exercising the right will: (i) lead to 'interference with, or harm to,' evidence connected with the indictable offence; (ii) lead to the 'interference with, or physical harm to,' other people; (iii) lead to the 'alerting' of other people suspected of having committed an indictable offence but not yet arrested for it; or (iv) 'hinder the recovery of property obtained in consequence of the commission of such an offence'. Additionally, the right not to be held incommunicado and the right to legal advice may be delayed under paragraph 2 of Annex B if the police officer has 'reasonable grounds' for believing that the person detained for an indictable offence has 'benefited from their criminal conduct'[35] and the 'recovery of the value of the property constituting that benefit will be hindered' by the exercise of these rights. The authority to delay a detainee's right to consult privately with a solicitor may only be given 'if the authorising officer has reasonable grounds to believe' that the solicitor which the detainee wishes to consult 'will, inadvertently or otherwise, pass on a message from the detainee or act in some other way which will have any of the consequences' specified above.[36] Should this be the case, the detainee must be allowed 'to choose another solicitor'.[37] Both rights may only be delayed for so long as the above mentioned grounds exist, and for a maximum period of 36 hours after the individual was first arrested.[38]

33 Par. 6.4, Code C of PACE.
34 Par. 5.2 and 6.5 respectively, Code C of PACE.
35 Decided in accordance with Part 2 of the Proceeds of Crime Act 2002.
36 Annex B, par. 3, Code C of PACE.
37 *Id.*
38 Annex B, par. 6, Code C of PACE.

Finally, according to paragraph 13.1 of Code C, Chief Police Officers are responsible for 'making sure' that appropriate arrangements are in place for the 'provision of suitably qualified interpreters' for people who are deaf or do not understand English. Where a detained person 'appears to be deaf or there is a doubt about their hearing or speaking ability', they must not normally be interviewed in the absence of an interpreter 'unless they agree in writing'.[39] Similarly, if a detained person has 'difficulty understanding English', or if the interviewer 'cannot speak the person's own language', or 'the person wants an interpreter present', that person must not normally be interviewed 'in the absence of a person capable of interpreting'.[40] These provisions thus help to protect from exploitation or manipulation by the police those persons who would otherwise have difficulty in communicating with them.

III.3. SPECIAL POWERS OF PRE-CHARGE DETENTION FOR THOSE SUSPECTED OF HAVING COMMITTED TERRORIST OFFENCES

As has already been seen, special powers of pre-charge detention apply where an individual is suspected of having committed a terrorist offence. Thus, section 41(1) of the Terrorism Act 2000 (TA) provides that a police constable may arrest a person whom that officer reasonably suspects of being a terrorist[41] and, once arrested, this person's detention will be governed by Schedule 8 to the TA[42] not PACE.[43] Unless a judicial extension is granted, section 41(3) of the TA permits those arrested under the TA to be detained without charge for a maximum period of 48 hours beginning from the time of their arrest, rather than the maximum of 36 hours permitted under PACE

As with police detention under PACE, detention authorised under the TA is required, by paragraph 21 of Schedule 8 to the Act, to be periodically reviewed. The first such review must be carried out by a review officer as soon as is 'reasonably practicable' after the suspected terrorist has been arrested.[44] Paragraph 23 of Schedule 8 authorises the review officer to order the continued detention without charge of the suspected terrorist if that officer is 'satisfied' that this is 'necessary' either to obtain or preserve evidence or for matters relating to the detainee's deportation. The officer must also be satisfied that the investigation

39 Par. 13.5, Code C of PACE.
40 Par. 13.2, Code C of PACE.
41 Section 1 of the TA defines terrorism for the purposes of the Act.
42 Section 41(2) of the TA.
43 Section 51(b) of PACE.
44 Schedule 8, par. 21(2), to the TA. Schedule 8, par. 24, to the TA defines the review officer as an officer independent to the investigation and of the rank of at least an inspector for the first 24 hours, and a superintendent for reviews carried out thereafter.

or process is being 'conducted diligently and expeditiously'.[45] Subsequent reviews must be carried out by the review officer at intervals of not more than 12 hours,[46] although – under paragraph 22 – a review may be postponed if it is not practicable to carry it out at the required time. Parallel to the two non-exhaustive examples of justified postponement given by PACE, reviews of the detention without charge of terrorist suspects can be justifiably postponed if the review officer is satisfied that the interruption of police questioning for the purpose of carrying out the review would be prejudicial to the investigation or if the review officer is not readily available. Once postponed, paragraph 22(2) stipulates that the review must be carried out as soon as is reasonably practicable thereafter and, as with PACE, postponement of the review must not affect the time when the subsequent review is to be carried out.[47]

At the expiry of the 48-hour period of detention without charge of a terrorist suspect under the TA, paragraph 29 permits a police officer of the rank of superintendent or above to apply to a 'judicial authority' for a warrant of further detention. As with the PACE regime, the requirement for judicial authorisation introduces an important check into the system by ensuring that there is independent scrutiny of the justification for any longer period of detention by a body other than the police which has a vested interest in the outcome. An application for a warrant of further detention may be made by the police at any time during the initial 48-hour period after arrest or within six hours of the end of that period.[48] But the judicial authority must dismiss any application brought to it after the initial 48 hours if it considers that it was 'reasonably practicable' for the police to have made an application during the initial period.[49] The judicial authority is only permitted to issue a warrant of further detention if it is 'satisfied' that there are reasonable grounds for believing that a period of further detention without charge is necessary in order to obtain or to preserve evidence and if it is satisfied that the investigation is being conducted 'diligently and expeditiously'.[50] The specified period for any warrant of further detention is seven days commencing from the time when the suspected terrorist was first arrested, although the judicial authority may issue a warrant of further detention which specifies a shorter period if it is 'satisfied that there are circumstances that would make it inappropriate' for the specified period to be as long as seven days.[51]

Controversially, in the Criminal Justice Act 2003, amendments were made to the TA to allow the maximum period of detention without charge to be increased

45 Schedule 8, par. 23(2) and (3), to the TA.
46 Schedule 8, par. 21(3), to the TA.
47 Schedule 8, par. 22(3), to the TA.
48 Schedule 8, par. 30(1), to the TA.
49 Schedule 8, par. 30(2), to the TA.
50 Schedule 8, par. 32, to the TA.
51 Schedule 8, par. 29(3) and 29(3A), to the TA.

from seven to 14 days. Even more controversially, a further legislative amendment in the Terrorism Act 2006 (TA 2006) raised that maximum period again to 28 days.[52] Thus, after seven days of detention without charge, paragraph 36 permitted a police officer of the rank of superintendent or above to apply again to a judicial authority for an extension to the warrant of further detention for a suspected terrorist. Applications for these extensions have to be made every seven days. Within the first 14 days, the application must be heard by a district judge, and thereafter by a senior judge.[53] In *R (Hussain)*,[54] the High Court held that the decision of a senior judge, when authorising a period of further detention in police custody of a suspected terrorist of up to the maximum period of 28 days was final and not challengeable by way of judicial review.

Spending 28 days detained without charge in a police station plainly constitutes a significant deprivation of liberty. Nonetheless, when the Terrorism Bill 2006 was first introduced into Parliament following the terrorist attacks in London on 7 July 2005, the United Kingdom government sought to extend the maximum period that terrorist suspects could be held in police detention without charge to 90 days. Defeat in the House of Commons forced the government to accept a shorter maximum period of 28 days, but this set-back only temporarily curbed its ambitions. In 2007, it made a second attempt to extend the permitted maximum period of detention, this time to 42 days. Again, its proposals were defeated, on this occasion by a vote in the legislative chamber of the House of Lords.

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III.4. COMPATIBILITY OF PRE-CHARGE DETENTION WITH THE RIGHT TO LIBERTY CONTAINED IN ARTICLE 5 OF THE ECHR

Any system of criminal justice that allows the state to detain its citizens without charge for substantial periods of time inevitably raises questions about the compatibility of those powers with the ECHR. Article 5(1) of the ECHR guarantees an individual's right to liberty and security of the person. But this is not an absolute right and paragraphs (a) to (f) of Article 5(1) allow for six exceptions where the liberty of an individual may be legitimately interfered with by the state. One of these, Article 5(1)(c), permits:

> "The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an

[52] Schedule 8, par. 36(3)(b)(ii), to the TA, as amended by section 23 of the Terrorism Act 2006.

[53] Schedule 8, par. 36(1A), to the TA. Par. 36(7) defines a senior judge as a judge of the High Court.

[54] *R (Hussain) v. The Honourable Mr Justice Collins and The Crown Prosecution Service* [2006] EWHC 2467.

offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

Article 5(1)(c) thus provides that a person may be lawfully detained pre-charge for the purposes of being brought at a later date before a competent legal authority on suspicion of having committed a criminal offence.[55] However, this power of detention has to be read in conjunction with the safeguards contained in Article 5(3), which requires that:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

As the text quoted above reveals, Article 5(3) has two limbs that relate to separate phases of pre-trial detention. The first limb is concerned with the early stages of pre-trial detention where, following an arrest, an individual is taken into police custody and detained without charge. The second limb – which is considered in part VII below[56] – is concerned with the period of remand where the suspect has been charged and is awaiting trial. Under the first limb, a person arrested or detained in accordance with Article 5(1)(c) must be brought before a judge or other officer authorised by law to exercise judicial power. Convention jurisprudence has interpreted this first limb as imposing three different requirements:[57] first, that an arrested individual must be brought promptly before a judge to allow for the detection of any ill treatment and to keep to a minimum any unjustified interference with the right to liberty; second, that judicial hearings must be automatic and not dependent upon an application being made by the detainee: the automatic nature of this review being designed to prevent the ill treatment of vulnerable categories of arrested persons who are incapable of lodging an application; and, third, that the judge or other judicial officer must be impartial and have the power to order the release of the detained individual after reviewing the lawfulness of, and justification for, that individual's arrest and detention.

The European Court of Human Rights (ECtHR) has not yet placed an exact limit on the period of time that may elapse before an individual must be brought before a judge in order to satisfy the requirement of 'promptness' found in the first of the above requirements. In *Brogan v. The United Kingdom*,[58] the ECtHR held that promptness must be assessed according to the special features of the

55 *Lawless v. Ireland* (1961) 1 EHRR 15, at par.14.
56 See text *infra* at n. 171 *et seq.*
57 See, for example, *McKay v. The United Kingdom* (2006) 44 EHRR 827, at par. 32–40.
58 (1986) 11 EHRR 117.

case.[59] The Court accepted that the challenges faced by the authorities when investigating terrorist offences could justify a longer period of detention in police custody than would be allowed for other criminal offences.[60] But the Court did not accept that such challenges could result in the requirement of promptness being dispensed with entirely, since judicial scrutiny provided an important safeguard against the risk of arbitrary interference with the right to liberty. On the facts of the case – which was decided when the Prevention of Terrorism Act 1984, the predecessor to the TA 2000, was in force – the ECtHR found that the applicant, who had been arrested on suspicion of involvement in acts of terrorism and held in police custody for four days and six hours, had not been brought sufficiently promptly before a judge to meet the requirements of Article 5(3).[61]

As yet, no challenge has been made under Article 5(3), domestically or at Strasbourg, to the current periods of pre-charge detention *without* judicial authorisation permitted by English law for either ordinary criminal offences or terrorist offences. As noted above, PACE requires individuals who are arrested for an ordinary criminal offence and then detained without charge to be brought before a magistrates' court in most cases within a maximum of 36 hours. However, PACE also allows an individual suspected of having committed a crime to be held without charge for a further six hours where it is not practicable for the magistrates' court to sit at the end of that period. For terrorist offences, the TA requires suspects to be brought before a judge after 48 hours and, again, a further six hours will be permitted at the end of this period. The Court in *Brogan* gave no general guidance on the permissible limits of detention without charge but the United Kingdom government, when introducing the TA, was of the opinion that allowing terrorists suspects to be detained for a maximum of 48 hours without judicial authorisation, less than half the period of time that gave rise to the breach of Article 5(3) in *Brogan*, would satisfy the requirement of promptness. This maximum of 48-hours detention was thus the United Kingdom government's attempt to comply with the breach of Article 5(3) found in *Brogan*.

The separate issue of whether the maximum periods of pre-charge detention *with* judicial oversight of 96 hours for ordinary criminal offences and 28 days for terrorist offences are compatible with the demands of Article 5(3) has also, as yet, not been subject to challenge in the ECtHR.[62] When the maximum period of pre-charge detention for terrorist offences was increased from 14 to 28 days in 2006, the Parliamentary Joint Committee on Human Rights (JCHR) reflected on this change as part of its inquiry into counter-terrorism policy and human

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59 *Ibid.*, at par. 59.
60 *Ibid.*, at par. 61.
61 *Ibid.*, at par. 62. In addition, the ECtHR found that the detention of the three other applicants for four days and 11 hours, five days and 11 hours, and six days and 16 hours respectively did not satisfy the requirement of promptness in Article 5(3).
62 See, generally, Brice Dickson, 'Article 5 of the ECHR and 28-day Pre-Charge Detention of Terrorist Suspects' (2009) 60(2) Northern Ireland Legal Quarterly 231.

rights. In evidence submitted to the JCHR, the United Kingdom government argued that a number of factors justified the increase in the maximum period of detention. These include, *inter alia*, that international terrorism posed a greater threat to national security than previous forms of terrorism; that the international nature of the offence often required investigations to be undertaken in a multitude of foreign jurisdictions; that there was a need to decrypt large numbers of computer hard drives; and that there was a need to make safe premises where extremely hazardous material might be found.[63] In its Third Report for the Session of 2005–2006, the JCHR concluded that this evidence presented by the United Kingdom government did not show that it was necessary to increase the 14-day limit. The JCHR was of the opinion that the extension to 28 days amounted to a disproportionate interference with the right to liberty guaranteed under Article 5 of the ECHR[64] and, in reaching this conclusion, considered that there were alternative means, such as using 'control orders' (see part VI below) or bringing lesser charges, by which the police could achieve their objectives without the need to extend the period of pre-charge detention for terrorist suspects.[65] The JCHR also expressed concern over the adequacy of the *procedural* safeguards available to pre-charge detainees, given that such safeguards are needed to prevent long periods of arbitrary detention. In this regard, the JCHR felt that the ability for detention to be extended by a judge under the TA in the absence of the detainee or the detainee's legal representative, as well as on the basis of material not available to him, was likely to breach Article 5.[66]

In its Nineteenth Report for the Session of 2006–2007, the JCHR again reviewed whether the increase from 14 to 28 days had been justified. Following the transatlantic airline bomb plot, which was discovered by United Kingdom police in August 2006 after an operation known as 'Operation Overt', the United Kingdom government argued that the fact that prosecutions had been brought in that case which would not otherwise have been possible showed that the increase had been necessary.[67] Of the 24 persons arrested in connection with that bomb plot, six had been charged only after their detention had been extended beyond 14 days and two had been charged just four hours before the end of the 28-day period.[68] However, seven had been released without charge and, of these, three were released during the increased time period, including two who were released

[63] JCHR, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, Third Report of Session 2005–06, HL 75-I, HC 561-I, at par. 78–79.

[64] *Ibid.*, at par. 92.

[65] *Ibid.*, at par. 91.

[66] *Ibid.*, at par. 99.

[67] JCHR, *Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning*, Nineteenth Report of Session 2006–07, HL 157, HC 394, at par. 29–30.

[68] *Ibid.*, at par. 35.

only at the very end of the 28-day period.[69] The JCHR commented that the fact that six suspects had been detained for more than 14 days before being charged would, on the face of it, appear to show that the increase from 14 to 28 days had been justified.[70] On the other hand, the fact that three of the five suspects who had been authorised to be detained for the full 28 days were released without charge very close to the end of that period raised concerns about whether the power to detain for up to 28 days had been used to detain those against whom there was actually very little evidence.[71]

In subsequent reports, the JCHR has said that it could not reach a conclusion on whether the extended power to detain for up to 28 days was necessary, as the United Kingdom government had not provided it with sufficient information to allow it to make that assessment.[72] In *Sultan Sher and Others v. The Chief Constable of Greater Manchester Police*, the High Court concluded that the procedures contained in Schedule 8 to the TA were compatible with Article 5(3) of the ECHR.[73] But whether that view of both the procedures and the maximum period of detention without charge contained in the TA is ultimately endorsed by the English appellate courts and the ECtHR remains to be seen. In deciding these issues, the courts will have to assess whether the interference with the right to liberty allowed under the TA is necessary in a democratic society and proportionate to the legitimate aims of maintaining national security and public safety. For the purposes of such litigation, the United Kingdom government will be required to submit evidence to the court to support the need for such intrusive measures and, although the JCHR has reached the conclusion that the United Kingdom government has thus far provided insufficient evidence to justify the interference with the right to liberty permitted under the TA, it is worth noting that the English appellate courts and the ECtHR will be likely to engage in a more deferential standard of review than the JCHR.

[69] *Ibid.*, at par. 37–38.

[70] *Ibid.*, at par. 39.

[71] *Id.*

[72] JCHR, *Counter-Terrorism Policy and Human Rights: Annual Renewal of 28 Days 2008,* Twenty-Fifth Report of Session 2007–08, HL 132, HC 825, at par. 27; JCHR, *Counter-Terrorism Policy and Human Rights: Annual Renewal of 28 Days*, Eighteenth Report of Session 2008–09, HL 119, HC 726, at par. 25.

[73] [2010] EWHC 1859. The High Court referred to the decisions of the House of Lords in *Ward v. Police Service of Northern Ireland* [2007] UK HL 50 and *Secretary of State for the Home Department v. AF and Others* [2009] UKHL 28. The High Court held that the minimum level of disclosure required for control orders by the decision in *Secretary of State for the Home Department v. AF and Others* did not apply to pre-charge detention cases under Schedule 8 to the TA: 'Under Schedule 8, there is both a strict time limit of pre-charge detention for periods of up to seven days at a time, up to a maximum of 28 days, and also the requirement that proper information is provided, by way of the notice to the detained person of the grounds of the application. This is therefore an entirely different situation to that under review in control order cases' (*per* Coulson J).

IV. INDEFINITE PREVENTIVE DETENTION WITHOUT CHARGE OF FOREIGN NATIONALS SUSPECTED OF INVOLVEMENT IN INTERNATIONAL TERRORISM

The provisions discussed above were not the only moves made by the United Kingdom government to try to stave off the increased threat posed by international terrorism. In a response to the devastating terrorist attacks in the United States on 11 September 2001, and the increased threat posed by Al-Qaeda and their supporters domestically, the United Kingdom government enacted the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which provided for the possibility of indefinite preventive detention without trial or charge of foreign nationals who were suspected of involvement in international terrorism.[74] The government was of the opinion that indefinite detention without trial of certain foreign nationals was a necessary counter-terrorist measure, given that it could neither place all individuals suspected of involvement in international terrorism on trial due to the sensitivity of the evidence against them nor deport them all to their countries of origin as some faced a real risk of being subjected to torture or inhuman or degrading treatment there. To return them in these circumstances would amount to a breach of obligations accepted by the United Kingdom in several international treaties. Article 3 of the CAT, for example, provides that no state shall return an individual to another state where there are substantial grounds for believing that they will be in danger of being subjected to torture; and Article 3 of the ECHR and Article 7 of the ICCPR have both been interpreted by their respective judicial organs as preventing states from sending individuals to third countries where they face a real risk of torture or inhuman or degrading treatment or punishment.[75] Moreover, in *Chahal v. The United Kingdom*[76] the ECtHR confirmed that the duty under Article 3 not to send an individual to a third country where they face a real risk of ill treatment was an absolute duty which does not admit of any national security exceptions.

The power to hold in detention indefinitely, without charge or trial, foreign nationals who were suspected of international terrorism was introduced in Part 4 of ATCSA and came into force on 14 December 2001. As a substitute for trial, section 21(1) of ATCSA provided the Home Secretary with the ability to issue a 'certificate' in respect of a person whose presence in the United Kingdom the Home Secretary reasonably believed created 'a risk to national security' and whom the Home Secretary reasonably suspected to be 'a terrorist'. Section 21(2)

[74] For a comment see Helen Fenwick, 'The Anti-Terrorism Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65(5) Modern Law Review 724.

[75] *Soering v. The United Kingdom* (1989) 11 EHRR 439; ICCPR General Comment No. 20, 44th Session, 10/03/92, at par. 9.

[76] (1996) 23 EHRR 413, at par. 79–80. See, also, *Saadi v. Italy* (2009) 49 EHRR 30.

of ATCSA defined a terrorist as someone who takes part in 'acts of international terrorism', 'belongs to an international terrorist group', or 'has links with an international terrorist group'. Once so certified, a foreign national could be detained without charge or trial under section 23 of ATCSA. On 17 and 18 December 2001, eight foreign nationals were issued with ATCSA certificates by the then Home Secretary under the new legislation. They were subsequently detained in Belmarsh prison and Highdown prison on 19 December 2001. A ninth individual was issued with a certificate on 5 February 2002 and detained on 8 February 2002. The provisions in the legislation allowed detainees to be released if they were willing to leave the United Kingdom voluntarily, even if that meant facing a risk of suffering ill treatment in a third country. Shortly after their detention, two of the suspected international terrorists left the United Kingdom under this provision.

Section 21(8) of ATCSA provided that challenges to decisions of the Home Secretary in relation to certifications could only be brought under the procedures set out in sections 25 and 26 of ATCSA. The possibility of judicial review and the right to habeas corpus were thus excluded, although section 25 gave suspected international terrorists the right to appeal to the Special Immigration Appeals Commission (SIAC) against their certification within the first three months of that certification being issued. When adjudicating upon a case, SIAC was required to cancel a certificate if it considered that there were no reasonable grounds for the Home Secretary to have exercised the power under section 21(1) or if it considered that the certificate should not have been issued for some other reason. In addition, section 26 placed SIAC under a duty to review certification six months after it had first been issued and every three months thereafter. Again, SIAC was required to cancel a certificate if it considered that there were no reasonable grounds for the Home Secretary to have exercised his power under section 21(1), although the Home Secretary retained a power under section 27(9) to issue another certificate on different grounds. In *M v. Secretary of State for the Home Department*,[77] SIAC cancelled a certificate issued against a suspected international terrorist under section 21(1). In reaching this decision, SIAC concluded that the assessment made by the Home Secretary had not been reliable and therefore lacked the necessary reasonable suspicion upon which certifications were to be based.

Under section 24(1) of ATCSA, SIAC was also given the power to release a detainee on bail in exceptional circumstances. In *G v. Secretary of State for the Home Department*,[78] SIAC ordered the release on bail of a suspected international terrorist who had been detained in Belmarsh prison. He suffered from major physical disabilities and his physical and mental health had been

77 [2004] SC/15/2002.

78 [2004] SC/2/2002 (Bail Application SCB/10). This case is also discussed *infra* at nn. 106 and 123.

deteriorating significantly due to the inappropriate treatment he had been receiving. SIAC was satisfied that, if he were not to be released, his physical and mental health would deteriorate to such an extent that Article 3 of the ECHR (which prohibits torture) and Article 8 of the ECHR (which guarantees the right to respect for private and family life, home and correspondence) would be breached. On granting bail, SIAC imposed the following strict conditions on the detainee: that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a security company five times each day; that monitoring equipment be installed in his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants, and other approved persons; that he make no contact with any other person; that he have no computer equipment, mobile telephone, or other electronic communication devices on his premises; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company.

In order to enact ATCSA, the United Kingdom government considered it necessary to derogate from the right to liberty guaranteed by both Article 5(1) of the ECHR[79] and Article 9 of the ICCPR.[80] Derogations from the rights guaranteed by the ECHR are permitted by Article 15(1). This states that:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

The power to derogate is thus qualified in three ways. For its lawful use there must have been 'a war or other public emergency threatening the life of the nation'; the measures must have been 'strictly required by the exigencies of the situation'; and the measures must not be inconsistent with other obligations placed on the derogating state under international law. Moreover, Article 15(2) makes it clear that no derogation is possible from the obligations contained in Article 3 of the ECHR. The United Kingdom government is therefore bound by the decision in *Chahal,* which was discussed above.[81] Derogations are, however, possible from other substantive rights found in the ECHR, including those contained in Article 5(1).[82]

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79 The Human Rights Act (Designated Derogation) Order 2001, SI 2001/3644.

80 United Kingdom Derogation under the ICCPR, 18 December 2001.

81 See n. 76 *supra*.

82 Following the decision in *Brogan* – see n. 58 *supra* – the United Kingdom government concluded that it was necessary, in respect of the periods of pre-charge detention without judicial authorisation that were allowed for terrorist suspects under the Prevention of Terrorism Act 1984, to derogate from Article 5(3) under Article 15 of the ECHR. This was considered necessary in the light of the continuing terrorist threat posed by the Irish

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In *A and Others*, a number of suspected international terrorists challenged the lawfulness of their indefinite detention before SIAC, arguing first that the derogation had not satisfied the three substantive requirements demanded by Article 15(1) and, second, that the ATCSA process infringed their rights under Articles 3, 6, and 14 of the ECHR.[83] The issue was not whether the procedural safeguards established by Part 4 of ATCSA provided due process but whether the statutory powers themselves were compatible with the requirements of the ECHR. SIAC held that they were not and the derogation under Article 15 was unlawful as the certification and detention measures went beyond what was 'strictly required by the exigencies of the situation' and violated the United Kingdom's other obligations under international law. Relevant to both these conclusions was the fact that the provision regarding indefinite detention contained in section 23 of ATCSA was applicable only to foreign nationals, even though United Kingdom nationals fell within the definition of a suspected international terrorist contained in section 21. By discriminating on the grounds of nationality, therefore, the measures could not be said to have been strictly required by the exigencies of the situation, since the threat to the life of the nation did not derive solely from foreign nationals. For this reason, SIAC held that the power of indefinite detention contained in section 23 of ATCSA breached Article 14 of the ECHR (which provides for freedom from discrimination) when read in conjunction with Article 5(1) of the ECHR and Article 26 of the ICCPR.

This decision of SIAC was overturned by a unanimous Court of Appeal, which held that there was an objective justification for applying the measures discriminately to foreign nationals, since they were not in an analogous situation to British nationals who could not be deported.[84] On appeal to the House of Lords, however, an eight-member majority rejected that argument.[85] In the opinion of the House, the derogation measures went beyond what was strictly required by the exigencies of the situation and were discriminatory in breach of

Republican Army (IRA) and other similar terrorist organisations to the United Kingdom. By 2000, however, the United Kingdom government felt that the IRA was no longer a serious threat to the life of the nation and concluded that its derogation was thus no longer lawful under the Convention. The introduction in the TA 2000 of a maximum period of 48 hours detention, plus a further six hours if it was not practicable for a magistrates' court to sit at the end of this period, was thus a move by the United Kingdom government to create periods of pre-charge detention without judicial authorisation for terrorist suspects which were compatible with the terms of Article 5(3) and hence did not produce the need for derogation.

83 *A and Others v. Secretary of State for the Home Department* [2002] SC/1–7/2002. The right to challenge before SIAC the lawfulness any derogation made under the ECHR was expressly provided under section 30 of ATCSA.

84 *A and Others v. Secretary of State for the Home Department* [2002] EWCA Civ 1052.

85 *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56. For a comment on the House of Lords' decision see Sangeeta Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5(2) Human Rights Law Review 403.

both Article 14 of the ECHR and Article 26 of the ICCPR.[86] Giving the leading judgment, Lord Bingham argued that the measures were both over-inclusive and under-inclusive and hence could not be said to fall within the requirements set by Article 15.[87] Because sections 21 and 23 of ATCSA permitted the certification and detention of persons who had no links with Al-Qaeda, the measures could be used in instances unconnected with the public emergency that the United Kingdom government considered justified the derogation. They were thus over-inclusive. Because the threat to the United Kingdom did not derive solely from foreign nationals, the measures could not be said to have rationally addressed the public emergency presented by Al-Qaeda. In this regard, they were under-inclusive. It was also observed that if the United Kingdom government could address the security threat presented by its own nationals who were suspected of being members or supporters of Al-Qaeda without infringing their right to liberty, it followed that the indefinite detention of foreign nationals was a disproportionate measure. Conversely, there was a contradiction in ATCSA, since it permitted the deportation and release of foreign nationals who were suspected of being Al-Qaeda terrorists even though these individuals could continue to threaten the security of the United Kingdom from their residences overseas. On the separate issue of discrimination, the House found that the derogation measures gave preferential treatment to United Kingdom nationals who had alleged links with Al-Qaeda without any reasonable or objective justification for doing so. The measures thus discriminated against suspected international terrorists in their enjoyment of their right to liberty. For this reason, ATCSA was held to have breached Article 14 of the ECHR and Article 26 of the ICCPR.[88] Having reached these conclusions, the House of Lords found it unnecessary to address arguments based on alleged breaches of Articles 3 and 6 of the Convention.[89]

The outcome of *A and Others* was that House of Lords quashed the derogation order that had been made by the United Kingdom government and entered a declaration of incompatibility under section 4 of the HRA against Part 4 of ATCSA. In response, the United Kingdom government withdrew its derogation and repealed the legislation.[90] Those foreign nationals suspected of involvement in international terrorism were released from detention but the threat they posed was regarded by the United Kingdom government as so serious that they were

86 Lord Hoffmann's judgment focused on whether the attacks on 11 September 2001 threatened the life of the nation and held that the terrorist violence did not threaten the institutions of government or the existence of a civil community in the United Kingdom.

87 *Ibid.*, at par. 30–44. Lord Walker dissented from the rest of the House on this point.

88 *Ibid.*, at par. 45–70. Again, Lord Walker dissented from the rest of the House. For a criticism of the majority's findings on discrimination see David Campbell, 'The Threat of Terror and the Plausibility of Positivism' [2009] Public Law 501.

89 *Ibid.*, at par. 71.

90 See section 16 of the Prevention of Terrorism Act 2005.

placed under a new restrictive measure – the control order – which was introduced in the Prevention of Terrorism Act 2005 and is discussed in part VI below. Nonetheless, in the brief interim period between the House of Lords delivering its judgment and the government repealing Part 4 of ATCSA, an application against the United Kingdom was brought before the ECtHR on behalf of the detainees, alleging that they were being unlawfully detained in contravention of Articles 3, 5(1), 13, and 14 of the ECHR.

On the issue of compatibility with Article 5(1), the United Kingdom government argued in the ensuing litigation that the foreign nationals had been detained pursuant to one of the lawful exceptions recognised by that provision. In the alternative, the United Kingdom government argued that the detention did not give rise to a violation of Article 5(1) because a valid derogation from the right to liberty had been entered by the United Kingdom under Article 15. As observed above, Article 5(1) contains a number of permissible grounds upon which a person may be deprived of their right to liberty. Pursuant to this, the United Kingdom government contended that the detention of foreign nationals suspected of involvement in international terrorism was justified as it fell within the exception provided by Article 5(1)(f) which permits the detention of persons against whom action is being taken with a view to their deportation or extradition. At the time when the individuals were certified by the Home Secretary, each had been served with a notice of the United Kingdom government's intention to deport them. The government accepted that it could not deport the individuals to countries where they faced a real risk of being subjected to ill treatment contrary to Article 3. But it argued that it had actively reviewed the possibility of deporting the suspected international terrorists while seeking undertakings from third party states that they would not be ill treated if received by them. A unanimous Grand Chamber of the ECtHR rejected that argument.[91] The Court found that the United Kingdom government had only begun to enter into negotiations with foreign states at the end of 2003 and had only received assurances after Part 4 of ATCSA had been repealed. In these circumstances, the Court held that it could not be said that the United Kingdom government had taken sufficient action with a view to deporting the detainees which might be properly regarded as falling within the lawful exception provided by Article 5(1)(f).[92] The Court also held that the individuals had not been detained as part of an immigration measure but on suspicion of their involvement in international terrorism and the threat they posed to national security.[93] An exception was the two detainees who had left the United Kingdom

[91] *A and Others v. The United Kingdom*, Application No. 3455/05 (19 February 2009), at par. 167. For a comment see Sangeeta Shah, 'From Westminster to Strasbourg: *A and Others v. United Kingdom*' (2009) 9(3) Human Rights Law Review 473.

[92] *Id.*

[93] *Ibid.*, at par. 171.

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voluntarily, where reasonable action had been taken by the United Kingdom when investigating whether their removal would be possible.[94]

Having found that the United Kingdom's detention without trial of these individuals breached their right to liberty guaranteed by Article 5(1), the ECtHR then proceeded to examine the United Kingdom government's second argument: that the derogation from Article 5(1) was valid. In making this argument, the United Kingdom government was seeking to challenge the conclusions reached by the House of Lords. While the ECtHR noted that it was most unusual for a state party to the Convention to contest a decision of its own court before the ECtHR in Strasbourg, it accepted that the United Kingdom government should be entitled to raise all of the possible arguments available.[95] However, the ECtHR concluded that, since the primary guarantors of rights under the Convention were the national authorities of member states, which included the national courts, a highly deferential standard of review should be adopted when assessing the findings made by the House of Lords.[96] Only if a national court had misinterpreted or misapplied the law, or reached a conclusion which was manifestly unreasonable, would the ECtHR be justified in reaching a contrary conclusion.[97] When considering the United Kingdom government's challenges to the House of Lords' decision against this background, the Court held that the House of Lords had not erred in its examination of the derogation under Article 15. With regard to the issue of whether the measures were strictly required by the exigencies of the situation, the Court endorsed the findings made by the House of Lords and held that the derogation measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.[98]

In finding a breach of Article 5(1) on both grounds, the ECtHR held that it was unnecessary for it to examine the separate complaint of discrimination raised under Article 14.[99] But it did consider claims made by the suspected terrorists that they had, while in detention, suffered ill treatment at the hands of the United Kingdom government which amounted to 'torture or to inhuman and degrading treatment or punishment' contrary to Article 3 of the ECHR. The applicants' arguments were in two parts: first, that the indefinite nature of their detention without trial or charge under ATCSA gave rise to abnormal suffering; and, second, that the conditions of their detention in Belmarsh prison and Broadmoor Hospital were inappropriate and damaging to their health. The effect of both these factors, the applicants said, had caused them an intense degree of

94 *Ibid.*, at par. 168.
95 *Ibid.*, at par. 156–8.
96 *Ibid.*, at par. 174.
97 *Id.*
98 *Ibid.*, at par. 190.
99 *Ibid.*, at par. 192.

mental anguish, as demonstrated in both a report from the CPT (discussed in part V below) and the fact that SIAC had ordered the release of one individual. In relation to the first part of the argument, the ECtHR accepted that the uncertainty surrounding their position, and the fear of indefinite detention, must have caused the detainees great anxiety and distress, which in turn had affected their mental health.[100] However, the Court noted that it could not be said that the detainees were without any prospect or hope of release.[101] Indeed, some had successfully challenged the legality of their detention both before SIAC and the House of Lords. Moreover, ATCSA granted them a right of appeal to SIAC to cancel the certification that had been made by the Home Secretary and SIAC was required to review the certification periodically. Accordingly, the ECtHR felt that the suspected international terrorists' indefinite detention under ATCSA did not give rise to an issue under Article 3.[102]

On the second part of the argument – the issue of the conditions of detention breaching Article 3 – the ECtHR held that this part of the complaint was inadmissible. The ground for that conclusion was that the detainees had failed to exhaust all of the domestic remedies available to them.[103] It followed, therefore, that the Court could not examine the complaint about the conditions of detention. Nor could it take the conditions of detention into account when forming a global assessment of the detainees' treatment for the purposes of Article 3.[104]

Ultimately, therefore, the Court drew the conclusion that the indefinite detention without trial of the suspected international terrorists under ATCSA did not reach the threshold of inhuman or degrading treatment which would give rise to a breach of Article 3 of the ECHR.[105] Similarly, when SIAC ordered the release of the detainee who had suffered the greatest ill treatment, it too did not find that the conditions of his detention had crossed the Article 3 threshold.[106] These conclusions must be compared with the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), to which we now turn.

100 *Ibid.*, at par. 130.
101 *Ibid.*, at par. 131.
102 *Id.*
103 *Ibid.*, at par. 133.
104 *Id.*
105 *Ibid.*, at par. 134.
106 *G v. Secretary of State for the Home Department*, *supra* n. 78.

V. INSPECTIONS BY THE CPT OF FACILITIES HOLDING TERRORIST SUSPECTS

V.1. INDEFINITE DETENTION WITHOUT CHARGE OF FOREIGN NATIONALS SUSPECTED OF INTERNATIONAL TERRORISM

Before the decision in *A and Others* forced the United Kingdom government to repeal the ATCSA power to order indefinite preventive detention without charge of foreign nationals suspected of involvement in international terrorism, a delegation of the CPT visited the United Kingdom in February 2002 to examine the treatment of the small number of suspected terrorists who had been detained under this regime. At the time of that visit, four suspected terrorists were being held in the High Security Unit at Belmarsh prison and four in Highdown prison. All were treated as Category A remand prisoners, the highest security risk classification.[107] The CPT, in its report published in February 2003, found that the conditions of detention for these ATCSA detainees were, 'on the whole', acceptable 'from a material standpoint':[108] All were held in individual cells measuring between 6.7 m^2 and 7.5 m^2 which were 'clean', 'in a reasonable state of repair', 'adequately furnished', equipped with 'adequate lighting (including access to natural light) and ventilation', and had in-cell lavatories and washbasins.[109] This aspect of the detainees' detention was thus considered acceptable by the CPT. But the range of activities available to them was not.[110] The CPT found that none of the detainees had been offered work or educational or cultural activities and only some had access to gymnasium facilities. The only organised activity that appeared to have been offered to them was the 'Friday prayer'. Furthermore, while the ATCSA detainees had been allowed between two to four hours of out-of-cell time a day during which they 'had contact with other Category A prisoners', 'took outdoor exercise', 'had access to shower facilities', and 'made telephone calls', this out-of-cell time was on occasions reduced considerably due to staff shortages. The CPT considered that the material conditions and activities offered to detainees under ATCSA ought to take 'due account' of both the fact that these individuals had been neither accused nor convicted of any criminal offence and the fact that their detention was

107 The CPT did not consider issues relating to the derogation from Article 5(1) of the ECHR – a matter which, as we have seen, was addressed in the domestic courts and Strasbourg – but rather examined the conditions under which detainees were held and the treatment they were receiving.

108 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 21 February 2002*, CPT/Inf (2003) 18, at par. 20.

109 *Id.*

110 *Ibid.*, at par. 21.

potentially indefinite. It thus recommended that ATCSA detainees should spend a reasonable part of their day, namely eight hours or more, outside of their cells engaged 'in purposeful activities of a varied nature' which should include work, education, sport, recreation, and association.[111] In addition, ATCSA detainees should receive 'at least one hour of outdoor exercise each day'.[112]

The psychological support and psychiatric treatment received by ATCSA detainees was considered by the CPT to be a 'particular' area of concern.[113] Appropriate health care was highly important for this group because of their personal histories: some had been the victims of torture; two had previously been diagnosed as suffering from post-traumatic stress disorder; and one had a psychiatric profile which included failed suicide attempts. Other factors highlighted by the CPT as a significant source of mental distress for the detainees included the indefinite nature of their detention; the limited time they spent out of their cells; and the 'belief that they had no means to contest the broad accusations made against them'. The CPT found that, despite their obvious needs, the arrangements that had been made for their mental health care by the prison authorities had been 'haphazard'.[114] Moreover, the CPT noted that the detainees had encountered 'significant difficulties in maintaining contact with their families' whilst imprisoned.[115] The processes for clearing visits and telephone numbers had in some cases 'taken several weeks' and access to a telephone had at first been 'very limited' because they had 'not been allowed to hold conversations in their own language unless an interpreter was present'. With regard to visits, several detainees complained that these took place under closed conditions and were limited to one a fortnight. The CPT also found that, while visits were capable of lasting for two hours, in practice they 'often' lasted for just over an hour. It did not call into question the closed nature of the visiting facilities for ATCSA detainees – given the grounds on which they had been detained – but it did encourage the authorities 'to explore the possibility' of providing at least one visit every week.[116]

Following the CPT's visit, and recognising that ATCSA was 'a new development', Her Majesty's Prison Service's Director of High Security Prisons commissioned a team 'to address the concerns and possible areas of development' identified by the CPT's report.[117] The United Kingdom government

111 *Ibid.*, at par. 22.
112 *Ibid.*, at par. 23.
113 *Ibid.*, at par. 25.
114 *Ibid.*, at par. 26. Accordingly, it recommended that they should be offered psychological and psychiatric support which met their 'specific needs': see *ibid.*, at par. 27.
115 *Ibid.*, at par. 32.
116 *Id.*
117 *Response of the United Kingdom Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment following its visit to the United Kingdom from 17 to 21 February 2002*, CPT/Inf (2003) 19, 12 February 2003, at p. 7.

accepted that, at the time of the visit, Belmarsh prison had – due to staffing difficulties – been unable to offer the wide range of activities normally made available to detainees in the High Security Unit.[118] However, the government stated that a 'revised daily regime for all prisoners' at Belmarsh had since been introduced[119] and was keen to emphasise that the Belmarsh Mental Health Team had provided 'comprehensive care to several of the detainees'.[120]

In March 2004, the CPT returned to the United Kingdom to assess the developments that had taken place in the treatment of persons detained under ATCSA since its last visit. This time it paid particular attention to the impact that the conditions of detention were having on the mental and physical well-being of the detainees. So concerned was it about three of the individuals who had been detained under the Act that it made immediate recommendations to the United Kingdom government about them before publishing its main report. The first of these three individuals was suffering from severe post-traumatic stress disorder and had been transferred by the Home Secretary from Belmarsh to Broadmoor, a secure mental hospital. At Broadmoor, the individual had 'endured frequent episodes of verbal abuse by members of staff' and had been physically assaulted by other patients. The CPT said that it was 'clinically inappropriate' for him to be placed 'in an establishment that was mainly tasked with the care of dangerous and violent patients'. As his mental state appeared to have deteriorated seriously, the CPT asked that he be urgently transferred to 'a different type of treatment facility'.[121] The second of the three individuals was being held at Belmarsh. He suffered from 'major physical disabilities', was severely depressed, and had lost a significant amount of weight which had led to his physical impairment. The CPT took the view that his health was 'likely to deteriorate further' if he were to remain in Belmarsh as no appropriate treatment facilities were available there. It therefore called for 'immediate steps to be taken to ensure that he received the care and treatment warranted by his condition'.[122] The third individual, also held at Belmarsh, had previously had both of his forearms amputated. It was found that he was unable to urinate or defecate unaided and 'did not always receive the assistance' he needed. The CPT considered that 'his mental health had deteriorated seriously as a result of his detention' which had led to him suffering from severe depression and post-traumatic stress. Concerned about his condition, the CPT asked the United Kingdom government to give urgent consideration 'to his transfer to an

118 *Ibid.*, at pp.17–18.

119 *Ibid.*, at p. 18.

120 *Ibid.*, at p. 23.

121 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*, CPT/Inf (2005) 10, 4 March 2005, at p. 8.

122 *Ibid.*, at p. 9.

establishment with proper facilities to deal both with his physical disability and to treat his mental disorder in a humane environment'.

The United Kingdom government, however, chose not to follow the immediate recommendations made by the CPT. Instead, the second of the three individuals made a bail application to SIAC which, as noted above, had the power to release detainees in exceptional circumstances.[123] In accepting the application, SIAC concluded that the individual's physical and mental health conditions were deteriorating to such an extent that any period of further detention would be likely to breach both Articles 3 and 8 of the ECHR. The other two individuals whom the CPT had recommended should be immediately placed in more suitable detention facilities were released on 11 March 2005 as a result of the House of Lords' decision in *A and Others*.[124]

The main report of the CPT's findings for its 2004 visit was subsequently published in June 2005.[125] The report noted that the conditions of detention for those held in Belmarsh prison had been relaxed following the decision to move them out of the High Security Unit and into an ordinary detention unit for Category A prisoners.[126] As a result, they now had access to educational activities and regular sporting activities and out-of-cell time had increased from two to five hours per day, three to four times a week.[127] Nonetheless, the CPT was unhappy that the prison authorities had rejected its previous request to lift the rule at Belmarsh prison which limited to three the number of detainees allowed to take part in educational activities at any one time. Again, it asked for this rule to be reviewed, arguing that it failed 'to take account of the specific status' of persons detained under ATCSA and represented 'a much more rigid attitude than that adopted in Woodhill prison' where other of the ATCSA detainees were being held.[128] On contact with the outside world, which had also been an issue in its previous report, the CPT noted that the situation had improved as visits now took place in open conditions and detainees could make telephone calls to a limited range of numbers 'without restriction'.[129] However, 'certain practical difficulties remained': visiting times were reduced by a visitor verification procedure and few telephones were available for use.

Overall, despite recognising that some improvements had been made, the CPT considered that these were 'far from sufficient when viewed against the scale of the problem'.[130] It claimed that the information it had gathered during its

123 *G v. Secretary of State for the Home Department*, *supra* n. 78.
124 See *supra* nn. 83 84, and 85.
125 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*, CPT/Inf (2005) 10, 4 March 2005.
126 *Ibid.*, at par. 16.
127 *Id.*
128 *Id.*
129 *Ibid*, at par. 17.
130 *Ibid.*, at par. 19.

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visit showed that the authorities were 'at a loss as to how to manage' individuals detained under ATCSA who were 'imprisoned with no real prospect of release and without the necessary support to counter the damaging effects of this unique form of detention'. It made the following telling comment on the impact that the conditions of detention were having on the mental and physical health of the detainees:

> "Two years after the CPT visited these detained persons, many of them were in a poor mental state as a result of their detention, and some were also in poor physical condition. Detention had caused mental disorders in the majority of persons detained under the ATCSA and for those who had been subjected to traumatic experiences or even torture in the past, it had clearly reawakened the experience and even led to the serious recurrence of former disorders. The trauma of detention had become even more detrimental to their health since it was combined with an absence of control resulting from the indefinite character of their detention, the uphill difficulty of challenging their detention and the fact of not knowing what evidence was being used against them to certify and/or uphold their certification as persons suspected of international terrorism. For some of them, their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment."[131]

The two psychiatrists on the CPT's delegation found that the detainees were suffering from a wide range of troubling conditions. These included serious signs of post-traumatic stress disorder, anxiety, depression, psychosis, nocturnal auditory hallucinations, delusional ideas, and considerable weight loss which had led to physical impairment. Some of the detainees were also said to pose a clear threat to themselves. The delegation concluded that the health-care centre at Belmarsh prison had been 'unable to cope with the care needs' of ATCSA detainees. It condemned as 'minimal' the medical care provided to one Belmarsh detainee, and of another it observed that the deterioration in his health had been 'virtually ignored' by the prison authorities.[132] In some cases, it said, there was a major risk of the detainees' symptoms becoming long-term and irreversible. Furthermore, interviews with the detainees had led the delegation to the view that the detainees' sense of not having any realistic prospects of release had been an aggravating factor in the deterioration of their mental health. Finally, it noted that the symptoms they suffered were much more severe than those suffered by ordinary remand prisoners.[133]

In its report, therefore, the CPT recommended that 'necessary steps' be taken, without delay, to ensure that ATCSA detainees received appropriate medical treatment for their 'specific needs'.[134] In addition, it argued that it was

131 *Id*.
132 *Ibid*., at par. 21.
133 *Ibid*., at par. 21.
134 *Ibid*., at par. 23.

essential that there be a 'fundamental review' of detention under ATCSA which recognised that the conditions of detainees' detention must reflect their status as persons who had neither been accused nor convicted of an offence.[135] This status, the CPT observed, should be reflected 'in practice' so as to 'prevent and actively counter the damaging effects' of the unique form of detention under which they were being held. In taking 'all possible steps to satisfy their reasonable needs', the CPT said, detainees should be able to engage in educational and intellectual activities and in training, work, and sport.[136] The longer the period of their detention, the more varied these activities needed to be. The CPT also recommended that each detainee should be given an 'individualised support plan, including psychological and social support, to help them as far as possible to cope with their detention'.[137] In this regard, it suggested that attention be given to allowing detainees to maintain contact with their families and friends in the outside world.

The United Kingdom government, for its part, 'categorically rejected' the suggestion that the individuals detained under ATCSA had been treated in an inhuman or degrading manner. In its response, it indicated that it 'firmly' believed that at all times detainees had received 'appropriate care and treatment' and had been given access to 'all necessary medical support, both physical and psychological, from medical support staff and doctors'.[138] In addition, the United Kingdom government rejected the suggestion that ATCSA detention had caused the mental suffering of the detainees, noting that some had had significant mental health issues in the past.[139] As the suspected international terrorists detained under ATCSA had been released following the House of Lords' decision in *A and Others*, it believed that the recommendations made by the CPT were no longer valid. It did not accept that the level of health care available at Belmarsh prison was deficient, as had been suggested by the CPT, and considered that the medical needs of the detainees had in fact been met.[140] It emphasised that the conditions of detention, as well as how detainees were 'to manage their daily lives', needed to be weighed against 'the operational needs of a high security prison'.[141] In any event, it stressed, detainees did have access to educational facilities, work, and association with other prisoners, and were able to exercise in the open air.[142] In answering the concerns raised by the CPT over access to visitors, it noted that the identity of all visitors to Category A prisoners had to be

135 *Ibid.*, at par. 26.
136 *Id.*
137 *Id.*
138 *Response of the United Kingdom Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment following its visit to the United Kingdom from 14 to 19 March 2004*, CPT/Inf (2005) 11, 9 June 2005, at par. 45.
139 *Id.*
140 *Ibid.*, at par. 52.
141 *Ibid.*, at par. 60.
142 *Id.*

'verified' before entry was permitted and that process could 'take six weeks on average' to complete. On telephone access, it responded by observing that the situation in Belmarsh had improved since the CPT's 2004 visit with the introduction of additional periods during the day when the telephone could be used.[143]

V.2. DETENTION WITHOUT CHARGE OF TERRORIST SUSPECTS UNDER THE TERRORISM ACT 2000

The CPT delegation also carried out investigations into the conditions of pre-charge detention under the TA. As discussed above, section 41 of the TA permits an arrested terror suspect to be detained without charge in police custody for an initial period of 48 hours before being brought before a judicial authority. Once that initial 48-hour period has elapsed, a judge may then issue a warrant of further detention for a maximum period of 28 days from the time when the person was first arrested. In July 2005, the CPT visited Paddington Green High Security Police Station where terror suspects were being held in a secure custody suite. It found the cells to be clean, adequately sized, 'reasonably well-lit', and equipped with 'a call system, a means of rest… and a toilet'.[144] Detained persons were offered a mattress and blankets. The CPT was informed that those in the secure custody suite were provided with between 15 and 30 minutes of outdoor exercise every day 'in a section of the vehicle car park that could be made secure'.[145] The CPT considered that this was insufficient and recommended that persons held in detention for more than 24 hours should be offered the opportunity of 'at least one hour of outdoor exercise every day'.[146] While it noted that the conditions of detention were suitable for short periods of stay, it considered that the conditions at Paddington Green High Security Police Station were not adequate for prolonged periods of detention and described them as of 'considerable concern'.[147]

When the CPT visited Paddington Green Police Station again, in December 2007, it found that 'no improvements' had been made to the conditions of detention.[148] It regarded the cells as creating a 'very austere environment' and

143 *Ibid.*, at par. 62–63.

144 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 15 July 2006*, CPT/Inf (2006) 26, 10 August 2006, at par. 21. The cells for adults measured approximately 8.5m²; the juvenile detention cells were much larger, at approximately 18m².

145 *Ibid.*, at par. 22.

146 *Ibid.*, at par. 23.

147 *Ibid.*, at par. 11 and 24.

148 *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading*

noted that they had 'minimal access to natural light'. Outside exercise was still not being offered every day and, when it did take place, was 'limited to 20 minutes' and occurred in an 'unsatisfactory' setting.[149] The CPT considered that such conditions were unacceptable for persons who were held for up to 28 days and called upon the United Kingdom government to take measures to improve them. Once again, it expressed considerable concern over the length of pre-charge detention in police custody.[150] It emphasised that 'in the interests of preventing ill-treatment', suspects should be 'passed into the hands of a custodial authority which is functionally and institutionally separate from the police'. More specifically, it recommended that terror suspects detained for longer than 14 days should be transferred to a prison and any further questioning should be carried out there rather than on police premises.[151]

The United Kingdom government, in its response to the CPT, did not consider it necessary for changes to be made to the general arrangements relating to the pre-charge detention of terror suspects under the TA. It stated that 'stringent safeguards' were in place for the prevention of ill-treatment and that detainees were transferred to prisons wherever possible.[152] It pointed out that since the power to detain people for up to 28 days had been introduced, only 11 people had been held in police custody for more than 14 days and, of these, nine had been transferred to prison on the fourteenth day of their detention. It also noted that police stations were specifically designed for interviews to take place whereas, contrary to the suggestions made by the CPT, prisons 'were not always as well equipped' for that purpose.[153] It confirmed that it was 'taking steps to improve the conditions of detention at Paddington Green High Security Police Station' following criticisms made by its Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC, who concluded in a report published in June 2007 that such facilities 'must ultimately be equivalent to those found in prisons in terms of the level of comfort, food, provision, and exercise'.[154]

Treatment or Punishment (CPT) from 2 to 6 December 2007, CPT/Inf (2008) 27, 1 October 2008, at par. 13.

149 *Id.*

150 *Ibid.*, at par. 6.

151 *Ibid.*, at par. 7.

152 *Response of the United Kingdom Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment following its visit to the United Kingdom from 2 to 6 December 2007*, CPT/Inf (2008) 28, 1 October 2008, at par. 12–13.

153 *Ibid.*, at par. 13. The JCHR, *supra* n. 67, at par. 73, noted that while transferring suspects to prison after 14 days was beneficial given the unsuitability of Paddington Green for long periods of pre-charge detention, it carried with it significant disadvantages in that the prison environment may be unduly oppressive and thereby unsuitable for people who have not been charged with any offence.

154 *Ibid.*, at par. 21–3. Lord Carlile was appointed to the role of Independent Reviewer of Terrorism Legislation in 2001. After 10 years in the role he will be succeeded by Mr David Anderson QC in 2011. Section 36 of the Terrorism Act 2006 requires the Secretary of State to appoint a person to review the operation of the provisions of the Terrorism Act 2000,

Accordingly, it declared that it had embarked on a project to address these recommendations 'through refurbishments and, ultimately, the construction of new facilities'.

VI. CONTROL ORDERS

Following the repeal of Part 4 of ATCSA, control orders were, as we have seen, introduced by the Prevention of Terrorism Act 2005 (PTA) as a way of seeking to prevent or restrict those suspected of terrorism-related activities from involving themselves further in such activity but without, as ATCSA had done, having to have recourse to the heavy-handed approach of ordering their indefinite detention which in any event had been held to be incompatible with the United Kingdom's obligations under the ECHR. In order to avoid the difficulties with the previous regime that were so vividly exposed in *A and Others*,[155] the PTA allowed control orders to be imposed on British citizens as well as foreign nationals. Under sections 1 and 2 of the PTA, the Home Secretary was empowered to make a control order, subject to later judicial confirmation,[156] if he had 'reasonable grounds for suspecting' that the individual was or had been 'involved in terrorism-related activity' and if he considered that an order was 'necessary for purposes connected with protecting members of the public from a risk of terrorism'. To make such an order, the Home Secretary must have come to the conclusion that it was compatible with the provisions of the ECHR: a so-called 'non-derogating control order'. Where a control order was considered to impose obligations which were incompatible with an individual's right to liberty under Article 5 of the ECHR – a so-called 'derogating control order' – the power to make the order and to set the obligations contained within it was restricted to the court on an application by the Secretary of State. Since the introduction of control orders in 2005, no derogating control order has ever been made[157] but a total of 48 people had have had non-derogating control orders imposed upon them: 28 foreign nationals and 20 British citizens.[158] As of

including Schedule 8, and the provisions of Part I of the 2006 Act. Section 36(4) requires the Independent Reviewer to report to Parliament 'at least once in every 12 month period'.

155 See nn. 83, 84, and 85 *supra*.

156 Section 3 of the PTA provides for judicial supervision of the making of control orders. Under section 3(10), the court's function is 'to determine whether the decision of the Secretary of State that the requirements of section 2(1)(a) and (b) were satisfied and that the obligations imposed by the order were necessary was flawed': see *per* Lord Phillips of Worth Matravers in *Secretary of State for the Home Department v. AF and Others* [2009] UKHL 28, at par. 4.

157 See *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011, at p. 41.

158 *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011, at p. 36, par. 5 and 6.

10 December 2010, there were eight people in the United Kingdom – all British citizens – subject to non-derogating control orders.

A list of the obligations that can be included in a control order is set out in section 1(4) of the PTA. The list is extensive but non-exhaustive and the Home Secretary is empowered under the legislation to impose any prohibition or restriction that he regards as necessary so long as it is not struck down by the court. The list includes: prohibitions or restrictions on the possession or use of specified articles or substances; prohibitions or restrictions on the use of specified services or facilities; restrictions on association or communication with specified persons or with persons generally; restrictions on the place of residence of the person subject to the order or on those given access to that place of residence; prohibitions on being at specified places or within specified areas at specified times or on specified days; prohibitions or restrictions on movement within or to and from the United Kingdom; requirements to surrender a passport or other items; requirements to allow access to specified persons to the residence or other premises to which the person subject to the order has the power to grant access; requirements to allow those premises to be searched and to allow items to be removed from them for tests; requirements to allow photographs to be taken; requirements to cooperate with specified arrangements for enabling the movements, communications, or other activities of the person subject to the order to be monitored by electronic or other means, including requirements to wear or otherwise use or maintain apparatus approved by or in accordance with those arrangements; and requirements to report to a specified person at specified times and places.

Until litigation in *Secretary of State for the Home Department v. AF and Others*,[159] control orders could be imposed upon individuals without their having been told the substance of the case against them. This was justified by the United Kingdom government on the ground that the material used in control order proceedings was so sensitive that its disclosure could risk endangering national security. The House of Lords in *AF and Others*, however, rejected that argument which was regarded as incompatible with the right to a fair trial guaranteed by Article 6 of the ECHR. The House held that before individuals could be made the subject of a control order they must, at a minimum, have been given a summary of the core allegations that had been made against them. Without this information, the House said, they would not be in a position to give effective instructions to the counsel who had been appointed to represent their interests in the case.[160]

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159 [2009] UKHL 28.

160 The rules that have been introduced to govern hearings under section 3(10) of the PTA – 'section 3(10) hearings' – were helpfully summarised by Lord Bingham of Cornhill in *Secretary of State for the Home Department v. MB and AF* [2007] UKHL 46, at par. 26 and 27. The legal framework allows for provision to be made for the court to conduct proceedings 'in the absence of any person, including a relevant party to the proceedings and his legal

Control orders – which require annual renewal by Parliament – are clearly preferable to indefinite preventive detention. But the nature of the obligations they impose can be highly intrusive and restrictive. Their effect can be to require the virtual house arrest of an individual and, like ATCSA orders, they have the potential to continue indefinitely. For these reasons, control orders have rightly been subjected to sustained and cogent criticism from many quarters. The Joint Committee on Human Rights, for example, has expressed 'serious reservations' about the control order system on each of the occasions since the system's creation in 2005 that an annual renewal order has been laid before Parliament by a Home Secretary. By the time of the fifth annual renewal, the Joint Committee had clearly lost patience. Previously, it had said that it had kept 'an open mind' about whether the current system could be made to operate in a way which was compatible with the basic fairness requirements inherent in both the common law and in Article 6 of the ECHR. By 2010, however, its assessment was that the system was 'not capable of ensuring the substantial measure of procedural justice' that was required and was 'no longer sustainable'. It argued that unless significant changes were made to make it human rights compatible, the system 'would continue to give rise to unnecessary breaches of individuals' rights to liberty and due process'.[161] It pointed out that although these warnings had been 'echoed by other international bodies charged with monitoring compliance with human rights', they had 'not been heeded'. As a result, the continued operation of the system had:

> "led to more unfairness in practice, more unjustifiable interferences with people's liberty, more harm to people's mental health and to the lives of their families, even longer periods under indefinite restrictions for some individuals, more resentment in the communities affected by or in fear of control orders, more protracted litigation to which there is no end in sight, more claims for compensation, ever-mounting costs to the public purse, and untold damage to the UK's international reputation as a nation which prizes the value of fairness."[162]

representative'. The framework also allows for provision to be made 'for the appointment of a person to represent a relevant party'. Known as a 'special advocate', the function of this person is 'to represent the interests of a relevant party'. Special advocates 'may only communicate with the relevant party before closed material is served upon him, save with permission of the court'.

161 See JCHR, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Ninth Report of Session 2009–10, HL 64, HC 395, 26 February 2010, at par. 110, p. 34, and at par. 15, p. 37.

162 *Ibid.*, at par. 21, p. 38. In *Secretary of State for the Home Department v. AF and Others* [2009] UKHL 28, at par. 6, Lord Phillips of Worth Matravers referred to the 'extraordinary volume of litigation' that control orders had generated. In many cases, he noted, section 3(10) hearings 'proved merely the start of a lengthy saga'. Indeed, the case before the House was the eighth substantial hearing that it had received concerning control orders and it would not, he said, 'be the last' (see par. 7).

These are telling criticisms and, given their force,[163] it is clear that the current system of control orders cannot survive for long. An improvement on the previous system of indefinite detention it may have been; but an acceptable system it is not.

VII. DETENTION OF UNTRIED DEFENDANTS POST-CHARGE

The final two parts of this chapter examine the detention of persons in England and Wales who have been charged but not yet tried. As we have seen, once a person suspected of a criminal offence has been charged, PACE provides that a custody officer should either release that individual on bail to attend a police station or a court at a later date or order the individual to be held in police custody until they can be brought before a court. If detained and brought before a court, any further detention of the individual will be governed by the Bail Act 1976, as amended. The heading to section 4 of the Act states that it creates a 'general right to bail' but the wording of the section itself indicates that a person brought before a magistrates' court or a Crown Court in connection with a criminal offence shall only be granted bail if one of the exceptions contained in Schedule 1 to the Act applies. The section is thus best regarded as creating a rebuttable presumption that bail will be granted.

The grounds listed in the Schedule 1 for refusing bail differ according to whether the defendant has been charged with an imprisonable or a non-imprisonable offence. As one might expect, more exceptions to bail are allowed in relation to defendants in the former than in the latter category. Where a defendant has been charged with an *imprisonable* offence, paragraph 2 of Part 1 of Schedule 1 sets out three grounds on which a defendant may be refused bail. According to this paragraph, a defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that, if released on bail, the defendant would: (i) fail to surrender to custody; (ii) commit an offence whilst on bail; or (iii) interfere with witnesses or otherwise obstruct the course of justice. In making this assessment, paragraph 9 provides that the court shall have regard to the following considerations as appear to it to be relevant: the nature and seriousness of the offence and the probable method of dealing with the defendant for it; the character, antecedents, associations, and community ties of the defendant; the defendant's record with respect to the fulfilment of his obligations under previous grants of bail in criminal proceedings; and the strength of the evidence of the defendant having committed the offence or having defaulted. A further three exceptions to the right to bail where a

[163] See also Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders', (2007) 60 Current Legal Problems 174.

defendant has been charged with an imprisonable offence are set out in paragraphs 2A, 5, and 6. Paragraph 2A states that if the offence charged is indictable or one that is triable either way, the defendant need not be granted bail if it appears to the court that he was on bail when committing the alleged offence. Paragraph 5 provides that the defendant need not be granted bail if the court is satisfied that it has not been practicable to obtain sufficient information to make a bail decision in the time available. And paragraph 7 provides that where there has been an adjournment for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody. Under an amendment made to section 4 of the Bail Act by the Criminal Justice and Public Order Act 1994 (discussed in detail below), bail is also restricted for defendants who have been charged with an offence of rape or homicide.

Where a defendant has been charged with a *non-imprisonable* offence, Part II of Schedule 1 to the Bail Act applies. Paragraph 2 of that Schedule provides that bail need not be granted to such a defendant if they have previously been on bail and failed to surrender to custody and if the court believes, in view of that failure, they would fail to surrender to custody again. In addition, there are three other exceptions to the general right to bail which are applicable to both non-imprisonable *and* imprisonable offences. Paragraph 3 of Part I and Part II of Schedule 1 provides that bail need not be granted if the court is satisfied that the defendant should be kept in custody for his own protection or, if a young person, for his welfare. Paragraph 4 of Part I and Part II provides that a defendant need not be granted bail if in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts. And paragraphs 6 of Part I and 5 of Part II provide that a defendant need not be granted bail if, having been released on bail, he was arrested for absconding or breaking bail conditions.[164]

There can be no doubt that, in certain circumstances, it is right for some defendants to be held in custody pending trial. Remanding a defendant in custody can help to keep the public safe and can assist in protecting the integrity of the criminal justice process where witnesses or other aspects of the trial process are under threat. A remand in custody can also be justified where a defendant has been charged with a serious offence and there is little likelihood that he will surrender to custody if released. Nonetheless, the size of the remand population in England and Wales raises serious questions about whether the balance between individual rights on the one hand and the broader public interest on the other is currently being struck in the right place. Despite the supposed 'right to bail' enshrined in the Bail Act 1976, the net effect of all the

[164] Section 52 of, and Schedule 12 to, the Criminal Justice Act 2008 also inserted a new Part 1A into Schedule I of the Bail Act 1976 which extended the restrictions on withholding bail to non-imprisonable offences to summary only offences which are imprisonable.

statutory exceptions is such that substantial numbers of untried people are held in custody in prisons in England and Wales at any one time. Thus, on 31 August 2010, a total of 85,200 people were being held in prisons in England and Wales and, of these, 8,880 – 10.5% – were untried prisoners held on remand. The comparable figures for August 2009 were 84,210 and 8,750.

The most frequently charged offence amongst remand prisoners is violence against the person, which made up 25 per cent of the total number of untried prisoners held on remand in prisons in England and Wales in August 2010.[165] However, a particularly troubling feature of the remand system in England and Wales is that many defendants who are held in pre-trial custody only receive a non-custodial disposal when their case is finally heard by the courts. This aspect of the remand system was taken up recently by the United Kingdom coalition government in a Green Paper entitled *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.[166]After observing that 'each year several thousand people are remanded in custody awaiting trial for offences for which they would be unlikely to receive a custodial sentence if they were convicted, because the offence of which they are accused is not serious enough to warrant it',[167] the Green Paper announced that it was the United Kingdom government's intention to remove the option of remand in custody for defendants who would be unlikely to receive a custodial sentence from the court.[168] This is a much-needed change and the sooner it finds its way into legislation the better.

VII.1. COMPATIBILITY OF THE BAIL ACT WITH THE ECHR

As was mentioned in part III above, the second limb of Article 5(3) of the ECHR requires persons who have been charged with a criminal offence and detained while awaiting trial to be brought before a court to determine whether they should be released on bail or remanded in custody. Article 5(3) creates a presumption in favour of release at this point but continued detention will be permitted if there is a public interest that outweighs the individual's right to liberty.[169] If the charged person is then remanded in custody by the court, the second limb of Article 5(3) requires that their trial must take place within a 'reasonable' period of time. If, on the other hand, they are released on bail,

165 See *Population in Custody, England and Wales,* Ministry of Justice Statistical Bulletin, August 2010.
166 Cm 7972, December 2010.
167 *Ibid.,* at p. 53, par. 179.
168 *Id.* This change is intended to apply both to adults and to young people: see *ibid.,* at p. 72, par. 249.
169 *McKay v. The United Kingdom*, *supra* n. 57, at par. 41–2.

Article 5(3) provides that this release may be made on condition that 'guarantees' are given that they will appear for trial.

Article 5(3) therefore plainly imposes constraints on the lawfulness of any system of remand. These constraints did not cause any particular problems for the arrangements originally created by the Bail Act 1976 but that changed when an amendment to section 4 of the Bail Act was introduced by section 25 of the Criminal Justice and Public Order Act 1994 (CJPOA). This provided that a defendant charged with certain serious offences – murder, attempted murder, manslaughter, rape or attempted rape – *had* to be remanded in custody if previously convicted for one of these offences. The amendment thus automatically excluded such defendants from being granted bail. In *C.C. v. The United Kingdom*[170] an applicant who had been charged with attempted rape and denied bail by a magistrates' court under the new provision because of a previous conviction for manslaughter challenged the provision under the ECHR, arguing that a mandatory refusal of bail breached his human rights under Article 5(3). In giving judgment, the European Commission of Human Rights observed that judicial control of interferences by the executive with an individual's right to liberty was an essential feature of the guarantees embodied in Article 5(3), which sought to minimise the risk of arbitrary pre-trial detention[171] and required the judicial officer before whom the accused was brought to examine the existence of a genuine requirement of public interest before justifying a departure from the accused's right to liberty. Observing that Article 5(3) required the judicial officer to have a power to order the release of the accused,[172] the Commission held that despite the applicant having been brought before a magistrates' court, the possibility of the court actually considering his pre-trial detention, and accordingly ordering his release on bail, had been excluded in advance by section 25 of the CJPOA. This automatic refusal of bail amounted to an arbitrary deprivation of liberty and hence breached Article 5(3).[173]

Following this decision, the United Kingdom government enacted section 56 of the Crime and Disorder Act 1998 to render section 25 of the CJPOA compatible with the demands of the ECHR. In providing judges with the power to release such individuals, the amended section 25 stated that an accused shall be granted bail 'only if the court … is satisfied that there are exceptional circumstances which justify it'. In *O v. Crown Court at Harrow*,[174] the House of

[170] *C.C. v. The United Kingdom* (Application No. 32819/96), Judgment of 30 June 1998. For a comment see Philip Leach, 'Automatic denial of bail and the European Convention' [1999] Criminal Law Review 300.

[171] *Ibid*., at par. 40.

[172] *Ibid*., at par. 43–44.

[173] *Ibid*., at par. 49–50. In *S.B.C. v. The United Kingdom* (2001) 34 EHRR 619, the ECtHR endorsed the finding made in *C.C.* and held that the automatic denial of bail for a second serious offence provided by section 25 of the CJPOA breached Article 5(3).

[174] [2006] UKHL 42.

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Lords was asked to consider whether this amended section 25 was Convention compliant. It found that a literal reading of the amended provision imposed a burden of proof upon the defendant to show that there were exceptional circumstances which justified bail being granted.[175] By placing that burden of proof on the defendant, the default position was that bail had to be refused unless the defendant could show there were exceptional circumstances. Delivering the leading judgment, Lord Brown noted that while in the vast majority of cases a court will reach a clear view on whether the conditions for withholding bail were satisfied, there would be occasions where that was left uncertain.[176] In these instances – where the arguments for or against the existence of exceptional circumstances justifying bail were evenly balanced – the burden of proof assumed relevance. The right to liberty enshrined in Article 5(3), he observed, required both that the prosecution bear the overall burden of justifying a remand in custody and that a judge be able to exercise effective judicial control over pre-trial detention.[177] Accordingly, by denying the defendant bail when he failed to rebut the presumption, the amended section 25 breached Article 5(3).[178] Nonetheless, rather than issuing a declaration of incompatibility under section 4 of the HRA, Lord Brown concluded that it was possible under section 3(1) of the HRA to re-interpret the burden of proof in the amended section 25 as placing only an evidential burden on the defendant and not a proof-based burden.[179] This conclusion fitted with the views of the Law Commission which undertook an extensive examination of whether the legislation relating to bail in England and Wales was compatible with the demands of the ECHR. In its Report published in 2001, the Law Commission concluded that the legal regime did not give rise to a breach of the Convention[180] as all of its provisions could be interpreted and applied in a manner which was compatible with the United Kingdom's convention obligations.

VII.2. CUSTODY TIME LIMITS

A further layer of protection for persons held in pre-trial custody in England and Wales is provided by custody time limits. Section 22(1) of the Prosecution of Offences Act 1985 empowered the Secretary of State may make provision for the

175 *Ibid.*, at par. 6, *per* Lord Carswell; and at par. 35, *per* Lord Brown. In addition, the legislative history confirmed that this was the intention of Parliament: see Hansard, HL Debates, col. 340, 31 March 1998, cited at par. 26.

176 *Ibid.*, at par. 35.

177 *Ibid.*, at par. 28. See *Ilijkov v. Bulgaria* (Application No. 33977/96), Unreported, Judgment of 26 July 2001, at par. 84–85.

178 *Ibid.*, at par. 35.

179 *Ibid.* A similar finding was made by Lord Carswell, at par. 12.

180 Law Commission for England and Wales, Law Commission Paper No. 269, *Bail and the Human Rights Act 1998*, 20 June 2001, at p. 117.

maximum periods across which an individual may be detained in custody whilst awaiting trial for a criminal offence. Two years later that power was exercised by the Secretary of State in the form of the Prosecution of Offences (Custody Time Limits) Regulations 1987.[181] Under this provision, as amended, the maximum period during which a person charged with a summary offence can be held in custody in England and Wales between their first appearing before a court and the start of their trial is set at 56 days.[182] For offences triable either way, the maximum period between first appearing before a court and the start of a summary trial or committal for trial to the Crown Court is 70 days.[183] For indictable offences that are committed to the Crown Court for trial, the maximum period between the accused being committed for trial and the start of the trial is 112 days.[184]

Custody time limits may be extended by a court under section 22(3) of the Prosecution of Offences Act 1985, but before a court may do this it must be satisfied, first, that the need for an extension is due to a good and sufficient cause; and, second, that the prosecution has acted with all due diligence and expedition. Two examples are given by the Prosecution of Offences Act 1985 of situations where there will be a need for an extension. These are the illness or absence of those involved in the trial and the postponement of the trial being ordered by another court. So long as the court is so satisfied that these conditions are met, no legislative limit is placed on the period of time across which a defendant may be held in custody pre-trial, although a lengthy period of pre-trail detention may nonetheless raise an issue under Article 5(3) of the ECHR which stipulates that an individual's trial must take place within a reasonable period of time.

In *R v. Manchester Crown Court, ex parte McDonald*,[185] Lord Bingham CJ, sitting in the Divisional Court, gave guidance on the law governing the extension of custody time limits. According to Lord Bingham, the Prosecution of Offences Act 1985 Act had three overriding purposes and a judge making a decision on the extension of a custody time limit should afford full weight to them all. The three purposes were: (i) to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; (ii) to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and (iii) to invest the court with a power and duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial.[186] Whenever an application for an extension to a custody time limit was made, Lord Bingham held that it was for the prosecution to establish on the balance of probabilities

181 SI 1987/299.
182 Regulation 4(4A).
183 Regulation 4(2).
184 Regulation 5(3).
185 [1999] 1 WLR 841.
186 *Ibid.*, at p. 846.

that the two statutory conditions in section 22(3) were met.[187] Lord Bingham also reviewed the Convention jurisprudence on the compatibility of individuals being remanded in custody with the right to liberty guaranteed by Articles 5(1) and 5(3) of the ECHR. While noting that the ECtHR had yet to set an upper limit on the maximum period of remand detention, he said that he had not found anything in the European cases which in any way threw doubt on English law complying with the demands of the Convention.[188]

VIII. CONDITIONAL BAIL AS AN ALTERNATIVE TO PRE-TRIAL DETENTION

As we have seen, a court or a custody officer may order that a suspected offender be released on bail unconditionally, in which case the bailee's only obligation will be to attend court at a specified time. On the other hand, the court or the custody officer may attach one or more conditions to the grant of bail which must be met by the suspected offender either before or after he is released on bail. The final substantive part of this chapter discusses the legal provisions in England and Wales that relate to conditional bail, both where it has been ordered by the court and where it has been ordered by the police.

VIII.1. CONDITIONAL COURT-ORDERED BAIL

The basis on which bail conditions can be imposed by a court is set out in section 3(6) of the Bail Act 1976. Under this provision, a court may impose such requirements as it considers necessary to ensure that a defendant 'surrenders to custody'; 'does not commit an offence while on bail'; 'does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person'; 'makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence'; or 'attends an interview with an authorised advocate or authorised litigator'. By virtue of an amendment to the Bail Act contained in section 13 of the Criminal Justice Act 2003, a court may also impose a bail condition if it appears necessary for the defendant's 'own protection or, if he is a child or young person, for his own welfare or in his own interests'.

The Bail Act did not set out an exhaustive list of the conditions that could properly be used by a court to secure any of the outcomes listed in section 3(6). Some conditions – such as 'surety' (where a third party promises to pay to the court a nominated sum should the defendant abscond), 'security' (where the

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187 *Id.*

188 *Ibid.*, at p. 850.

defendant himself deposits money or items of value with the court on the understanding that all or some of these may be forfeited if he absconds), residence in a 'bail hostel' or in a 'probation hostel', and 'electronic monitoring – are mentioned in terms in the legislation. But, in the main, bail conditions have simply developed over time as a result of judicial practice. Among the most popular of these judicially-developed bail conditions, which can be and often are used by the courts in combination, are: to require the defendant to surrender his passport to the court; to require him to live at a specified address; to require him to abide by the terms of a 'curfew' (i.e. to remain in his dwelling for specified periods); to require him to report to a police station at particular times; to require him not to contact specified persons, such as witnesses or victims; to require him not to enter specified buildings or specified areas; and (if a juvenile) to require him to agree to be supervised by a Youth Offending Team.

As mentioned in the previous paragraph, one of the bail conditions expressly referred to in the legislation is the use of electronic monitoring. Where the defendant is a child or young person over the age of 12, the Bail Act, as amended, allows a court to seek to enforce its bail conditions through electronic means.[189] Such monitoring can only be imposed where the child or young person has been charged with a sexual or violent or other serious offence or, if charged with an imprisonable offence, has 'a recent history of repeatedly committing imprisonable offences while on bail'. This power to impose electronic monitoring as a condition of bail was recently extended to adults – i.e. persons aged 17 and above – by amendments made to the Bail Act 1976 in Schedule 11 to the Criminal Justice and Immigration Act 2008. A notable feature of the change, which was brought into force on 3 November 2008, was that the court's power to attach electronic monitoring as a condition of adult bail is confined to situations where the court is satisfied that, without the electronic monitoring requirement, the person 'would not be granted bail'. Here, then, the legislature has explicitly underscored, in a way that is notably absent from the rest of the legislative structure governing conditional bail, that electronic monitoring should be used only as an alternative to custody and not as a belt and braces measure for defendants who would have been released on bail anyway.

Finally, it should be noted that, in certain circumstances where a defendant has been involved in the use of Class A drugs and has agreed to undergo an assessment and participate in any follow-up related to that drug use, the Bail Act 1976 provides that if the court decides to grant the defendant bail it must make it a condition of that bail that the defendant does the things to which he has agreed.[190]

[189] Section 3AA of the Bail Act 1976.
[190] Section 3(6C)-(6E) of the Bail Act 1976.

VIII.2. CONDITIONAL POLICE BAIL

Conditional bail may also be ordered by the police, either pre-charge or post-charge, under section 3A(1) of the Bail Act 1976 which stipulates that the 'normal powers to impose conditions of bail' will be available to a custody officer when releasing someone on police bail. These powers are subject to a few statutory restrictions, the most significant of which is that a custody officer cannot impose a requirement that the bailee reside in a bail hostel or makes themselves available for inquiries and reports. Pre-charge conditional police bail is also unavailable for persons detained under Schedule 8 to the Terrorism Act 2000 on suspicion of having committed a terrorist offence. This exclusion is justified on the basis that conditional police bail is inappropriate for persons who 'might be intent on engaging in terrorist activity, including attack planning' or might 'plan to leave the country, possibly under an assumed identity'[191]

The grounds on which a custody officer may legitimately attach conditions to the grant of police bail are set out in section 3A(5) of the Bail Act. The list mirrors the three main grounds that operate in respect of court-ordered bail. Custody officers may thus impose conditions on a grant of police bail if they appear to be necessary to prevent the bailed individual from 'failing to surrender to custody', from 'committing an offence while on bail', or from 'interfering with witnesses or otherwise obstructing the course of justice'. But, as no other grounds are mentioned in the legislation, a custody officer – unlike a court – may not impose a bail condition on the basis that it is necessary for the bailee's own protection.

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IX. CONCLUSION

Incorporation of the ECHR into domestic law by the HRA in 2000 marked a sea change to the constitutional landscape in the United Kingdom. For the first time, individuals were able to challenge the compatibility of any restrictions made to their human rights before national courts. Arguably, one of the most important decisions in the post-HRA era has been *A and Others* which provided strong confirmation that the courts in the United Kingdom were willing to apply the jurisprudence of the ECHR in a robust manner when rendering the domestic legislative framework for pre-trial detention compatible with its demands. Furthermore, although the United Kingdom government has not been particularly receptive to the recommendations made by the CPT following its visits to the detention facilities for terror suspects, the protection offered to such detainees has recently been enhanced by the Coroners and Justice Act 2009 which introduced a new element of scrutiny of the treatment of individuals

191 See *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011, at p. 11 at par. 18.

detained under anti-terrorism legislation. Amending section 36 of the TA 2006, section 117 of the Coroners and Justice Act extended the duties of the United Kingdom government's Independent Reviewer of Terrorism Legislation to include both reviewing and reporting on the treatment of persons detained under section 41 of the TA for more than 48 hours. This is a most welcome step and it is hoped that the United Kingdom government will receive any recommendations made by the Independent Reviewer concerning the treatment of terror suspects more favourably than it has received recommendations made by the CPT. An even more significant development, though, is that soon after the coalition government came into power in May 2010 the new Home Secretary, the Rt Hon Theresa May, announced that a 'rapid review of counter-terrorism and security powers' – including the controversial powers to make control orders and to detain terrorist suspects for 28 days without charge – would be carried out by the Office for Security and Counter-Terrorism (a division within the Home Office) with 'independent oversight' provided by Lord Macdonald of River Glaven QC, the former Director of Public Prosecutions.[192] That Review has taken longer to complete than was originally anticipated. Nonetheless, it is now expected that the Review will be published early in 2011 and simultaneously laid before Parliament as a Command Paper. It is likely that it will recommend radical changes to the existing law.

X. POSTSCRIPT

Since this chapter was completed in December 2010, a number of important developments have occurred in relation to the law governing the detention of terrorist suspects in the United Kingdom. The first of these happened on 26 January 2011 when the Review by the Office for Security and Counter-Terrorism was published. The Review amounts to a volte-face in certain aspects of United Kingdom government policy on counter-terrorism. It examined both the 28-day limit on the pre-charge detention of terrorist suspects and control orders. On the 28-day limit, it recommended that the maximum permitted period of pre-charge detention for terrorist suspects be reduced from 28 days to its pre-2006 limit of 14 days.[193] It considered the case for a time limit of less than 14 days but concluded that 'there was a high risk that such reduction would have a significant impact on the ability of police and prosecutors to charge and prosecute those suspected of terrorist activity'.[194] It therefore recommended that the current 28-day maximum period of pre-charge detention for terrorist

192 The announcement was made on 13 July 2010.
193 *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011. at p. 13, par. 26.
194 *Ibid.*, at p. 13, par. 25.

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suspects, which requires renewal by affirmative order by Parliament and was last approved in July 2010 pending the outcome of the Review, should be allowed to lapse. It further recommended that the relevant order making provision in the Terrorism Act 2006 should be repealed; that 'emergency legislation' extending the period of pre-charge detention to 28 days should be drafted and discussed with the Opposition and be available for use should that prove necessary; that part of the Independent Reviewer of Terrorism Legislation's role 'should include publishing reports following any use of pre-charge detention beyond 14 days'; and that the United Kingdom government 'should make it clear that it can see no scenario that would ever require the use of 42 days pre-charge detention'.[195]

The Review's recommendation to lower the maximum period of pre-trial detention for terrorist suspects to 14 days was strongly supported by Lord Macdonald. In a separately published Report, he said:

> "It is my clear conclusion that the evidence gathered by the Review failed to support a case for 28 day pre-charge detention. No period in excess of 14 days has been sought since 2006. Bearing in mind that the power to detain suspects beyond 14 days was always regarded by Parliament as a temporary and quite exceptional measure, this rarity of use in recent years hardly speaks of a pressing need."[196]

In anticipation of the publication of the Review, the Home Office Minister Mr Damien Green announced in Parliament on 20 January 2011, in response to a question, that the United Kingdom government would not be 'seeking to extend the order allowing the maximum 28-day limit'. As a result, the current order lapsed on 25 January 2011 and the maximum limit on pre-charge detention reverted to 14 days from that date.[197]

The Review by the Office for Security and Counter-Terrorism also carried out a careful examination of the control order regime. It concluded that control orders were 'neither a long term nor an adequate alternative to prosecution'[198] and endorsed their abolition and replacement by a new measure to be known as a 'Terrorism Prevention and Investigation Measure' or 'TPIM'. The Review accepted that 'for the foreseeable future' there was 'very likely to be a small number of people' in the United Kingdom who were assessed as posing 'an immediate and significant terrorist threat' but whom the government could

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195 *Ibid.*, at p. 14, par. 28.

196 *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC*, Cm 8003, 26 January 2011. In addition, the Review recommended that the post-charge questioning provisions in the Counter Terrorism Act 2008 should be brought into force, along with the safeguards for terrorist suspects contained in the Coroners and Justice Act 2009 which enhanced the role of independent custody visitors (see par. 30).

197 See HC Deb., 20 January 2011, c 1013.

198 *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011, at p. 41, para 24.

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neither prosecute nor deport.[199] Nonetheless, it concluded that any preventative system ought to be 'less intrusive'[200] and 'more precisely focused and targeted'[201] than control orders, which had permitted both lengthy curfews that prevented individuals from leading normal daily lives and forced relocation (dubbed by some 'internal exile') which required individuals to move to different parts of the country.[202] Unlike control orders which can run indefinitely, the Review made it clear that TPIMs would be subject to a maximum time limit of two years.[203] The power to impose them would rest with the Home Secretary but, other than in urgent cases where confirmation from the High Court would have to be obtained within seven days, the Home Secretary would need prior permission from the High Court.[204] The High Court would 'undertake a mandatory full review of each case' and have the power to quash or revoke the measures.[205] There would be no provision in the TPIM regime for orders which require derogation from the ECHR, thus ensuring that the right to liberty in Article 5 of the Convention was protected.[206] Exclusions zones would be permitted but only if they were 'tightly defined'. Greater freedom of communication and association would be allowed than was the case with control orders and only 'limited restrictions on communications, including the use of the internet, and on the freedom to associate' would be tolerated.[207] As with the 28-day limit, the Review recommended that emergency legislation should be drafted to cope with 'exceptional circumstances' where it might be necessary for the government 'to seek Parliamentary approval for additional restrictive measures'.[208] This draft could then be discussed with the Opposition 'with a view to reaching agreement on its terms'.[209] These emergency measures – which would include 'curfews and further restrictions on communications, association and movement' – would be available only if the Home Secretary were satisfied, on the balance of probabilities, that the individual was or had been involved in

199 *Ibid.*, at p. 37, para 9.
200 *Ibid.*, at p. 41, para 23.
201 *Ibid.*, at p. 39, para 20.
202 Lord Macdonald described forced relocation as a 'thoroughly offensive practice' which was 'utterly inimical to traditional British norms' (see *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC*, Cm 8003, 26 January 2011, at p. 12, par. 22) and considered the use of curfews and tags in this context to be 'disproportionate, unnecessary and objectionable' (*ibid.*, at p. 13, par. 28).
203 They will be able to be reimposed after two years but 'only where there is new material to demonstrate that the person concerned poses a continued threat': see *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004, 26 January 2011, at p. 41, par. 24.
204 *Ibid.*, at p. 42, par. 26(i).
205 *Ibid.*, at p. 42, par. 26(iii).
206 *Ibid.*, at p. 43, par. 26(xii).
207 *Ibid.*, at p. 42, par. 26(vi) and (vii).
208 *Ibid.*, at p. 43, par. 27.
209 *Ibid.*, at p. 43, par. 28.

terrorism-related activity, a more demanding test than the 'reasonable grounds for belief' test which would apply to standard TPIMs.[210]

If enacted, the TPIM regime will be a significant improvement on the now discredited system of control orders. It is, however, unfortunate that, pending the introduction of TPIMs, the United Kingdom government chose to renew the control order legislation for a sixth time. This was done by introducing a new statutory instrument: The Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011.[211] Simultaneously, the Home Secretary made statement of human rights compatibility in respect of this statutory instrument, indicating that she regarded its provisions as compatible with convention rights. The JCHR has rightly questioned this decision,[212] asking whether renewing the control order regime was consistent with the government's own findings and recommendations in its Review of Counter Terrorism Powers. The JCHR was concerned that control orders could continue to be used to 'park' or 'warehouse' individuals who were 'beyond the reach of the criminal justice system', in a way which positively obstructed 'any realistic possibility of prosecution', something which Lord Macdonald had identified as one of the 'central problems' with the current system. The JCHR, therefore, sensibly recommended that no new control order should be made which contained obligations that are 'more extensive than those proposed to be made available under the new regime of TPIMs'.[213]

Finally, it should be noted that, following the publication of the Review, a clause was included in the Protection of Freedoms Bill to delete section 25 of the Terrorism Act 2006. This clause would remove the power of the United Kingdom government to use secondary legislation to restore extended pre-charge detention. Draft primary legislation, as called for by the Review, has also been produced by the United Kingdom government in the form of the Draft Detention of Terrorist Suspects (Temporary Extension) Bills.[214] The effect of these Bills, if introduced and approved by Parliament, would be to extend the maximum period of pre-charge detention to 28 days for a period of three months and the draft legislation is currently undergoing a process of Parliamentary pre-legislative scrutiny.

210 *Ibid.*, at p. 43, par. 27.

211 SI 2011/716. The SI was laid before Parliament on 3 February 2011 and came into force on 11 March 2011.

212 JCHR, *Renewal of Control Order Legislation 2011.*

213 *Ibid.*, at par. 33.

214 These Bills were published on 11 February 2011.

LA DÉTENTION AVANT JUGEMENT EN DROIT FRANÇAIS

Jean Pradel*

I. INTRODUCTION

Parler de la détention après jugement et de la détention avant jugement n'est pas la même chose du tout. Après décision définitive, la personne est présumée coupable et elle doit exécuter sa peine, même si le droit actuel prévoit (et multiplie) les mesures libérales d'individualisation. Avant jugement contraire, une attitude répressive des autorités est plus fragile : en effet la personne privée de sa liberté est présumée innocente, même si en fait les éléments à charge sont puissants. Le droit ne correspond pas toujours avec le fait.

C'est pourquoi les normes relatives à la détention avant jugement sont extrêmement nombreuses. Elles sont d'abord internationales, ce qui n'étonne personne compte tenu de l'importance de la matière et, faut-il le rappeler, des multiples dérapages ou dysfonctionnement qui apparaissent dans certains pays. Bien évidemment, aussi, les législateurs nationaux, celui de la France comme les autres, ont brossé un cadre national fait de distinctions subtiles à partir de principes directeurs. Mais le législateur n'est pas tout car il faut bien savoir comme s'exécute la détention. Il faut encore s'interroger sur les alternatives à la détention avant jugement : la détention est en effet une mesure extrême dont les magistrats peuvent parfois faire l'économie grâce à certains instruments juridiques dont il faudra décrire les grands traits. Une conclusion enfin s'impose. Ce sont tous ces points qui vont être examinés pour la France.

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II. CADRE LÉGAL : NORMES INTERNATIONALES ET DE DROITS DE L'HOMME

Parler de la détention avant jugement soulève d'emblée un redoutable débat. A l'encontre d'une telle institution, l'on invoque aussitôt deux arguments, pour aller à l'essentiel: la liberté d'aller et de venir et la présomption d'innocence. Il est évident en effet que la confiscation de la liberté avant jugement atteint ces deux prérogatives attachées à la qualité d'être humain. Et c'est d'autant plus vrai que la liberté d'aller et venir, et la présomption d'innocence sont des valeurs aujourd'hui traditionnelles[1] et qui ont une nature constitutionnelle.[2]

Et pourtant la société doit pouvoir se défendre contre ceux qui par méchanceté ou par intérêt déchirent le pacte social. Or pour sauver celui-ci, il faut bien que les autorités puissent, dès avant la décision judiciaire finale, prendre des mesures d'urgence. Ces mesures qui peuvent attenter à la liberté de la personne suspectée sont rendues indispensables pour éviter sa fuite et la réitération de son acte et bien sûr pour permettre le rassemblement des preuves.

Les juristes sont donc conduits à admettre en pratique des mesures qu'ils réprouvent au nom des principes traditionnels. La procédure pénale apparaît ainsi comme un équilibre entre des impératifs opposés. Faustin-Hélie à la fin du XIXème siècle écrivait qu'il convenait de concilier « deux intérêts également puissants, également sacrés qui veulent à la fois être protégés, l'intérêt général de la société qui veut la justice et la prompte répression des délits, l'intérêt des accusés qui est lui aussi un intérêt social et qui exige une complète garantie des droits de la cité et des droits de la défense.[3] A la limpidité prophétique et aujourd'hui banale du grand auteur, fait aujourd'hui écho le Conseil constitutionnel qui en 1996 décida ceci: « Considérant que la recherche des auteurs d'infractions est nécessaire à la sauvegarde de principes et droits de valeur constitutionnelle; qu'il appartient au législateur d'assurer la conciliation entre cet objectif de valeur constitutionnelle et l'exercice des libertés publiques constitutionnellement garanties, au nombre desquelles figurent la liberté individuelle et notamment l'inviolabilité du domicile… ».[4] Conciliation, le mot essentiel est lâché. Il en résulte que sous réserve de limites, la liberté individuelle peut être restreinte, y compris celle d'aller et de venir, et même avant jugement.

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[1] Remontant à la Déclaration des droits de l'homme et du citoyen, d'août 1789.

[2] Laquelle, selon la doctrine, fait partie du « bloc constitutionnalité », avec le Préambule de la Constitution de 1946, les principes fondamentaux des lois de la République (PFLR) et bien sûr la Constitution de 1958. Une décision importante du Conseil constitutionnel, la décision n° 71-44 DC du 16 juillet 1971 donne valeur constitutionnelle au Préambule de la Constitution de 1958 dont le premier alinéa fait référence à la Déclaration de 1789 et au Préambule de la Constitution de 1946.

[3] Faustin-Hélie, *Traité de l'instruction criminelle*, 2ème éd., 1866, tome 7, p. 4.

[4] Décision n° 96-377 DC du 16 juillet 1996, § 16, D. 1997, 69, note B. Mercuzot; JCP 1996-II-22709, note Nguyen Van Tuang.

Cette nécessité des atteintes à la liberté avant jugement est reconnue partout. L'article 5 Conv. EDH, intitulé « Droit à la liberté et à la sûreté », traite notamment des atteintes à la liberté avant jugement : en son paragraphe 1, il y est décidé que « nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales… c) s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci… ». Faut-il préciser que la Conv. EDH a été ratifiée par la France et qu'elle fait donc partie de son droit positif, y ayant même un effet direct.[5] Sur le plan international, on peut citer aussi le Pacte international relatif aux droits civils et politiques (de 1966) et la Convention internationale des droits de l'enfant (de 1989). Ces deux textes ont eux aussi été ratifiés par la France et ils ont un effet direct sur le droit français, même s'ils apportent peu d'éléments en ce qui concerne la privation de liberté avant jugement.

A côté de ces instruments internationaux ou plutôt à un degré inférieur – il faut citer les textes législatifs français dont les principaux sont les suivants : l'ordonnance du 2 février 1945 relative à l'enfance délinquante et, pour les majeurs, le Code de procédure pénale (ci-après CPP). Ces textes internes sont très précis et porteurs d'une jurisprudence importante qui, le plus souvent, se combine avec celle de la Cour européenne des droits de l'homme (ci-après CEDH), laquelle n'a pourtant pas d'effet direct (contrairement à la Conv. EDH), tout en ayant de fait une importance essentielle.[6]

Les textes nationaux (mais pas les textes supranationaux) distinguent deux sortes de privation de liberté. A lire en effet l'ordonnance de 1945 (sur les mineurs délinquants) et le CPP, le législateur a institué la garde à vue et la détention provisoire. La première peut être qualifiée de détention policière et la seconde de détention judicaire.[7] On les examinera tour à tour.

5 Ce qui veut dire que le texte international s'applique prioritairement au droit national. Cet effet direct résulte de l'article 55 de la Constitution : « Les traités et accords régulièrement ratifiés ou approuvés ont, dès leur publication une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ». V. aussi, Civ. 1ère, 18 mai 2005, JCP 2005-II-10081, note F. Granet-Lambrechts et Y. Strickler, arrêt consacrant avec éclat l'effet direct de la Convention de 1989. *Add* P. Bonfils et A. Gouttenoire, Droit des mineurs, 1ère éd., Dalloz, 2008, n° 61 et s.

6 J. Pradel, Droit pénal général, 17ème éd., 2008-2009, éd. Cujas, n° 163 et 164 où sont rappelés des exemples d'influence de la CEDH sur le droit national français, lequel créé souvent une loi pour être en accord avec la CEDH.

7 Les droits étrangers font la même distinction, v. J. Pradel, Droit pénal comparé, 3ème éd., Dalloz, 2008, n° 338 et s.

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

III.1. LA DÉTENTION POLICIÈRE

Très pratiquée par les enquêteurs[8], la détention policière, appelée garde à vue par le législateur fut longtemps une mesure de fait sans réglementation. Les enquêteurs mettaient un suspect (voire un témoin) en garde à vue pendant quelques heures et les décisions de justice admettaient que la rétention de la personne pouvait durer jusqu'à un jour. Avec le CPP en 1959, la matière fut réglementée et des lois postérieures affinent la matière. Aujourd'hui la durée de la mesure est plus ou moins brève. D'un autre côté, cependant, la défense est encore peu présente. Mais une importante réforme est en vue.

Une durée plus ou moins brève

Par principe la détention policière ne saurait s'étendre sur une durée très longue, à l'inverse de la détention judiciaire. Et de toute façon, elle est plus brève pour les mineurs que pour les majeurs.

S'agissant des *mineurs*, c'est une loi du 4 janvier 1993 modifiée ensuite qui rajoute à l'ordonnance du 2 février 1945 des dispositions strictes (article 4). La matière est fondée sur un système de tranches d'âge et subsidiairement de gravité de la peine encourue.

Le mineur de plus de dix ans et de moins de treize ans ne peut pas être gardé à vue en principe. Toutefois, le mineur peut être « retenu à la disposition d'un officier de police judiciaire avec l'accord » d'un magistrat pour une durée de douze heures au maximum, sauf prolongation d'une égale durée, sur décision motivée du magistrat. Encore faut-il qu'il y ait des indices de présomption d'une infraction punie d'au moins cinq ans.

Le mineur de treize à seize ans ne peut être gardé à vue que pendant vingt quatre heures si la peine encourue est inférieure à cinq ans (art. 4-V). Dès lors une prolongation n'est possible que pour les affaires graves et alors le statut de ce mineur rejoint celui des majeurs pour lesquels la garde à vue peut être prolongée, d'ailleurs même si la peine encourue est inférieure à cinq ans.

Enfin le mineur de plus de seize ans est soumis au régime des majeurs. Et même, en cas de criminalité organisée, la garde à vue peut atteindre quatre jours « lorsqu'il existe une ou plusieurs raisons plausibles de soupçonner qu'une ou plusieurs personnes majeures ont participé, comme auteurs ou complices, à la commission de l'infraction » (art. 4-VI, ord. 1945 et 706-88 CPP combinés).

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[8] Et même de plus en plus (et trop) : 300 000 en 2000 et 700 000 en 2009.

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A titre complémentaire, on indiquera que toute prolongation de garde à vue, quand elle est possible, doit être précédée d'une présentation préalable au procureur ou au juge, que les parents doivent être avisés de la mise en garde à vue de leur enfant, qu'un examen médical doit être ordonné pour apprécier la compatibilité de la mesure avec l'état de santé de l'intéressé et qu'un enregistrement audiovisuel de l'audition du mineur doit être effectué.[9]

Les *majeurs*, de leur côté, sont évidemment soumis à un statut plus sévère, encore que très réglementé lui aussi. Cette fois, le seul critère retenu est celui de la gravité de la peine encourue.

En droit commun, soit pour le plus grand nombre d'infractions la garde à vue dure vingt quatre heures, la mesure étant décidée par l'officier de police judiciaire « pour les nécessités de l'enquête » (art. 63 al. 1 CPP). Il faut qu'existent « une ou plusieurs raisons plausibles de soupçonner la personne d'avoir commis ou tenté de commettre une infraction » (id), ce qui est la reprise littérale de l'article 5 §1c Conv. EDH. De plus, dès le début de la garde à vue, l'enquêteur doit aviser la personne[10] et le procureur.

En cas de besoin, une prolongation de vingt quatre heures est possible. Elle est accordée par le procureur, la présentation de la personne à celui-ci étant possible sans être obligatoire.[11]

En matière de criminalité organisée au sens des articles 706-73 et 706-74 CPP[12], le système adopté est plus lourd. En effet, à l'issue des quarante huit heures (durée maximale en droit commun), deux prolongations de vingt quatre heures chacune ou une seule de quarante huit heures sont possibles. La décision est prise par un juge, statuant à la requête du procureur (art. 706-88 CPP). La personne est présentée devant le juge. Et dans le cas particulier des actes de terrorisme, une nouvelle prolongation de deux jours est possible « s'il existe un risque sérieux de l'imminence d'une action terroriste en France ou à l'étranger » ou si « les nécessités de la coopération internationale le requièrent impérativement », le juge ne pouvant alors agir « qu'à titre exceptionnel » (art. 706-88 CPP) : alors la garde à vue peut durer six jours et en pratique cette possibilité n'est jamais utilisée. On aura noté que les prolongations de garde à vue en cas de criminalité organisée sont toujours décidées par un juge (et non

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9 Ces exigences se fondent sur la vulnérabilité du mineur, Crim., 25 octobre 2000, Bull. crim., n° 316 ; RSC 2001, 407, obs. Commaret.

10 Et lui indiquer ses droits à aviser sa famille et à bénéficier de l'assistance d'un avocat. Tout retard injustifié dans cette notification « porte nécessairement atteinte aux intérêts de la partie qu'elle concerne », c'est-à-dire de la personne gardée à vue, de sorte que la procédure est nulle, Crim., 30 avril 1996, Bull. crim n° 182 ; RSC 1996, 879, obs. J. P. Dintilhac, nombreux arrêts postérieurs qui tous traduisent le souci des juges de protéger l'individu.

11 En principe elle n'a presque jamais lieu.

12 Lesquels énumèrent les infractions de criminalité organisée comme le meurtre en bande organisée, le trafic de drogue, le vol en bande organisée, le blanchiment et bien sûr le terrorisme pour ne donner ici que quelques exemples. La peine est toujours au moins égale à 10 ans de privation de liberté.

par le procureur). Le juge est le défenseur des libertés individuelles. L'appel au juge met la France à l'abri de toute critique de la part de la CEDH : en effet, l'article 5 §3 Conv. EDH veut que toute personne arrêtée soit aussitôt traduite « devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires », cet autre magistrat devant tout comme le juge être indépendant. Nous touchons là à une garantie. Mais la plus importante consiste dans le respect des droits de la défense. Or à cet égard, la défense est peu présente.

Une défense peu présente

En droit français, traditionnellement, la défense est beaucoup plus présente au cours de l'instruction (et donc devant le juge d'instruction) qu'au cours de l'enquête de police. Les raisons sont probablement que l'enquête de police ne peut se faire qu'en l'absence d'un avocat (plus ou moins présumé entraver les recherches) et que de toute façon, pour les affaires complexes du moins, les investigations sont amplifiées et en la présence d'un avocat qui a accès au dossier, assiste son client aux interrogatoires et peut demander des mesures probatoires complémentaires.

S'agissant de l'enquête policière, l'avocat n'apparait traditionnellement que si le suspect n'était pas en garde à vue : en effet ce suspect pouvait toujours rencontrer un avocat et lui demander conseil. Pour le suspect en garde à vue, notre droit est passé par trois phases.

1. Lors de la *première phase*, l'avocat est absolument absent en droit et en fait. Cette situation contrastait avec celle de certains droits étrangers et faisait l'objet de critiques notamment de la part de la défense qui soulignait la différence entre le suspect gardé à vue et celui qui ne l'est pas.[13]

2. La *seconde phase* s'ouvre avec les lois des 4 janvier et 24 août 1993, créatrices de l'article 63-4 CPP modifié ultérieurement. Le principe nouveau est celui d'un entretien de trente minutes de l'avocat avec son client gardé à vue, dans des conditions qui en garantissent la confidentialité. Mais l'avocat n'assiste pas son client lors des interrogatoires et il ne peut consulter le dossier. Sur un plan plus technique et précis, trois questions se posent.

A quel moment d'abord se place cet entretien ? Selon l'alinéa 1 de l'article 63-4, « dès le début de la garde à vue, la personne peut demander à s'entretenir avec un avocat ». Et en cas de prolongation de la garde à vue, un nouvel entretien est possible « dès le début de la prolongation » (al. 6). Mais en matière de criminalité organisée un régime plus strict est prévu et ce régime est même dual : 1° pour les affaires d'enlèvement et séquestration de personnes, de proxénétisme aggravé, de vol en bande organisée, d'extorsion aggravée et

13 Le Barreau face aux problèmes actuels de la justice pénale, travaux du XLI Congrès de l'Association nationale des avocats, Toulouse, mai 1969, p. 16 et s., Dalloz 1970. *Add.* R. Merle, Le rôle de la défense en procédure pénale comparée, RSC 1970, p. 1 et s.

d'association de malfaiteurs, l'entretien se situe à l'issue de la quarante huitième heure ; 2° pour les affaires de trafic de stupéfiants et d'actes de terrorisme, l'entretien n'a lieu qu'à l'issue de la soixante douzième heure (al. 7). Le Conseil constitutionnel, dans sa décision du 2 mars 2004, n'a pas annulé ces dernières dispositions pourtant sévères car la garde à vue est soumise au contrôle de l'autorité judiciaire : les prolongations au-delà de quarante huit heures sont décidées par un juge et, de son côté le procureur est avisé de la qualification des faits par les policiers dès qu'il est informé par ces derniers du placement en garde à vue.[14]

Quelles sont ensuite les formes de l'entretien avec l'avocat ? Le choix de l'avocat est fait par l'intéressé, à défaut par le bâtonnier de l'ordre des avocats. Le droit à l'assistance de l'avocat est absolu : les magistrats et les policiers ne peuvent l'exclure en invoquant les nécessités de l'enquête.[15] A l'issue de l'entretien, l'avocat peut présenter des « observations écrites qui sont jointes à la procédure » (al. 4). L'avocat ne peut évidemment faire état de cet entretien auprès de quiconque pendant la durée de la garde à vue (al. 5), ce qui a pour but d'exclure une éventuelle collusion entre avocat et complices non en garde à vue.

Quelle est enfin la nature de l'intervention de l'avocat ? Le Conseil constitutionnel, dans sa décision du 11 août 1993, a intégré l'avocat dans les droits de la défense en déclarant : « Le droit de la personne à s'entretenir avec un avocat au cours de la garde à vue constitue un droit de la défense qui s'exerce durant la phase d'enquête… ». Or le même Conseil avait déclaré dans une décision du 2 décembre 1976 que le respect des droits de la défense faisait partie des « principes fondamentaux reconnus par les lois de la République » et donc du « bloc de constitutionnalité ».[16] Concrètement, l'entretien est et n'est qu'un réconfort moral pour le gardé à vue qui va savoir comment va se dérouler la procédure.

3. Légalement le droit français en est encore là et pourtant une *troisième phase* vient de s'ouvrir avec un arrêt de la CEDH en date du 27 novembre 2008.[17] Le passage le plus important est celui-ci : « La Cour estime que pour que le droit à un procès équitable consacré par l'article 6 §1 demeure suffisamment concret et effectif, il faut en règle générale que l'accès à un avocat soit consenti dès le premier interrogatoire d'un suspect par la police, sauf à démontrer, à la lumière des circonstances particulières de l'espèce, qu'il existe des raisons impérieuses de restreindre ce droit. Même lorsque des raisons impérieuses peuvent exceptionnellement justifier le refus de l'accès à un avocat, pareille restriction – quelle que soit sa justification – ne doit pas assidûment préjudicier aux droits découlant pour l'accusé de l'article 6. Il est en principe porté une atteinte

[14] J. Pradel, étude de la loi du 9 mars 2004 au JCP 2004-I-134, n° 44, p. 886.
[15] Ce qui est possible en droit anglais pendant les 36 premières heures.
[16] L. Favoreu et L. Philip, *Les grandes décisions du Conseil constitutionnel*, 12ème éd., 2003, Dalloz, not. Pp 254, 577 et 718.
[17] CEDH, 27 novembre 2008, *Salduz c./ Turquie*, requête n° 36391/02.

irrémédiable aux droits de la défense lorsque des déclarations incriminantes faites lors d'un interrogatoire de police subi sans assistance possible d'un avocat sont utilisées pour fonder une condamnation » (§55).[18] L'avocat doit donc pouvoir être présent lors de l'interrogatoire policier en garde à vue. Cependant, on notera que la formule n'est pas absolue, résumant implicitement le cas des infractions de criminalité organisée. En outre, la Cour ne paraît pas exiger que l'avocat consulte le dossier.

Cet arrêt a jeté le trouble dans les milieux judiciaires en France. Certains bâtonniers ont conseillés à leurs confrères de soulever systématiquement la nullité de la procédure lorsque l'avocat n'était pas présent lors de l'interrogatoire en garde à vue. Le ministère de la justice a publié une note, en novembre 2009, à l'intention des procureurs, en leur demandant de s'opposer à la nullité quant la poursuite pouvait s'appuyer sur des éléments probatoires extérieurs aux déclarations de l'intéressé en garde à vue (déclarations faites avant-garde à vue, déposition de témoins, traces, indices…). Un projet de loi a été déposé devant le bureau de l'Assemblée nationale au début de 2010. Il est très probable qu'une loi sortira dans les prochains mois, qui consacrera le droit du suspect gardé à vue à bénéficier de la présence d'un avocat pendant ses interrogatoires. La condition de la personne objet d'une détention policière alors se rapproche de celle de la personne en détention judiciaire.

Une réforme en vue

Le législateur a ouvert en 2009 le droit pour les citoyens de soulever l'inconstitutionnalité d'une loi, avec effet à compter du 1er mars 2010. Aussitôt, une foule de plaideurs s'est appliquée à saisir le juge pénal (ou autre). Celui-ci peut saisir à son tour la Cour de cassation qui, faisant un second tri, peut saisir, si la demande est sérieuse et nouvelle, le Conseil constitutionnel.

C'est ainsi que ce dernier a été saisi de la prétendue non-conformité aux principes constitutionnels du régime de la garde à vue : la défense ne serait pas vraiment assurée alors que les droits de la défense constituent un principe constitutionnel plusieurs fois consacré par les juges constitutionnels.

Les juges rendirent ainsi une importante décision en date du 30 juillet 2010.[19] Ils firent une distinction entre les affaires de criminalité organisée et les affaires de droit commun.[20]

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18 Arrêt très important car rendu en grande chambre. D'autres décisions suivent cet arrêt.

19 Décision n° 2010-14 Question prioritaire de constitutionnalité (QPC) du 30 juillet 2010, M. Daniel W et autres (Garde à vue).

20 Les infractions de criminalité organisée sont limitativement énumérées aux articles 706-73 et 706-74 CPP (meurtre en bande organisée, tortures et actes de barbarie en bande organisée, proxénétisme aggravé, vol en bande organisée, fausse monnaie, actes de terrorisme, blanchiment et recel aggravés…). Toutes infractions autres sont dites infractions de droit commun.

Pour les premières, le Conseil décide que la question lui avait déjà été posée en 2004 dans le cadre du contrôle *a priori* qui à l'époque existait seul et qu'elle n'était donc pas nouvelle. Rappelons en effet que si une question a déjà été posée au Conseil, celui-ci ne peut la réexaminer que si les « circonstances » ont changé. Or depuis 2004, elles n'ont pas changé.

Pour les affaires de droit commun, le Conseil reconnaît avoir déjà statué en 1993, mais ajoute que depuis lors les « circonstances » ont changé : le nombre de garde à vue s'est accru énormément en quelques années et la pratique du traitement réel fait que le procureur prend sa décision sur conversation téléphonique avec l'enquêteur alors que la garde à vue n'est pas forcément terminée de sorte que le cas va passer en jugement sur les seules déclarations du gardé à vue privé d'avocat. Le Conseil constitutionnel entend donc que le suspect bénéficie de « l'assistance effective d'un avocat » et ajoute que « toute personne ayant commis une infraction peut être placée en garde à vue quelle que soit la gravité des faits », ce qui est une invitation au législateur de prévoir des critères de garde à vue.

Il faut bien comprendre que le Conseil constitutionnel n'a pas pour fonction d'écrire les lois. Son rôle est seulement de rappeler les principes à défaut desquelles une loi ne serait pas conforme à la Constitution. Au législateur donc maintenant de faire une nouvelle loi sur la garde à vue, loi qui pourrait d'ailleurs être déférée elle aussi au Conseil !

Comme la réforme est important – il faudra tenir compte de diverses forces ou lobbies, celle des policiers, des magistrats, des avocats, des défenseurs des droits de l'homme – le Conseil a décidé que la loi nouvelle devra intervenir avant le 1er juillet 2011 et que d'ici là le système actuel sera maintenu, quoique non conforme à la Constitution. Sans cette réserve, ce sont des centaines ou des milliers de procédures à base de garde à vue qui seraient annulées à la plus grande joie du malfaiteur chevronné.

III.2. LA DÉTENTION JUDICIAIRE

Le climat est différent. D'abord, alors que la garde à vue s'effectue dans un local de police ou de gendarmerie, la détention judiciaire (ou provisoire) se déroule dans un établissement pénitentiaire et plus précisément dans une maison d'arrêt. De plus, les garanties en faveur de la personne détenue sont nettement plus fortes, ne fût-ce que parce que la détention provisoire peut durer des mois, voire des années, alors que la garde à vue ne saurait dépasser six jours, comme il a été dit. De la sorte, la rigueur de cette détention est à la fois réglementée et atténuée.

Une rigueur réglementée

La décision sur la détention est motivée et la durée de celle-ci est plafonnée.

1. La règle de la *décision motivée* signifie qu'elle se fonde sur des motifs et qu'elle est l'objet d'une motivation, consécutivement à un délicat contradictoire dans le bureau du juge.[21]

La détention doit se fonder sur des motifs ou cas énumérés par la loi. Les motifs indiqués dans le CPP français sont proches de ceux qui figurent ailleurs. De façon générale, l'article 137 CPP, rappelle que le principe est la liberté d'aller, mais « qu'en raison des nécessités de l'instruction ou à titre de mesure de sûreté » la personne peut être astreinte au contrôle judiciaire[22] ou si celui-ci est insuffisant, placée en détention provisoire. Ce texte donne le ton : la détention est exceptionnelle. Et pour en préciser l'esprit, l'article 144 CPP énumère les cas de détention, celle-ci servant à :

1° Conserver les preuves ou les indices matériels qui sont nécessaires à la manifestation de la vérité ;
2° Empêcher une pression sur les témoins ou les victimes ainsi que sur leur famille ;
3° Empêcher une concertation frauduleuse entre la personne mise en examen et ses coauteurs ou complices ;
4° Protéger la personne mise en examen ;
5° Garantir le maintien de la personne mise en examen à la disposition de la justice ;
6° Mettre fin à l'infraction ou prévenir son renouvellement ;
7° Mettre fin au trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé. Ce trouble ne peut résulter du seul retentissement médiatique de l'affaire. Toutefois le présent alinéa n'est pas appliquer en matière correctionnelle ».

Quelques remarques s'imposent à propos de ce texte. En premier lieu, les prescriptions de l'article 144 CPP ne sont pas incompatibles avec celles de l'article 5 §1 C Conv. EDH qui énumèrent le risque de commission d'une infraction et celui de fuite après l'accomplissement d'une infraction. Sans doute le texte français vise t-il d'autres cas, notamment celui de la nécessité des recherches. Mais la CEDH n'a jamais contesté ce cas de détention. En second lieu, le texte national vise les nécessités de l'ordre public comme motif de détention. Mais ce cas est particulièrement encadré et la jurisprudence a déjà indiqué qu'il s'agit de celui apparaissant en France[23] et de celui existant encore quand le juge statue.[24] D'ailleurs une définition de l'ordre public est malaisée. On

21 Au cours de ce débat, prennent nécessairement la parole le représentant du parquet et l'avocat de la personne poursuivie. Après quoi le juge (dit juge de la liberté et de la détention) prend sa décision, art. 145 CPP.

22 Voir, infra III (La détention judiciaire).

23 Crim., 15 octobre 1985, *D.* 1986, 170, note D. Mayer.

24 Crim., 6 mars 1986, *Bull. crim.*, n° 94, 2ème espèce.

y verra que le trouble à l'ordre public résulte avant tout de l'émotion de l'opinion et du fait que celle-ci ne comprendrait par que l'auteur présumé des faits (graves par hypothèse) n'aille pas en prison.

Les motifs doivent se fonder sur une motivation. Le législateur se contente de décliner des raisons abstraites ou motifs théoriques. Or le juge des libertés et de la détention, en décidant l'incarcération de la personne doit « démontrer au regard des éléments précis et circonstanciés résultant de la procédure que la détention constitue l'unique moyen de parvenir à l'un ou plusieurs des objectifs suivants », que sont les sept motifs indiqués ci-dessus. En somme, le juge doit concrétiser les motifs légaux par le rappel de circonstances factuelles propres au cas sur lequel il statue. Si la loi est abstraite et ne peut qu'être abstraite, le juge est concret et doit être tel.

La chambre criminelle de la Cour de cassation contrôle avec minutie la motivation des décisions de mise ou de maintien en détention. Elle casse les décisions qui se bornent à recopier les motifs sans les personnaliser, sans faire apparaître de lien entre ces motifs et les données propres à l'espèce. Et le juge doit se prononcer sur le caractère insuffisant du contrôle judiciaire car le législateur préfère le contrôle judiciaire à la détention provisoire.[25]

Bien entendu la décision de détention implique l'existence d'indices de culpabilité. Sans doute le Code ne l'indique pas directement. Mais la détention ne pouvant être décidée qu'à l'encontre d'une personne inculpée et l'inculpation[26] impliquant des « indices graves ou concordants rendant vraisemblable » la participation à la commission de l'infraction (art. 80-1 al. 1 *in fine* CPP), la détention n'est possible que si existent ces indices. On notera que ces indices, suffisants pour inculper ou détenir ne suffisent pas à condamner, la condamnation impliquant des preuves.[27]

2. Si la décision de détention doit être motivée, la *détention elle-même est plafonnée*. Le droit français adopte un système de tranches avec pour critères principaux la nature des infractions et la complexité des affaires. Le système est subtil. On le résumera.

Après avoir décidé à l'article 144-1 CPP que « la détention ne peut excéder une durée raisonnable au regard de la gravité des faits reprochés à la personne mise en examen et de la complexité des investigations nécessaires à la manifestation de la vérité »[28], le législateur distingue entre délits et crimes.

En matière de délit, l'article 145-1 CPP décide que la détention ne peut en principe dépasser quatre mois. Mais si l'intéressé a déjà été condamné à plus d'un an d'emprisonnement et s'il encourt une peine supérieure à cinq ans, la

25 J. Pradel, Procédure pénale, 15ème éd. 2010, n° 744.

26 La loi parle aujourd'hui de mise en examen, expression lourde ayant remplacée l'inculpation. Il aurait été meilleur de ne rien changer.

27 Voir dans le même sens CEDH, 28 octobre 1994, *Murray c./ Royaume-Uni*, § 55.

28 Echo à l'article 5 § 3 Conv. EDH selon lequel la personne détenue a « le droit d'être jugée dans un délai raisonnable au libérée pendant la procédure ».

détention, par renouvellements de quatre en quatre mois, peut atteindre dans certains cas (terrorisme, trafic de drogue…) deux ans et quatre mois.

En matière de crime (art. 145-2 CPP), la détention est en principe d'un an. Mais des dépassements sont possibles pour des durées de six mois en six mois. Le plafond est de deux, trois ou quatre ans, selon la durée de la peine encourue, voire à titre exceptionnel de quatre ans et huit mois.

Toutes ces prolongations donnent lieu à un débat contradictoire (en présence du parquet et de l'avocat de l'inculpé), le juge prenant la décision. Et les prolongations sont toujours fondées sur la nécessité de poursuivre les investigations et de protéger la société face au risque de dangerosité de l'intéressé.[29]

Les garanties prévues en faveur de la personne sont donc considérables (elles s'accroissent même au fil des lois successives). Cependant la détention préalable reste un mal, même si elle est nécessaire. D'où les créations de certaines mesures pour en atténuer la rigueur.

Une rigueur atténuée

La détention provisoire n'est jamais obligatoire et, si elle a été décidée, elle peut à tout moment disparaître. La personne peut en effet être mise en liberté soit à sa demande, soit à la requête du parquet, soit même d'office sur décision du juge.

L'élargissement de la personne peut intervenir si le maintien en détention n'est plus nécessaire (les preuves sont là et le risque de fuite a disparu compte tenu par exemple des garanties offertes par l'intéressé). Un cas particulier est celui où la qualification criminelle ne peut plus être maintenue au cours de l'instruction, les faits apparaissant comme simplement correctionnels. Or si la détention est en pratique l'usage en matière criminelle, elle ne l'est pas en cas de délit correctionnel. Alors le juge pourra élargir la personne (art. 146 CPP).

Le processus d'élargissement est toujours le même. Le juge d'instruction sollicite l'avis du parquet, qui prend sa décision. Si la demande émanait de la personne et si le juge décide la mise en liberté, le parquet, s'il avait pris des réquisitions de refus d'élargissement, peut faire appel de la décision du juge. L'appel est porté devant la chambre de l'instruction, juridiction collégiale, composée souvent d'anciens juges d'instruction.

[29] Bien évidemment, l'intéressé peut à tout moment solliciter sa mise en liberté et faire appel d'une décision qui lui est défavorable.

IV. ELÉMENTS FACTUELS SUR LA DÉTENTION (ÉTABLISSEMENTS) ET DROITS DES PERSONNES DÉTENUES AVANT JUGEMENT

La personne mise en détention est placée dans un établissement pénitentiaire. Le régime applicable à cette personne est décrit dans un bref chapitre du CPP, intitulé « De l'exécution de la détention provisoire » (art. 714, 715 et 716).

Dans la tradition, il y avait une maison d'arrêt par département.[30] Actuellement, beaucoup d'établissements sont vétustes et sont fermés, d'autres étant construits à la place. Le ministre de la justice, Madame Alliot-Marie a annoncé le 26 juillet 2010 que 23 prisons seraient fermées d'ici 2017, ce qui correspond à 9 000 places tandis que 14 000 autres seront créées d'ici là. La France comptera alors 68 000 places de prison dont la moitié auront été ouvertes après 1990. Evidemment sur toutes ces places, seulement le tiers servira pour les détenus provisoires, ceux-ci représentant en effet le tiers de la population pénale.[31]

Le régime pénitentiaire est dans l'ensemble le même pour les prévenus et pour les condamnés à ceci près que les premiers sont en principe placés en cellule individuelle de jour et de nuit (art. 716 et D 58 CPP). Rien n'interdit cependant à un prévenu de solliciter un régime autre (art. 716).

Enfin le juge d'instruction peut prescrire à l'encontre de la personne détenue une interdiction de communiquer pour une période de dix jours, renouvelable une fois et pour la même durée. Cette mesure vise à éviter des communications avec d'autres détenus du même établissement poursuivis pour des faits identiques en cause. Mais cette interdiction ne peut concerner l'avocat (art. 145-4 CPP). Par ailleurs, après cette période de vingt jours, le juge d'instruction ne peut refuser de délivrer un permis de visite aux membres de la famille que par une décision écrite et motivée au regard des nécessités de l'instruction (id.).

V. ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

Deux séries de techniques ont été instituées : une alternative à la détention et, a posteriori, des mesures compensatoires.

1. L'alternative est bien connue : c'est le *contrôle judiciaire*. Créé en 1970, le contrôle judiciaire est une demi-mesure par l'effet de laquelle le juge au lieu de

[30] Dans ces établissements sont hébergés également les condamnés à une courte peine (en principe inférieure ou égale à un an). Concrètement le détenu provisoire qui passe en jugement et qui est condamné restera dans le même établissement si le total de sa détention ne dépasse pas deux ans.

[31] Soit actuellement 20 000 personnes environ.

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détenir (ce qui est trop grave et inutile) et de laisser l'intéressé en totale liberté (ce qui n'est pas suffisant) adopte un tiers parti : celui d'une liberté associée à des obligations, au nombre de dix sept. On citera l'interdiction de sortir des limites territoriales déterminées par le juge, l'interdiction de s'absenter de son domicile ou de se présenter périodiquement à un service de police, l'obligation de répondre aux convocations de toutes autorités[32], la remise du passeport ou du permis de conduire, la soumission à des mesures de traitement médical[33], l'obligation de verser un cautionnement[34], l'interdiction de s'approcher du domicile conjugal.[35]

La mesure du contrôle judiciaire est modifiable en cours de procédure. Elle peut notamment être supprimée si l'intéressé n'en respecte pas les modalités.

Actuellement le contrôle judiciaire est de plus en plus souvent prononcé.[36]

Une loi du 24 novembre 2009 créé, à côté du contrôle judiciaire le placement sous bracelet électronique. Mais ce procédé nouveau n'est pas encore entré en application.

2. Après l'achèvement de la détention provisoire, c'est-à-dire au moment où s'active la phase préparatoire du procès, il existe des *mesures a posteriori*, destinées à « effacer » rétroactivement le préjudice causé à l'intéressé par son incarcération.

D'abord en cas de non-lieu ou de relaxe, il a droit de solliciter une indemnisation pour compenser le préjudice né de son incarcération. Ce système créé par une loi de 1970 est traité aux articles 149 à 149-3 CPP. Une requête est présentée par la personne au premier président de la Cour d'appel[37], avec recours possible devant une commission nationale de réparation des détentions, placée auprès de la Cour de cassation. Le principe est celui de la réparation intégrale de tous les préjudices. En revanche, aucune réparation n'est prévue en cas de contrôle judiciaire.

Ensuite, en cas de condamnation, le temps de détention provisoire s'impute intégralement et automatiquement sur la durée de la peine prononcée si celle-ci consiste en une privation de liberté (art. 716-4 CPP). Cette règle, très raisonnable, conduit en fait la juridiction de jugement à prononcer une peine privative de liberté quand le prévenu ou l'accusé comparaissent détenus. Ainsi la détention provisoire appelle la condamnation à la privation de liberté.

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32 Par exemple l'obligation de répondre à une convocation d'un expert.

33 On pense aux toxicomanes.

34 La caution pour prix de la liberté accordée *ab initio* ou retrouvée après une période de détention provisoire peut être très élevée, voir l'affaire *Mangouras* de ce capitaine de marine pollueur, où la CEDH a admis qu'une somme de 30 000 000 euros n'était pas excessive, CEDH, 8 janvier 2009, RSC 2009, 180 et obs. J.P. Marguénaud.

35 On pense aux nombreux auteurs de violence à l'égard de leur épouse ou concubine.

36 Pour 1000 décisions de détention, on compte 120 décisions de contrôle judiciaire.

37 Dans le délai de six mois à compter du non-lieu ou de la relaxe.

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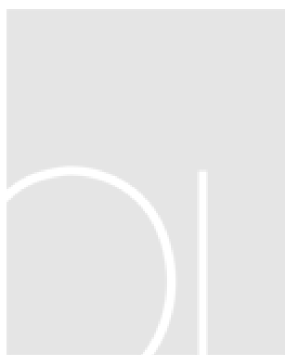
VI. CONCLUSION

Le système français est donc complexe, soucieux de concilier les droits des citoyens à la sécurité et les droits de l'individu à la liberté, à un moment du procès où s'applique la présomption d'innocence.

La matière est tiraillée actuellement entre deux courants : celui de l'ordre public, vivifié par les multiples agressions et actes de violence dont sont actuellement victime les citoyens, et celui des droits de l'homme qui insiste sur la présomption d'innocence et sur l'inutilité de la détention. Seule (et encore) la garde à vue échappe à ce dilemme.

« Cent fois sur le métier, remettez votre ouvrage » écrivait le poète Boileau. C'est bien ce que fait le législateur. Faut-il rappeler que depuis 1959, date de mise en application du CPP, vingt réformes ont été votées sur la détention provisoire. Et il n'y a aucune raison de croire à la modération du législateur dans les années à venir.



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PRE-TRIAL DETENTION IN GERMANY: FACTUAL REDUCTION AND LEGAL CONFUSION

Johannes Feest*

I. INTRODUCTION

There was a time when pre-trial detention was used excessively in Germany and was seen as contributing to general prison overcrowding.[1] Today the use of pre-trial detention has declined considerably. But problems have emerged in the normative domain. For more than 100 years, pre-trial detention was regulated, all too briefly, by the central state as a part of the Code of Criminal Procedure. Recent constitutional reforms have shifted the competency for prison legislation to the individual states (*Länder*). Instead of one brief regulation, Germany is about to have 15 different ones plus a conflict over how much competency the central state can retain in this respect.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Germany is a party to all relevant international and European conventions and other international standards relating to pre-trial detention.[2] No reservations

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1 Johannes Feest, 'Reducing the Prison Population: Lessons from Germany', in: John Muncie/ Richard Sparks (eds.) *Imprisonment. European Perspectives*, New York, London: Harvester Wheatshea, 1991, p. 131–145.

2 International Covenant on Civil and Political Rights (ratified by Germany in 1973); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Germany in 1990); Convention on the Rights of the Child (ratified by

have been entered. In German practice, the most relevant international instruments are:

- the European Convention on Human Rights, incorporated into German Law by statute in 1952; individual complaint possible to the European Court of Human Rights, after seeking relief in German courts
- the European Convention for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (treaty status; no complaints to national or international courts possible)
- the European Prison Rules (Council of Europe, Recommendation 2006[3]).

The European Court of Human Rights (ECtHR) has decided 16 cases involving prisoners in pre-trial detention in Germany. But only in six of these cases, pre-trial detention itself was a central issue. In all six of these cases, the complainant argued that his/her detention had been overly long. In three of these cases, the court found a violation of Article 5 (3) ECHR.[4] The rest of the cases concerned procedural questions not directly connected with detention (length of proceedings; access to the prosecutorial files; fair trial et cetera).

In the years 1991, 1996, 2000 and 2005, Germany has received regular visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[5] These visits always also included visits to police detention facilities and remand prisons.

The European Prison Rules were largely unknown in Germany until the CPT started to use them as a frame of reference for its assessment of prison conditions (since its first visit to Germany in 1993). The German Constitutional Court has quoted the European Prison Rules in at least one recent decision (on youth imprisonment). But because the European Prison Rules focus on sentenced prisoners, they are less frequently quoted with respect to pre-trial imprisonment.

All in all, the influence of the relevant international instruments or international decisions is very limited so far.

Germany in 1992); European Convention on Human Rights (ratified by Germany 1952); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.(ratified by Germany in 1987).

3 While these are not a binding rules, they are seen as "guidelines for legislation and their implementation into practice" (joint foreword by the heads of prison administrations in Austria, Germany and Switzerland in the German language publication of these Rules).

4 ECtHR 29 July 2004, *Cevizovic v. Germany*; ECtHR 10 November 2005, *Dzelili v. Germany*; ECtHR 13 December 2007, *Mooren vs. Germany*.

5 Cf. CPT Web Page (at: www.cpt.coe.int/en/states/deu.htm).

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

The German constitution (*Grundgesetz = Basic Law*) includes a catalogue of "basic rights" (*Grundrechte*). In addition, the Basic Law includes two articles with "basic procedural rights" (*Prozessgrundrechte*). For the present purpose, Article 104 is most relevant.

Article 104 Basic Law [Legal guarantees in the event of detention]:

> "(1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.
> (2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.
> (3) Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.
> (4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom."

Since the constitution is binding law for all German courts, infractions of Article 104 GG can be dealt with directly by the courts dealing with particular cases of police arrest or remand. For the arrested person, there is also always the possibility (after having sought relieve in the regular courts) to complain about such infractions to the Federal Constitutional Court (*Verfassungsbeschwerde*). In fact, this court has become a major point of reference for prisoners, including remand prisoners.[6]

6 In the years 1998–2010 the Federal Constitutional Court has decided 93 cases involving serving prisoners and 145 cases involving remand prisoners. Source: calculation on the basis of the Web Page of the Federal Constitutional Court (www.bundesverfassungsgericht.de/suche.html).

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III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK[7]

German criminal procedure distinguishes two main phases: provisional arrest (*vorläufige Festnahme*) and remand imprisonment (*Untersuchungshaft* = *investigative detention*). Within remand imprisonment, one can distinguish three phases: the pre-trial phase (*Untersuchungshaft* properly so called), remand during the trial phase (*Hauptverhandlungshaft*), and remand during the appeals phase (*Rechtsmittelhaft*).

No published statistics on police detention are available in Germany, neither are statistics on police arrests in connection with crime investigations. The prison statistics include data on remand prisoners, but they do not distinguish between the above phases.

Table 1. Remand Prisoners by age and gender (November 30, 2009)[8]

	14–18	18–21	21 and above	Total
Male	382	960	9,135	10,467
Female	33	57	571	661
Total	**415**	**1,017**	**9,706**	**11,138**

The total number of prisoners in Germany on that same date was 70 817 (3779 of which were women). Remand prisoners constitute 15.7 per cent of the total number of prisoner (the percentage for women is, with 17.5, slightly higher). There are huge differences in the use of remand between the German Länder states: the remand rate (by 100 000 of the population) is 8.8 in northernmost Schleswig-Holstein and 23.5 in southernmost Bavaria.[9]

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[7] See also the extensive analysis of the German situation of Christine Morgenstern, 'Germany', in: A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009.

[8] Source: Statistisches Bundesamt, *Rechtspflege. Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten* (yearly statistics; per November 30), 2010, p. 7 (at: https://www-ec.destatis.de/csp/shop/sfg/vollanzeige.csp?ID=1024197).

[9] Christine Morgenstern, 'Germany', in: A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 402.

Table 2. Remand Prisoners in Germany (2002–2009, November 30)[10]

Year	Total prisoners	Remand prisoners	Percentage Remand
2009	70,817	11,138	15.7
2008	72,259	11,577	15.9
2007	72,656	12,357	17.0
2006	76,629	13,339	17.4
2005	78,664	15,228	19.4
2004	79,452	15,783	19.9
2003	79,153	16,785	21.2
2002	70,203	17,431	24.8
2001	70,245	17,805	25.3
2000	69,221	17,670	25.5

The number of remand prisoners reached its highest point (17,806) in the year 2001 and has gone down regularly ever since, which means that it has decreased in 8 years by 35 per cent and has reached its lowest point ever. At the same time, the share of remand prisoners in the total prison population has gone down from 25.5 per cent to 15.7.

The average length of pre-trial detention is not given in published German statistics. The only way to gather this dimension is by time intervals (Table 3). Even those data are not officially published, but are being collected in the context of a research project.

Table 3. Remand prisoners in Germany by length of detention (2006) (old Federal states and West Berlin only)[11]

Year	Length of pre-trial detention					
	Up to 1 month	1–3 months	3–6 months	6–9 months	12 months	Total
2006	6,272	5,869	6,227	4,485	1,499	24,352
2005	7,247	6,717	7,215	4,587	1,487	27,257
2000	13,049	8,531	8,206	5,310	1,587	36,683
1995	10,452	9,749	8,332	5,495	1,997	36,070

10 Source for 2003–2009: Statistisches Bundesamt, *Rechtspflege. Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten* (yearly statistics; per November 30), 2010, p. 5 (at: https://www-ec.destatis.de/csp/shop/sfg/vollanzeige.csp?ID=1024197); for 2002: Statistisches Bundesamt, *Strafvollzug- Anstalten, Bestand und Bewegung der Gefangenen*, Wiesbaden, 2003, p. 16; for 2001: Statistisches Bundesamt, *Strafvollzug- Anstalten, Bestand und Bewegung der Gefangenen*, Wiesbaden, 2002, p. 16; for 2000: Statistisches Bundesamt, *Strafvollzug- Anstalten, Bestand und Bewegung der Gefangenen*, Wiesbaden, 2003, p. 16.

11 Wolfgang Heinz, Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland – Stand: Berichtsjahr 2006, *Konstanzer Inventar Sanktionsforschung*, 2006 (at: www.ki.uni-konstanz.de/kis/).

Year	Length of pre-trial detention					
	Up to 1 month	1–3 months	3–6 months	6–9 months	12 months	Total
1990	10,410	6,828	5,386	3,588	1,341	27,553
1985	11,297	7,494	6,479	4,250	1,516	31,036
1980	15,138	9,900	6,919	4,176	1,248	37,401
1975	15,317	12,066	8,458	4,735	1,529	42,105

Table 3 shows that over the years short term remand imprisonment has decreased most markedly, while long term remand (i.e. over six months) has remained more or less stable. As a result, the share of long-term remand has increased. Morgenstern explains this plausibly "by the fact that courts order pre-trial detention (only) in cases that are more severe and/or more complicated; therefore, the proceedings and pre-trial detention last longer".[12]

Table 2 also confirms the general downward trend of remand in Germany. It shows that (at least in the "old" Federal states) the use of remand has gone down twice: between 1975 and 1990, and again since 2000. This trend was interrupted only in the ten years after unification (and the turmoil caused by the opening of borders to Eastern Europe).

III.1. BETWEEN ARREST, POLICE CUSTODY AND REMAND

If a person is caught in the act or is being pursued, any person can hold the suspect until the police arrives ("citizen's arrest", Article 127 CCP). The decision to take the suspect provisionally into police custody (*vorläufige Festnahme*) is made by the police officer, if the identity of the suspect cannot be immediately established or if grounds for a remand decision exist (see below). Furthermore, „in case of imminent danger", the prosecution and the police is authorized to make a provisional arrest if the prerequisites for issuance of a warrant of arrest have been fulfilled (Article 127 §2 CCP).

"The arrested person shall, without delay, be brought before the judge of the Local Court in whose district he was arrested at the latest on the day after his arrest, unless he has been released" (Article 128 CCP, repeating and specifying Article 104 of the German Constitution).

Provisional arrest is not seen as pre-trial detention. The decision to remand a person into custody ("*Haftbefehl*") can only be taken by a judge, usually after the

12 Christine Morgenstern, 'Germany', in: A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009, p. 403.

prosecutor has filed a motion (Article 128 CCP). This has to happen within the above time interval, otherwise the suspect has to be released.

The phrase "without delay" is construed by the courts as meaning that this maximum period may not be exhausted and that police and prosecutor must strive to present the arrested person before the judge as soon as possible. The police, for their part, usually consider those (almost) 48 hours as "their time". If an arrest is made just before midnight, they are "losing" almost 24 hours of undisturbed questioning. They will therefore sometimes try to postpone the formal arrest to a point in time just after midnight.

During the time in police custody, the detainee has the right to remain silent and to contact a lawyer (Arts. 163a, 136 CCP). Over and above these basic rights, the legal situation of police detainees leaves a lot to be desired. The CPT from the beginning of its visits to Germany has demanded, on the grounds of torture prevention, certain additional minimum rights for detainees. But these recommendations were only partly implemented, as can be gathered from the reports about the CPT's last visits to Germany:

> "As for *fundamental safeguards against ill-treatment* of persons deprived of their liberty, the CPT was pleased to note that its recommendation that persons in police custody have the right to be examined, if they so wish, by a doctor of their own choice, had been implemented in all Federal Länder […].
> However, shortcomings remain in respect of two other fundamental safeguards. Firstly, criminal suspects apprehended by the police in case of imminent danger (*Gefahr im Verzug*) still do not have a formal right to inform a close relative or a third party of their choice of their situation until they have been brought before a judge to decide on the imposition of remand detention. Secondly, despite the recommendations made by the CPT over almost a decade, criminal suspects apprehended by the police still do not enjoy the right of access to a lawyer from the very outset of their detention. The CPT has stressed yet again that it is during the period immediately following the deprivation of liberty that the risk of intimidation and ill-treatment is at its greatest; no State is free from the risk of such acts. The Committee has called upon the German authorities to ensure that, throughout Germany, all persons deprived of their liberty by the police, for whatever reason, enjoy both of the above-mentioned rights from the very outset of their custody".[13]

> "The CPT is also concerned by the fact that criminal suspects who are provisionally apprehended (*vorläufig festgenommen*) by the police according to sections 127 and 127 b, §1, *StPO* still do not have a formal right to inform a close relative or a third party of their choice about their situation until they have been brought before a judge

13 CPT 2003, Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 15 December 2000, §161 (at: www.cpt.coe.int/documents/deu/2003–20-inf-eng.pdf).

to decide on the imposition of remand detention (i.e. not later than the end of the day following that of their apprehension)."[14]

As a rule, the person in respect of whom remand is being sought will be "brought before the judge" (Article 128 CPP) within 48 hours. In case the respective person is hiding, the judge may sign an arrest warrant and, once arrested, the person will be brought "without delay" before a judge (Article 115 CPP).

III.2. LEGAL BASIS FOR REMAND

German law requires three elements on which the remand decision needs to be based:

- "Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for remand. It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed" (Article 112 (1) CCP).
- *Strong suspicion* (*dringender Tatverdacht*) of a criminal offence: this means that it must be highly probable that the suspect has committed the offense and will be convicted for it. The level of suspicion must be higher than the one for starting a preliminary investigation into an offence, where only "sufficient suspicion" (*hinreichender Tatverdacht*) is required.
- *Grounds for remand* (*Haftgründe*): originally, Article 112 (2) CCP established a closed catalogue of such grounds:
  - flight/hiding (*Flucht*)
  - the risk of absconding (*Fluchtgefahr*)
  - the risk of tampering with evidence or collusion (*Verdunklungsgefahr*).

To these "classical grounds" Article 112 a CCP adds another possibility: the risk of recidivism (*Wiederholungsgefahr*) with respect to a long list of offenses (including certain sexual offences, drug trafficking, burglary, fraud, arson et cetera). This has been criticized as a deviation from the classical goal to guarantee that the suspect will successfully be brought to trial and as a violation of the presumption of innocence.[15]

Another later addition is the arrest and remand in connection with accelerated proceedings (Article 127 b CCP). The prosecution as well as the police are

[14] CPT 2005, Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005, Strasbourg, §19 (at: www.cpt.coe.int/documents/deu/2007–18-inf-eng.pdf).

[15] Manfred Seebode, *Das Vollzug der Untersuchung*shaft, Berlin 1985, p. 74 ff.

authorized to arrest provisionally a person caught in the act or being pursued: "if it is probable that an immediate decision will be taken in accelerated proceedings and if, on the basis of certain facts, it is to be feared that the arrested person will fail to appear at the main hearing". Both the notion of accelerated proceedings and the detention in connection with it have been criticized as disproportional.[16]

Every one of these grounds for remand (*Haftgründe*) must be substantiated by specific facts. In the case of capital crimes (like murder, manslaughter and the like), the threshold of substantiation can be lowered (Article 112 (3) CCP).

Proportionality

Even if the above elements can be proven, remand detention is not called for when it is seen as disproportionate with respect to the likely outcome of the case. This general rule is supplemented by another norm (Article 113 CCP) specifying that for offences "punishable only by imprisonment of up to six months, or by a fine up to one hundred and eighty daily units, remand detention may not be ordered on the ground of a risk of collusion".

In such cases, even on the ground of a risk of flight, remand detention may be imposed only under certain additional conditions (previous flights; no permanent domicile; unclear identity). The principle of proportionality does, however, not explicitly rule out remand in cases where imprisonment is not provided as a penalty. Statistical data show that in a substantial number of cases, persons remanded into custody end up being sentenced to fines or to suspended prison terms.

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III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

The remand decision can be subjected to judicial review in two different ways:

- The normal appeals procedure (*Beschwerde*), which brings the case to the next higher court. This is normally a written procedure, which can be pursued only once for every decision of the remanding judge.
- Alternatively, the detainee can at any time ask the remanding judge to reconsider the decision (*Haftprüfung*). This can be done repeatedly at any stage of the proceedings (Article 117 CCP) and the detainee can (at least once every two month) ask for an oral hearing. If the detainee has not applied for such a review, the remanding judge has to fix *ex officio* a hearing after three months of remand detention.

16 Felix Herzog, 'Symbolische Untersuchungshaft und abstrakte Haftgründe – Anmerkungen zur Hauptverhandlungshaft', in: *Strafverteidiger* 1997, p. 215.

In all these cases, both points of law and points of fact may be reviewed. Criteria are the legal norms for pre-trial detention. The court will have to make sure that these norms were applied correctly in the first place and that the detention is still warranted in the light of the principle of proportionality, especially with regards to alternatives such as bail (Article 117 CPP) or other less intrusive measures (Article 116 CPP).

There is no absolute time limit with respect to remand detention. But six months constitute a relative limit, over which remand can be prolonged only "if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention" (Article 121 CCP). The prolongation has to be decided by the Regional High Court (*Oberlandesgericht*). Once that time limit has been reached, the prosecution has only the choice between releasing the detainee or applying for a prolongation to the Regional High Court. If, however, the trial has started prior to the expiry of the six months time limit, the running of this time limit is suspended until the pronouncement of the trial judgement. After six months the Regional High Court is in charge of further detention and will have to review the case every three months, without further time-limits, for the rest of the court procedures (including appeals).

This system has ambiguous effects. On the one hand, in the vast majority of cases the detainees are released before the six months time-limit expires. However, once the regional high court has decided that the case is a particularly difficult one, the door is open for much longer detention periods. An empirical study of cases dealt with by the Regional Court (*Landgericht*) in some German cities found that the average length of detention in these cases was between 280 and 295 days.[17]

The issue of unreasonably long deprivation of liberty has also frequently been brought to the attention of the Federal Constitutional Court.[18] But despite of this highly developed system of controls, the European Court for Human Rights has still found violations of Article 5 (3) ECHR.[19]

III.4. INFORMATION, LEGAL REPRESENTATION AND SUPPORT

Any person arrested shall be informed of the offence with which he is charged, when first examined by police officials (Article 163 a (4) CCP). He is also to be

17 Dieter Dölling & Thomas Feltes, 'Dauer von Strafverfahren', in: *Strafverteidiger* 2000, p. 174.

18 For a recent decison see BVerfG EuGrZ (2009), p. 414–417.

19 For the most recent of these decisions cf. ECtHR, 10 February 2006, *Dzelili v. Germany* (detention 5 years and 6 months). In still another case, the ECtHR found no violation, even though the detention had lasted even longer. Cf. ECtHR, 26 January 2007, *Chraidi v. Germany.*

told that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defence counsel of his choice. He shall further be advised that he may request evidence to be taken in his defence (Article 136 (1) CCP).

The detainee has a right to be represented by a lawyer at any stage of the criminal investigation. But that does not mean that the defence counsel is entitled to be present at the police interrogation. The law grants this right of the lawyer to be present only when a prosecutor or a judge examines the client.

Detainees who cannot afford to pay a lawyer, must by law get one, at the latest, after three months in remand detention (Article 140 (1 no. 5) CCP) on the grounds that this has now become a case of mandatory defence (*Pflichtverteidigung*). But mandatory defence can be granted much earlier, upon application or *ex officio* if the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself (Article 140 (2) CCP).

Legal representation is particularly important for the suspect, since only his lawyer may get access to the prosecution's file (Article 147 CPP). Even the defence lawyer can be denied file access as long as the prosecution has not yet finished their investigation. The details are, however, in dispute and the European Court for Human Rights has intervened in a number of cases. The most recent case was a decision by the Grand Chamber of the European Court of Human Rights,[20] which decided unanimously that Germany had violated Article 5 (4) ECHR for lack of speedy review of the lawfulness of the detention and for refusal to grant the applicant 's counsel access to the case file.

If the detainees do not understand or speak sufficiently the German language, the arrest warrant has to be translated for them.

A relative of the arrested person or a person trusted by him shall be notified without delay of the arrest and of every further decision concerning the continuation of detention (Article 114 b CCP).

III.5. RECOMPENSE AND FINAL SENTENCE

As a rule, the time spent in remand detention is automatically counted against the final prison sentence. The court may, however, order for such time not to be credited in whole or in part if in light of the conduct of the convicted person after the offence this would be inappropriate (Article 51(1) CCL). Examples for

[20] ECtHR, 9 July 2009, *Mooren vs. Germany*; the case was originally decided by a chamber on 13 December 2007.

the latter are cases where the detainee has provoked prolonged remand detention for the purpose of reducing the time in a serving prison.[21]

Time spent in remand can lead to recompense, if the detainee is acquitted or if the prosecution or the court decide to drop further proceedings. Such a recompense is, however, excluded if the court has decided not to credit the time spent on remand against the final sentence. It is also excluded if the suspect has intentionally or through gross negligence brought the criminal investigation upon himself.[22]

III.6. MOST IMPORTANT DEVELOPMENTS

The most important factual development over the last 10–15 years has been the gradual decrease of remand detention. This remained "hidden" for some time because of the concomitant increase in the number of convicted prisoners. Since so far nobody has systematically studied the phenomenon, it is unclear whether the decrease of remand in Germany can be ascribed to a gradual decrease of relevant crime, to the successful functioning of the alternatives, or to a growing disenchantment of judges and prosecutors with the institution of remand. For important legal developments see the end of this article.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

Germany finds itself in the midst of a legal transformation with respect to prison laws, including the law of remand prisons. Traditionally, the legal regulation of remand prisons consisted of one article in the Federal Code of Criminal Procedure (CCP). This Article 119 CCP goes back to the 1870s and represents an example of liberal legal thinking:

- the arrested person shall be kept separate from convicted prisoners and shall be entitled to a particular room, except when the physical or mental state of the detainee requires the presence of another person;
- detainees may provide for their own comfort and occupation, only being subjected to such restrictions as are required by the purpose of remand detention or by the need for order in the institution;

[21] Cf. decision by the Federal Supreme Court: BGHSt 23, 307.

[22] This is regulated in a special "Act about the recompense for law enforcement measures" (Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen).

– the detainee may be shackled, but only in certain situations of concrete risk (resistance, absconding, suicide), if no other less severe measure is available;
– all restrictions require a court order; only in situations of urgency interim measures may be imposed by the prosecutor or the prison director, subject to later approval by the judge.

This article was later (1953) supplemented by detailed uniform administrative rules for the practice of remand detention (*Untersuchungshaftvollzugsordnung= UVollzO*) agreed upon by the Länder states. These rules shift the decisional powers from the judge to the prison institution. But since these administrative rules did not have the status of laws, they were not binding for the courts and increasingly seen as insufficient as a basis for the restrictions of the detainees' freedoms. In practice, the remanding judges spared themselves permanent involvement in the daily work of the prison by making the administrative rules binding for the individual case.

Now that the competency for legislation has been transferred to the Länder states, all of them are about to promulgate states laws on the execution of remand imprisonment. By April 2010, in eleven of the sixteen states such laws have come into force. The other states are likely to follow within the next few months. For the interim period, the old administrative regulations are still used in those states that have not yet passed state laws.

It remains to be seen whether the new state laws follow the liberal philosophy of Article 119 CCP or the more restrictive, bureaucratic logic of the administrative rules.

Facilities

While the preliminary detention by the police is administered in police cells (under the responsibility of the Interior Ministries), remand is always carried out in regular prisons (under the responsibility of the Justice Ministries).

There are presently 198 prison institutions in Germany. All prisons are run by the respective Länder states; there are no Federal prisons. Very few of these facilities are run exclusively for the purpose of remand imprisonment. Most remand facilities are therefore part of larger prison institutions (housing mainly sentenced prisoners). Architecturally, remand facilities are hardly any different from facilities for sentenced prisoners. But they offer less possibilities for work, education, training and leisure time activities.

Male juveniles suspects are remanded into facilities for convicted male juvenile offenders. Female juvenile suspects, are –in the absence of juvenile facilities for women- remanded into prisons for convicted female offenders. In both cases, the principle of the separation of unconvicted and convicted prisoners is violated; but other solutions (*e.g.* isolation) are seen as even less in accordance with humane treatment.

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Categories and accommodation

By law, pre-trial detainees are supposed to be, "as much as possible" (Article 119 CCP) accommodated separately from sentenced prisoners. For practical reasons, especially in times of overcrowding, this rule is not always followed.

As long as the detainee has not yet reached the age of 21, pre-trial imprisonment follows the rules for young offenders and is, if possible, served in institutions for young offenders (Article 89c JGG = Youth Court Code). But the court may decide to place even older detainees (up to 24 years of age) in such institutions.

No general arrangements exist to protect specially vulnerable groups of pre-trial detainees. Such arrangements are, however, decided on a case-by-case basis. The same is true for members of groups seen as especially dangerous.

There are no formal space requirements for the accommodation of prisoners (remand or sentenced). This was true under Federal law and is also true for most of the emerging prison codes of the Länder states. The courts have, however, increasingly intervened and established minimum standards at around six square meters per prisoner. Baden-Württemberg has, in 2010, become the first German state to set, in its Prison Act, formal space requirement: nine square meters for single occupation and seven square meters per prisoner in multiple occupation. This refers, however, only to newly built prisons. Older prisons can get by with a minimum of 4 ½ square meters per prisoner in double occupation and 6 square meters in multiple occupation.[23]

Remand detainees have a right to be accommodated in separate rooms. This has been true under the old version of Article 119 I CCP, but all of the states are about to incorporate the same rule into their Remand Acts. This rule allows for the following exceptions: physical or mental condition of the detained person or a written waiver by this person. No official statistics exist. In the state of Bremen, according to information from the justice administration, almost ninety per cent of the remand prisoners are presently accommodated in single cells; the rest is being double-bunked. Formal assessment procedures for the suitability of cellmates do not exist.

IV.1. RIGHT TO HUMANE TREATMENT

The German Constitution in its Article 1 obligates all state power to "respect and protect" human dignity. The Code of Criminal Procedure includes no explicit rule to this effect. But the uniform administrative rules for remand prisons (UVollzO) obligate the remand prison administrations to "respect the personality of the detainee and […] their sense of honour"(Article 1 (3)). Only

[23] Gesetzbuch über den Justizvollzug in Baden-Württemberg, book 1, Article 7.

one of the new state laws on remand imprisonment includes language that incorporates the standards of the International Covenant of Civil and Political Right.[24] Most of the new state laws make do with the formula that remand prisoners are presumed innocent and must be treated as such and that even the semblance of their being detained as a punishment must be avoided.[25]

Arrested persons are usually not given much information on their rights in custody. Once transferred to a remand prison, they are, as a rule, provided with a copy of the house rules. Not one of the new state laws on remand detention entitles remand prisoners to receive a copy of those very state laws.

All cells in German prisons includes water toilets. As a rule, they are not separated from the rest of the room, even if the room is used by more than one prisoner. In recent years, this has been criticized by the courts as violating human dignity. In newly built prisons, separated bathroom within prison cells have become the rule.

There are no provisions in the German prison statutes that refer to showers or baths. In practice, remand prisoners can use communal showers several times a week, in most institutions.[26]

Remand prisoners are allowed to wear their own clothes. This was traditionally so[27] and it is now enshrined in the new state laws. But it is not an absolute right of the remand prisoner: "The remand prisoner may wear their own clothes, if they see to its cleaning, repair and regular change […]. This right can be restricted or taken away if this is necessary for the implementation of a judicial order or for the security or order of the prison institution".[28]

Remand prisoners are entitled to contacts with the outside world. They may receive visitors, write and receive letters and even use the phone. The now obsolete traditional rule (Article 119 CCP) gave the competent judge the discretion to impose such restrictions as seemed necessary in the interests of the "goal of detention" or of the order of the institution. The judges usually delegated these powers to the prosecutors in charge of the case. Under the new Länder state laws, remand detainees have a right to outside contacts except in those cases, where the court has imposed an order restricting such rights in order to safeguard the investigation. In addition, the prison administration may impose restrictions to secure the order of the institution. These latter restrictions can in

24 *E.g.* the Code for Baden-Württemberg in Book 2, Article 1 (1): "The remand prisoners are to be treated with due respect to their Basic and Human Rights. Nobody shall be subjected to inhuman or denigrating treatment".

25 *E.g.* Article 1 of the Remand Act of Northrhine-Westfalia.

26 Information from the justice administration in the state of Bremen indicates that remand prisoners can user showers every day during the time, when the prison cells are open.

27 Article 52 UVollzO.

28 Article 17 Berlin Remand Prison Act. The Remand Prison Acts of the other states include the same or similar language.

turn be appealed to the competent court. There are no statistics on the number of cases in which such restrictions are imposed.

Most remand prisoners have to stay in their cells up to 23 hours per day, if they are not working. One hour of exercise in the open air is guaranteed in international instruments (*e.g.* the European Prison Rules) and incorporated in all German prison laws. Even this right can, however, be stripped away under certain conditions. On the repeated insistence of the CPT, this cannot be done any more for disciplinary purposes, but it is still legally possible for reasons of security. "Special security measures" may be taken if there is a risk of self-mutilation, violence against others or threats against the security of the institution. The CPT, in his latest report on Germany has again taken exception to this situation.[29]

Remand Prisoners are not obliged to work. For those who want to work, there is usually not enough paid work available. The percentage of remand prisoners given the opportunity to work varies greatly from state to state; in the state of Bremen, only 11.5 prisoners are presently working. With respect to remuneration of working prisoners, another difference between the states has emerged. Until the year 2001, remand prisoners received the same (meagre) wages as sentenced prisoners (five per cent of the average outside pay). In 1998, the Constitutional court ruled that this was not enough encouragement for sentenced prisoners to strive for their reintegration: "Work in the prison, which prisoners are obliged to perform, can become an instrument of reintegration ("Resozialisation") only if the work performed finds adequate recognition".[30] As a consequence of that decision, the wages for sentenced prisoners were raised (to 9 per cent of the average outside pay). The wages of remand prisoners, however, remained the same as before. This inequality was justified by the argument that while there was a constitutional obligation to reintegrate sentenced prisoners, no such obligation existed with respect to remand prisoners.[31]

When, however, the Länder/states acquired legislative competencies in this realm, some of them reconsidered the matter. It seemed patently unfair and potentially disruptive to remunerate prisoners differently, if they did the same

29 Cf. CPT 2005, Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005, Strasbourg, §89 (at: www.cpt.coe.int/documents/deu/2007–18-inf-eng.pdf): "the CPT reiterates its recommendation that withdrawal of outdoor exercise be abolished from the relevant legislation as a special security measure (in respect of both sentenced and remand prisoners)".

30 BVerfG, 1 July 1998 (at: www.bundesverfassungsgericht.de/entscheidungen/rs19980701_2bvr044190.html?Suchbegriff=Arbeitsentgelt+strafvollzug).

31 Eventually, the Federal Constitutional Court agreed that this distinction was within the political discretion of the legislature. BVerfG 14 March 2004 (at: www.bundesverfassungsgericht.de/entscheidungen/rk20040315_2bvr040603.html?Suchbegriff=Arbeitsentgelt+strafvollzug).

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kind of work, sometimes even in the same institution. This argument won the day in some of the states,[32] while others turned a blind eye to it.[33]

Another inequality of the past is also handled in different ways by different states. While sentenced prisoners, who, for no fault of their own, do not receive any wages (*e.g.* because there is not enough work or because they cannot work for health reasons) are entitled to receive a monthly allowance, there was no such legal entitlement in the case of remand prisoners. Now some of the states are offering the same kind system to remand prisoners,[34] while other states keep referring destitute remand prisoners to the welfare agencies[35] (which means that they have to make written applications and may not receive any allowance while in need).

IV.2. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Remand prison staff has the same basic training as the other prison staff.

The main measure to protect remand prisoners from being assaulted by other prisoners is their right to single occupancy cells. Systematic suicide prevention is a relatively late development in German prisons and especially in remand facilities: a working group has developed standards that are now beginning to be implemented. They consist mainly in careful screening and close supervision of the prisoners at risk. But most remand legislation does not even mention the issue of suicide prevention.[36]

Remand prisoners are entitled to a level of health care equivalent to outside standards. But they can be asked to contribute "in an adequate fashion" to the costs of medical care. Theoretically. this applies also to treatment of drug addiction, but drug addiction programs within German prisons are rare. Drug substitution programs (*e.g.* methadone programs) are available in some states, but are not regarded as a legitimate medical approach to drug addiction in other states. Psychological counselling is usually available through the prison psychological service. Welfare advice is usually available through social workers employed by the institution.

Prior to being placed in any sort of solitary confinement, prisoners have to be seen by a medical doctor to check for possible counter-indications.

32 *E.g.* Berlin; Bremen; Hamburg; Brandenburg; Lower Saxony.
33 *E.g.* Northrhine-Westfalia (the state with the largest prison population); Baden-Württemberg.
34 *E.g.* Berlin, Bremen, Hamburg.
35 *E.g.* Lower Saxony.
36 Only the city states of Bremen and Hamburg have included special provisions on suicide prevention in their respective Remand Prison Acts.

IV.3. COMPLAINTS BY PRE-TRIAL DETAINEES

Remand prisoners have a legal right to complain about their treatment to the higher administrative authority. They can also bring their complaints to the court that has remanded the suspect into custody (Article 119a CCP). The procedure is a written one. A further appeal to the next higher court is also foreseen.

Violations of pre-trial rights can, as a rule, not be raised during the trial. An especially strenuous period of detention may, however, be considered as a mitigating factor in sentencing.

In the past, two different roads to the courts were envisaged: one against decisions of the remanding judge (to the next higher court) and the other one against decisions of the remand prison authorities (to the regional high court). Since the difference was in practice not always clear, even lawyers were often not sure where to bring their case.

The new complaints procedure will hopefully make things more transparent for detainees. Now, judicial oversight is all in the hands of the remanding judge, whose decisions can be appealed to the next higher court. There is no difference of opinion between the State and the Federal legislatures as to which court has jurisdiction in such matters. Since procedural law has remained within the competency of the Federal system, the relevant new Article 119 CCP is uncontested in this realm. But the issue of which substantive rules these courts are supposed to apply, is certain to haunt the German system for the years to come.

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IV.4. MOST IMPORTANT DEVELOPMENTS

In Germany criminal law and criminal procedure are traditionally a prerogative of the Federal legislature. This, logically, included legislation on prisons, both for untried and for sentenced offenders. In 2006, in the course of a constitutional reform (*Föderalismusreform*), the legislative competency for all forms of imprisonment was handed over to the individual Federal states (*Länder*), while substantive criminal law and criminal procedural law remained with the central state. This new distribution of legislative competencies was criticized by a vast array of academics and practitioners for being illogical, unpractical and potentially contributing to a "competition of shabbiness" between the *Länder* states.[37] But the constitutional reform went ahead anyway.

[37] Frieder Dünkel & Horst Schüler-Springorum, 'Strafvollzug als Ländersache? Der "Wettbewerb der Schäbigkeit" ist schon im Gange', in: *Zeitschrift für Strafvollzug und Straffälligenhilfe* 2006, p. 145–149.

While this new division of competencies does not cause major legal problems with respect to sentenced prisoners, it does so in the field of remand. This is due to the fact that remand and remand imprisonment has traditionally been dealt with in the context of criminal procedural law. According to the compromise solution reached in the reform of German federalism, procedure should remain with the Federal authorities. In the case of remand, this has led to a legal controversy, focussing on Article 119 CCP, especially on its §3, which read: "The arrested person may only be subjected to such restrictions as are required by the purpose of remand detention or by the need for order in the prison".

According to one school of thought,[38] procedure covers everything with respect to remand, excluding only those regulations that concern security and order in the remand institution. As a consequence the Federal legislature is still considered in charge of normsetting and judicial oversight with respect to the grounds of detention. On the basis of this interpretation of the constitutional situation, the Federal legislature has updated Article 119 CCP regulating in great detail the restrictions that judges may impose on remand prisoners required "for warding off the risk of absconding, the risk of tampering with evidence or collusion and the risk of recidivism". The Länder/states[39] following that school have restricted themselves in their remand prison acts to matters concerning the internal order and security of the institution.

Another school[40] argues that only the grounds for detention remain in the competency of the Federal legislature. All follow-up decisions with respect to the conditions of detention are to be determined by the legislatures of the *Länder* states. One state, Lower Saxony/*Niedersachsen*, has followed this second school and already in 2009 passed a State Remand Act, regulating in great detail the when and how the remand institutions may impose restrictions on prisoners not only with respect to the institutions' order and security, but also with respect to the grounds for detention. Even after the Federal legislature passed the new version of Article 119 CCP, claiming competency for the latter matters, Lower Saxony has not given in. In one of the first court cases, dealing with this issue, the highest court of the state has sided with the state's legislature and ruled that Article 119 of the Federal CCP has no validity in Lower Saxony.[41] Some states

38 See Detlev Krauß, §119 StPO No. 1–4c, in: *Beck'scher Online-Kommentar*, München 2009; Hans-Ullrich Paeffgen, 'Das niedersächsische Justizvollzugsgesetz vom 14 Dezember 2007', in: *Strafverteidiger* 2009, p. 46–53; Norbert Kazele, 'Anmerkung zu OLG Celle, Beschluss vom 09.02.2010', in: *Strafverteidiger* 2010, p. 258–261.

39 This is the line taken by a number of states that together have drafted a model law and are now,one by one, turning it into their respective state remand prison acts. These states are: Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Rheinland-Pfalz, Saarland, Sachsen-Anhalt, Sachsen, Schleswig-Holstein, Thüringen.

40 See Manfred Seebode, 'Das "Recht der Untersuchungshaft" im Sinne des Artikel 74 GG', in: *HRRS* 2008, p. 236–241 at: www.hrr-strafrecht.de/hrr/archiv/08–05/index.php?sz=6).

41 OLG Celle in: *Strafverteidiger* 2010, 194; in a comment on this decision, a high court judge from Saxony has critizised this decision and expressed his hope that the court will "think

may still follow the Lower Saxony model,[42] while still others[43] are sympathetic but are trying to avoid the constitutional conflict.

This conflict will probably have to be resolved by a decision of the Federal Constitutional Court.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

German law does not provide for a range of alternatives to detention on remand. While bail (*Kaution*) exists (Article 116 (1 no. 4) CCP), it does not play an important role in German forensic practice. Electronic supervision has been tried in the context of a model project in Hessen, but the evaluation came to a negative conclusion.[44]

German procedural law is still relying on very traditional alternatives:

- not using pre-trial detention if that would appear disproportional (Article 112 (1) CCP),
- supplying a defence lawyer once the detention is longer than three months (Article 140 (1 no. 5) CCP),
- not enforcing the arrest warrant if it is based on danger of absconding only and less invasive means exist to secure the goal of remand (Article 116 (1) CCP), *e.g.*
  - regular reporting to the police
  - the order to stay in a certain area
  - the order not to leave home without supervision
  - bail
- not enforcing the arrest warrant based on the danger of collusion, if less intrusive measures exist to reduce this danger, *e.g.* the prohibition to contact other suspects or witnesses in the case (Article 116 (2) CCP).

In the 1980ies social work projects were developed to quell the then much higher incidence of remand imprisonment. These programs focus on features of the remand decision, especially with respect to absconding. Having found out that most judges based such a decision on the fact that the arrested person has no

over" his opinion: Norbert Kazele, 'Anmerkung zu OLG Celle, Beschluss vom 09.02.2010', in: *Strafverteidiger* 2010, p. 258–261.

[42] Most probably Bavaria.

[43] Baden-Württemberg; Northrhine-Westfalia.

[44] Markus Mayer, *Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des Hessischen Projekts*, Max-Planck-Institut für ausländisches und internationales Strafrecht, 2004 (at: www.mpicc.de/shared/data/pdf/fa-mayer2.pdf; see also: www.mpicc.de/ww/de/pub/forschung/forschungsarbeit/kriminologie/archiv/fussfessel.htm).

place to live or no work, these programs tried to provide housing or jobs. Program representatives would also show up in court to convince judges that detention was not necessary. These programs to avoid detention (*Haftvermeidungsprogramme*) were seen as quite successful at the time and they contributed to the decrease of remand detention. Some of these projects were discontinued, some are still working successfully, especially in the field of juvenile justice. Most of the organizations offering alternatives to detention are voluntary associations,[45] but in other cases, the task has been incorporated into the official criminal justice system.[46]

Since the organisations involved are typically local, no national or state statistics are available. The cases involved concern usually small to medium offences and only rarely murder, manslaughter and the like. On the other hand, if imprisonment is not provided as a penalty, remand can usually be avoided on the grounds of disproportionality.

Alternatives to remand are logically connected to the criminal investigation against a particular person. Once the investigation comes to an end, remand or its alternatives are not necessary any more. There are no formal monitoring mechanisms for such alternatives. But the judge/prosecutor who agreed to waive remand detention may check from time to time whether the program is performing well.

The most important development here is the decrease in pre-trial detention in Germany. It is, however quite unclear whether this has much to do with available alternatives. It seems more likely that there are now more and better organized defence lawyers. Further research is needed here.

VI. CONCLUSION

"Significant qualitative improvements in detention conditions will […] only be realized when there is a limitation or reduction in the number of persons incarcerated".[47] If this is true, then Germany should now have the chance for significant improvements in its jails. They will have to deal with two distinct issues.

45 *E.g.* Kölner Appell (http://koelnerappell.de/?page_id=20); Jugendschutzstelle Marienhafe, Ostfriesland (www.ifi-ggmbh.de/html/u-haft-vermeidung.html); Jugendclub Erkner, Berlin (www.jugendclub-erkner.de/produkt4.htm); Hoppenbank e.v., Bremen (www.hoppenbank.info/12.0.html).

46 *E.g.* Haftentscheidungshilfe, Schleswig-Holstein (http://shvv.juris.de/shvv/vvsh-451.3–0001.htm).

47 Frieder Dünkel, 'Germany', in: Frieder Dünkel & Jon Vagg (eds), *Waiting for Trial*, Freiburg 1994, p. 131–177, at 176.

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For one, they will have to bring the rights of pre-trial detainees more in line with the presumption of innocence. This is professed in the preambles of all the new state remand laws, but often not followed up in the more specific norms.

Secondly, these improvements will have to deal with the empirical fact that most pre-trial detainees will, at the end of their day in court, be convicted and sentenced to imprisonment. This means that they should have the option to start working on their reintegration. Again, this is hardly dealt with in legislation so far.

Whether any of that will really happen depends now exclusively on the Länder states. It is to be hoped that they will use this opportunity before the pre-trial imprisonment rate takes an upswing again.

In German criminal politics, remand was an issue twenty years ago. It was discussed, briefly, again when every single state had to pass its own statute on remand conditions. Nowadays, the concern of politics and media has shifted to a completely different topic: the release of supposedly still dangerous criminals that were kept for long years in *Sicherungsverwahrung* (preventive detention) and have now to be released by a decision of the European Court of Human Rights.[48] Whether the resulting lack of interest in pre-trial detention bodes well or ill for reforms in this area remains to be seen.

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48 ECtHR, 17 December 2009, *M. v. Germany.*

PRE-TRIAL DETENTION IN GREECE: THE ACHILLES HEEL OF THE PRISON SYSTEM

Effi Lambropoulou*

I. INTRODUCTION

The preservation of human rights has always been one of the Greek state's priorities. A shrinkage and infringement of these rights has taken place only during turbulent periods and anomalous regimes. Violations of human rights in normal political situations are mostly an inability to deal with difficult situations or a reaction to pressing conditions by law enforcement officials. They are trapped between contradictory demands and a low level of support from society and the state from the one side, party political expediencies and corporate interests from the other, making them unable to make sound decisions and form strategic plans. Professionalism based on transparency and accountability is not enough, if it is not supported by flexible policies.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

Greece has been a member of the United Nations (UN) since 1945, the Council of Europe (COE) since 1949, the European Union (EU) since 1981, and the Economic and Monetary Union of the European Union since 2001. It is also member of many other European and international organisations, as well as regional organisations for economic cooperation and development.

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In regard to international human rights treaties and conventions, Greece is a contracting party of the following organisations among others:

- The 1949 *Universal Declaration of Human Rights* (UDHR) (A/RES/217);
- The UN 1966 *International Covenant on Civil and Political Rights* (ICCPR) and its two *Optional Protocols* (1966, 1989), Law 2462/1997;[1]
- The UN 1984 *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Law 1782/1988;
- The UN 1989 *Convention on the Rights of the Child*, along with the Amendment to Article 43(2) (1995), Law 2101/1992 and the *Optional Protocols on the involvement of children in armed conflict* (2000), Law 3080/2002, as well as *on the sale of children, child prostitution and child pornography* (2000), Law 3625/2007;
- The COE 1950 *European Convention on Human Rights* (ECHR). It was ratified by Law 2329/1953, and re-ratified on 19 September 1974 with its first *Protocol* by Decree 53/1974[2] because of its previous denouncing (5/13–2–1970) during the dictatorship (1967–74). *Protocols 2*, *3* and *5* (1963) were ratified by Decree 215/1974,[3] the 6th (1983) concerning the abolition of the death penalty by Law 2610/1998, the 7th (1984) by Law 1705/1987 and the 8th (1985) by Law 1841/1989. The following amendments of the Convention carried out by *Protocol 11* and *Protocol 14*, which reformed the control system of the Convention, have also been ratified and put into force by Laws 2400/1996 and 3344/2005; and finally, *Protocol 13* for the abolition of the death penalty in all circumstances by Law 3289/2004. Greece has neither signed nor ratified *Protocol 4* on civil imprisonment, free movement, expulsion.
- Greece has also ratified the COE 1987 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECTP) with the issue of Law 1949/1991, and its *Protocols I* and *II* (04.11.1993) by which the Convention has been amended, with the Common Decree of the Ministers of Foreign Affairs and Justice MD 28-//1994 (66206) on 15 April 1994.[4] The ECTP is monitored by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

These treaties have been incorporated into Greece's domestic legal order by the issuing of Laws and Decrees as already referred to above. Greece made no reservations with regard to *(pre-trial) detention* when signing up to the ECHR (Articles 5, 18) and its protocols. Fundamental human rights are directly enforceable through the domestic courts.

1 Greece objected with regard to the declarations made by Turkey upon ratification (11 October 2004).
2 Gov. Gazette A/256/1974.
3 Gov. Gazette A/365/1974.
4 Gov. Gazette A/66/1994.

Citizens have a right of complaint to an international judicial body a) if they have previously used up all legal means offered by the national law, and b) if a state or if the Greek state has violated some of their rights included in the articles of the European Convention on Human Rights and its Protocols. The recourse to litigation refers to a state and not to a person.

Greece's Constitution (1975–1986/2001/2008) includes a Bill of Rights from which citizens can derive rights pertaining to pre-trial detention (Article 6, Part II, Civil and social rights; see more below III, 3.1).

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

The detention of persons pending trial is an extremely sensitive issue, which during the last decade became even more pressing due to a considerable rise in prison population whereby the amount of detainees make up a big part of it. The minimum standards for the rights of the accused during arrest and detention are described in the Constitution, the Penal Procedure Law and the International and European Treaties integrated into the national law.

III.1. GENERAL LEGAL BACKGROUND

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During the last 20 years criminal procedure in Greece has undergone significant changes due to various legislative and case-law developments, which have resulted in the modification of several of its characteristics.[5] Criminal proceedings are divided into the pre-trial and the trial stage. They begin with an act of prosecution and finish with a decision of a court or a judicial council.

The pre-trial procedures are written, non-public and non-adversarial (alias: inquisitorial) (Articles 33, 34, 241 GPPC).[6] However, the pre-trial phase has also some accusatorial (adversarial)[7] characteristics, since the parties – *i.e.* the accused and often also the civil claimant – have certain rights and may influence

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[5] Dellidou 2007: 101; Bahtiyar 2009: 437.

[6] Anagnostopoulos & Magliveras 2000: 135; Bahtiyar 2009: 437.

[7] It has been suggested, however, that a distinction be drawn between the two. Under this approach the *adversary* process is said to denote only a method of finding facts and deciding legal problems, and is characterised by two sides shaping issues before a relatively neutral judge. The *accusatorial* system, on the other hand, is a more encompassing concept, which includes the adversary method as its constituent element (http://law.jrank.org/pages/470/Adversary-System-An-archetype-Anglo-American-process.html>Adversary System – An Archetype of Anglo-American Process.html).

the proceedings by submitting applications, handing over evidence, lodging appeals to the judicial council against the decisions of the investigating judge or the public prosecutor, et cetera.[8]

Offences are prosecuted exclusively by the public prosecutor. The public prosecutor is obliged to prosecute a case as soon as it is referred to him/her, provided that the case is based on law, not too vaguely reported or is obviously not based on facts (Legality principle, Articles 43, 46 GPPC). Before the investigation, the prosecutor *can* make a *preparatory examination* to find whether there exists any reason for prosecution (Article 31(1a) GPPC). Preparatory examination is necessary for felonies and serious misdemeanours judged by the three-member misdemeanours court (Article 43(1b GPPC). It finishes either with the ordering of a preliminary investigation or the direct call of the accused before the court, but only for misdemeanours (Article 244 (b, c)). Therefore, the prosecutor:

a) Can *call the accused/suspect directly before the court*. "The direct call before court" is a common way of prosecution for petty offenses as well as misdemeanours, when a preliminary investigation is not necessary (Article 244 GPPC) and there are adequate indications against the suspect. According to Article 244 (a, b) GPPC, preliminary investigation is unnecessary for: a) less serious misdemeanours; b) misdemeanours for which the offenders have been arrested "in the act" (Article 417 GPPC); c) all other misdemeanours, for which a preliminary *inquiry* (cf. investigation) (Articles 31(2), 240, 241 GPPC) has already been carried out.
b) Can *order a preliminary investigation*; which is a summary investigation and can be carried out by an (general or special) investigating officer (Articles 33, 34 GPPC). This option is usually followed in cases involving felonies or serious misdemeanours, and occasionally less serious ones, as well as misdemeanours where the accused is "caught in the act" (Articles 242(1), 244, 49 GPPC). The preliminary investigation finishes with: i) a direct call before court; ii) a motion by the prosecutor to the judicial council of first instance, if – according to his/her opinion – there is not enough evidence to refer the case to court; iii) the issue of a justified order by the first instance prosecutor having the agreement of the prosecutor of appeals to shelve the case, if there is insufficient evidence. This applies to less serious misdemeanours punishable by a prison sentence of at least three months or less, a fine, or both – a prison sentence and a fine (*e.g.* assault: Article 308 Greek Penal Code/ GPC; slander, defamation and insult: Articles 361, 361a, 362 GPC) that are judged by the one-member court of misdemeanours/Court of First Instance (Article 114 GPC); iv) the ordering of a main investigation, if during the preliminary investigation a felony is suspected of having been committed

[8] Spinellis & Spinellis 1999: 19.

(Article 245 GPPC). The maximum time defined by law that the *preparatory examination* can last is eight months (4 + 4 months, Article 31(3) GPPC) and *preliminary* investigation ten months (6 + 4 months, Article 243(4) GPPC). For both extensions (4 months) the approval of the prosecutor of the Court of Appeal is required. The carrying out of a *preparatory* and *preliminary* investigation does not mean that the suspects are held in custody.

c) Finally, the prosecutor can *order a main investigation*, which is carried out by an investigating judge (Article 246(3a) GPPC). The main investigation applies to felonies and to misdemeanours, when the prosecutor believes that release on bail could be imposed on the accused (Article 282 GPPC). For felonies, the main investigation always ends with a decision of the Judicial Council either of misdemeanours or of appeals (of first and second instance respectively) (Article 308 GPPC). The prosecutor files a motion to the judicial council either to acquit without trial (permanently or temporarily) or to refer the case to trial or to decide not to impeach the suspect (Articles 309–311 GPPC). For misdemeanours the main investigation can also finish with a direct call before the court ordered by the prosecutor with the agreement of the investigating judge. The main investigation must finish within 12 months after the investigating judge receives the file and the additional investigation within 3 months after the expiration of the main investigation; both can be extended for six and two months respectively, apart from the investigations carried out by the courts of first instance in Athens, Piraeus and Thessaloniki for which the extension can last twelve and six months respectively (Article 248(4) GPPC).

intersentia

The pre-trial phase is deemed to end when the "intermediate stage", namely the proceedings before the judicial councils, finishes. After that, and in particular when the accused is served with a summons, the trial stage begins.[9]

Rights that are relevant to (pre-trial) detention are provided by the Greek Constitution (1975-amended in 1986, 2001 and 2008). According to Article 6(1) "No person shall be arrested or imprisoned without a reasoned judicial warrant, which must be submitted at the moment of arrest or detention pending trial, except when caught in the act of committing a crime".

The phases of pre-trial deprivation of liberty which are distinguished by the criminal procedural law system are:

- *Arrest* can be followed by *police custody* (Articles 275–277 GPPC). After arrest with a warrant, as well as in case that the offender is caught in the very act, if s/he cannot be brought immediately before the prosecutor for

9 Spinellis & Spinellis 1999: 19.

questioning and/or to the court for trial, the person(s) remain in *police custody*, in a holding cell.

- *Custody /Detention pending trial* takes place when the investigating judge orders with the agreement of the public prosecutor the detention of the accused or in case of disagreement the judicial council decides, whether there is a serious reason to hold the accused in detention in order to ensure his/her presence at trial (Articles 282(3), 283, 284 GPPC). Detention is ordered only to suspects for a felony supported by one or more special prerequisites. It is also ordered when the offender is caught in the very act and s/he is going to be sent soon (within 24 hours) to trial.
- *Remand in custody, remand in detention* have the same meaning as pre-trial detention, but also when a convicted offender is serving his/her prison sentence imposed by the first instance court, and is waiting the decision of the appellate court (see also COE Recommendation Rec(2006)13, Section 1).

The detention pending trial has been reformed by Law 1128/1981, following the guidelines of Recommendation Nr. R (80)11 of the Council of Europe.[10] The law introduced the "restrictive terms" (restrictions, alias *release on bail*) as an *alternative* and changed detention to optional, depending on certain prerequisites and as the last resort.[11] Later Laws 2207/1994 and 2408/1996 guarantee the protection of personal freedom by controlling the deprivation of liberty during the preliminary proceedings. After 1996 detention pending trial has been limited to felonies, while remand on bail could be imposed on the accused of a misdemeanour punished with imprisonment for over three months.[12]

The prerequisites foreseen by the law (Article 282(3) GPPC) for detention (untried prisoners and prisoners without final sentence), whereby fulfilment of just one of them is enough for its enforcement, are: the person is accused of a felony *and* doesn't have either any known residence in the country, or has made "preparations to facilitate his absconding", which means s/he has tried to escape, or has been a fugitive in the past, or has been declared guilty for escape from prison or for violation of restrictions regarding his/her place of residence; or, finally, by setting him/her free and taking into account special events of his/her earlier life or special characteristics of the crime at hand (s/he is accused to have committed), it is possible that s/he may commit a new crime(s). In summary, if the defendant is a flight risk or a danger to the community.

This assessment results after reasoning based on events concerning the previous life of the accused or the special circumstances under which the offense for which s/he is charged has been committed. Only the severity of crime is not

[10] Courakis 1986.
[11] Spinellis & Spinellis, 1999: 10.
[12] See also Spinellis & Spinellis, 1999: 10.

sufficient reason for ordering remand. In exceptional circumstances, detention can be imposed under the same conditions, to those accused of reckless manslaughters (multiple accidental manslaughters), *e.g.* labour-, shipwrecks-, car accidents, or building's collapse et cetera. (Article 282(3)(b) GPPC).

Last year Law 3811/2009 was issued by parliament (17 December 2009), soon after the Ministry of Justice announced consideration of measures in order to decrease the number of pre-trial detainees. According to it, detention is to be imposed only to felonies, as before, yet punished with *life sentence* or *confinement over ten to twenty years*, unless the arrested has a criminal record of irrevocable sentences for similar felonies (Article 24(1)(a), Law 3811/2009;[13] cf. Article 282(3) GPPC).

The mentioned prerequisites (*e.g.* no residence, escape et cetera.) retain, however the assessment about the danger of escape is now based on the criminal record of irrevocable sentences of the accused and not on the accused life or special characteristics of his/her offence(s). The latter are *also* taken into consideration, whenever the suspect is accused of a crime punished with *life sentence* or *confinement up to twenty years*. Since felonies are serious crimes punishable with imprisonment from 5–20 years (Article 18 GPC) or life sentence, is not clear what the law implied "with confinement up to 20 years". The additional clause-addendum to the Explanatory report of the Law 3811/2009 clarified that detention was to be imposed only for felonies punished with confinement of *over ten years*.[14]

Consequently, the detention of the accused would be possible even if s/he is accused of a felony punished with less than ten years (and over five), when s/he has a criminal record of irrevocable sentences; detention is *also* possible even if the accused has no criminal record of irrevocable sentences, but has committed a felony for which imprisonment over ten years is imposed, *and* the special characteristics of his/her offence(s), imply that if set free s/he would very likely commit new crimes.

At any rate, the law now foresees that detention is to be imposed if the release on bail *is not enough* to guarantee that the defendant will be present during the pre-trial investigation or at trial, but also to prevent him/her from committing new offence(s); this must be *justified* in detail (Article 296 GPPC). The purpose of the amendment is to demand an exhausting reasoning by the investigation-judges, when they impose pre-trial detention instead of (restrictions) release on bail.

In the case of reckless manslaughters the new Law (Article 24(1)(c), 3811/2009) demands a detailed justification too of why release on bail is not adequate and whether the accused, if set free, may commit new crime(s). Previously there was no special reference to the assessment of the danger of escape of the suspect (cf. 282(3)(b) GPPC).

13 *Addendum to Explanatory Report on Law 3811/2009*: 3.
14 25.11.2009: 3.

Law 3315 ("On Completing the Provisions on Juvenile Courts and the Treatment of Minor Offenders"), as amended, introduced already in 1955 (Article 2) the temporary detention of minors up to 15 y.o. in training schools (semi-closed juvenile institutions) and of over 15 y.o. in special departments of juvenile prisons. A new law in 2003 set the age for pre-trial detention of minors to over 13 y.o.,[15] if they are accused of felonies punished with *at least ten years* imprisonment as before (Laws 1941/1991, Article 10(1); 2408/1996, Article 2(11c); 3189/03, Article 4(4) amended Article 282(5) of GPPC). In March, 2010 the draft of a new law "about the reform of penal legislation for minors" suggested the increase of the minors' age from 13 to 15; only when a young offender reaches the age of 15 can be sent to juvenile prison and has committed a felony (Article 126 (2,3) GPC as amended by Law 3860/2010, Article 2(1, 2)). Consequently the age for pre-trial detention has increased to 15 y.o. (Article 282(5) GPPC as amended by Law 3860/2010, Article 8(2)). The draft was finally issued by Parliament in July 2010 (Law 3860). Article 96(3) of the Constitution excludes juvenile courts from the jury system and the public hearing, as well as from other provisions of the GPPC.

According to Greek Criminal Law (Articles 18, 54), any offense punishable either with imprisonment from over 10 days to five years, or a fine[16] or confinement in a juvenile correctional institution is a misdemeanour. Since minors can only be sentenced to a juvenile correctional institution, every crime, except for petty offences, committed by a minor is a misdemeanour. Consequently, pre-trial detention of minors cannot exceed six months and in exceptional cases can be prolonged for three more months (Article 6(4) Constitution; Article 8(2)(b) Law 3860/2010).[17]

After 1998, the number of detainees on remand corresponded to 24–30 per cent of the prison population, with that of foreigners reaching 40–46 per cent, including some exceptions, as in 2006, where the proportion of foreigners rose to 58.4 per cent of the prison population.[18] There is no specific information about the proportion of foreigners to remand prisoners; from various ministerial and

15 The age of full adult criminal responsibility is 18 years (Articles 121, 126 GPC, Law 3189/2003 Government's Gazette A/243/21.10.2003). Up to that age the court applies either educational or therapeutic measures (Articles 122, 123 GPC); it decides whether the crime warrants a prison sentence to be served in a juvenile prison, only if the adolescent is aged 13–18 (while now after the recent Law 3860/2010, Article 2) only if the adolescent is aged 15 and after the examination of the circumstances under which s/he committed the crime, his/her family environment and his/her psychological situation, regards imprisonment as necessary to prevent him/her from further offences (Articles 121, 126, 127 GPC, Law 3189/2003, Article 1(2]); after the recent Law 3860/2010. Young adults aged 18–21 will usually be sentenced under "mitigated punishment" and any prison sentence is usually served at a "juvenile reformatory" (Article 133 GPC).

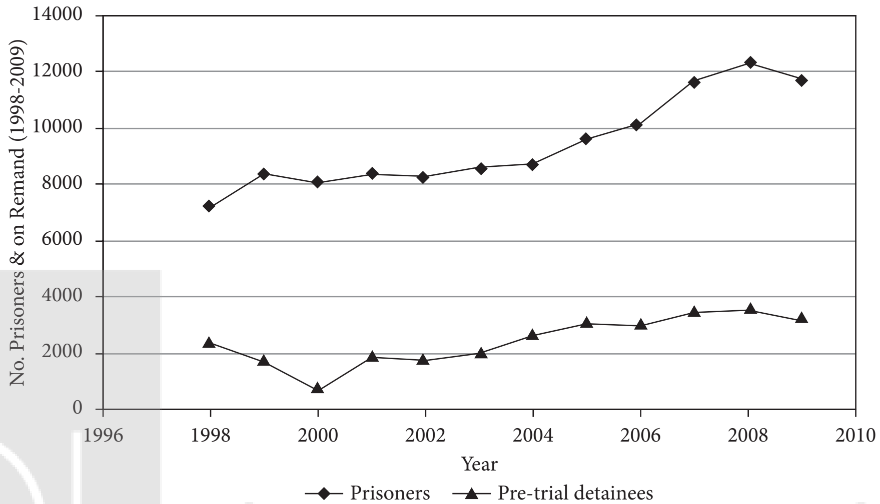
16 The misdemeanours which can incur a fine are specifically referred to in GPC.

17 Pitsela 2004: 357–359; Bahtiyar 2009: 456.

18 COE 2008: *SPACE I* 2006.3, Table 3.

media sources, foreigners seem to represent 14–20 per cent of pre-trial detainees, not including those who have been under administrative detention. In September 2006, 24 per cent of foreign nationals in the prisons of the country were awaiting their trial, corresponding to 14 per cent of the total (foreign and national) population of pre-trial detainees.[19] From *Figure 1* we see that the trend of pre-trial/on remand detainees follow the trend of the prison population.

Figure 1. No. of Prisoners & Pre-trial detainees/On remand (1998–2009)



Source: Table VII27 Justice Statistics, Prison Statistics (1998–2005); Ministry of Justice (2006–2009).

Pre-trial detainees and total prison population indicatively

August 2010: pre-trial detainees / remand prisoners 3,590 (*30.5%*) of the 11,762 total prison population of whom 57.9% (6,820) were foreigners.

Source: Ministry of Justice 2010.

November 2009: pre-trial detainees / remand prisoners 3,218 (*27.4%*) of the 11,736 total prison population of whom 51.8% (6,078) were foreigners.

Source: Ministry of Justice 2009; *Eleftherotypia* 2009.

104 prisoners (28.6 pre-trial /remand) per 100,000 of the national population.

November 2008: Pre-trial detainees / remand prisoners 3,518, corresponding to *28.6%* of the 12,300 total prison population of whom 44% (5,400) were foreigners. 109 prisoners (31.2 pre-trial /remand) per 100,000of national population.[20]

Source: Ministry of Justice 2009; World Prison Brief 2009.

[19] Idem.

[20] Based on an estimated national population of 11.25 million in November 2008, from Marcu/ *Eurostat* 2009, Table 1.

30 June 2007: pre-trial detainees / remand prisoners 3,068 (*28.6%*) of the 10,370 total prison population of whom 4,695 (*45.2%*) were foreigners.

Source: Walmsley 2008; Ministry of Justice 2009.

92 prisoners (27 pre-trial /remand) per 100,000 of national population.

1999: 2554 (*35%*)/ 7280; 2000: 2217 (*29%*)/ 7625; 2001: 2296 (*27.6%*)/ 8295; 2002: 1954 (*23%*)/ 8507.

III.2. MINIMUM STANDARDS

Length of pre-trial detention

Regarding the length of pre-trial detention, the Constitution orders in Article 6:

> "(2) A person who is arrested in the act of committing a crime or on a warrant shall be brought before the competent examining court within twenty-four hours (24h) of his/her arrest at the latest; should the arrest be made outside the seat of the examining court, within the shortest time required to transfer him/her thereto. The examining court must, within three (3) days from the day the person was brought before it, either release the detainee or issue a warrant of imprisonment. This time limit shall be extended by two (2) days upon application of the person brought before the court or in case of *force majeure* confirmed by decision of the authorised judicial council.
> (3) Should either of these time limits elapse before any action has taken place, any warden or other officer, civil or military servant, responsible for the detention of the arrested person must release him/her immediately. Violators shall be punished for illegal detention and shall be liable to restore any damage caused to the sufferer and to pay him/her monetary compensation for pain and suffering, as specified by law.
> (4) The maximum duration of detention pending trial shall be specified by law (see Article 287 GPPC, clarification by EL);[21] such detention may not exceed a period of one year in the case of felonies or six months in the case of misdemeanours. In entirely exceptional cases, the maximum durations may be extended by six or three months respectively, by decision of the competent judicial council. The excess of the maximum duration of detention pending trial, by successively applying this measure for separate acts referring to the same case, is prohibited."

Between the arrest of a person "in the act" and a decision about taking this person in police custody doesn't elapse any time, unless the person is arrested far away from a prosecution service, and therefore s/he has to be brought within 24 hours to the prosecutor, otherwise in a timely manner; while those arrested on a warrant of the investigating judge have to be brought to him/her within 24 hours after the issuing of the warrant (Article 6, Constitution).

[21] As amended by Law 2408/1996, Article 2(12] and Law 3727/2008, Article 19(1].

In June 2009 the European Court of Human Rights (ECtHR) convicted Greece for violation of Article 3 of the ECHR[22] because the detention centre (Katerini Police Station) was not an appropriate place for detention of the length imposed on the detainees, noting previous findings of the national Ombudsman about long detention of the arrested in police stations' cells,[23] and in the same year two more times, for similar reasons, among others (violation of Article 5(3) ECHR).[24] No reliable research data are available for the average length of pre-trial detention; research is now being carried out and we expect its findings.[25] However, according to the European Commission's data, the average length of pre-trial detention in Greece for 2002 was 365 days.[26] Other estimates, based on the data of the National Statistical Service, reduce the average length to six-seven months.[27] This length does not include the time spent awaiting the determination of an appeal or the "awaiting confirmation of the sentence" stage, which is delivered alongside with the verdict.

According to recent information from the Korydallos prison administration (the biggest prison in Greece which is located in the Piraeus region, and with 75 per cent of its population being now pre-trial detainees), the average length of pre-trial detention ranges from six to twelve months; the waiting time for trial depends on the place of the court where the cases are pending. In big cities the case takes ten to twelve months, while in small cities it takes six to eight months to be brought to the court of first instance.

For time spent on remand awaiting determination of an appeal, the results of a newly published research (2009) with selected data between 1 July 2000–30 June 2002 and a sample of 145 (13.7%) released persons (Total number of releases during the time period: 1,053) from Korydallos prison for men, having served *a prison sentence over five years for a felony* show that a) 22 per cent (n=32) were released before their case was brought to the appellate court, because their appeal is appointed at a later point than they have been granted probation (ratio 2 released: 10 not released of the total number of the sample); b) 88 per cent (113) were released after the decision of the appellate court, being on average 22.5 months (less than two years) in prison; c) 12 per cent (17) were released after fully serving their time; and d) 11 per cent (16) were released because of their acquittal by the appellate court, remaining on average 3.5 years in prison.[28]

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22 ECtHR 4 June 2009, *Siasios and Others v. Greece*.

23 Ombudsman 2007a.

24 ECtHR 2 July 2009, *Vafiadis v. Greece*; ECtHR 29 October 2009, *Shuvaev v. Greece*; see also ECtHR 27 July 2006, *Kaja v. Greece*.

25 The study is carried out by Dr. Panajotis Papaioannou, Lawyer, and member of the research staff of the Centre for Penal and Criminological Research of the Law School of Athens University.

26 ECComm 2006, Table 3.2: 10.

27 NSSG 1998–2005: Table VII27: Changes on the number of prisoners awaiting trial: 1998–2001, 2002–2005; Bahtiyar 2009: 453–455.

28 Koulouris & Spyrou 2009: Tables 2–7, 229–231.

In December 2008, with the article 19(1) of the issued Law 3727 (ch. 3), detention can be prolonged for six more months after the completion of the 12 months, only in *exceptional cases* and for felonies punished with life sentence or confinement between 10 and 20 years (287(2, b) GPPC; cf. Law 3811/2009, Article 24(2)). In November 2009, the maximum time of detention for reckless manslaughters was reduced from nine to six months (Law 3811/2009, Article 24(1)(c)).

Between arrest, police custody and remand

The decision to send a person into police custody, after any initial apprehension by a law enforcement officer, can be taken by the *police officer* for the suspects/offenders caught in the very act (for misdemeanours and felonies) and arrested outside the prosecutor's jurisdiction (territory over which authority is exercised). In such a case the police officer has to bring the suspect to the prosecutor without unnecessary delay and within the shortest possible transfer time (Article 279 GPPC). The recent Law 3860/2010 (Article 7) introduced a questionable amendment, whereby the procedure for offenders caught in the act cannot be enforced anymore for the juveniles up to the age of 18 (Article 242(1) GCPP). This means that even if the minor is arrested committing a crime, the summary investigation as well as his/her immediate presence at the court cannot take place and must be freed after his/her identification.

Apart from the special cases mentioned above, the decision is taken by the *public prosecutor* for those caught in the act committing *misdemeanours*, unless the prosecutor deems that the regular "summary" investigation procedure is not necessary (Article 417 (b) GPPC). The public prosecutor must send the case to trial within 24 hours; otherwise, if this is not possible, s/he sends the case to the *investigating judge* who must decide within 24 hours about either the detention or the release of the accused (Articles 279(1), 417, 418(1,2,3) GPPC). The time limit cannot be extended even after the application of the accused. The detention of the accused is carried out according to the general terms of the article 283 GPPC. If an arrest warrant is issued, neither a judicial means can be exercised against it nor the temporary release of the suspect is permitted (Article 419 (b) GPPC). The whole procedure is carried out only for serious misdemeanours, *e.g.* multiple accidental manslaughters, tried by the three-member court (Article 282(3)(b) GPPC) following the amendments introduced by Law 3346/2005 (Article 11).

The similar proceedings are followed for those being caught in the act committing a *felony* or are arrested with a *warrant*. An arrest warrant can be issued only for offences for which pre-trial detention is to be ordered (Article 276(2), 282(3) GPPC), meaning that an arrest warrant is issued by the investigating judge having the agreement of the prosecutor, only when a felony

(or multiple reckless manslaughters) is suspected. In the event of a disagreement, the judicial council decides (Article 276(2)(b) GPPC).

In these cases the prosecutor sends the arrested immediately to the *investigating judge*. The investigating judge has, within three days after the presentation of the arrested, either to release him/her or to free him/her on bail or to issue a warrant for his/her detention (Articles 279(1)(b), 282(1,2,3) GPPC, Article 6(3) Constitution). The accused/suspect can request a deadline of 48 hours for his/her pleading (Article 102(1) GPPC), which *can be* prolonged after the request of the suspect (Article 102(2) GPPC) or in case of *force majeure* confirmed by a decision of the authorised judicial council (Article 6(2) Constitution). During that time, only those arrested on a warrant may be kept in police custody.

As previously analysed, the decision to hold a person on remand is taken by the *investigating judge* having the agreement of the public prosecutor, and in case of disagreement, the judicial council decides. The investigating judge, and not the council *itself*, issues the remand according to the decision of the council. Only the public prosecutor of second instance has the possibility to lodge an appeal against a decision of the council within one month of its issue (Article 479(2) GPPC), while the accused can exercise a recourse against the remand warrant in five days (Article 285(1)(b) GPPC) from its enforcement.

Grounds for pre-trial detention, level of suspicion and rights of the defendant

For the Greek Law the foundation of pre-trial detention is to ensure that the defendant will be present during the pre-trial investigation or at trial, meaning to prevent interference with the course of justice, and will submit him/herself to the execution of the court decision (Article 296 GPPC; COE/CoM, Recommendation 2006(13), Principle 7). In general, Greek law tries to prevent collusion or suppression of evidence, and to temper public opinion in cases of serious crimes.[29] Although the latter ground is not based on law, it corresponds to social and legal morals and is generally accepted; yet, it is carefully and moderately used.[30] With the recently issued Law 3811/2009, the avoidance of the commitment of a new offence was added and put in the first place, implying eventually the prevention of the accused posing a serious threat to public order.

A person cannot be taken in pre-trial detention when s/he is suspected of an offence for which imprisonment is not provided as a penalty. Similarly, even if imprisonment is provided as a penalty, pre-trial detention cannot be imposed on the accused of a misdemeanour.

The minimum level of suspicion required for police custody, respectively remand, is either the person to have been caught in the very act or the enforcing

29 Tsoureli 1982: 219; Bahtiyar 2009: 447–448.
30 More in Anagnostopoulos 1983.

of an arrest warrant due to "serious indications of guilt" (serious evidence from the preparatory or the preliminary investigation points to the crime commitment; Article 282(1) GPPC). For juveniles, only when the over 15 y.o. minor is suspect for a felony punished with *at least ten years* imprisonment (Article 282(5) of GPPC as amended by Law 3860/2010, Article 8(2)). No other considerations have to be taken into account when police custody is being ordered. However, in practice, overcrowding in police stations, detention departments and prisons also counts for not imposing custody or remand by law enforcement authorities, and primarily the police. In addition, after the enforcement of detention and at the time when the detainee applies for release, apart from the conditions of law (Article 286(1,2) GPPC), the general family situation, employment and the health of the accused, are taken into consideration as well as some other relevant conditions, *e.g.* pregnancy stage (cf. Article 556 (a,d); 557(2) GPPC).

The person in respect of whom remand is being sought appears in person before the judge/court that is authorised for taking this decision (detention). Otherwise, if s/he doesn't appear and the investigating judge considers that the facts alleged do establish *Probable Cause* (reasonable grounds for holding a belief) that the suspect committed the crime, then the investigation can be regarded as finished with the issue of an arrest or a bench warrant ("warrant of forcible presentation": warrant issued by a judge or court ordering the forcible presentation of the offender, Articles 270, 272, 276 GPPC).

In summary, the defendant has certain rights at the pre-trial stage included in the Constitution and the Penal Procedure Law, as already noticed. To the previous rights those deriving from International and European conventions ratified and integrated into the national law have to be added (cf. Article 28(1) Constitution). The most important is the right to be heard (Article 20 Constitution; also 287(5) GCPP) and the "presumption of innocence" (UDHR, Article 11(1); ICCPR, Article 14(2); ECHR, Article 6(2); EU-Treaty, Charter of Fundamental Rights of the Union, Article II-108), which until now applies to the whole penal procedure and which, unfortunately, is frequently disregarded by the private mass media, especially television, in certain reported cases.[31] Moreover, the accused/suspect has:

- the right to remain silent, deny the charges, and submit a written defence statement (Articles 104, 273 GPPC);
- the right to be informed and receive copies of all the evidence in the case file, and to ask for sufficient time (no less than 48 hours) to prepare his/her defence (Articles 101, 102 GPPC);

[31] Androulakis 2000: 27–30.

- the right to be informed by the investigating judge or other investigating officials of the charges brought against him/her and his/her rights before being called to answer the charges (Articles 101, 273 GPPC);
- the right to appoint a defence counsel (no more than two) from the very beginning of the police or judicial investigation (or to receive legal aid if s/he is indigent) and to communicate with his/her legal counsel at any stage of the investigation (Articles 96, 100, 273(2) GPPC);[32]
- the right to present evidence in his/her defence and to request the examination of witnesses, experts et cetera. (Articles 104, 273, 274 GPPC);
- the right to be present at all investigation acts apart from witness examination (Article 225(1) GPPC), to be supported by his/her counsel during cross examination with witness(es) or other defendant(s), to put questions to them, and to submit comments on the collected evidence (Articles 97, 99, 101 GPPC);
- the right to be informed in a language s/he understands (the right to an interpreter, Article 233 GPPC);
- the right to appeal against the decisions of courts and judicial councils (Articles 285(1), 286(2), 287(1)(a, 5), 291(1)(a), 322(1) GPPC);[33] and
- the privilege against self-incrimination (Article 227(3) Greek Correctional Code/GCC; ICCPR, Article 14(3g), Law 2462/1997; cf. ECHR, Article 6; see also AP 1/2004; 2683/2008).

Protection against unlawful or unreasonably long deprivation of liberty

Police custody and/or remand are subject to regular review. The GPPC foresees two forms of (automatic) detention-term control. The first one is the control of continuing or not the pre-trial detention up to one year, namely six more months (Article 287(1)), and the second one is the control of extension or not of the one year to the maximum term of 18 months (Article 287(2)).

In the first control form (Article 287(1,3) GPPC), if the detention has lasted six months, the judicial council of misdemeanours (first instance) has to decide with explicit arguments whether the accused shall be released or detained for an additional period up to six months. The previous applies to the case when the inquiry has not yet been completed. The whole proceeding is to be carried out within exclusive dates before expiring the detention term (five to ten days).

32 Although the law provides for persons in detention to have access to a lawyer from the very beginning of the investigation, in practice, unfortunately, it is sometimes different. The CPT, during its 2005 visit, registered a number of allegations according to which the access to a lawyer had been delayed for up to three days (CPT/Inf (2006) 41).

33 See also Bahtiyar 2009: 450, and more in Tsoureli, 1982; Magliveras & Anagnostopoulos 2000: 153–154; Spinellis 2008: 477–478.

When the detention expires during the trial, then the council of appeals decides on its continuing or not.

The judicial council in order to decide has to examine all the prerequisites for detention from the beginning; however, the judicial councils in the majority of the cases are restricted to repeating the prerequisites of the law in order to justify their decision, without explaining sufficiently the reasons for that. If the detention is not extended within 30 days after its expiration (of three or six months, Article 287(1) GPPC), the legitimacy of the detention warrant ceases and the public prosecutor orders the release of the detainee (Article 287(3) GPPC).

The second form of control, that of *extension*, is different from the first, since it refers to exceptional conditions being under the auspices of the Constitution (Article 6(4)). A decision justifying in detail the reasons for extension is required by the judicial council. The council has to take into account all of the evidence and real events on which the "completely exceptional circumstances" are grounded, so that the extension could be considered as necessary.

As previously noted, the accused enjoys the right to be heard by the judicial council about the extension (287(5) GPPC; Law 3346/2005, Article 12). The judicial council's decision to prolong or extend pre-trial detention can be appealed only before the Supreme Court by the defendant and the prosecutor (Articles 287(1,4,5), 285(5), cf. 287(2) GPPC).[34]

Law 3346/2005 (Article 12) amended Article 287(1a, b) of the GPPC introducing the *right* of the accused *to be heard* by the judicial council, when it is going to decide about the continuing or the extension of his/her pre-trial detention (see also 287(5) GPPC). Previously the accused had the right to submit a petition to the council; this practice was not corresponding to the Article 5 ECHR, since it didn't safeguard the *principle of equality of arms* (principe de l'égalité). As a result of this practice Greece was convicted by the ECtHR, not once but three times.[35]

Another issue arises when someone is accused of two or more counts of reckless manslaughter committed concurrently or crimes that are interrelated, *e.g.* car accidents, fraud and embezzlement.[36] In this case the term starts from the initial detention of the accused. The detention may be served at the same time for all crimes with the longest period determining the amount of time the accused will remain in detention centre (Article 288(1) GPPC).

The review does take place automatically with the prosecution service starting the procedure and the judicial council deciding. Moreover, in the

34 Bahtiyar 2009: 452–453.

35 13.07.1995, *Kampanis v. Greece*; 23.09.2004, *Kotsaridis c. Grèce*; 02.11.2006, *Serifis c. Grèce*..

36 Judicial Council of Appeals/Thessaloniki 1045/2001.

control of *continuation*, if the detention has not been prolonged within 30 days after the expiry of the three or six months of the detention-term (Article 282(1) GPPC), the prosecutor orders the release of the detainee, even when the detention has been decided by a judicial council (Article 287(3) GPPC; see also Article 285(1) GPPC).

Apart from the automatic control, the suspect/defendant him/herself can initiate proceedings for release. In particular, the *detainee* can apply for the revocation or the replacement of the detention (or the remand on bail/restrictive conditions). The application is to be submitted to the investigating judge up to the end of the inquiry, *e.g.* up to the time s/he forwards the file to the prosecutor (Article 286 GPPC). Yet, it can be applied later, in fact at any time, but not by the accused of drug laws violation, who can submit his/her request only after two months of the detention enforcement. If his/her request is rejected, s/he can apply again after one month from the previous refusal (Law 1729/1987, Article 21; Law 3459/2006, Article 42(2)(b)). At the end of 2009, the previous regulation was fully replaced (Law 3811/2009, Article 25(4)) with a vague notification according to which "the decision for pre-trial detention or its continuation should take in any case into account the indices showing that the accused is addicted to drugs". The time spent in a detoxification centre is calculated as part of the detention time or the imposed sentence (Law 3459/2006, Article 32(1)(e)).

Although the law refers to the "detainee" who can apply for the revocation, in another article the GPPC explains that, in order to be accepted, the application for revocation or replacement, the *previous* enforcement of detention is not necessary (Article 291(3) GPPC). This is justified, according to several jurists and case law, by the "spirit of Law's (*i.e.* 1128/1981) clemency", which introduced significant reforms to the pre-trial detention.[37]

The detention or the release on bail can also be removed *ex officio* by the investigating judge or after the suggestion of the prosecutor (Article 286(1)(a) GPPC), or the application of the investigating judge to the judicial council. Additionally, the investigating judge can replace the detention with restrictions and the restrictions with remand (Article 298 GPPC), justifying in detail his/her order and after the written response of the prosecutor (Article 286(1) GPPC). S/he can likewise replace the imposed restrictions with others.

The detainee can lodge an appeal against the decision of the investigating judge who denied his/her application for revocation or replacement to the judicial council, within five days after the announcement of the rejection (Article 286(2)(b) GPPC). The rejection of detention's revocation causes no precedent, thus it can be filed again by the accused as many times as s/he wishes.

[37] See *supra* section III (under: General legal background); also Lafazanos 1982: 456; Papadamakis 2004: 305, 309; cf. Androulakis 1994: 282–286; 1981: 819–820; Foussas 1981; Statheas 1981: 105.

The second, and perhaps the primary, procedural alternative which offers the law to the accused is that s/he may challenge the *lawfulness of the warrant* of pre-trial detention to the judicial council, which decides definitely on the issue (Article 285(1) GPPC). Filing an appeal does not have a suspending effect and after its lodging the investigating judge can continue the inquiry until the judicial council meets its decision (Article 285(2,5) GPPC).

In particular, the accused can appeal against the decision of the investigating judge who orders his/her detention, asking for its replacement with release on bail (and respectively the raise of the imposed restrictions) to the judicial council of first instance within five days from the (announcement of) detention order (Article 285(1) GPPC).[38] The appeal can be exercised by the accused himself, his/her representative and his/her defence attorney (cf. Article 465(2) GPPC). It is submitted to the secretary of the court of first instance or to the directorate of the detention centre/prison (Article 474(1) GPPC). Nevertheless, if the detention is based on a warrant of the judicial council itself, no legal remedy is provided (Article 285(3) GPPC).

Summing up, the judicial council of first instance decides to the cases of the review against the detention warrant and the warrant imposing restrictions (Article 285(1a) GPPC). The investigating judge and the judicial council of appeals decides to the appeals for revocation or replacement of either the detention or the release on bail (Article 291(2) GPPC). The judicial council of first instance (misdemeanours) decides only when the prosecutor or the defendant applies against the order of the investigating judge for the replacement of the release on bail with detention or remand (Articles 286(3)(a); 298 GPPC). The review can be applied only once (Article 285 GPPC), while the appeal for revocation or replacement as many times as the defendant wishes (Article 286 GPPC).

Criteria which are taken into account for the review are: the progress of the investigation and the existing of special or general preventive reasons. Several specialists note that the overuse of pre-trial detention does not correspond to its role, which is to ensure the defendant's appearance at trial, and not to operate as a means of "pre-sentencing" (*i.e.* making the accused serve some of his/her anticipated sentence). This is what the bar associations in the last few years often refer to in their information magazines, flyers, and press releases,[39] and that pre-sentencing contradicts the presumption of innocence.[40] Criticism on long

[38] Disagreement exists over the starting point of the five days' period; according to one view which is prevailing and also expressed by the case law it starts the day on which the accused is placed in the detention centre/prison, while according to the other, the five days' limit starts a day after the enforcement of the arrest warrant.

[39] *I.e. The Lawyer's Tribune* 8(77) 2009: 10; Papadamakis 2004: 305; also US Department of State 2008: 1d, 2009: 1d.

[40] The presumption of innocence places the legal burden on the prosecution to prove all elements of the offence – generally beyond a reasonable doubt: *in dubio pro reo* – and to

sentences and remand time, the overcrowding in prisons and detention centres along with the prisoners' unrests in November 2008, resulted in the issuing of measures and legal amendments (December 2008) already referred to above. The *upper* level of pre-trial detention was reduced from 18 to 12 months for felonies to which a prison sentence of five to ten years is foreseen. For felonies, for which either longer imprisonment (over ten years) or a life sentence is foreseen, the upper level of pre-trial detention didn't change, since it can be prolonged for six more months as before. However, it was emphasized that the prolongation refers only to *absolutely exceptional cases* even to the very serious felonies (imprisonment ten years to life: Law 3727/2008, Article 19(1); Article 287(2) GPPC).

The time of pre-trial detention runs from the first day of detention, irrespective of the simultaneous or successive pronouncements of the charges against the defendant.

A new detention for another crime during the same period cannot be ordered, unless the particular crime could not be prosecuted but during the last three months before the expiry of the previous detention term or before the release of the accused. In such a case the new detention cannot last over a year and cannot be extended for any reason (Article 288(2 sections b, c) GPPC).

Whether the pre-trial detention status is retained until the determination of an appeal against conviction[41] generally depends on the time spent in the prison/detention centre and the length of the serving sentence. A formal prerequisite is also the appeal to have been legally and in time applied. The appeal and the rest of the judicial means (*i.e.* reversal) suspend the remand "if the law does not order differently" (Article 471(1) GPPC). Nevertheless, in the case of arrest and remand with an order of the judicial council (when disagreement exists between prosecutor and investigating judge), the appeal against the decision has no suspending result (Article 471(1)(b) GPPC), even if an arrest or detention warrant has not been issued (Article 315(3) GPPC). This occurs in few cases, where the court regards itself as "non competent" and by sending the case to the authorised court operates like a judicial council and can order the arrest and detention of the defendant accordingly (Article 120(2), cf. Article 315(3) GPPC).

Article7(4) of the Constitution foresees that "The conditions under which the State, following a judicial decision, shall compensate persons for unjust or illegal conviction detained pending trial, or otherwise deprived of their personal liberty, shall be provided by law" (Article 26, Law 2915/2001).

disprove all the defence arguments. See Androulakis 1974; 1994: 184–98; Zesiadis 1989: 100–23; Alexiadis 1990; Bakas 1995: 85–6, Androulakis 2000: 30–34; Mylonas 2001: 707.

41 Conviction and sentencing takes place at the time of the delivery of the verdict.

Articles 533–545 GPPC set the conditions for recompense (in particular, Articles 533(1), 536(1) according to Law 2915/2001, Article 26). The right for compensation refers not only to the convicted but also to the pre-trial detainees (Article 533(2) GPPC). Although compensation has been regulated since 1931 (Law 4915/1931 "About compensation by the state of the unjustly convicted"), it was hardly used.[42] Articles 535(1) and 536 GPPC foresaw that "The State has no obligation to compensate a person who (…) has been detained on remand if, whether intentionally or by *gross negligence* (emphasis, by E.L.), s/he was responsible for his/her own detention". Courts were allowed to decide *proprio motu* about compensation for unlawful detention without a hearing and detailed reasoning on the basis of an application by the detainee or the convict.[43]

Convictions of Greece by the European Court of Human Rights motivated the reform of the relevant Code's articles (esp. Articles 533, 536(1)). In particular, the Decisions of the European Court on 29.05.1997 about the cases *Georgiadis v. Greece*, *Tsirlis and Kouloumpas v. Greece*,[44] as well as the Decisions on the cases *Sinnesael v. Greece* (01.07.1998), *Goutsos v. Greece* (3 March 1999)[45] and *Karakasis v. Greece* (17 October 2000).

Following the European Court's judgments, Greece adopted constitutional and statutory reforms. As regards the absence of reasoning in judicial decisions, Article 93(3) of the Constitution was amended in April 2001 to explicitly require that judicial decisions are to be supported by *detailed* reasoning, and to authorise the law to determine sanctions in case of ignoring or disrespecting this rule.

As regards the fairness of the proceedings, the new provisions no longer exclude the possibility of compensation in cases of detention due to the detainee's "gross negligence" and obligate criminal courts to give reasons for their decisions after having heard the persons concerned and the public prosecutor. In particular, Article 26 of Law 2915/2001 adapted Articles 533–545 of the GPPC to Article 5(5) of the ECHR, Article 14(6) of the ICCPR and Article 7(4) of the Greek Constitution, by striking out negligence and adding the hearing of the applicant and the prosecutor (Articles 535, 536(1) GPPC).

However, there are different interpretations of law (Article 537(1) GPPC) by the courts concerning the irrevocable decision as a prerequisite for an application for compensation and concerning the starting point of the ten-day limit for submitting applications after the pronouncement of the verdict.[46]

42 Courakis 1998.
43 Margaritis 2001; Courakis 2005; Bahtiyar 2007: 454.
44 See also COE/CoM, *Resolution ResDH(2004)82*, which concerns both cases, and in particular, the judgments of the ECtHR about unlawful detention and unfair compensation by the Greek state, in December 2004.
45 *Interim Resolutions DH(99)130* (p. 247–248) and *DH(99)558* (p. 21) to the cases respectively, followed by the final *Resolution ResDH(2004)83* in 2004.
46 Judicial Council of Appeals/Patras 403/2004.

Information, legal representation and support

If the person is caught in the act, after s/he is brought to the police station for booking (identification, fingerprints et cetera), s/he must sign the arrest report, wherein the time of the arrest is also registered.[47] From this moment s/he also has the right to contact family members and his/her counsel.

At times, police officers during their patrol carry out identity-checks;[48] they can also bring some persons for identification to the police station and after the identification they must let them free. If not, then the arrested have the right to be informed of the charge or charges. In this case, the charge must be announced to the arrested who must also sign the official report of the arrest. After that s/he has the right to make a telephone call to his/her family and his/her legal counsel.

Occasionally, the ombudsman reports on the issue[49] that the arrested either according to the expedite procedure of the crimes in the act, or brought to the police department after a stop-and-frisk type of search or when a pedestrian who, upon seeing police officers patrolling the streets in an area known for narcotics trafficking, or public disorder et cetera. flees from the officers, stay much longer than justified at the police station without being charged; thus, they don't have the rights of the accused and they cannot call their attorneys.[50] The ombudsman asserted in his last published annual report that the number of complaints from citizens about violations of personal freedoms in the course of taking citizens to detention centres for arbitrary identity checks was high.[51] The ombudsman noted an increase in the number of complaints that police conducted investigations without soliciting testimony from the complainants.[52]

In arrests with a warrant of the investigating judge or an order of the judicial council of first instance or of appeals, the arrested is informed about the reasons of the arrest and the charges against him/her *at the time* of his/her arrest. S/he has the right to remain silent or deny the charges, deny signing any kind of declaration or giving his/her fingerprints until his/her counsel is present. The warrant contains the article(s) of the Criminal Law by which the person is charged, stamped by the authorised court and signed by the investigating judge and the secretary of the court, otherwise it is invalid (Article 276(2) GPPC). The investigating judge issues the warrant only in cases to which detention is permitted, taking into account the view of the prosecutor; in disagreement, the arrest is ordered by the judicial council (Article 276(3) GPPC).

47 Cf. Papadakis 2000: 1–3.
48 ECtHR 20 December 2004, *Makaratzis v. Greece*.
49 Ombudsman 2003; 2007b; 2008a: 46–48, 269; 2008b: 10–12.
50 Papadakis 2000; Ombudsman 2008a: 46–47.
51 Ombudsman 2008a: 46–48.
52 Ombudsman 2003: 2–3, 10; see also Fytrakis 2004: 392–3; cf. EL.AS 2005.

If the accused has no counsel at the *ordinary/main investigation* (usually concerning a felony and a (serious) misdemeanour tried by a three-member court), the investigating judge is obliged to appoint one *ex officio* (Article 100(3) GPPC). It is suggested that the accused also be explicitly informed in the *summary investigation* for the sake of the good administration of justice (EU-Treaty establishing a Constitution for Europe 2004, II, Articles 101, 107, 108(2)). In Greek law and practice, the *accused* always has the ability during the "summary investigation" to ask for an attorney or to call his/her attorney. The representation of offenders caught in the act of committing misdemeanours or in the presence of a police officer by a defence counsel on trial is specifically referred to Article 423(1)(a) GPPC. Law 3160/2003 (Article 2(1)) introduced the *obligatory* presentation of an attorney during the *preparatory examination* as well; as already referred to, this is the first phase in which the case is examined to decide whether an investigation is justified or not (Article 31(1a) GPPC). It must be taken into account that the questioning of the suspect without the support of a legal counsel cannot form part of the case file (Article 31(2)(3).

The law (3160/2003) granted additional rights of the accused to the quasi *suspect*, which were complemented two years later with another law (3346/2005, Article 5): the right to silence, the right to be informed about the offence that the preparatory investigation refers to, to receive copies of the charge and all the evidence in the case file, to ask for sufficient time (48 hours) for his/her preparation, to present evidence in his/her defence and to request the examination of witnesses, experts et cetera, as well as the privilege against self-incrimination. All correspond to the right to a *fair trial* according to Article 20(1) of the Constitution and the Article 6(1)(a) of ECHR.

Regarding offenders "caught in the act," the short time period limits the defendant's ability to present an adequate defence. Therefore s/he may request a delay to prepare it, and the court is obliged to grant it, but no longer than three days (Article 423(1) GCP).

In conclusion, during the pre-trial phase in felonies and serious misdemeanours to which pre-trial detention can be imposed, the defendants *must* be legally represented. In case that s/he is not already represented by private counsel and is unable to afford one, the court appoints an attorney. S/he is a private defence attorney paid by the state (Articles 100(3), 340(1)(b), 376, 423(1)(a) GPPC. In less serious misdemeanours, by the request of the defendant, the court *must nominate* a counsel; it is also usual for the court to nominate a defence counsel even without the request of the defendant.

In the trial phase, although for decades the law provided the appointment of a counsel cost-free for cases in civil courts (legal aid -"privilege of indigence" Civil Procedure Code, Article 194), in criminal courts, this wasn't the case. The

court appointed an attorney free of charge and the Athens Bar Association provided legal assistance for special types of offenders in economic need, such as aliens, minors, Roma or drug addicts. Bar Associations in other cities of the country sporadically provided legal aid. Such aid was also and is still offered for specific cases by the National Refugee Council, the Marangopoulos Foundation for Human Rights, the Office of Legal Aid of the Law Faculty of the University of Athens in co-operation with the Athens Bar Association et cetera.[53] Since 2004 the law (3226) provides *full* legal aid,[54] while since 2007, minors are also entitled to legal aid if they are victims of sexual crimes, trafficking, exploitation or victims of crimes against their personal freedom (Article 1(3) as amended by Law 3625/2007, Article 6(1,2)).

In the pre-trial phase, the appointment of defence counsel is carried out by the investigating judge or the court from a list which is drawn up every month by the bar association of the city or the district for criminal-, civil- as well as commercial law cases and acknowledged to the court (Law 3226/2004, Article 3(1)(a), as amended by Law 3625/2007, Article 6(2)).

The law also foresees the assignment of an attorney during the court trial for defendants who do not have the financial means to appoint a lawyer themselves, charged with felonies, misdemeanours of the authority of the three-member court and for all courts of appeal (Article 7(2)). In addition, they are appointed in criminal proceedings for civil claims of torture victims, as well as for violation of human dignity and several other crime groups, if they are felonies or misdemeanours under the authority of the three-member court for which imprisonment of at least six months is foreseen (Article 7(3)).

Cases tried before a one-member misdemeanours' court are excluded from legal aid, both at the pre-trial and the trial stage,[55] but if the defendant asks for a counsel, the court must appoint one.

Legal aid is granted by the judge or the president of the district court in which the case is to be adjudicated or is pending (Law 3226/2004, Articles 3(1)(a), 6(1), 8(1)). For minors, not only the court but also the prosecutor, the investigating judge or the judicial council can appoint counsel, if it is regarded as necessary (Article 3(5) as amended by Law 3625/2007, Article 6(3)). For minors and adults accused for felonies the appointment of a counsel is obligatory (Article 340(1)(b, c) GCPP; Article 9(1) Law 3860/2010). In issues irrelevant to a trial, legal aid is granted by the one-member district court of the applicant's residence (Article 8(1) refers to civil cases). The Law (3226/2004) foresees also the advisory aid that may be provided in criminal cases by the duty prosecutors and the supervisory prosecutors of the prison establishments, or in civil cases by the presiding duty judge of the authorised district court (Law 3226/2004, Article 5).

53 Spinellis & Spinellis 1999: 31–32.
54 See also European Commission/EJN 2005, 2007.
55 Dellidou 2007: 118–119.

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The suspects/defendants who do not know (or do not know quite well) the Greek language have a right to an interpreter when they are brought to the prosecutor, the investigating judge or to the judicial council, during the trial and whenever is needed (Articles 227(2), 233 GPPC). The interpreter is appointed from a list drawn up each year by the judicial council of first instance. The same applies for deaf and mute people (Articles 227(2), 233 GPPC).

However, several foreign defendants complain that documents are not systematically translated, but their content is roughly presented and explained to them. They also complain that they are asked to sign documents without being fully informed about their content and about the quality of the services offered to them. In particular, they say that it is not always clear to them about what they are accused of, what is discussed during the trial in all details and what exactly the verdict means.[56]

The law doesn't mention anything in the section about mentally ill *defendants*, though the same can occur if they are in need of assistance; in general, they are regarded as incompetent ("non-imputable") or of limited competence and they are institutionalised after the agreement of the investigating judge, the prosecutor and the experts, for no more than six months for observation. During this period, pre-trial detention is suspended and the time under observation is accounted in the final sentence in case of conviction (Articles 200 GPPC, 87(3) GPC).

III.3. RECOMPENSE AND FINAL SENTENCE

One more point about detention, which has to be discussed here is whether the time spent in pre-trial detention is taken into account in the final sentence. The time of pre-trial detention runs from the first day of detention, irrespective of the simultaneous or successive pronouncements of the charges against the defendant (Article 288(1) GPPC).[57] In case of conviction of the accused with imprisonment, the term of pre-trial detention as well as the time between the arrest and the order of pre-trial detention shall be deducted from the final sentence (Article 87 GPC and Article 371(4) GPPC).[58] This means that deduction is not restricted to the period spent in pre-trial detention but also includes the time spent in arrest or police custody. The deduction rate is that one day of pre-trial detention is equal to one day of imprisonment. Difficulties rise about the deduction in cases of life sentences.

56 Papadakis 2000: 5–6.
57 Cf. ECtHR 3 July 1995, *Kampanis v. Greece*.
58 Spinellis & Spinellis 1999: 23; Bahtiyar 2009: 454; van Kalmthout et al. 2009: 87.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

Everyday life in prison is regulated by Prison Law, the Internal Regulations of Remand Detention Establishments, the Penal Procedure Law and the Constitution. Greek prison legislation is progressive and human orientated. Nevertheless, its humane orientation is called into question by overcrowding, inadequate employment of specialised personnel, insufficient (re-)training of security staff and, generally, outdated prison management, which generates retreatism or cynicism among personnel.

IV.1. LENGTH OF PRE-TRIAL DETENTION

Legislative initiatives to shorten the pre-trial detention time and prevent abuses during the last decade caused the reaction of law enforcement agencies which, when they considered that the accused *should be* detained, they preferred to increase the charges against him/her or the seriousness of crimes committed in order to protect society and have more time for their investigation. Although international research in the area shows that this is a common technique of all crime control agencies,[59] in order to back their decisions, such practices may undermine the will of law and have side-effects for the accused and the prison system.

Another important development is the mentioned reduction in December 2008 of the *upper* level of pre-trial detention (Article 287(2) GPPC) from 18 to 12 months for felonies to which a prison sentence of over ten to 20 years is foreseen (Law 3727/2008, Article 19(1)).[60]

The above amendment was an effort of the Ministry of Justice to deal with the pressure exercised by the prisoners' unrest during that period and the general criticism for overcrowding.[61]

Persons arrested are kept in police station holding cells for a few days, while detainees in houses of detention and/or prisons, when they are awaiting their trial or the decision of the appellate court. Until recently, pre-trial detainees were not placed separately from sentenced prisoners, although the Correctional Laws always foresaw special prison-types or departments in the existing establishments (Article 15(1) GCC). The only exception was the minors who are housed in separate facilities (Law 3189/03, Article 4(4); Article 282(5) GPPC;

59 See mainly Levine et al. 1980: 136–137; Lambropoulou 1999: 77–78.

60 Cf. *Addendum to Explanatory Report on Law 3811/2009*: 3.

61 See Athenian Press *i.e. Eleftherotypia, Kathimerini, Τα νεα*, in November-December 2008; *In.gr* 2008; see also AI-GR 2008.

Article 96(3) Constitution). In June 2008, the convicted women were transferred from the Central Women's Prison of the Korydallos Prison Complex to the new women's prison in Eleonas/Theva, while the female detainees remained in the old facility.

In recent years, the male detainees of Korydallos are regularly transferred to other prisons after their conviction, apart from those who attend therapeutic or educational programmes. These remain in the prison until they have completed their course. In this way the prison population of Korydallos (2,150 persons) nowadays consists of approximately 75 per cent pre-trial detainees and the facility for the first time after decades corresponds to its official defined use as "judicial" prison.

IV.2. PROTECTION AND CARE

Especially vulnerable groups of pre-trial detainees are kept separate in order to be protected. In particular,

- Homosexuals and transsexuals are kept in special units or in different prisons (*e.g.* a section of Corfu prison, and segregation units in some other prisons); the same applies for those accused of sex offences (*e.g.* special units in Tripolis and Grevena prisons), and of offences against children;
- Those who are HIV positive are kept in the Prisoners' Hospital of Korydallos prison for men. Sick women, convicted or on remand are generally sent to the Prison Hospital of Korydallos, where a few rooms are reserved for them.[62]
- Former policemen or other former law enforcement officials are usually kept in small units of the prison facilities with a small number of prisoners who also need protection for various reasons, mainly because of their professional and/or social status, such as priests, lawyers, judges, (see also Article 144(13), PD 141/1991 about their transfer), military personnel, and white collar criminals. No other special measures are carried out to prevent pre-trial detainees from being assaulted by other prisoners.
- "Suicidal" prisoners are usually placed in small units of the prison too, without having contact with the majority of the other prisoners. Psychiatric treatment by psychiatrists and surveillance by the prison staff and their fellow mates are the common prevention measures used for them. Psychological support is also offered by approximately 30 specialists working in the 33 current prison facilities, who belong to the permanent prison personnel. Their work overload is more than obvious.

[62] One woman, who has been recently found (November 2009) HIV positive, is kept separated in Korydallos Women's Prison for detainees.

There are also special groups who are held in special facilities and who are subject to special conditions. Terrorists and "dangerous" criminals are held in special units of prisons and single cells. A recently issued law (3772/2009, Article 20(1)) introduced type C prison establishments, which can be created either in separate or in the existing facilities after a Decision of the Ministry of Justice. These establishments would be for prisoners serving life sentences or long sentences over ten years and are considered to be especially dangerous for the smooth life in prison; they would not have any contact with the type A and type B prisoners in the facilities. In type A facilities, pre-trial detainees, prisoners on remand, persons convicted for economic crimes and those serving a prison sentence up to five years are housed; in type B facilities, prisoners who do not fit into the type A or C categories are housed (cf. Article 19(2) GCC).

The "dangerousness", however, is not specified in the text of the respective law. Lately, in the new prison of Grevena (Macedonia) a part of it was changed from type A to C after a Minister's Decision (MD 103//2009; see also MD 982//2009).[63] Before the Decree, units for dangerous criminals of common criminal law were operating (de facto) in some prisons, while after the arrests of leading members of the terrorist group, 17 November, extra cells for them in a separate area of Korydallos prison were established. Since September 2009 several persons have been arrested as suspects for violation of the anti-terror legislation; they are detained in prisons all over the country. As far as it is known, some of them are accommodated either in special units and prison wings or in prisons for convicts serving long sentences.

IV.3. ACCOMMODATION

No difference exists between pre-trial detainees and convicted prisoners in the amount of space that the law requires for each person to have in his/her living accommodation. The Prison Law foresees the accommodation of one prisoner per cell, and only in extraordinary cases, such as prison overcrowding and for a certain period, two in a cell or up to six in a ward/ dormitory (Article 21(1,2) GCC). It foresees 35–40 m^3 for individual cells and six m^2 for each person in a dormitory (Article 21(2,4) GCC). At present, due to congestion, three to four persons are accommodated in single cells and 12–16 in the dormitories. Only a very small proportion of detainees and convicted persons are accommodated alone in individual cells. These are "dangerous" criminals, usually involved in organised crime activities, being fugitives et cetera, and convicted terrorists, as well as vulnerable people either being in danger of attack or running a risk of harming themselves and inmates who cause problems in the discipline of the

[63] MD 103920/2009, Gov. Gazette B′ 1544/28.07.2009; MD 98257/2009, Gov. Gazette B′ 1525/27 July 2009.

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institution. The only exception is mothers with children, who are put in individual cells (Article 21(2)(d) GCC) in a separate area. In each prison establishment, two to three single cells are reserved for solitary confinement.[64]

The policy in Greece's prison system for pre-trial detainees is to be accommodated in individual cells wherever possible. However this has not been done in the last two decades. The law underlines that each person has *the right* to his/her own cell (Article 21(2)(b) GCC; MD 58819/2003, Article 31(7)) that can be fulfilled whenever it is necessary for the good of the prisoner and it is possible by the conditions prevailing in the establishment (Article 21(2)(c) GCC; MD 58819/2003, Article 10(6,9)).

Pre-trial detainees who share accommodation aren't regularly assessed in order to ensure that they are suitable to associate with each other. However, during their office hours, the chief guards regularly examine prisoners' requests to be moved to another cell or ward from which they have been put, for "sharing (or not) a room with someone else". In practice, the personnel take into account the particularities of detainees or categories of them (Articles 107(2), 108 (b), 113(4–7) GCC; MD 58819/2003, Articles 32(2,8), 53(7,12–14), 54(3)(b, d, e), 56(3,6), 59(2)).

Whenever a pre-trial detainee is to be placed in solitary confinement/isolation punishment, a medical doctor or any other member of the health staff, *if available*, is asked to check *beforehand* that s/he is fit to sustain such punishment. Since doctors are not *at any time* available, but once or twice a week, depending on their specialty, such control is carried out by any on duty member of the nursery staff. The Correctional Code (alias Prison Law) also foresees that in case of solitary confinement, a medical doctor has to check the health of the person *every day* (Articles 69(1a) GCC, 21 (3)) which is also impossible in practice for the same reason and is carried out by the nursery staff.[65] The decision for solitary confinement rests with the prison board[66] which is supposed to take into account the situation of the detainee or the prisoner. There are no complaints about maltreatment in solitary confinement which, as far as I know, is rarely used.[67] The prison board is also concerned with the disciplinary proceedings in cases of disorder and riots and the following of prison rules (Articles. 10(1), 70(1) GCC).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in order to evaluate progress made

64 Ombudsman 2009.

65 Cf. CPT/Inf (2008) 4, par. V: 27.

66 On the board are the prison director, the senior social worker of the prison and the senior special scientist (psychologist, teacher, sociologist, jurist, agriculturist), and the chief warden of the correctional officers, the latter without voting rights (Article 10(1] GCC).

67 CPT/Inf (2002) 32 par. 110; cf. CPT/Inf (2002) 31 paras 108–111; ECtHR 19.04.2001, *Peers v. Greece*.

since its last periodic visit in 2005 and in particular to assess developments in relation to the prison's health-care service, paid a targeted visit to the Korydallos Prison Complex[68]; this is the biggest in the country with 2,043 prisoners and an official capacity of 640 places at the time of the visit in February 2007 (20–27 February 2007). Korydallos Prison remains a regular concern of the CPT. The delegation recommended again Greek authorities to take concrete steps in order to reduce overcrowding in the Korydallos Men's Prison and to improve the material conditions in the facilities.[69] Nevertheless, in 2005 it had recognised that overpopulation may be an impediment to the development of adequate measures to address prison problems (violence, dearth of staff, et cetera),[70] and it encouraged prison services to confront expanding defeatist feelings.[71] The ombudsman for human rights (part of the national Ombudsman's Office) stated likewise in May 2007 that the increasing overcrowding was creating poor prison conditions, discipline and serious health-care problems in the institutions.[72] As already mentioned in this study, in very recent years, the majority of pre-trial detainees have been concentrated in the Korydallos Prison Complex, the female detainees remaining in the old Women's Prison in Korydallos while convicted women are transferred from the Central Women's Prison of Korydallos to the new facility in Eleonas/Theva.

Finally, the CPT recommended that Greek authorities give due consideration to the possibility for an independent body, such as the operating Ombudsman's Office, to carry out prison visits, taking into account the remarks made by the Committee in its previous reports.[73]

The supervision of prison operation rests with the public prosecutor of the court in the area of which each institution is located. This supervision usually keeps to formal visits due to its overload of duties and the prison overpopulation (Article 572 GPPC; Articles 85, 86 GCC). According to the Constitution (Article 103(9)), prisons as public services run also under the competence of the Independent Agency, the national Ombudsman. In May 2007 the ombudsman for human rights formally complained that since 2004 the Ministry of Justice has denied his representatives access to prisons.[74] The Minister of Justice of the new government (October 2009) gave the green light for the ombudsman's visits.[75] In addition, he allowed the traditional form of social control which is

68 CPT/Inf (2008) 3, par. 49. One more ad hoc visit took place in October/November 1999, which also served for the review of measures taken to implement the CPT's recommendations for the prison and to carry out a visit to the Institution for Male Juvenile Offenders in Avlona, which was opened in August 1998.

69 CPT/Inf (2008) 3, par. 45.

70 CPT/Inf (2006) 41, paras. 83, 123, 125.

71 CPT/Inf (2006) 41, par. 75.

72 Ombudsman 2007a: 49–50; see also NCHR 2008b, paras II.12, 16.

73 CPT/Inf (2008) 3, par. 57.

74 Cf. Wener 1983; Lambropoulou 2008: 396.

75 Cf. CPT/Inf (2009) 20, par. 17.

exercised by the Bar Associations, local charitable, communal, social organisations, human rights groups and NGOs. Nevertheless, international human rights observers reported in previous years fewer problems receiving permission for visits than did local human rights groups, and the International Committee of the Red Cross had a regular programme for prison visits.[76]

Moreover, in 2002 the Inspectors Controllers Body of Prisons (or: Monitoring and Control Body, SEEKK–Law 3090) was created, which is composed of a retired judge and public servants (Law 3090/2002, Article 3(3)). It has the special task of making regular and unannounced visits for controlling prisons' conditions, order and transparency in the operation of the institutions (Article 3(2)). However, until 2009 nothing has been published and no information about its activities has been provided, even in the General Inspector's of Public Administration annual reports, where the activities of all control bodies of public administration are registered in summary. In April 2009, a special reference was made on a few MPs websites about the report submitted to the Parliament's Permanent Committee on Institutions and Transparency by the Head of the Body (19 March 2009) referring to illegal markets (cell phones) in prisons and the reply of the Minister of Justice to an MP's question concerning the issue.[77] The new government has already taken some steps to start operating the mechanism of a Controllers' Body of prisons.

In September 2008 after seventeen months, the CPT carried out another *ad hoc* visit to Greece (23–29 September 2008) in order to examine the treatment of persons detained by law enforcement agencies. Particular attention was paid to the situation of irregular migrants detained under Aliens legislation (*administrative detention*), who are held in either police/border guard stations or in special holding facilities under the responsibility of the Ministry of Interior.[78] Its report refers almost *exclusively* to illegal migrants.[79]

The CPT recommended that the Greek government, among other things, establish an independent police complaints' mechanism,[80] even if the Directorate of Internal Affairs is an independent Service of the Police supervised by the prosecutor of appeals, as the Government's also underlined in its response.[81] In addition, the disciplinary investigation of complaints are being carried out by the Sub-Directorates of Administrative Investigations, specialised for this purpose, which at administrative level are completely independent of the accused

[76] US Dpt. of State 2008: 5, 1c.

[77] LAOS 2009.

[78] CPT/Inf (2009) 20; 2009: 30, 71; see also the Response of the Greek Government, CPT/Inf (2009)21.

[79] See also CPT 2009. The present study does not refer to illegal immigrants held in administrative detention; there have been many reports describing the very poor conditions of the centres in which they are detained.

[80] CPT/Inf (2009) 20, paras 16, 17, 52.

[81] CPT/Inf (2009) 20, par. 16; AI-GR 2009; CPT/Inf (2008) 3, par. 57.

officers.[82] In December 2009, the new Minister for the citizen's protection (previously: Public Order and/or Interior) announced the creation of a complaints' service, and in February 2010 staffing took place.

The undocumented population in Greece was estimated in 2006 to number between 200,000 and 400,000 persons and the number of asylum seekers was, at the end of 2008, 38,061. In 2005, the Greek government issued 40,649 expulsion decisions and removed 21,219 persons from the country.[83] Between 1993 and 2008, the number of immigrants quadrupled. The total number of migrant apprehensions rose from approximately 40,000 in 2005 to 146,337 in 2008. The appointed immigration detention sites in 2007 were 9, with an estimated capacity of 2,500 persons.[84] The number of irregular migrants in the country cannot be estimated reliably.[85]

IV.4. INFORMATION AND SUPPORT

Concerning the information that pre-trial detainees are provided with regarding the regulations of the institution, including the method of making complaints, how to seek assistance in health, social or other issues that arise during detainment, according to Prison Law (Article 24 GCC), upon entering the prison, the prisoner/detainee meets the prison director (warden) and the social service representative, and is examined by the medical staff.

The *Internal Regulation of General Detention Establishments Type A and B* (hereinafter: MD 58819/2003) foresees the admission-procedure in prison facilities without distinguishing between pre-trial detainees and those convicted. The person entering the prison meets the social service representative and the chief of the security staff (correctional officer), as happens in practice, and declares if there is any reason to be protected, if s/he has any problem with other prisoners, or whether s/he is associated with some of them (MD 58819/2003, Article 10(6)). Both, social service and the chief of the security staff, and occasionally the director (Article 24 GCC), inform the newcomers about the prison regulation. They are examined by the medical doctors whenever they are available, usually once or twice weekly, and only occasionally when they are entering the prison. Only recently in Korydallos prison, the detainees entering the prison also see a doctor, who is employed on a daily basis after big efforts made by the prison directorate temporarily to offer their services due to the danger of Virus H1N1. The employment of the doctor is made possible by

[82] CPT/Inf (2009) 21, points 17.
[83] Global Detention Project 2009.
[84] Idem.
[85] Frontex 2010: 5,6, 19, 27, 28.

transferring the profit from the sale of cigarettes in prison kiosks to the payment of the doctor; the profit is also used for repairs, the painting of the prison, et cetera.

Teachers working in prisons and other professionals as well are willing to inform the inmates about their obligations and rights in prison or about any issue regarding their life in prison when they are asked. Furthermore, the public prosecutors supervising the prisons inform regularly those applied during their legal consultation hours operating in all prisons (Law 3226/2004, Article 5).

From time to time, information material (pamphlets) with the rights and duties of prisoners, as well as the institution's regulation and other practical advice in various languages is distributed. Since last year, such pamphlets have started being distributed in the juveniles' prison of Avlona.

As usual, the most efficient knowledge and experience transfer takes place from the older inmates to the newcomers.

IV.5. HUMANE TREATMENT

The international obligation that all persons under any form of detention shall be treated in a humane manner (ICCPR, Article 10, Part III) and with respect for the inherent dignity of the human person is expressly codified in the Prison Law (2776/1999, Articles 2, 3, 4)/GCC and the Constitution (Article 7(2)).

Pre-trial detainees like those convicted have access to sanitary installations and can have a bath or shower on a daily basis. All prisoners, irrespective of their legal status wear their own clothes (Article 33(1,4) GCC).

They enjoy certain rights deriving from Prison Law in order to maintain their contacts with free society and the bonds with their family (Article 51(2) GCC). They are permitted to have contact with their family and relatives up to the fourth grade (*i.e.* first cousins; Article 52(1) GCC). They also have the right to have visitors *at least twice* per week. The maximum number of visits is regulated by the prison board. Usually, those accused or convicted for misdemeanours cannot be visited more than three times weekly, while those for felonies once per week for at least thirty minutes and limitless visits from their defence attorneys (Article 52(1) GCC; MD 58819/2003, Article 21(1,2)). Visits from other persons need the permission of the prison board, which informs the Minister of Justice; within three days the Minister grants or rejects the application (Article 52(2) GCC). This procedure is usually preferred for visits, that according to the board, are considered to exercise an undesirable influence on the prisoner/detainee, such as when the visitor is either involved in the detainee's (and prisoner's) criminal case or is a former prisoner. There are no available data about what percentage of pre-trial detainees are denied regular visits from family members

on the grounds that such visits would interfere with the administration of justice. However, it seems to happen rarely.

Foreign prisoners are allowed contact with diplomatic and consulate representatives of their country of origin, as well as with other persons and organisations that could help solve problems relating to their prison accommodation (MD 58819/2003, Article 21(13)).

All prisoners, irrespective of their legal status, can make unlimited phone calls from the phone boxes of the institution paying themselves, unless the prison board has set restrictions because of certain violations committed by them (Article 53 GCC). Nevertheless, prison life and overpopulation both set boundaries to which the prisoners adjust. The use of mobiles is forbidden, but some are skilful enough to possess one.

Prisoners can also send and receive letters without limit (Article 53); censorship is forbidden by the Constitution (Article 19; also Article 53(4) GCC), though it is permitted in cases where serious crimes are being investigated or for reasons of national security (Article 3, Law 2225/1994). The letters are electronically controlled and opened in the presence of the prisoner/detainee (MD 58819/2003, Article 23(5)). The prisoners can always appeal for violation of their rights to the court responsible for their sentence enforcement, namely the court of the larger area where prison is located (Law 2225/1994, Articles 3,4,5; Article 53(7) GCC). The same applies for the furloughs, disciplinary sanctions, and restrictions of vocational and educational training. However, the pre-trial detainees can be granted a furlough only in extraordinary cases and unforeseen events affecting them, such as death, funeral and serious health problems of a close family member (Article 57(2) GCC).

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In general, pre-trial detainees are not preferred for work in prison. The proportion of working to non-working persons in prison facilities of the country tends to be 1 (working):2 (not working), while in Korydallos where the biggest number are pre-trial detainees, the quota is 1:3.

Work in prison is provided exclusively on a voluntary basis. The Greek Constitution prohibits forced or compulsory labour of any kind (Article 22(4); cf. ECHR 1950/53, Article 4(3a)). The main emphasis of the country's correctional policy is motivating prisoners to participate in work activities and educational programmes by providing incentives, the possibility for earlier release being the most important, offered also to the persons awaiting trial. Particularly since the 1990s although education and vocational training programmes have operated, they have not had a permanent character; they are, for the most part, those co-financed by the European Union and the Greek State and the old workshops constituting a significant element of prison infrastructure have been drastically reduced. At the same time, farming "half-way houses" for offenders, famous for their good performance for decades were abandoned to their fate. The

indifference of the prisoners to work there is due to the expansion of conditional release, increased opportunities for merging and conversion of sentences to fines, and change in the composition of the prison population.

IV.6. HEALTH CARE

All prisoners, convicted and pre-trial detainees, are formally entitled to health care services equivalent to those offered to the general population. Yet, significant problems arise from the very low staffing levels of medical personnel.[86] Concerning dearth, the CPT expressed its concerns (2005, 2007), especially in Korydallos Men's Prison.[87] Medical doctors, nurses and pharmacists do not show any special interest in working in prison facilities, their number fluctuating, while the ministry attempts to cover the needs mostly with part-time personnel.[88] The monthly reimbursement per doctor should not exceed 420 euro gross and 380 net (contract, part-time and medical regulations), which means that they formally should not examine and look after more than 25–28 prisoners *per month;* and that because their contract payment per patient is 25 euro for the first visit and 15 euro for the second, third et cetera. for the same person. In practice, they usually examine approximately 13 persons *per day*, therefore they exceed their limit in two or three visiting days instead of a month, which also means that they are not paid for the rest of the days.

The Government and the Ministry of Justice in particular, in their efforts to drastically confront the problem, announced in June 2009 the integration of the therapeutic institutions of the Ministry of Justice (Psychiatric Hospital for prisoners in Korydallos, the Prisoners' Hospital of Korydallos, and three Detoxification centers for drug and alcohol abusers (Article 19(1) GCC) in the national health system (ESY-Law 3772/2009, Article 13).[89] Thus, the prisoners can make full use of the national health system services and the medical staff offer their services 24 hours a day in whatever public hospital or clinic is needed. As far as it is known, the Decrees for the operation of a Prisoners' hospital under the Greek National Health System has not yet been issued.

In several prisons, "sensitisation and mobilisation" groups (counselling, phase A of detoxification programme) are being held for drug addicts by KETHEA (Therapy Centre for Dependent Individuals), operating since 1988 and by the "Over 18" Unit since 1994. KETHEA runs its programmes in 14 prison establishments of the country (three in Korydallos Prison Complex). Similarly, the "Over 18" Unit of the Psychiatric Hospital of Attica also runs its programmes

86 Cf. CPT/Inf (2008) 4 par. IV.
87 CPT/Inf (2006) 41, par. 75.
88 CPT/Inf (2008) 3 par. 52; CPT/Inf (2002) 31, par. 88; CPT/Inf (2009) 20 paras. 19, 23, 49, 54; see also Lambropoulou 2008: 399–400.
89 Cf. CPT/Inf (2006) 41, par. 51; also CPT/Inf (2002) 31, par. 97.

(counselling) in the Judicial Prison and the Psychiatric Hospital for Prisoners in Korydallos and in the Women's detention centre in Korydallos. All programmes operate irrespective of the legal status of prisoners.

Since 2006, KETHEA has also started offering psychiatric and physical support (phase B) for detoxification in the Women's prison of Korydallos and reintegration support (phase C) for released persons in its Athens centre facility.[90] These services along with the old ones, which included counselling and sensitisation, belong to the first *complete* programme for detoxification in prisons carried out after long hesitation.[91]

Furthermore, since 2008, in the men's prison of Korydallos, a drug-free prison unit is operating (offering counselling and psychiatric support). To participate, there is no prerequisite (legal or physical), which is usually set by the law and each programme (*i.e.* length of prison sentence, served sentence, minimum age et cetera, Law 3459/2006, Article 31(10); MD 792//2007 B-1777).[92]

Concerning the training of the prison staff, it is generally over a short period (2–4 months) because of overcrowding and the high demands on personnel. The training covers how to deal with pre-trial detainees and persons with no serious criminal record first entering prison and, in particular, drug addicts and suicidal prisoners; no other special education is offered to them. Nevertheless, all staff are expected to work with all kind of inmates, convicted and on remand, foreigners and nationals.

IV.7. COMPLAINTS

Pre-trial detainees have the right and they use it to make complaints with regard to their pre-trial detention. Breaches of pre-trial detention rights cannot be raised during the trial though, only in a separate recourse to litigation.

The Law doesn't make any distinction between those convicted and detainees. Irrespective of their legal status, all prisoners have the same rights before the prison board and the public prosecutor. The enforcement of prison sentences, the protection of prisoners' rights and the supervision of prison operation rests with the public prosecutor of the court in the area of which each institution is located (Articles 85, 86(1,2) GCC; MD 58819/2003, Article 7). The public prosecutor is also responsible for the complaints and the appeals against disciplinary sanctions imposed on prisoners, as well as other duties assigned to him/her by the Prison Law and other laws (Article 572 GPPC). Two full-time prosecutors are assigned for the four largest prisons of the country (Athens/

90 KETHEA 2007: 28; see also Article 56(3], Presidential Decree/PD 148/10 August 2007 Gov. Gazette 191 vol. A').

91 KETHEA 2007: 27–30; cf. CPT/Inf (2006) 41, par. 115.

92 MD 79292/2007 Gov. Gazette B′ 1777/5 September 2007.

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Piraeus, Thessaloniki, Larissa and Patras), in which over one third of the total prison population serve their terms (Article 572(3) GPPC). Both are accountable to the Public Prosecutor of the Supreme Court and the Minister of Justice.

As described, the law provides for persons in detention the right to contact a close relative or another third party, to access to a lawyer and a doctor. CPT in the reports after its 2005, 2007 and 2008 visits to the country's institutions stated that the government did not always respect these rights in practice.[93] It refers mainly to complaints of illegal migrants held in police and border guard stations until being moved to the (administrative) detention centres.[94] Thus, the CPT called upon the authorities to take "immediate steps" to ensure the satisfaction of these rights for all persons deprived of their liberty,[95] although some years ago it had recognised the then heavy difficulties which the ministry has due to the large number of persons in administrative detention (illegal migrants).[96]

IV.8. INTERNATIONAL INSTRUMENTS AND DECISIONS

Law and practice are affected by conventions and treaties concerning organised crime and terrorism, in particular the investigation techniques, surveillance, accommodation of the suspects, testimonies, composition of the court (jury system).

According to Prison Law, persons sentenced to imprisonment for over 10 years and life are kept separated from the rest without having any contact with them (Article 11(4) GCC). This, however, does not mean that they are undergoing stricter treatment-conditions than the other groups of prisoners. The higher security measures are under the control of the authorised prosecutor. This applies for the prisoners and detainees that are regarded as dangerous, mostly because they escaped in the past and were arrested for organised crime or terror activities.

Prison Law makes a special reference to pre-trial detainees. According to it (Article 15(2) GCC), the living conditions of pre-trial detainees approach as much as possible the conditions of free life. They are not subject to any other restriction than those that are considered to be necessary for the smooth carrying out of the inquiry. Nevertheless, the regular life and security in the facilities can justify restrictions on living conditions, which however are to be defined by the prosecutor who supervises the prison (Article 7(4) GCC). The

93 CPT/Inf (2006) 41 paras. 40–42; CPT/Inf (2008) 3 paras. 38–40, 42; CPT/Inf (2009) 20, paras. 20, 23, 53.

94 Cf. CPT/Inf (2008) 4, par. (7).

95 CPT/Inf (2009) 20, par. 20.

96 CPT/Inf (2002) 31, par. 33; Cf. the last response of Greek Authorities submitting further data about the availability of doctors and information leaflets, CPT/Inf (2009) 21, points 10, 11, 13, 20, 23.

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previous can affect pre-trial detainees, although there is no special reference to them.

In addition, the *Internal Regulation of Detention Establishments* (MD 58819/2003, Articles 33(1,4,5), 35(2a)) foresees the support of pre-trial detainees, in particular to prepare their defence in court with legal advice, as well as with the provision of a defence counsel if they don't have one and they are indigent (also Law 3226/2004, Article 5).

The Greek Prison Law and the Internal Regulation(s) of the prison institutions are generally based on the UN *Standard Minimum Rules for the Treatment of Prisoners*, the *European Standard Minimum Rules for the Treatment of Prisoners* drawn up by the Council of Europe in 1973, the Recommendation No. R (87)3 of the Committee of Ministers of COE on the *European Prison Rules* in 1987 and the updated *European Prison Rules* in 2006 (Recommendation Rec. (2006)2), on special Recommendations of COE about the pre-trial detention (No. R(80)11), the furloughs (No. R(82)16), the detention and treatment of dangerous offenders (No. R(82)17), the detention of foreign prisoners (No. R(84)12) et cetera. They are also inspired by the legislation and good practices of some European countries, *e.g.* The Netherlands, Finland and England.

IV.9. MOST IMPORTANT DEVELOPMENTS

In my opinion the most important developments are: a) the tremendous overcrowding and the amount of foreigners in prisons and police stations; b) the prison construction boom after 2000; c) the weakness of the justice system for a short- and long-run management of its overload and consequently the length of detention-time; d) that longer prison sentences (up to three years, Article 82(1, 2) GPC; up to five, Law 3811/2009, Article 26(1); Law 3772/2009, Article 14(2)) are convertible to fines and the decrease of the served time for parole, in spite of the severity of the crimes (*conditional release*);[97] e) the poor health-care services; f) the inability of experts to find a successful intervention strategy, as well as to work out new alternatives to imprisonment corresponding to the contemporary needs, existing possibilities and legal culture of the country; g) the active involvement of NGOs in prisoners claims and unrests; h) the spectacular escapes from prisons, displaying the shortcomings of prison administration; i) the decrease of detention time with an enhancement for release on bail issued lately; and j) the special detention status under which the members of the terrorist group 17 November are serving their sentences, attracting no special interest by the CPT during its visits, and the local or international NGOs,[98] with the sole

97 Lambropoulou 2008: 393–394.
98 *E.g.* AI-GR, Archive 2005–2010, 2006; AI 2007: 124–126; 2009; 2010: 152–153.

exception of the NCHR, contrary to the administrative detention of illegal immigrants.[99]

I find the following positive: a) the recent division of female detainees from the convicts in two different facilities, b) the permanent control by the CPT, c) the initiative to start the operation of full detoxification programmes for drug and alcohol abusers, as well as the expansion of the counselling to more prisons than before, d) the operation of probation officers, and e) the reintroduction of the *right* of the accused to be heard by the judicial council, when it is going to decide about the continuing or the extension of his/her pre-trial detention.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

According to law, alternatives for pre-trial detention "particularly" are the obligation of the suspect to report regularly to the police station (it can be every day, every week, every 15 days), the prohibition of staying in or leaving from certain places, travelling outside the country, to meet or associate with certain persons, and the payment of bail; they are summarised under the term "restrictive conditions", *i.e.* remand/release on bail (Articles 282(1,2), 286 GPPC). By "particularly" the law implies that the court can impose other alternatives than those expressly provided, however such alternatives are hardly ever used.

Electronic monitoring and house arrest of detainees or of certain groups of offenders are not used at all. The reasons are the high costs of the system, its questionable effectiveness along with the expected criticism of political parties and non-parliamentary groups, as well as the eventual difficulties to be permitted by the (Hellenic) Data Protection Authority (Law 2472/1997; Law 3471/2006), since *monitoring* is not covered by the *data protection* law. Yet the main ground is that many detainees don't have any stable residence and it is therefore impossible to track them.

There are no statistics available regarding the number and percentages of cases in which the alternative measures are applied to suspected offenders. Yet, we can say that with regard to suspicion and the severity of crime, offences allowed alternatives are often public order offences, escort service and prostitution related offences; very often traffic offences unless resulting in dead or severely injured persons, in those cases less frequently; however, when someone is accused of reckless manslaughters that are interrelated, with two or more victims, as in car accidents, then alternatives are sometimes allowed. Release on bail is sometimes provided for assault and battery, manslaughter, theft and embezzlement, fraud, forgery, counterfeiting, money laundering, weapons and guns offences, while murder and terrorism offences are rarely allowed

[99] NCHR 2005: 135; 2008a: 211; Koulouris 2004: 413–414, footnote 4.

alternatives. For drug offences there are some differentiations. Those arrested with a charge for minor misdemeanours of the drug legislation, *i.e.* drug use and possession of small quantities of drugs, crime in relation to drug use such as theft, alternatives are often imposed, while those arrested with a charge for a felony of drug laws sometimes-rarely.

A person cannot be subjected to alternatives when s/he is suspected of an offence for which imprisonment is not provided as a penalty. Alternatives may be ordered when the accused is suspect of a misdemeanour punished with imprisonment for over three months or a felony for which pre-trial detention is not considered necessary (Article 282(1), in relation to 282(3) as amended by Law 3811/2009, Article 24 (1); 296 GPPC).

Alternatives are also used for the replacement of pre-trial detention, when during the main investigation it comes out that the reason for which the detention or the restrictions have been ordered does not exist anymore. The minimum standards and the general legal background described above for pre-trial detention also apply with alternatives. If the accused is convicted by the first instance court and given a prison sentence and has lodged an appeal, which does not have a suspending effect on the serving of the sentence, s/he by him/herself or through the prosecutor can apply for the suspension of imprisonment until the appellate court issues its decision. The suspension can be ordered if the accused is not especially dangerous or recidivist or an escape suspect and a sound fear does not exist that s/he is going to commit new crimes, and if the imprisonment up to the decision of the appellate court would result in excessive and irreparable damage for the convicted and his/her family (Article 497(7) GPPC). Thus, not only legal but also practical considerations might be taken into account for using alternatives.

The alternatives are under the supervision and control of law enforcement officials, in particular the police officers of the department in the area where the accused has his/her residence or workplace, and in case of violations the prosecutor of the court imposes the alternative. The frequency of the review depends on the decision of the court (*e.g.* for the accused to report every day, every week et cetera to the police station; the restrictions of staying in or leaving from certain places, travelling outside the country, meeting or associating with certain persons). Moreover, the victim or any person can denounce the accused for violating the restrictive measures (*e.g.* meeting with the victim or other persons related to the victim; staying in or leaving from certain places) either to the police or to the prosecutor. Practically, it is a matter between the police and/or the victim and the accused. The alternatives are revocable by their violations or ended by the court trial. The time limits are similar to the pre-trial detention.

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To my knowledge, no other developments *exclusively* concerning alternatives to pre-trial detention, *e.g.* release on bail, are important, apart from relaxing detention rules and increasing the control of the investigating authorities presented in the beginning of the analysis. The use of alternatives for pre-trial detainees accused of drug law violations could prove an interesting case for the monitoring of *alternatives*.

Whether pre-trial detention or solely release on bail will be imposed on drug addicts is unclear, since until now addicts are rarely sent to detention only for their addiction, namely without another charge (cf. Law 3459/2006, Article 29(1,3)). The law foresees that in replacement of detention with bail, one term can be the participation of the accused in a therapeutic programme, if s/he has been accepted into such a programme (Law 3459/2006, Article 42(2d)).

VI. CONCLUSION

Long remand time is not a case of legal matters, but of practical and operational issues. Justice and law enforcement systems in Greece require technical, infrastructural and managerial improvements, *e.g.* time management of judicial proceedings, full implementation of the existing instruments, court's support, appropriate delegation of authority, undistorted lines of communication.[100]

Successive changes in legislation are not effective in the long run. High rates of pre-trial detention mainly relates to changes in the profile of crime, the rise in serious criminality, and the increased representation of foreigners, whose criminal record cannot be easily or quickly controlled. This is demonstrated by the haphazard mismanagement of an already difficult situation and, occasionally, by the violation of human rights by the law enforcement agencies.[101] Nonetheless, the incapacity of the agencies to deal with the state of affairs adequately is associated with the incompetence or the low interest of the authorised ministries – mainly of justice and public order (now euphemistically renamed "citizens' protection") – and the government to correspond with the aggravated conditions all these years.

Yet it also rests with negligence and apathy of the European Union administration. Greece faces extraordinary pressure from the incursion of illegal immigrants from Asia and Africa; the vast majority enter the country via Turkey.[102] The networks which transfer them are linked to organised crime, such as drug and arms trafficking, prostitution and eventually terrorism, as

[100] See Loveday 1999; Freitas Dias & Vaughn 2006.
[101] Cf. Ombudsman 2008b: 11–12.
[102] *Economist* 2010: 24.

international research has shown.[103] Common crime has tremendously increased.[104] Greek governments overestimate the tolerance and cultural generosity of Greek citizens, the voices of whom are not heard eventually because they don't represent organised interests, therefore lacking access to channels of mass communication and what is more, depriving their rights to be heard. European Union administration and the Council of Europe relax their conscience with programmes and grants such as from the European Integration Fund for the integration of third-country nationals. Programmes which do not refer to the quality of life of the Greek citizens (and citizens of other Mediterranean countries) in especially the big cities, but to various regional development companies, NGOs and other organisations.

The main financial support for the survival of these hundreds of thousands of desperate people, but also that of several marauders, as well as the co-financing of such programmes, still comes from the tax money paid by Greek citizens. What should be kept in mind is that these citizens also pay with their safety and the consequences of crime. One of these consequences is providing funds and capital for the prison system.

The overload of the criminal justice with its extreme delays, as well as prison and detention centres overcrowding, is no longer only a problem of the Greek justice system, but of European Union as well. The managers of the criminal justice system, the Greek governments and the relevant ministries of interior, justice, and public order seem to pretend they don't see the intensity of the situation and rather want to ignore its outcomes; it looks that they are either trapped in outdated ideologies and party political interests or they have accepted their country's role as the breakwater of crime and illegality for a safer Europe.

BIBLIOGRAPHY

Addendum to Explanatory Report on Law 3811/17 December 2009 (25 November 2009).

Aebi, M. (2010). *European Sourcebook of Crime and Criminal Justice Statistics – 2010*, 4th edn., den Haag, WODC.

Alexiadis, S. (1990). "The presumption of innocence (Article 6(2) ECHR), in: *Human rights, penal control: Twelve essays*, Thessaloniki, Sakkoulas, 58–82 (in Greek).

AI (Amnesty International) (2007, 2009, 2010). *AI Report(s) 2006, 2008, 2009. The state of the world's human rights, Greece* (www.amnesty.org/en/region/greece).

AI- GR (Greek Section) (2005–2010). *Archive* (www.amnesty.org.gr/news-and-events/) (in Greek).

[103] *E.g.* Lichtenwald et al. 2009; Kolovos 2010; UNODC 2010.

[104] The average annual increase rate from 1980–1999 was *2,800 offences* per year, while after 1999 this rises to the annual rate of *5,515 offences* per year (calculated by Linear Regression). A much more striking increase has been in thefts (annual increase rate of 2,381), robberies, serious and violent offences. See more in EL.AS (2009); Tavares & Thomas 2009; Aebi et al. 2010.

AI- GR (2006, 21 September). *Press release* (www.amnesty.org.gr/) (in Greek).

AI-GR (2008, 5 November). *Press release* (www.amnesty.org.gr/).

AI-GR (2009, 21 December). *Public statement* (www.amnesty.org.gr/) (in Greek).

Anagnostopoulos, I. & Magliveras, K.D. (2000). *Criminal Law in Greece*, The Hague, Kluwer Law International.

Anagnostopoulos, I. (1983). "Procedural guarantees and 'public indignation'", *Nomiko Vima* 31: 770–781 (in Greek).

Androulakis, I. (2000). *Standards of fair criminal trial* (according to Article 6 ECHR), Athens, P.N. Sakkoulas (in Greek).

Androulakis, N. (1974). "The survival of 'suspicion sentences' and the repeal enforcement control of the principle in 'dubio pro reo' during the phases of criminal trial process", *Poinika Chronika* 24, 165–173 (in Greek).

Androulakis, N. (1981). Private consultation, *Poinika Chronika* 31: 819–21 (in Greek).

Androulakis, N. (1994). *Fundamental principles of criminal trial process*, 2nd edn., Athens, Komotini, A.N Sakkoulas (in Greek).

Bahtiyar, Z. (2009). "Greece", chapter 12, in: *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds), Nijmegen/NL, Wolf Legal Publishers, 435–464.

Bakas, Ch. (1995). *The pre-trial phase of the criminal trial*, A. Konstantinidis & G. Triantafyllou (eds), Athens, Komotini, A.N. Sakkoulas (in Greek).

COE (Council of Europe). *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950/1953). CETS No.: 005, Rome (http://conventions.coe.int).

COE (2008, 23 January). *Annual Penal Statistics*, *SPACE I*, *Survey 2006*, PC-CP (2007)9 rev3, Aebi, M.F & Delgrande, B., Strasbourg (www3.unil.ch/wpmu/space/space-i/annual-reports/).

COE/CoM (Committee of Ministers). *European Standard Minimum Rules for the Treatment of Prisoners* (1973), Resolution (73)5.

COE/CoM. *Recommendation No. R (80) 11* to member states concerning custody pending trial. Adopted on 27 June 1980 at the 321st meeting of the Ministers' Deputies.

COE/CoM. *Recommendation No. R (82) 16* to member states on prison leave. Adopted on 24 September 1982 at the 350th meeting of the Ministers' Deputies.

COE/CoM. *Recommendation No. R (82) 17* to member states concerning custody and treatment of dangerous prisoners. Adopted on 24 September 1982 at the 350th meeting of the Ministers' Deputies.

COE/CoM. *Recommendation No. R (84) 12* to member states concerning foreign prisoners. Adopted on 21 June 1984 at the 374th meeting of the Ministers' Deputies.

COE/CoM. *Recommendation No. R (87) 3* to member states on the *European Prison Rules. Adopted* on 12 February 1987 at the 404th meeting of the Ministers' Deputies.

COE/CoM. *Recommendation Rec(2006)2* to member states on the European Prison Rules. Adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

COE/CoM. *Recommendation Rec(2006)13* to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. Adopted on 27 September 2006 at the 974th meeting of the Ministers' Deputies.

COE/CoM. *Interim Resolution DH(99)130* to the Application No. 32397/96 Sinnesael v. Greece adopted on 19 February 1999 at the 659th meeting of the Ministers' Deputies, in: *Yearbook of the European Convention on Human Rights*, 4, The Hague, Kluwer Law International 2000.

COE/CoM. *Interim Resolution DH(99)558* to the Application No. 34373/97Goutsos v. Greece, adopted on 08 October 1999 at the 680th meeting of the Ministers' Deputies, in: *Gazette, Parliamentary Assembly Documents, Ordinary Session (Second part)*, No IX October 2009, Strasbourg, Council of Europe.

COE/CoM. *Resolutions ResDH(2004)82, ResDH(2004)83,* adopted by the Committee of Ministers on 22 December 2004 at the 906th meeting of the Ministers' Deputies (https://wcd.coe.int/ViewDoc.jsp?id=806725&Site=COE#P1148_109938).

Courakis, N. (1986). "Remand. The dysfunctions of an institution", *Poinika Chronika* 36: 625–629 (in Greek).

Courakis, N. (1998). "The institution of recompense of those who had been convicted or detained before trial and then had been acquitted", in: *Honorary volume for G.-A. Mangakis*, G. Bemmann & D. Spinellis (eds), Athens, A.N. Sakoulas, 501–516 (in Greek).

Courakis, N. (2005). "Miscarriages of justice and victims' recompense. On occasion of five years after the issuing of the new law", *Poinikos Logos* 6 (5) (www.poinikos-logos.gr/arxeio/05t6e.html) (in Greek).

CPT (Committee for the Prevention of Torture) (20 October2009). *Twenty years of combating torture*, *19th General Report of the CPT (1 August 2008–31 July 2009)*, COE Publishing, Strasbourg.

CPT/Inf (2002) 31. *Report to the Government of Greece on the visit to Greece carried out by the CPT from 23 September-5 October 2001,* Strasbourg, 20 November.

CPT/Inf (2002) 32. *Response of the Government of Greece to the report of the CPT on its visit to Greece from 23 September-5 October 2001*, Strasbourg, 20 November.

CPT/Inf (2006) 41. *Report to the Government of Greece on the visit to Greece carried out by the CPT from 27 August-9 September 2005*, Strasbourg, 20 December.

CPT /Inf (2008) 3. *Report to the Government of Greece on the visit to Greece carried out by the CPT from 20–27 February 2007,* Strasbourg, 8 February.

CPT/Inf (2008) 4. *Response of the Government of Greece to the report of the CPT on its visit to Greece from 20–27 February 2007,* Strasbourg, 8 February.

CPT/Inf (2009) 20. *Report to the Government of Greece on the visit to Greece carried out by the CPT from 23–29 September 2008*, Strasbourg, 30 June.

CPT/Inf (2009) 21. *Response of the Government of Greece to the report of the CPT on its visit to Greece from 23–29 September 2008*, Strasbourg, 30 June 2009.

Dellidou, Z. (2007). "The investigative stage of the criminal process in Greece", in: *Suspects in Europe. Procedural rights at the investigative stage of the criminal process in the European Union*, E. Cape, J. Hodgson, T. Prakken & T. Spronken T. (eds), Antwerp-Oxford, Intersentia, 101–128.

ECComm/Commission of the European Communities (2006, 29 August). SEC(2006)1079 *Commission Staff Working Document accompanying document to the proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, {COM(2006) 468 final} Impact Assessment*, Brussels.

Economist (21–27 August 2010). "Illegal immigration in Greece. Border burden", 396 (8696): 24 (www.economist.com/node/16847278?story_id=16847278&CFID=142398900&CFTOKEN=20995879).

EL.AS/Hellenic Police Headquarters (2005, 17 June). *Circular on stop-and-frisk search and identity checks as preventive and reactive control technique of the police authority*, Athens, MPO (in Greek).

EL.AS (2009). *Crime statistics 2008, 2009* (www.astynomia.gr/index.php?option=ozo_content&perform=view&id=91&Itemid=447&lang=).

Eleftherotypia, 11 November 2009, "Refrain of prisoners from mess as a reaction to the prison conditions, the politics of furloughs, and use of alternative forms of punishment", by Vana Fotopoulou (www.enet.gr/?i=news.el.ellada&id=100751).

Eleftherotypia 3, 4, 5, 6, 8, 9, 11, 19 November 2008, 2 December 2008, on prisoners' unrest.

European Commission, EJN (European Judicial Network in civil and commercial matters) (2005, 2007). *Legal aid – Greece* (http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gre_en.htm).

Europol (September 2009). *Facilitated illegal immigration into the European Union*, Fact Sheet.

EU-*Treaty establishing a Constitution for Europe* (2004/C). 310/01, *Part II- Charter of Fundamental Rights of the Union* (http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML).

Foussas, A.G. (1981). "For the revocation or replacement of pre-trial detention the previous custody of the accused is no longer necessary", *Poinika Chronika* 31: 830–831 (in Greek).

Freitas Dias C. & Vaughn, M.S. (2006). "Bureaucracy, managerial disorganization, and administrative breakdown in criminal justice agencies", *Journal of Criminal Justice* 34: 543–555.

Frontex 2010. *General report 2009*, Warsaw (www.frontex.europa.eu/annual_report).

Fytrakis, E. (2004). "Human rights in criminal court trial. From humanisation to 'modernisation'", in: *(Human) Rights in Greece. From the end of civil war to the reestablishment of democracy*, M. Tsapogas & D. Christopoulos (eds), Athens, Kastaniotis, 381–401 (in Greek).

Global Detention Project (2009, November). Programme for the Study of global migration, The Graduate Institute, Geneva (www.globaldetentionproject.org).

In.gr (14 November 2008). "The Ministry of Justice has announced new regulations for the prison system to be issued by the Parliament" (www.in.gr/news/article.asp?lngEntityID=957902&lngDtrID=244).

Internal Regulation of General Detention Establishments Type A and B (Ministerial Decree 58819/07.04.2003), Government's Gazette B-463 (in Greek).

Kathimerini 4, 5, 7, 9, 11, 12, 13, 15, 16, 19, 20, 21, 22, 27, 28.11.2008, on prisoners' unrest.

KETHEA (2007). *Annual report* 2006, Athens, KETHEA (in Greek).

Kolovos, I. (September 2010). "Illegal immigration: A multifaceted national security threat", *RIEAS Publications*, Issue 145, Research Institute for European and American Studies (RIEAS), Athens (www.isn.ethz.ch/isn/Digital-Library/

Publications/Detail/?ots591=0c54e3b3–1e9c-be1e-2c24-a6a8c7060233&lng=en&id=120495).

Koulouris, N. & Spyrou, S. (2009). "Chronographs on dispensation of justice" in: *On prison,* N. Koulouris, & S. Spyrou, Athens, Komotini, A.N. Sakkoulas, 197–235 (in Greek).

Koulouris, N. (2004). "Prisoners' rights. Sounds of silence in the crowded wilderness", in: *(Human) Rights in Greece. From the end of civil war to the reestablishment of democracy*, M. Tsapogas & D. Christopoulos (eds), Athens, Kastaniotis, 410–429 (in Greek).

Lafazanos, Th. (1982). "Problems resulting from the enforcement of pre-trial detention", *Poinika Chronika* 32: 449–465 (in Greek).

Lambropoulou, E. (1999). *Sociology of criminal law and the institutions of crime control,* Athens, Ellinika Grammata (in Greek).

Lambropoulou, E. (2008). "Correctional policy in Greece: law in action", in: *Prison policy and prisoners rights. The protection of prisoners' fundamental rights in international and domestic law (Politiques pénitentiaires et droit des détenus en droit national et international*), P. Tak & M. Jendly (eds), IPPF, Nijmegen/NL, Wolf Legal Publishers, 391–406.

LA.O.S./The People's Orthodox Rally. *On the Report of the Head of the Inspectors-Controllers Body of Prisons* (2009, 3 April)), with the answer of the Minister of Justice in an attached file (www.thanos-plevris.gr/eperotiseis/ekthesi-proistamenoy-somatos-epitheorisis-kai-elegxoy-katastimaton-kratisis.html), (in Greek).

Levine, J.P., Muscheno, M.C. & Palumbo, D.J. (1980). *Criminal justice. A public policy approach*, New York, Harcourt, Brace, Jovanovich.

Lichtenwald, T.G., Perri, F.S. & MacKenzie, P. (2009). "Smuggling multi-consignment contraband: Isolated incidents or a new trend?", *Inside Homeland Security*, Summer 2009 (www.all-about-forensic-science.com/support-files/smuggling.pdf).

Loveday, B. (1999). "The impact of performance culture on criminal justice agencies in England and Wales", *International Journal of the Sociology of Law* 27: 351–377.

Marcu, M. (2009). *The EU-27 population continues to grow*, Eurostat, *Population and social conditions, Data in focus 31/2009*, European Commission (http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-09–031/EN/KS-QA-09–031-EN.PDF).

Margaritis, L. (2001). "The recompense of detainees been acquitted, and the recent law 2915/2001: an initial approach to the new provisions", *Poiniki Dikaiosini*: 750–754 (in Greek).

Ministry of Justice (2009, December). *General statistical data for prisoners and sentences 2003–2009* (www.ministryofjustice.gr/).

Ministry of Justice (September 2010). *General statistical data,* Directorate of prison policy, Athens (unpublished).

Mylonas, I. (2001). "The ECtHR Decision 'Telfner v. Austria' on 20.03.2001", *Poinikos Logos* 2: 705–708 (in Greek).

(Ta) νεα 3, 4, 11, 12, 14, 24.11.2008, on prisoners' unrest.

NCHR/National Committee of Human Rights (March 2005). *Annual report 2004* (in Greek).

NCHR (March 2008). *Annual report 2007* (in Greek) (2008a).

NCHR (2008, 10 April). *Issues relating to prisoners' rights and the conditions of detention in Greek prisons* (in Greek) (2008a).

NSSG/National Statistical Service of Greece (1998–2005). *Justice statistics, Prison Statistics* (in Greek) (available only at: www.statistics.gr).

(The Greek) Ombudsman/Synigoros (2003, 30 June). *Findings on legal prerequisites for citizens' presentation to police departments and on police search. Register Nr. 16024.02.2.4–20580.02.2.4/30.6.2003,* Rapporteur M. Tsapogas (www.synigoros.gr/) (in Greek).

Ombudsman (2007, May). *Findings on prisoners' detention in police cells,* Rapporteur Fytrakis, E. (2007a) (www.synigoros.gr/pdfs/30_10_porisma_paramoni_poinikwn_kratoumenwn.pdf) (in Greek).

Ombudsman (2007, 5 July). *Findings on administrative investigations for unjustified presentations of citizens to police departments and police violence against an attorney. Submitted report, register Nr.* 20354/2005, Rapporteur Tsapogas M. (2007b) (in Greek).

Ombudsman (2008, March). *Annual report 2007,* Athens, National Printing House (2008a).

Ombudsman (2008, March). *2007 Annual Report – Summary,* Athens, National Printing House (2008b).

Ombudsman (2009, 18 February). *Petition of the Ombudsman to the Committee of the Hellenic Parliament for the examination of the correctional system and the life conditions of prisoners* (in Greek).

Papadakis, C. (2000, 17 December). "The procedure for offences 'caught in the act' at the edge of the legal civilization", Paper presented at the conference organized by the judges' Unions, the presidents' plenum of the bar associations and the federation of courts' employees under the title *Operational problems of justice*, in Athens (www.epda.gr).

Papadamakis, A. (2004). "Is it necessary for the accused to be detained in order to apply for the revocation or replacement of his remand?", Consultation, *Armenopoulos* 58: 305–11 (in Greek).

Pitsela, A. (2004). "Greece. Criminal responsibility of minors in the national and international legal orders", *Revue Internationale de Droit Penal* 75(1–2): 355–378.

Spinellis, C. & Spinellis, C.D. (1999). *Greece: Criminal justice systems in Europe and North America,* Helsinki: HEUNI.

Spinellis, D.D. (2008). "Criminal law and criminal trial process", in: *Introduction to Greek Law,* K.D. Kerameus & P.J. Kozyris (eds), Deventer/Athens, Kluwer/Sakkoulas, 339–365.

Statheas, G. (1981). *Pre-trial detention and remand on bail,* Athens, Komotinin, A.N. Sakkoulas (in Greek).

Tavares, C. & Thomas, G. (2009). *Crime and criminal justice*, Eurostat, *Population and social conditions, Statistics in focus 36/2009,* European Commission (http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09–036/EN/KS-SF-09–036-EN.PDF).

The Lawyer's Tribune/To vima tou dikigorou (2009). 8(77): 10 (in Greek).

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Tsoureli, L. (1982). "Human Rights in pre-trial and trial procedures in Greece", in: *Human rights in criminal procedure. A comparative study*, J.A. Andrews (ed.), The Hague and elsewhere, Nijhoff, 202–237.

United Nations, General Assembly (1948, 10 December). *Universal Declaration of Human Rights (UDHR)*, Resolution 217A (III).

UN/*Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

UNODC/United Nations Office on Drugs and Crime 2010. *UNODC and organized crime* (www.unodc.org/unodc/en/organized-crime/index.html).

US Department of State-Under Secretary for Democracy and Global Affairs – Bureau of Democracy, Human Rights, and Labor (2008, 11 March). *Country reports on human rights practices – 2007 Greece.*

US Department of State-Under Secretary for Democracy and Global Affairs – Bureau of Democracy, Human Rights, and Labor (2009, 25 February). *Country reports on human rights practices – 2008 Greece.*

van Kalmthout, A.M., Knapen, M.M. & Morgenstern, C. (2005, 17 June). *Introductory summary*, in: *Pre-trial detention in the European Union. An analysis of minimum standards in pre-trial detention and the grounds for regular review in the member states of the EU*, van Kalmthout, A.M., Knapen, M.M. & Morgenstern, C. (eds), Nijmegen/NL, Wolf Legal Publishers 2009, ch. 1 (http://ec.europa.eu/justice_home/doc_centre/criminal/procedural/doc/preface_en.pdf)

Walmsley R. (2008, January). *World Pre-trial / Remand Imprisonment List (Pre-trial detainees and other remand prisoners in all five continents),* King's College London, International Centre for Prison Studies (www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf).

Wener, G. (1983). *A legitimate grievance: A report on the role of the ombudsman in the prison system,* London, Prison Reform Trust.

World Prison Brief/ICPS (2009). (www.prisonstudies.org/info/worldbrief/).

Zesiadis, B. (1989). *The enforcement of the 'in dubio pro reo' principle in the phases of criminal trial process*, Sakkoulas, Thessaloniki (in Greek).

CASE LAW

AP/Areios Pagos (Supreme Court, en banc), decision no. 1/2004.
Areios Pagos (Supreme Court, Panel E, Penal), decision no. 2683/2008.

ECtHR 13 July 1995, *Kampanis v. Greece*
ECtHR 29 May 1997, *Georgiadis v. Greece*
ECtHR 29 May 1997, *Tsirlis and Kouloumpas v. Greece*
ECtHR 1 July 1998, *Sinnesael v. Greece*
ECtHR 3 March 1999, *Goutsos v. Greece*
ECtHR 17 October 2000, *Karakasis v. Greece*
ECtHR 19 April 2001, *Peers v. Greece*

ECtHR 23 Septembre 2004, *Kotsaridis c. Grèce*
ECtHR 20 December 2004, *Makaratzis v. Greece*
ECtHR 27 July 2006, *Kaja v. Greece*.
ECtHR 2 Novembre 2006, *Serifis c. Grèce*
ECtHR 4 June 2009, *Siasios and Others v. Greece*
ECtHR 2 July 2009, *Vafiadis v. Greece*
ECtHR 29 October 2009, *Shuvaev v. Greece*

Judicial Council of Appeals, Thessaloniki 1045/2001 with an accepted motion by the prosecutor of Appeals A. Nikolaidis, and agreeing remarks by L. Margaritis, *Poiniki Dikaiosyni* 4(10), 2001: 1011–1012 (in Greek).
Judicial Council of Appeals, Patras 403/2004, and comments by A. Zachariadis, *Armenopoulos* 59, 2005: 412.

DECREES

Decree 53/1974 Gov. Gazette A/256/1974.
Decree 215/1974, Gov. Gazette A/365/07.12.1974.
MD 28-//1994 (66206), Gov. Gazette A/66/1994.
MD 79292/2007 Gov. Gazette B′ 1777/05.09.2007.
MD 98257/2009, Gov. Gazette B′ 1525/27.07.2009.
MD 103920/2009, Gov. Gazette B′ 1544/28.07.2009.

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PRE-TRIAL DETENTION IN IRELAND

Michael Mellett*

I. INTRODUCTION

In Ireland, a presumption against pre-trial detention exists on the basis that in accordance with the presumption of innocence, a person should not be deprived of his or her constitutional right to liberty unless and until he or she is convicted by a court of an offence and a sentence of imprisonment is imposed.

Nevertheless, pre-trial detention is possible in limited circumstances. Traditionally a court could order pre-trial detention where such was deemed necessary to ensure that a person did not evade justice. More recently, following an amendment to the Irish Constitution (the Constitution) and the enactment of the Bail Act 1997, pre-trial detention may be ordered by a court to prevent the commission of a serious offence. In addition, very limited periods of pre-trial detention, strictly set down in statute, are permitted at the police investigative stage.

The legal framework governing the detention of unconvicted persons contains provisions to safeguard the rights of such pre-trial detainees. The laws derive from the common law and statute law and are underpinned by the guarantees in the Constitution and the requirements of international human rights law, in particular the European Convention on Human Rights.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Ireland is a member of the following relevant international organisations: the United Nations; the Organisation for Security and Cooperation in Europe; the Council of Europe and the European Union. Ireland is a contracting party to the following relevant Human Rights Treaties and Conventions: the International Covenant on Civil and Political Rights (UN); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN); the Convention on the Rights of the Child (UN); the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);[1] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[2] and both Protocols to that Convention.[3]

II.2. IMPLEMENTATION OF INTERNATIONAL TREATIES AND CONVENTIONS

These treaties and conventions are incorporated into Irish domestic law in the following way. The Constitution[4] provides:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas:[5] no other legislative authority has power to make laws for the State."

The Constitution[6] also provides:

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

The general effect of these provisions is to require specific domestic legislation to incorporate international treaties and conventions into domestic law. Some treaties and conventions have been incorporated into Irish law by Acts of the Oireachtas such as the Criminal Justice (United Nations Convention against Torture) Act 2000 and the European Convention on Human Rights Act 2003.

1 Council of Europe, CETS No. 005.
2 Council of Europe, CETS No. 126.
3 Council of Europe, CETS No. 151 and Council of Europe, CETS No. 152.
4 Article 15.2.1° of the Irish Constitution.
5 Irish Parliament.
6 Article 29.6 of the Irish Constitution.

While others may not have been directly incorporated as a whole, their provisions and the principles contained in them are reflected in relevant constitutional, legislative, and administrative measures. They are also taken into account in judicial decisions.

II.3. ENFORCEMENT OF HUMAN RIGHTS

Fundamental human rights are enforceable through the domestic courts. (For further details see section III below). Furthermore, Irish citizens have a right of complaint to various international bodies. For example, pursuant to Article 34 of the European Convention on Human Rights the European Court of Human Rights may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a breach of the rights set forth in the convention and the protocols thereto. It should be noted that this right of application includes citizens but is not restricted to citizens. Article 1 of the European Convention on Human Rights obliges High Contracting Parties to secure to *everyone within their jurisdiction* the rights and freedoms defined in section 1 of the Convention. Also persons in detention may complain to the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

II.4. NATIONAL HUMAN RIGHTS FRAMEWORK

The Constitution was adopted by referendum in 1937. It sets out the form of Government for Ireland and defines the powers of the President of Ireland, the Oireachtas (Parliament) and the Government. It also defines the structure and powers of the courts, sets out fundamental rights of citizens and contains a number of directive principles of social policy for the general guidance of the Oireachtas.

Irish law is based on common law as modified by legislation and by the Constitution of 1937. Statutes passed by the United Kingdom Parliament before 1921 have the force of law in Ireland unless repealed by the Oireachtas. In accordance with the Constitution, justice is administered in public in courts established by law.

The Judiciary

In the exercise of their judicial functions judges in Ireland are independent both of the Government and the Oireachtas and this independence is given full

protection by the Constitution. The Constitution[7] states "all judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law". Judges may not be removed from office except for stated misbehaviour or incapacity and then only upon resolutions passed by both Houses of the Oireachtas calling for their removal.[8] So far, this power has never been exercised. With the exception of the power of the Oireachtas to remove a judge, questions of discipline relating to judges are currently regulated by the judiciary itself.

Police

Ireland has a single national police service, An Garda Síochána. The powers of the police are set out in statute and all their actions under these powers are subject to review by the judiciary. As regards discipline and related matters police officers are accountable to the Commissioner of An Garda Síochána: they are also accountable to an independent Ombudsman Commission.[9]

Director of Public Prosecutions

The authority to prosecute a person for a criminal offence which might lead to pre-trial detention rests with an independent officer, the Director of Public Prosecutions.[10]

The Constitution and personal rights: specified rights

A large number of rights are specifically provided for in the Constitution. They are principally, although not exclusively, to be found in the chapter headed "Fundamental Rights" which comprises Articles 40–44. Insofar as those Rights relate to pre-trial detention the following are important: equality before the law;[11] the right to life;[12] the right to protection of one's person;[13] the right to one's good name;[14] personal liberty;[15] freedom of expression;[16] freedom of

7 Article 35.2 of the Irish Constitution.
8 Article 35.4 of the Irish Constitution.
9 The Garda Síochána Ombudsman Commission was established under the Garda Síochána Act, 2005.
10 The Prosecution of Offences Act, 1974, established the office of Director of Public Prosecutions as an independent office.
11 Article 40.1 of the Irish Constitution.
12 Articles 40.3.2° and 3° of the Irish Constitution.
13 Article 40.3.2° of the Irish Constitution.
14 Article 40.3.2° of the Irish Constitution.
15 Article 40.4 of the Irish Constitution.
16 Article 40.6.1° (i) of the Irish Constitution.

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association;[17] freedom of conscience and the free profession and practice of religion;[18] the right to have justice administered in public by judges who are independent[19] and the right to criminal trial in course of law.[20]

The Constitution and personal rights: unspecified rights

The Irish courts have identified a number of rights which, although not expressly referred to in the Constitution, nonetheless flow from it. In dealing with Personal Rights the Constitution states as follows:

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."[21]
> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."[22]

Unspecified rights arise from court decisions holding that these rights are encapsulated in the general expression "personal rights" contained in Article 40.3.1° or are corollaries of, or ancillary to, the specific rights mentioned in Article 40.3.2°. The role the Irish Courts played in identifying these rights is particularly evident in the judgment of Kenny J in *Ryan v Attorney General*, a judgment which also identified the right to bodily integrity as a constitutionally protected unspecified right. In the context of this report on pre-trial detention the more notable of these unspecified rights and the relevant cases which gave rise to their identification are: the right to bodily integrity;[23] the right not to have health endangered by the State and freedom from torture and from inhuman or degrading treatment or punishment;[24] the right to litigate or have access to the courts;[25] the right to justice and fair procedures;[26] the right to legal counsel;[27]

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17 Article 40.6.1° (iii) of the Irish Constitution.
18 Article 44 of the Irish Constitution.
19 Articles 34 and 35 of the Irish Constitution.
20 Article 38.1 of the Irish Constitution.
21 Article 40.3.1° of the Irish Constitution.
22 Article 40.3.2° of the Irish Constitution.
23 *Ryan v Attorney General* [1965] IR 294.
24 *The State (C.) v Frawley* [1976] IR 365.
25 *Macauley v Minister for Posts and Telegraphs* [1966] IR 345.
26 *The State (Howard) v Donnelly* – on the subject of Natural Justice; The State (Gleeson) v Minister for Defence – on the subject of Natural Justice; Curran v Attorney General – on the subject of the need for sufficient time to prepare a defence; The State (Walshe) v Murphy – on the subject of the accused having an effective opportunity to meet the case against him; and The State (Williams) v Kelleher – on the subject of the requirement that an accused be given advance notice of the evidence against him.
27 *The State (Healy) v Donoghue.*

the right to communicate;[28] the right to legal representation in certain criminal cases;[29] and the right to fair procedures.[30]

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

III.1. ARREST AND DETENTION IN POLICE CUSTODY

The police derive their powers to arrest persons from common law, statute, or warrant. Apart from the special provisions of the Offences Against the State Act 1939 which deals with subversion or emergency situations, the law, traditionally, did not confer on the police a power to detain a suspect for the purposes of investigation. Once they had sufficient evidence to charge a person they had to arrest him not for questioning or further investigation but to bring him before a court. A person brought in custody to a police station may be released on bail by the police. This is a procedure which is frequently referred to as 'station bail'. A recognisance may be required to ensure that the person will appear before the appropriate court.

The Criminal Justice Act of 1984 introduced a power for police to detain a person in police custody for the purpose of investigating an offence. The power relates to "arrestable" offences, which are defined as those which carry a penalty of at least 5 years' imprisonment. There are now a number of other specific statutory provisions which enable persons to be taken into police custody for the purpose of investigating an offence. The decision to detain for an initial period is made by a police officer and this period may be extended by a senior officer or a judge as the case may be. Details of the statutory provisions are set out in the following Table.

28 *Attorney General v Paperlink Ltd* [1984] ILRM 343.
29 *The State (Healy) v Donoghue* [1976] IR 325.
30 *Re Haughey* [1971] IR 217.

Table

Legislative Provision Authorising detention following arrest	**Sec. 4, Criminal Justice Act 1984**	**Sec. 42, Criminal Justice Act 1999 (1)**	**Sec. 30, Offences Against The State Act 1939**	**Sec. 2, Criminal Justice (Drug Trafficking) Act 1996**	**Sec. 50, Criminal Justice Act 2007**
Initial period	6 hours	6 hours	24 hours	6 hours	6 hours
First extension authorised by Superintendent	6 hours	6 hours	24 hours: by Chief Superintendent	18 hours: by Chief Superintendent	18 hours
Second extension authorised by Chief Superintendent	12 hours (see Sec. 9 CJA 2006)	12 hours	–	24 hours	24 hours
First extension authorised by District or Circuit Court	–	–	24 hours: District Court following an application by a superintendent	72 hours	72 hours
Second extension authorised by District or Circuit Court				48 hours	48 hours
TOTAL	24 hours	24 hours	72 hours/3 days	168 hours/ 7 days	168 hours/ 7 days
SCOPE of the **powers to arrest and detain**	All arrestable offences.	All arrestable offences.	Any offence under the OAS, or an offence designated a Scheduled offence under Part V of the Act.	'Drug trafficking' offences as defined in 1994 Cr Justice Act.	a. murder involving firearm, b. 'capital' murder, c. possession of firearm with intent to endanger life, d. kidnapping / hostage taking involving firearm.

Notes on Table:

- Section 42 relates to prisoners. They may be arrested and removed from the prison to a police station for questioning. The arrest must be in connection with an offence(s) other than the one(s) for which they have been convicted.
- Custody Regulations provided for under the 1984 Act apply equally to persons detained by the police under any of the statutory provisions.

- The total detention periods set out above are exclusive of periods for which the clock stops running *e.g.,* where the suspect is hospitalised or is absent from the Garda station in connection with a habeas corpus application.
- Re-arrest following release is provided for. A District Court order is needed if the re-arrest is for further questioning. No such order is needed if re-arrest is for charging the person, but he/she may not be re-interviewed in these cases.

Even though the laws in relation to bail are quite liberal in Ireland, on the 7th October 2009 there were six hundred and twenty-three prisoners on remand in custody, out of a total of 3,999 prisoners in custody.

Irish law requires that an arrested person must be brought into Garda custody with "reasonable expedition".[31] A delay of 10 minutes before the suspect was driven to the station has been held not to constitute unreasonable delay.[32] On the other hand a delay of two hours – during which time the suspect was searched for drugs in a shed – was held to be unreasonable and invalidated the arrest.[33]

The investigating police officer makes the decision on whether to take a person into custody. In the case of an arrest for the purposes of investigating the offence under one of the provisions listed in the above Table, the decision to take into custody is, in operational terms, usually linked to the decision to arrest. If a person is detained for investigative purposes under a statutory provision listed in the above Table, the time limits listed apply. The periods set out in the Table are the maximum periods. Within those periods once a decision to charge has been made, the detainee must be charged immediately and brought before a court.

A decision to remand a person in custody arises where a person has been arrested and charged with an offence, as distinct from being arrested and detained for questioning. Decisions to remand persons in custody are made by the courts. Section 15 of the Criminal Justice Act 1951 provides:

> "15.(1) A person arrested pursuant to a warrant shall on arrest be brought, as soon as practicable, before a judge of the District Court having jurisdiction to deal with the offence concerned.
> (2) A person arrested without warrant shall, on being charged with an offence, be brought, as soon as practicable, before a judge of the District Court having jurisdiction to deal with the offence concerned.
> (3) Where a person is arrested pursuant to a warrant later than the hour of 5 o'clock on any evening or, having been arrested without warrant, is charged after that hour and a judge of the District Court is due to sit in the District Court District in which the person was arrested not later than noon on the following day, it shall be sufficient compliance with subsection (1) or (2) of this section, as the case may be, if he is

31 *People v Walsh* [1980] IR 294 per O'Higgins C.J. (S.C.).
32 *(DPP) v Cleary*, High Court, 7 December 2001.
33 *(DPP) v Boylan* [1991] 1 IR 477.

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brought before a judge of the District Court sitting in that District Court District at the commencement of the sitting.

(4) If the accused is remanded on bail and there and then finds bail, the case shall be remitted to the next sitting of the District Court.

(5) In any other event, the case shall be remitted to a sitting of the District Court at a named place to be held within a period not exceeding 8 days of the arrest.

(6) This section is without prejudice to the provisions of any enactment relating to proceedings after arrest or charge in particular cases".

The phrase "as soon as practicable" is a phrase that appears regularly in Irish law. The meaning of this and analogous phrases has been considered by the Irish Supreme Court. In one case (*McCarthy & anor -v- Garda Síochána Complaints Tribunal & ors*)[34] the judge stated "Provisions in statutes requiring expedition but not specifying any precise time limit have traditionally taken different forms such as "*as soon as possible*", "*as soon as practicable*" and as in this case "*as soon as may be*" etc. A good deal of the case law in relation to these respective expressions is of limited assistance in my view because their meaning is always contextual to the statute or document in which they appear". Reference was made to a previous case (*Mac Neill v Commissioner of An Garda Síochána*)[35] where the former Chief Justice stated "the use of each of these phrases clearly indicated the intention of the Minister for Justice as expressed in the regulations that the alleged breaches of discipline by members of the Garda Síochána be dealt with expeditiously and as a matter of urgency." Essentially, the inclusion of such a phrase in a statue indicates that the pertinent matter should be dealt with expeditiously and as a matter of urgency.

Arrest and initial police custody must be based on reasonable suspicion. Charging a person requires evidence admissible in court and which would be sufficient to establish a *prima facie* case against that person. While the courts have the power to remand persons in custody who have been charged, they must consider any application for bail. The person charged will invariably be present when these decisions are being made.

Section 21 of the Criminal Procedure Act 1967 provides that where an accused person is before the court in connection with an offence the court may remand the accused from time to time as the occasion requires. The test of reasonableness applied by the courts would ensure that there was no unconscionable delay which would impinge on the detainee's right to a speedy trial.

[34] *McCarthy & anor -v- Garda Síochána Complaints Tribunal & ors* [2002] IESC 18.

[35] *Mac Neill v Commissioner of An Garda Síochána* [1997] 1 I.R. 479.

III.2. HABEAS CORPUS

Habeas Corpus is a safeguard against the unlawful detention of persons. It is a further protection available to persons in pre-trial detention. As regards applications for *Habeas Corpus*[36] orders – or more commonly an application under Article 40 – the Constitution provides as follows:

> "1° No citizen shall be deprived of his personal liberty save in accordance with law.
> 2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.
> 3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Supreme Court has determined the question so referred to it.
> 4° The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only."

It is clear from this provision that a detained person or another party on his behalf can initiate *habeas corpus* proceedings. This procedure is available in the case of any person who is detained. The decision whether or not to grant *habeas corpus* relief is a matter for a judge of the High Court. Repeated applications for *habeas corpus* relief may be brought but the courts have indicated that they will be reluctant to put the full Article 40.4 procedure in train in the absence of fresh evidence or new grounds not previously advanced.

[36] Article 40.4 of the Irish Constitution.

III.3. DELAY IN PROCEEDING WITH THE TRIAL

The time limits applicable to police custody for the purposes of investigation are set out in the above Table. The courts will consider the effect a delay may have in prejudicing the fairness of a trial and they will also be mindful of the need to prevent oppressive pre-trial incarceration.[37] Access to bail is decided on a case by case basis by the court but within the parameters laid down in the law.

III.4. DELAY PENDING APPEAL

In the case of a conviction following a trial on indictment (non-summary trial) a sentenced person will usually be imprisoned pending determination of any appeal lodged in the case but he may be granted bail in the interim. This is a matter for the courts and, again, they would not permit unconscionable delay in processing an appeal particularly where the accused is in custody. In the case of an appeal from a District Court conviction (summary trial) the majority of persons will be on bail pending appeal.

III.5. INTERNATIONAL INSTRUMENTS AND DECISIONS – THEIR INFLUENCE

Legislation, administrative actions and judicial decisions are influenced by and reflect international provisions, for example police practices are particularly influenced by the ECHR in terms of the training provided to officers and in the guidelines given to officers dealing with those in custody. However, the relevant laws and measures have developed incrementally over time and it can be difficult to link them to specific international provisions. However, a good example of the influence of International Conventions on Irish law is the amendment to Article 40.4.6 of the Constitution which provides that *"Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person"*. That amendment reflects, and was based on,[38] Article 5 of the European Convention on Human Rights which provides that everyone has a right to liberty and security of the person but the deprivation of liberty is permitted in certain circumstances including *inter alia* when "*it is reasonably considered necessary to prevent his committing an offence*". Indeed, it may be

[37] *SF v Director of Public Prosecutions* [1999] 3 IR 235.

[38] See the Ad Hoc Commission on Referendum Information- Cases for and against the bail referendum (November 1996) (as at www.ucc.ie/law/irishlaw/bail/ad_hoc.shtml).

noted that the constitutional amendment qualifies the word offence as contained in the Convention by adding the qualification "serious".

III.6. SOME IMPORTANT DEVELOPMENTS

The most significant development in this area has been the further introduction into domestic law of specific statutory provisions governing detention for the purposes of investigation since the Criminal Justice Act 1984 as outlined in the above Table. The system has been improved through specific clarification of the obligations of the police when detaining persons and, of the rights of those persons. The particular statutory provisions apply to general crime (Criminal Justice Act), terrorism and serious crime (Offences Against the State Act), drug trafficking (Criminal Justice Drug Trafficking Act) and serious crime (Criminal Justice Act 2007). The updating of the Regulations governing police custody is also very important, particularly those requiring the audio-visual recording of suspect interviews as provided for by statutory Regulations introduced in 1997. Over 99% of police interviews are now electronically recorded.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

The most detailed set of Irish provisions relative to prison standards and rights of detainees are specifically provided for in the Irish Prison Rules 2007, which are contained in a Statutory Instrument made under the Prisons Act 2007.

IV.1. FACILITIES, CATEGORIES, ACCOMMODATION AND PROTECTION

Until their first appearance in court detainees are held in police custody; thereafter if they are remanded in custody they are held in a prison. A number of prisons within the State contain remand sections.

While every effort is made to segregate those on remand from those sentenced, full segregation away from the general sentenced prison population can be difficult to maintain in the face of surges in the overall prison population. The Prison Rules[39] 2007 deals with this issue as follows:

39 Rule 71 of the Irish Prison Rules, 2007.

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"Unconvicted prisoners shall, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be accommodated in areas that are separate from those in which convicted prisoners are accommodated or to which convicted prisoners have access, and convicted prisoners shall, as far as is practicable, not be permitted access to areas to which unconvicted prisoners have access at those times when unconvicted prisoners have such access."

With regard to Article 10, paragraph 2 of the International Covenant on Civil and Political Rights, which states:

"(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."

Ireland made the following reservation upon ratification:

"Ireland accepts the principles referred to in paragraph 2 of Article 10 and implements them as far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively."

As regards segregation of young persons from the adult prison population, the Prison Rules[40] 2007 contain provisions for the treatment of all prisoners under the age of 18, as follows:

"(1) Subject to paragraph (2), a prisoner who has not attained the age of 18 years (in this Rule referred to as a "young prisoner") shall, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be accommodated in areas that are separate from those in which older prisoners are accommodated or have access.
(2) A young prisoner may participate with older prisoners in such authorised structured activity as the Governor may determine at such times as he or she may determine (in this paragraph referred to as "communal activity"), if the Governor considers that such communal activity is reasonably likely to be beneficial to the welfare of the young prisoner concerned, and such activity shall be supervised in such manner as he or she directs.
(3) Subject to paragraph (4), a young prisoner shall, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.
(4) Where practicable a young prisoner shall associate with other young prisoners."

40 Rule 69 of the Irish Prison Rules, 2007.

Apart from young detainees the Prison Rules[41] also make provision for the protection of other detainees, including pre-trial detainees, particularly vulnerable detainees. They provide as follows:

> "(1) A prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.
>
> (2) A prisoner to whom paragraph (1) applies may participate with other prisoners of the same category in authorised structured activity if the Governor considers that such participation in authorised structured activity is reasonably likely to be beneficial to the welfare of the prisoner concerned, and such activity shall be supervised in such manner as the Governor directs.
>
> (3) The Governor shall make and keep in the manner prescribed by the Director General, a record of any direction given under this Rule and in particular
> (a) the names of each prisoner to whom this rule applies,
> (b) the date and time of commencement of his or her separation,
> (c) the grounds upon which each prisoner is deemed vulnerable,
> (d) the views, if any, of the prisoner,
> (e) the date and time when the separation ceases".

The Rules[42] continue:

> "(1) Subject to paragraphs (6) and (7) a prisoner shall, where the Governor so directs, be accommodated in a special observation cell designated by the Minister under Rule 18 (Certification of cells or rooms) for the purposes of this Rule, for such period, not exceeding 24 hours, as is specified in the direction concerned.
>
> (2) A direction under paragraph (1) shall not be given, in relation to a prisoner, unless it is necessary to prevent the prisoner from causing imminent injury to himself or herself, or others and all other less restrictive methods of control have been or would, in the opinion of the Governor, be inadequate in the circumstances.
>
> (3) A prisoner to whom a direction under paragraph (1) applies shall be examined by the prison doctor as soon as practicable after he or she has been accommodated in a special observation cell pursuant to such direction.
>
> (4) If the prison doctor advises that a prisoner to whom a direction under paragraph (1) applies should be accommodated other than in accordance with such direction the Governor shall consider the matter and shall, if he or she decides against the advice of the prison doctor, record the reasons for his or her action.
>
> (5) A prisoner to whom a direction under paragraph (1) applies shall be observed by a prison officer at least once every 15 minutes while he or she is being accommodated in a special observation cell.

[41] Rule 63 of the Irish Prison Rules, 2007.

[42] Rule 64 of the Irish Prison Rules, 2007.

(6) Subject to paragraph (7) a period specified in a direction under this Rule shall not exceed 24 hours, but the Governor may, having consulted the prison doctor and considered all other matters, if exceptional circumstances exist that would warrant the extension of the period, direct that the period be extended for not more than four further periods none of which shall exceed 24 hours commencing on the expiration of the first-mentioned period.

(7) The Governor may extend the periods provided for in paragraph (6) that a prisoner may be accommodated in a special observation cell but only after submitting a report to the Director General explaining the need for such an extension and receiving written authorisation from the Director General for such an extension.

(8) The Governor may require a prisoner's clothing, including underwear, to be removed before the prisoner is accommodated in a special observation cell where he or she considers that items or parts of the prisoner's clothing may be used by the prisoner to harm himself or herself, or others, or to cause significant damage to property, and such removal of clothing shall be carried out with due regard to decency and the dignity of the prisoner.

(9) No prisoner shall be left unclothed in a special observation cell, but may be provided with appropriate clothing in the interests of his or her safety.

(10) The Governor shall visit any prisoner accommodated in a special observation cell under this Rule not less than once on each day that he or she is so accommodated.

(11) A doctor shall visit a prisoner accommodated in a special observation cell under this Rule at least daily and as frequently as the doctor believes it necessary.

(12) The Governor shall, in the manner prescribed by the Director General, record –
   (a) any direction given under this Rule and its terms,
   (b) the date and time of the commencement of a period specified in a direction under this Rule,
   (c) the grounds upon which the direction is given,
   (d) the date and time of the termination of a period specified in a direction under this Rule,
   (e) all visits received by a prisoner to whom a direction under this Rule applies during any such period,
   (f) any request made by such prisoner to be permitted to meet with or receive a visit from a prison doctor, psychologist, healthcare professional, or chaplain, and the action taken by the Governor in response to such request,
   (g) any request made by such prisoner to be permitted to meet with or receive a visit from his or her legal adviser, and the action taken by the Governor,
   (h) any other significant occurrences, or requests of the prisoner, during such period and any other comments or observations of the Governor relating to any direction under this Rule,
   (i) any report issued under paragraph (7).

(13) Under no circumstances shall a prisoner be accommodated in a special observation cell for purposes of punishment."

A Segregation Unit was opened in Cloverhill Prison in May 2007 which houses a number of serious drug and criminal gang members thus limiting the inappropriate influence they might otherwise have been able to exert. Portlaoise Prison is a maximum security prison with a constant army presence on the prison perimeter. There are a number of subversive prisoners located there. All of these prisoners are subject to the Prison Rules as they apply to the general prison population.

There is no statutory requirement in relation to a specific amount of space that must be allocated to a prisoner on remand. In the design of prisons the State has regard to various international instruments such as the International Covenant on Civil and Political Rights, the European Prison Rules, the reports of the CPT and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

The Prison Rules[43] provides that the Minister shall certify cells or rooms in respect of their size, lighting, ventilation, fittings etc. as suitable for the purposes of prisoner accommodation. The average cell size in new prison designs are about 11 square metres, which is intended for single occupancy but may accommodate two persons for operational flexibility. This area includes in-cell sanitation and shower facility. Some of the older prisons, dating back to the middle of the 19th century, have smaller cells and have less facilities. Some of these prisons are being upgraded and others will eventually be replaced altogether. The Prison Rules[44] states:

"(1) The Minister shall, in relation to a prison or part of a prison, certify that all such cells or rooms therein as are intended for use in the accommodation of prisoners are, in respect of their size, and the lighting, heating, ventilation and fittings available in the cells or rooms in that prison or that part, suitable for the purposes of such accommodation.

(2) (a) The Minister may specify the maximum number of persons who may, in normal circumstances, be accommodated in cells or rooms belonging to such class as may be so specified.

(b) The Minister shall when specifying a maximum number under subparagraph (a) have regard to the size of, and the availability of lighting, heating, ventilation and fittings in cells or rooms belonging to the class concerned.

(3) The Minister shall, in relation to a prison or part of a prison, designate particular cells or rooms, to be used only for the purposes of the special observation of prisoners in accordance with the provisions of Rule 64 (Use of special observation cell), and such cells or rooms must comply with the design requirements approved by the Minister for such special observation cells.

(4) Each cell or room used to accommodate prisoners shall be fitted with a mechanism by which a prisoner locked inside may attract the attention of a

43 Rule 18 of the Irish Prison Rules, 2007.

44 Rule 18 of the Irish Prison Rules, 2007.

> prison officer and each such mechanism shall be capable of being operated by such a prisoner at all times."

About two-thirds of those on remand are detained in Cloverhill Prison in Dublin where, due to pressure on accommodation, most of the cells accommodate 3 persons. Exceptions will be made for persons who are especially vulnerable or who request protection, those placed in close supervision cells or those who have to be placed in a single cell for medical or psychiatric reasons. Where detainees share a cell staff try to ensure that they can get on together or at least not be antagonistic towards each other. The remaining one-third of those on remand are accommodated in other prisons in either single cell accommodation or two to a cell. Even these figures can on occasions be exceeded due to pressure on accommodation.

IV.2. INFORMATION

Information to be provided while in police custody

Under Regulation 8 of the Treatment of Persons in Custody in Garda Síochána Stations Regulations, 1987 and 2006, the information in Appendix A to this report is given to persons taken into custody. This includes information on the reason for arrest, access to legal advice, notification to other persons, visits, telephone calls, examination by a doctor etc. If the person has any language problems the police are required to provide an interpreter and a translation of key documents.

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Information to be provided to the prisoner on committal

Information is a two-way process and persons in custody must be given certain important information on committal. The Prison Rules[45] provide as follows:

> "(1) Each prisoner shall, upon admission to prison, be given an explanatory booklet outlining his or her entitlements, obligations, and privileges under these Rules.
> (2) Each prisoner who was admitted to prison before the commencement of these Rules and who is in prison on the date of such commencement shall be given an explanatory booklet outlining his or her entitlements, obligations, and privileges under these Rules.
> (3) A full copy of these Rules and any local orders directly addressed to prisoners shall be available for examination by prisoners at a convenient location in the prison, and in so far as is practicable, copies of these Rules and any such local orders shall be made available to prisoners.

45 Rule 13 of the Irish Prison Rules, 2007.

(4) The booklet referred to in paragraph (1) and (2) shall, in so far as is practicable, be provided to a foreign national in a language that is understood by him or her.
(5) Where the booklet referred to in paragraph (1) and (2) is not available in a language that is understood by the foreign national concerned or he or she does not understand the contents thereof, all reasonable efforts shall be made to ensure that the said contents shall be explained to him or her in a language that he or she understands.
(6) The booklet referred to in paragraphs (1) and (2) shall contain details in relation to the implementation of paragraph (3) in the prison concerned.
(7) Where a prisoner is unable to read or is unable to understand the contents of a booklet referred to in paragraphs (1) and (2) the Governor shall take all reasonable measures to ensure that the prisoner's entitlements, obligations, and privileges under these Rules are explained to him or her as soon as is practicable."

The Rules[46] go on to provide –

> "The Governor shall, as soon as may be after the admission of a prisoner on committal to the prison concerned, meet that prisoner, and satisfy himself or herself that the prisoner has been informed of, and understands, his or her obligations, entitlements and privileges under these Rules, and shall further ensure that details of any matters of significance to which the prisoner may draw his or her attention are recorded."

IV.3. RIGHTS TO HUMANE TREATMENT

As mentioned earlier Article 10 of the International Covenant on Civil and Political Rights is not incorporated into Irish domestic law but the Inspector of Prisons – a former Judge – in his document entitled "Standards for the Inspection of Prisons in Ireland" has included in that document several of the provisions of Article 10. These are the standards which the Inspector will demand in going about his work. On the more micro aspects of the treatment of a person in custody the following Prison Rules are relevant.

Personal cleanliness

Remand prisoners have both rights and obligations as regards personal cleanliness.[47] The relevant Prison Rule states as follows:

"(1) A prisoner shall keep his or her person clean.

46 Rule 14 of the Irish Prison Rules, 2007.
47 Rule 25 of the Irish Prison Rules, 2007.

(2) A prisoner shall be permitted to take a hot shower or bath as often as is reasonably practicable and shall be entitled to, and may be required to, take a hot shower or bath at least once a week.
(3) A prisoner shall be provided, free of charge, with such toilet articles as are necessary for the maintenance of health and cleanliness.
(4) Additional toilet articles shall be available for purchase in the prison at such times and in such parts of the prison as the Governor considers appropriate.
(5) Unless the prison doctor considers it necessary on health grounds, a prisoner's hair shall not be cut, and a male prisoner shall not be prevented from growing or be required to remove or grow a moustache or beard, without his or her consent.
(6) The Governor may require a prisoner to cover or restrain his or her hair at such times as are necessary for the maintenance of good health or for reasons of hygiene or safety."

Clothing

Some remand prisoners are allowed to wear their own clothes: others are required to wear clothes provided by the prison. For example, where a detainee's own clothes are badly soiled or otherwise in poor condition, clothes will be provided by the Prison Service. The clothes provided are in general similar to clothes available in the community at large.

IV.4. LEGAL REPRESENTATION AND CONTACT WITH THE OUTSIDE WORLD

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A person charged with an offence has a right to be legally represented at remand hearings. Financial assistance is provided to those with insufficient means to secure legal representation. A legal representative may visit his client in a prison at any reasonable time.[48]

"(1) A prisoner shall be entitled to receive a visit from his or her legal adviser at any reasonable time for the purposes of consulting in relation to any matter of a legal nature in respect of which the prisoner has a direct interest, and any such visit shall take place within the view of but out of the hearing of a prison officer."

A person in pre-trial detention must be facilitated in making contact with a relative, friend or other person with an interest in the detainee's welfare. The Prison Rules[49] deals with "prisoners not serving sentence". Unconvicted/remand

[48] Rule 38(1) of the Irish Prison Rules, 2007.

[49] Part 6 of the Irish Prison Rules, 2007 – Rule 71 (Separate accommodation); Rule 72 (Authorised structured activity); Rule 73 (Private healthcare); and Rule 74 (Payment by unconvicted prisoner for private healthcare).

prisoners are entitled, to enhanced levels of visits, letters and telephone calls. The relevant Prison Rule states as follows as regards visits:[50]

> "(3) Subject to the provisions of these Rules, an unconvicted prisoner shall be entitled to receive one visit per day from relatives or friends of not less than 15 minutes in duration on each of six days of the week, where practicable, but in any event, on not less than on each of three days of the week."[51]

IV.5. DAY-PROGRAM OF PRE-TRIAL DETAINEES

Exercise[52]

The relevant Prison Rule states as follows as regards exercise of prisoners, including remand prisoners:

> "(1) Each prisoner not employed in outdoor work or activities shall be entitled to not less than one hour of exercise in the open air each day, provided that, having regard to the weather on the day concerned, that is practicable.
> (2) In so far as is practicable, each prisoner shall be permitted to have access to, and the use of, indoor space and equipment, suitable for physical recreation, exercise or training, and shall be provided with appropriate instruction where necessary.
> (3) Where a prison doctor certifies that a prisoner is unfit for physical recreation, exercise or training either generally or of a particular type, the prisoner shall not be permitted to engage or participate therein during the period in relation to which the prison doctor so certifies.
> (4) Where a prison doctor certifies that a prisoner requires remedial physical education or therapy, the Governor shall, in so far as is practicable, make provision in relation thereto, in consultation with the Director of Prison Healthcare Services."

Work

Where workshops are available pre-trial prisoners are offered work but even then the take-up rate is usually low. They cannot be compelled to work.

Education

The Irish Prison Service delivers programmes of education that help prisoners achieve personal development and other goals. The provision and assignment of

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50 Rule 35(3) of the Irish Prison Rules, 2007.

51 There are no statistics available relating to exceptions to this Rule but exceptions would be rare. In the event of such visits being problematic it would be more likely that the visit would be closely supervised.

52 Rule 32 of the Irish Prison Rules, 2007.

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teachers to the Irish Prison Service is managed at a local level by independent Community Vocational Education Committees, in partnership with the Irish Prison Service. Each Education Unit is staffed by a Head Teacher and a compliment of qualified teachers. Various subjects are taught depending on the intellectual capabilities of the prisoner and on his or her previous education experiences. The units aim for standards similar to schools and colleges in the community.

IV.6. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Assessment

All prisoners, including remand prisoners, undergo assessment on committal which includes an interview with a Governor and Nursing Officer along with a Doctor's assessment within 24 hours of committal. Persons who give cause for concern have access to psychiatric clinics and may be placed in special observation cells on their own where they are examined each day. In Cloverhill Prison, for example, there is an in-reach programme which ensures the continuing assessment of vulnerable prisoners. This programme is provided by doctors and staff from the Central Mental Hospital which is a separate institution from the Prison Service. The in-reach team aim to divert detainees with serious mental health problems from the prison system and they also support other detainees in the prison who are awaiting a place in the Central Mental Hospital.

A "Committal Details" form providing the prisoner's personal details on such matters as previous drug use, next of kin, previous psychiatric history and other relevant information is completed on committal. As mentioned earlier, there are also a number of prisoners in custody, including on remand, who belong to criminal gangs engaged in on-going feuds with other rival criminal gangs: this is a growing problem. The need for prisoners to be accommodated in separate areas from other identified prisoners from whom they may be at risk is of primary importance when assessing suitable locations. The prisoner's personal details are identified at this committal stage based on information provided by the prisoner himself, by the police or, sometimes, by other prisoners. In particular, the prisoners themselves will inform the prison staff if they feel they are at risk from other prisoners.

Health

Medical services in the prisons are provided by fully qualified nurses employed full-time by the Prison Service. Many of the doctors who attend the prisons on a daily basis are involved in private medical practice in the community and would bring to the prison medical services the same ethos and standards they would

uphold in their community medical practice. The Prison Rules[53] provide as follows:

> "(1) Subject to paragraphs (2) and (6), each prisoner shall be examined separately by a doctor on the day of his or her admission to a prison for the purpose of –
> (a) the diagnosis of any physical or mental illness and the taking of such measures as are necessary to ensure that any such illness is treated,
> (b) the isolation of, on medical grounds, a prisoner suspected of having a contagious condition or any condition that might threaten the health or well being of others if they were to come into contact with him or her,
> (c) the determination of the prisoner's fitness for work,
> (d) the noting of any physical or mental conditions that might impede the prisoner's integration into the prison regime or into society upon his or her release, and
> (e) the noting of any indication of recent injuries, and
> (f) the recording of any medication prescribed for the prisoner.
>
> (2) Save in the most exceptional circumstances, a prisoner admitted to prison on the day of his or her committal, at a time when a doctor is not available, shall, immediately following his or her committal, be given a preliminary medical screening by a nurse officer, or any other person, duly authorised in that behalf, and shall then be examined by the prison doctor on the first scheduled visit of the prison doctor to the prison following his or her committal.
>
> (3) Each prisoner on transfer to another prison shall be examined by the prison doctor on the first scheduled visit of the prison doctor to the prison after the transfer.
>
> (4) The prison doctor shall determine what use shall be made of medicines brought into the prison by a prisoner.
>
> (5) A prisoner who attends court and returns to the prison within 24 hours of leaving it shall not be required to be examined by the prison doctor unless particular circumstances exist that require his or her medical examination.
>
> (6) The prison doctor may, as he or she considers appropriate, examine separately a prisoner prior to his or her final discharge from the prison.
>
> (7) All medical examinations by a prison doctor shall, except where the prison doctor, on grounds stated and recorded, requests otherwise, take place out of sight and hearing of persons other than healthcare professionals."

During the period of remand a prisoner is entitled to request to see a doctor at any time and will generally be seen within twenty four hours. Under exceptional circumstances a person on remand may be given access to a doctor or dentist of his choice but in those circumstances he would have to pay for those services.

[53] Rule 11 of the Irish Prison Rules, 2007.

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Drugs

Drug treatment services are available to prisoners, including those on remand. Drug Treatment programmes seek to reduce the demand for drugs within the prison system through education, treatment and rehabilitation services. Particular initiatives include the provision of detoxification, methadone maintenance, addiction counselling and drug therapy programmes. The fact that a prisoner is on remand will be taken into account when treatment options are being considered. These may include stabilisation on methadone maintenance for persons who wish to continue on maintenance while in prison.

Support/Counselling

The Prison Rules generally, insofar as they relate to prisoner treatment, entitlements, et cetera, apply equally to sentenced and un-sentenced prisoners. A psychological support service is available to prisoners, including remand prisoners. Psychologists are required to treat prisoners with the same dignity and respect as would be afforded to any person availing of his or her services who is not a prisoner.

Balancing care with custody

In line with its mission statement, the Irish Prison Service endeavours to achieve a balanced approach in discharging its care and custody functions. The Irish Prison Service provides a wide range of education, work and training programmes, psychology, psychiatric, counselling and spiritual services. These services are important not just in addressing personal needs and rights of the prisoners but also in helping the person in custody to address missed educational and vocational opportunities, offending behaviour, drug and alcohol addiction and poor self esteem and self-management. The aim is to help the prisoner experience positive personal development while in prison and to achieve successful re-integration and resettlement in the community after release.

Confinement[54]*/Isolation*

The Prison rules provide as follows:

> "(1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to –
>
> (a) engage in authorised structured activities generally or particular authorised structured activities,

[54] Rule 62 of the Irish Prison Rules, 2007.

(b) participate in communal recreation,
(c) associate with other prisoners,
where the Governor so directs.

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(9) The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General."

IV.7. PRISON STAFF TRAINING

The training provided to staff of the Irish Prison Service fully equips them to deal with the needs of remand prisoners. Prison officer training emphasises concepts of humane treatment and awareness of international instruments, as well as an appreciation of the ethical context within which prisons must be administered. All training is underpinned by a belief in the dignity and humanity of the person. All training programmes emphasise the need to treat prisoners as individuals with humanity and respect for their rights and to act within the law at all times.[55] The Irish Prison Service overall and at local level its constituent prisons, are fully committed to delivering training on a continuous basis for all grades. Its Training and Development Centre has received positive feedback from visiting Council of Europe and other foreign experts on this aspect of its training programmes. Training programmes comprise elements of theory and practice; they seek to avoid concentrating on training that is too remote from practical realities while acknowledging the importance of a sound theoretical basis. On completion of their two year induction training programme the officers may be awarded a National Certificate from Sligo Institute of Technology, a third level college. There is no specific training module focused on juvenile or women prisoners either on remand or sentenced.

[55] Rules 75(2)(iii) and 85(3)(c)(iii) of the Irish Prison Rules, 2007.

IV.8. COMPLAINTS BY REMAND PRISONERS

Remand prisoners have a number of avenues open to them to complain about their treatment. First, the person complained to would normally be the Governor. The Prison Rules[56] provide as follows:

> "(1) The Governor shall, as soon as is practicable, meet with a prisoner where the prisoner so requests.
> (2) Where at a meeting to which this Rule applies, the prisoner makes a complaint to or request of the Governor, or brings to the Governor's attention any other matter relating to the prisoner in respect of which a decision by the Governor is warranted, the Governor shall, upon making a decision in relation to any such complaint, request or matter, notify the prisoner as soon as is practicable thereafter.
> (3) The Governor shall record the date and time on which a meeting under this Rule took place, the name of the prisoner concerned, the nature of any request, complaint or matter brought to the Governor's attention during the meeting and the decision (if any) of the Governor in relation thereto."

Second, a Visiting Committee is appointed to each prison and may hear complaints from individual prisoners. The Committee brings these matters to the attention of the prison governor, or the Minister for Justice and Law Reform where appropriate. They do not adjudicate on the complaint. The relevant Rule[57] states:

> "Where a prisoner makes a request to meet with the visiting committee or a member of the visiting committee the Governor shall forward the request without undue delay to the visiting committee or the member concerned, as may be appropriate."

Third, the Office of the Inspector of Prisons, a statutory, independent office, which was established under the Prisons Act, 2007. The key role assigned to the Inspector is to carry out regular inspections of all the prisons in the State and to present reports on each institution to the Minister for Justice and Law Reform. While it is not the function of the Inspector to investigate or adjudicate on individual complaints he may examine the circumstances surrounding the complaint and comment on these where necessary in performing his own functions.

Under section 32(1) of the Prisons Act 2007, the Inspector of Prisons must submit an annual report to the Minister on the performance of his functions during the previous year.

[56] Rule 55 of the Irish Prison Rules, 2007.
[57] Rule 56 of the Irish Prison Rules, 2007.

The Inspector's reports must by law, in respect of each prison inspected during the year in question, deal with, in particular:

(a) its general management, including the level of its effectiveness and efficiency,
(b) the conditions and general health and welfare of prisoners detained there,
(c) the general conduct and effectiveness of persons working there,
(d) compliance with national and international standards including in particular the prison rules,
(e) programmes and other facilities available and the extent to which prisoners participate in them,
(f) security, and
(g) discipline.

The Prisons Act, 2007 provides that the Minister shall cause a copy of the report to be laid before the Houses of the Oireachtas and published.

As mentioned earlier the Inspector recently published a booklet dealing with standards for the inspection of prisons in Ireland, together with a juvenile supplement, against which he will benchmark the care of prisoners, as well as the facilities and conditions in the prisons.

Fourth, a remand prisoner may raise, at his trial matters relating to his detention which may have implications for his trial, for example where the rules governing pre-trial detention have been breached.

Fifth, a remand prisoner can complain to the European Court of Human Rights and the CPT and the UN Human Rights Commission.

There is no ombudsman for prisoners in Ireland.

IV.9. INTERNATIONAL INSTRUMENTS AND DECISIONS – THEIR INFLUENCE

The Irish Prison Rules 2007 reflect the UN and Council of Europe guidelines on the treatment of prisoners and international best practice in general. As mentioned earlier, Ireland is a signatory to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Its obligations under that convention are provided for in the Criminal Justice (UN Convention against Torture) Act 2000. The Irish Government pays particular attention to decisions of the European Court of Human Rights and to the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

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V. ALTERNATIVES TO PRE-TRIAL DETENTION

In the case of very minor offences, *e.g.*, minor road traffic offences, the question of alternatives to pre-trial detention would normally not arise. The most important alternative to pre-trial detention is bail. Bail is provided by law in Ireland and may be applied for in all cases. This does not, of course, mean that bail is granted in all cases. Bail, however, has been granted in the most serious crimes, including murder, manslaughter and negligent homicide.

While definitive statistics are not available, it is estimated from available data that bail is granted in approximately 25% to 33% of murder cases, but is usually granted in more than 80% of cases involving less serious offences. The reason for this relatively high figure of 80% is that there is, as mentioned earlier, a constitutional presumption in favour of bail since, in the eyes of the law, a person is innocent until proven guilty. Courts in determining bail applications will consider the seriousness of the charge, the nature of the evidence, the likely sentence, the possibility of disposing of illegally acquired assets, interfering with evidence, witnesses or jurors and failure to answer bail on previous occasions. Courts will refuse if there is a likelihood that the person will abscond or will interfere with evidence, witnesses or jurors. Factors to be taken into account but not grounds for refusal are prosecution objections, possibility of a speedy trial and the level of bail.

An amendment to the Constitution in 1996 added a new ground for refusal of bail, i.e. bail may be refused where a person is charged with a serious offence which could attract a penalty of 5 years imprisonment or more and where refusal is "reasonably considered necessary to prevent the commission of a serious offence by that person".[58] The Bail Act 1997 gave effect to this constitutional amendment. Section 2 of the 1997 Act repeats the constitutional provision and sets out the matters the court 'shall' take into account before deciding on bail. These are: the nature and degree of seriousness of the offence charged; the likely sentence if convicted; the nature and strength of the evidence; any convictions for offences while on bail previously; any previous convictions and whether the accused is charged with and awaiting trial for other offences.

Bail can be made subject to conditions, including conditions relating to residence, reporting to the police, surrender of passport etc. The 2007 Act also provides that agreement to electronic monitoring can be a condition of bail but this provision is not yet in force. The duration of this alternative to pre-trial detention is determined by the courts but in any event would not normally extend beyond the commencement of the trial unless the court otherwise directs.

Under section 11 of the Criminal Justice Act 1984, a sentence for an offence committed while on bail is consecutive on the sentence for the first offence. The

[58] Article 40.4.6° of the Irish Constitution.

fact that it was committed while on bail is to be regarded as an aggravating factor when deciding on the level of sentence for that offence. Section 13 of the 1984 Act provides that failure to answer to bail is an offence, punishable by up to one year's imprisonment and a fine of up to € 5,000 and is to be regarded as an offence committed while on bail, thus attracting a consecutive rather than concurrent sentence.

Section 24 of the Criminal Procedure Act 1967 provides that a court shall not remand a person in custody, on their first appearance before the court, for more than eight days without the consent of both the prosecutor and the accused person. At subsequent sittings the court may remand an accused person for up to 15 days or, with the consent of the prosecutor and the accused, up to 30 days. A remand may be subject to review by the court which made the initial remand order at periods set by the court.

Bail may be reviewed by the court at intervals determined by the court setting the bail or upon application by the accused. The same criteria are used in respect of the review as was used in regard to the original bail application.

Where bail is refused, a detained person may make an application direct to the High Court for bail. It should also be noted that where bail has been refused under section 2 of the Bail Act 1997[59] because it was reasonably necessary to do so and the trial has not commenced within four months of the refusal, the detainee can renew his or her application for bail on the grounds of delay in proceeding with the trial. The court can grant bail if satisfied that the interests of justice require it.

There is no specific limit to the period which a court can set for a person to be on bail once a trial date is set. A court may prohibit further prosecution of a criminal case where there is undue delay in bringing a case to trial.

Bail has a constitutional basis in Ireland which is linked to the exercise of rights guaranteed by the Constitution. Some of these rights are also provided for under the European Convention on Human Rights and the International Covenant on Civil and Political Rights. While it is probably true to say that it has only been to a limited extent that these international instruments have been debated in relation to the subject of bail, they have undoubtedly played a part, and continue to play a part, in the development of the principles which underpin the right to bail.

V.1. SOME IMPORTANT DEVELOPMENTS

The implementation of new modern Prison Rules (the previous Rules dated from 1947), together with increased investment in the upgrading of the prison estate are the most important developments as regards prison custody in recent years.

[59] See p. 31.

The Prison Rules take account of the relevant UN and Council of Europe guidelines as well as international best practice. The Irish Prison Service has been engaged in an extensive programme of investment in its prison estate. This has involved both the modernisation of the existing estate and the provision of additional new prisons. Since 1997, approximately 1,800 additional spaces have been created in the prison estate. Despite this significant investment, it is clear that some prisons are operating in excess of capacity. The Irish Prison Service is committed to replacing the old prisons, some of which are over 150 years old. In particular, the planned new major prison outside Dublin on a green field site will open up new opportunities for the development of a state of the art facility which will deliver proper accommodation and structured regimes that support the rehabilitation and resettlement of prisoners. Of course the question of alternatives to imprisonment after conviction should not be lost sight of but that is another matter.

Independent oversight bodies are required under various international instruments such as the UN Standards Minimum Rules for the Treatment of Prisoners and the European Prison Rules. In this connection the CPT made recommendations as regards the independence of the then Garda Síochána Complaints Board[60] and the establishment of an independent prisons inspectorate,[61] both of which were subsequently addressed by the Irish Government. In Ireland there is now a Police (Garda Síochána) Inspectorate, a Police (Garda Síochána) Ombudsman Commission and an independent Inspector of Prisons.

VI. CONCLUSION

The Irish law, practice and administration of pre-trial detention take their starting point from the safeguards of the Constitution. Over time they have been developed in accordance with the requirements of modern standards of protection for the rights and dignity of the person and in accordance with the recommendations of the relevant international organisations and the obligations of international human rights instruments. Notwithstanding such development, the Irish situation in relation to pre-trial detention is likely to continue to evolve to take account of new developments and international law and best practice.

[60] See p. 26, CPT Report to the Government of Ireland, CPT/Inf (95) 14.
[61] See p. 38, CPT Report to the Government of Ireland, CPT/Inf (99) 15.

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APPENDIX A

C.72(S)
GARDA SÍOCHÁNA

Information for Persons in Custody

Regulation 8 – Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 and 2006
Only *rights as required and as appropriate to the arrest/detention need only be read over the person*

Member in Charge
I am the member in charge of this station and I am responsible for overseeing the application of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 and 2006 in respect of your treatment while in custody and for that purpose will visit you from time to time. Any matters relating to your treatment should be brought to my attention as member in charge.

Reason for Arrest
You will have been informed of the offence or offences for which you have been arrested.

Notification to other Persons
If you are eighteen or over, you may, on request, have a solicitor and another person named by you notified that you are in custody in a particular station. If the person first nominated cannot be contacted, you may nominate another person.

If you are under eighteen, your parent or guardian (or, if you are married, your spouse) will be notified and asked to attend at the station without delay. If your parent or guardian (or, if you are married, your spouse) cannot be contacted you will be given an opportunity to ask for another person, reasonably named by you, to be contacted.

Non-Irish Nationals
If you are a foreign national you may communicate with a diplomatic or consular representative of your own country who is either in the State or accredited to the State on a non-residential basis, or a diplomatic or consular representative of a third country which may formally or informally offer consular assistance if your country has no resident representative in the State.

Your consul will be notified of your arrest if you so wish.

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If you are a national of the United States of America your consular representative will be notified of your arrest unless you request otherwise.

Legal Advice

You may communicate privately with a solicitor either in writing or by telephone, or consult with the solicitor in the station.

Visits, Telephone Calls etc.

You may, if you wish, (a) receive a visit from a relative, friend or other person with an interest in your welfare and (b) make a telephone call or send a letter, provided that (i) the member in charge is satisfied that it will not hinder or delay the investigation of crime and (ii) in the case of a visit, it is practicable for the visit to be adequately supervised.

Searches

If you are to be searched, the reason for the search will be explained to you.

Meals

There is no charge for meals supplied. However, if you wish to have a meal of your own choice it will be supplied, if practicable, but at your own expense.

Bail

You may be released on bail if the member in charge considers it prudent to do so and no warrant directing your detention is in force. If you are not given bail, you may apply for it when you come before the Court.

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Legal Aid

This is dealt with on application to the court and may be granted in certain circumstances.

Examination by a Doctor

You have the right to request a medical examination by a doctor, including one of your own choice.

Photograph for the purpose of Identification

If you have been arrested under any power conferred by law, a member of the Garda Síochána, when authorised by a member not below the rank of Sergeant, may take your photograph for the purpose of assisting with your identification in connection with any proceedings that may be instituted against you for the offence in respect of which you are arrested. Refusal to allow your photograph to be taken for the purpose of identification is an offence.

Fingerprints, Palmprints, Photographs and Tests

If you have been arrested/detained under: (Tick box as appropriate)
☐ section 30 of the Offence Against the State Act 1939 as amended, or
☐ section 42 of Criminal Justice Act 1999 as amended, or
☐ section 4 of the Criminal Justice Act 1984 as amended, or
☐ section 2 of the Criminal Justice (Drug Trafficking) Act 1996 as amended, or
☐ section 50 of the Criminal Justice Act 2007,

a member of the Garda Síochána, when authorised by a member not below the rank of Inspector, may take your fingerprints, palmprints or photograph. A member may also make/conduct tests to see if you have been in contact with a firearm or explosive substance and for that purpose may take swabs from your skin or samples of your hair.

Reasonable force may be used if you fail to cooperate and allow your photographs or fingerprints and palmprints to be taken. Such a power will not be exercised except on the authority of a member not below the rank of Superintendent. You will be informed of the intention to exercise such power and that the authorisation of the Superintendent has been given. Photographs or fingerprints and palmprints taken by force shall be taken in the presence of a member not below the rank of Inspector. The taking of such photographs and fingerprints must be video recorded.

In any other case if you volunteer, a member may take your fingerprints, etc. with your written consent and, if you are under eighteen, the written consent of your parent/guardian.

Taking of Bodily Samples
If you have been arrested/detained under: (Tick box as appropriate)
☐ section 30 of the Offence Against the State Act 1939 as amended, or
☐ section 42 of Criminal Justice Act 1999 as amended, or
☐ section 4 of the Criminal Justice Act 1984 as amended, or
☐ section 2 of the Criminal Justice (Drug Trafficking) Act 1996 as amended, or
☐ section 50 of the Criminal Justice Act 2007,

a member of the Garda Síochána when authorised by a member not below the rank of Superintendent, may take or cause to be taken (*e.g.*, by a doctor) from you bodily samples for forensic testing. In these cases certain types of samples may not be taken without written consent. In those cases and if you are seventeen or over your written consent will be required and if you are under fourteen the sample(s) in question may be taken with the written consent of your parent or guardian. If you are fourteen or over but under seventeen your written consent

and that of your parent or guardian will be required. Failure to provide written consent may have certain legal consequences which will be explained to you.

In any other case if you volunteer, a member may take your bodily sample with your written consent and, if you are under eighteen, the written consent of your parent/guardian.

Inferences

Where sections 18, 19 and 19A of the Criminal Justice Act 1984 as amended or section 2 of the Offences Against the State Act 1998 as amended have been invoked in relation to an arrestable offence, in regard to inferences, you will be afforded a reasonable opportunity to consult a solicitor and the questioning must be recorded by electronic or similar means unless you consent in writing to it not being so recorded.

Identification Parades

If you take part in an identification parade –

(a) you will be placed among a number of other persons who are, as far as practicable, of similar height, age, general appearance, dress etc.
(b) you may have a solicitor or friend present at the parade;
(c) you may take up any position you wish in the parade and, after a witness has left, change your position in the parade, if you wish, before the next witness is called;
(d) you may object to the member conducting the parade regarding any of the persons on the parade or the arrangements for it.

Medical Treatment

If you are

(a) injured,
(b) under the influence of intoxicating liquor or drugs and cannot be roused,
(c) fail to respond normally to questions or conversation (otherwise than owing to the influence of intoxicating liquor alone),
(d) appear to the member in charge to be suffering from a mental illness, or
(e) otherwise appear to the member in charge to need medical attention,

the member in charge shall summon a doctor or cause him to be summoned, unless your condition appears to the member in charge to be such as to necessitate immediate removal to a hospital or other suitable place.

Medical advice shall be sought if you claim to need medication relating to a heart condition, diabetes, epilepsy or other potentially serious condition or the

member in charge considers it necessary if you have in your possession any such medication.

Human Rights

The Garda Síochána shall at all times respect your personal rights and your dignity as a human being and shall not subject you to torture or to cruel, inhumane or degrading treatment or punishment.

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LA DÉTENTION AVANT JUGEMENT EN ITALIE

Franco Della Casa*

I. INTRODUCTION

En ce qui concerne la détention avant jugement, l'Italie a dû faire un grand pas en avant pour se détacher du code de procédure pénale de 1930 qui, en tant qu'expression d'un Etat non démocratique, faisait prévaloir le principe d'autorité et prévoyait une faible protection de la liberté personnelle du prévenu. Il suffit de rappeler ici que les mesures alternatives à la détention n'existaient pas, et que non seulement le juge, mais aussi le ministère public pouvait décider de faire enfermer le prévenu dans une maison d'arrêt. A l'heure actuelle, les dispositions du code de procédure pénale de 1988 et des lois successives sont radicalement différentes et vont au delà des garanties demandées par la Charte constitutionnelle (art. 13), entrée en vigueur le 1er janvier 1948. Les caractéristiques fondamentales des textes actuels sont les suivantes : a) mise en place d'une série de mesures ayant un effet plus ou moins accentué sur la liberté personnelle du prévenu : étant bien entendu qu'en règle générale, l'incarcération doit être considérée l'*extrema ratio* (art. 275 al. 3 C.pr.pén.) ; b) fixation de la règle selon laquelle le juge, sur requête du ministère public – et non *motu proprio* – peut disposer, par décision motivée, la limitation ou la privation de la liberté personnelle ; c) attribution au prévenu du droit de demander à un juge collégial différent de celui qui s'est prononcé sur la liberté personnelle (ledit tribunal de la liberté) le réexamen de la décision, ainsi que de se pourvoir en cassation.

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II. CADRE LÉGAL : NORMES INTERNATIONALES ET DE DROITS DE L'HOMME

L'Italie est membre de nombreuses organisations internationales : parmi les plus importantes, il faut citer les Nations Unies, dans laquelle elle a été admise le 14 décembre 1955, le Conseil de l'Europe et l'Union européenne, au moment de leur constitution.

S'il est vrai que l'Italie, depuis la fin de la seconde guerre mondiale, a adhéré sans réserve aux plus importantes Chartes internationales, il est aussi vrai que cela a eu des conséquences positives sur l'évolution de la réglementation interne. Pour éviter des décalages avec les textes internationaux, voire des condamnations de la part d'organismes internationaux, le législateur italien a été amené à agir de manière préventive.

En référence à la liberté personnelle, on peut donner l'exemple du tribunal de la liberté qui, dans des délais extrêmement brefs (15 jours à compter de la saisine), doit décider s'il y a eu atteinte ou pas à la liberté personnelle du prévenu. A ce propos, la doctrine n'a pas manqué de souligner que la réglementation italienne a été élaborée de telle manière à être en accord avec les indications de l'article 5 al. 4 de la Convention européenne.[1]

II.1. INSTRUMENTS INTERNATIONAUX DE DROITS DE L'HOMME

Le rôle majeur que l'Italie attribue à la collaboration internationale s'est traduit dans son adhésion convaincue aux règles des différentes Conventions visant à une reconnaissance de plus en plus ponctuelle des droits de l'homme et à leur protection toujours plus efficace. Voici donc les Conventions les plus connues et plus pertinentes avec le sujet de cet exposé qui ont fait l'objet d'une loi de ratification puis d'une loi d'exécution : la Convention des NU contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (signée le 4 février 1985 et ratifiée le 12 janvier 1989) ; la Convention des NU sur les droits de l'enfant (signée le 26 janvier 1990 et ratifiée le 5 septembre 1991) ; la Convention européenne des droits de l'homme (signée le 4 novembre 1950 et ratifiée le 26 octobre 1955) ; la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (signée le 26 novembre 1987 et ratifiée le 29 décembre 1988). Puisque la réglementation dont nous parlons a été introduite dans la législation nationale par des lois d'exécution spécifiques, elle est directement applicable par les juges italiens. Non seulement : dans certains cas la personne concernée peut dénoncer la non application ou

[1] Dans ce sens, v. SPAGNOLO, « *Il tribunale della libertà* », Milano, 2008, p. XI.

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l'application erronée de cette réglementation par un recours aux organes judiciaires supranationaux : le 1er août 1973 est une date significative à cet égard, car elle marque la reconnaissance par l'Italie du droit de recours individuel à la Commission européenne des droits de l'homme.

II.2. DROITS DE L'HOMME AU NIVEAU NATIONAL

Sans vouloir diminuer l'importance des sources mentionnées, il faut cependant préciser que le sujet de la détention provisoire n'est pas ignoré par la Constitution italienne, du moment qu'elle établit à ce propos certains principes fondamentaux qui rendent tangible la présomption d'innocence prévue par l'article 27 alinéa 2. C'est surtout au prévenu que fait référence l'article 13 Const. lorsque, après avoir affirmé que la liberté individuelle est inviolable, il admet tout de même qu'elle peut être limitée « dans les seuls cas et les seules formes prévus par la loi », et il ajoute que, si exceptionnellement même la police peut intervenir à titre provisoire, en règle générale une décision motivée de l'autorité judiciaire est requise. Ce même article interdit toute violence physique et morale sur les personnes détenues et confie au législateur le devoir de fixer les limites maximales de la détention provisoire. Il faut rappeler aussi l'article 111 alinéa 7 Const., là où il est affirmé qu'un pourvoi en Cassation pour violation de la loi est toujours admis contre les mesures concernant la liberté individuelle.

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

La liberté personnelle et les preuves sont deux domaines où le code de procédure pénale de 1988 a fait enregistrer le plus de progrès par rapport au passé. Cela mérite de rappeler qu'une grande partie du livre III du code de procédure pénale est consacrée à la détention avant jugement ainsi qu'aux mesures alternatives à la détention avant jugement. Il faut cependant ajouter que, même après l'entrée en vigueur du code, le législateur est intervenu maintes fois sur la liberté personnelle : aussi bien dans un sens libéral, que – lorsque les exigences de défense sociale ont été considérées prioritaires – en réduisant les garanties précédemment définies en faveur du prévenu. Il en résulte que la réglementation sur la liberté personnelle doit être considérée moins stable que celle relative aux autres domaines du code de procédure pénale. Pas seulement : si sur le plan de la législation nous passons à celui de la pratique, on doit partager la critique selon laquelle le système italien a encore trop recours à la détention avant jugement.

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D'après le code de procédure pénale italien, la liberté individuelle de la personne mise en examen peut être limitée par l'adoption d'une des mesures suivantes : l'arrestation en flagrance (art. 380 et 381 C.pr.pén.) ; la mise aux arrêts (ci-après dénommée *fermo*) – abstraction faite de la condition requise de la flagrance – de la personne suspectée d'avoir commis une infraction grave, lorsqu'il existe un risque de fuite fondé (art. 384 C.pr.pén.) ; l'ordonnance privative ou limitative de la liberté individuelle rendue par le juge chargé du procès (art. 272-286-*bis* C.pr. pén.).[2] Les deux premières mesures (arrestation en flagrance et *fermo*) comportent le placement de la personne gardée à vue dans une maison d'arrêt, pendant que le juge de l'enquête préliminaire vérifie que sont remplies les conditions prévues par le code de procédure pénale.

En ce qui concerne l'ordonnance rendue par le juge, elle peut disposer, selon les cas, la détention dans une maison d'arrêt, l'assignation à domicile ou bien une autre mesure coercitive prévue par les articles 281-283 C.pr.pén. (v. *infra*, §IV). Mais le juge peut aussi appliquer une mesure d'interdiction, à savoir une mesure qui prive la personne mise en examen de l'autorité parentale ou lui empêche de remplir une certaine fonction ou de mener une activité donnée (art. 287-290 C.pr.pén.).

En Italie, la population carcérale au 1er septembre 2009 était ainsi constituée : 30.445 prévenus et 31.569 condamnés.[3] La durée moyenne de la détention provisoire concernant l'année 2002 s'élevait à 175 jours (c'est le seul chiffre que nous avons trouvé[4], même s'il n'est pas spécifié si ces 175 jours comprennent ceux où le prévenu est dans l'attente de l'arrêt d'appel et de l'arrêt de la Cour de cassation).

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III.1. INTERVALLE ENTRE L'ARRESTATION ET LA GARDE À VUE OU LA DÉTENTION PROVISOIRE

Conformément aux dispositions de l'article 13 al. 3 Const., les seuls deux cas d'espèce où la police peut priver une personne de la liberté individuelle en l'absence d'une ordonnance du juge, sont respectivement prévus aux articles

[2] A propos de l'ordonnance du juge, il faut tenir compte du fait qu'elle peut aussi disposer l'application, à titre provisoire, d'une mesure de sûreté (art. 312 et 313 C.pr.pén.), lorsque la personne mise en examen se révèle socialement dangereuse et se trouve dans une des situations prévues par l'art. 206 C.pén., qui fait référence aux mineurs, aux malades mentaux et aux personnes alcooliques ou qui font usage de stupéfiants.

[3] Pour ces chiffres, il faut se référer au paragraphe « statistiques » (www.giustizia.it), où on trouve aussi qu'à la fin de l'année 2008, sur un total de 56.417 détenus, les prévenus étaient 28.091, ainsi répartis : 14.671 en attente du procès en première instance ; 9.555 en attente de l'arrêt d'appel ; 3.865 en attente de l'arrêt de la Cour de cassation.

[4] V. *Public Service Workers United Against Overcrowded Prisons* (www.epsu.org).

380-381 C.pr.pén. (arrestation en flagrance)[5] et à l'article 384 C.pr.pén. (*fermo*).[6] Dans les 24 heures qui suivent l'arrestation, l'officier ou l'agent de police judiciaire doit conduire la personne arrêtée ou soumise à *fermo* dans la maison d'arrêt, en la mettant à disposition du procureur de la République (art. 386 al. 4 C.pr.pén.), qui ordonne sa mise en liberté s'il se rend compte d'une erreur de personne ou si la police est allée au delà des pouvoirs que le code de procédure pénal lui a attribués (par exemple : le risque de fuite pour soumettre la personne mise en examen à *fermo* n'existait pas). Dans le cas contraire, dans les 48 heures qui suivent l'arrestation, le procureur de la République doit demander au juge de l'enquête préliminaire la validation de l'arrestation ou du *fermo*.

Au cours d'une audience spécifique qui doit avoir lieu dans les 48 heures suivant la requête du procureur de la République, le juge statue sur la validation et évalue également l'existence des conditions nécessaires pour prononcer une ordonnance privative de liberté, s'il y a une demande dans ce sens de la part du procureur de la République. Cependant, en l'absence de cette requête ou si le juge estime qu'elle est sans fondement, la personne placée en garde à vue doit être remise en liberté même si son arrestation a été validée. Il faut également noter que le non-respect d'un seul des délais déjà mentionnés met fin à la garde à vue et comporte, par conséquent, la libération de la personne qui y était soumise.

III.2. CAS, MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

Pour pouvoir priver un individu de sa liberté, il faut que le délit qu'on lui attribue soit très grave et notamment : 1) pour l'arrestation en flagrance, il faut distinguer l'hypothèse où l'arrestation est obligatoire de celle où elle est facultative.[7] Dans le premier cas (art. 380 C.pr.pén.), il doit s'agir d'un délit intentionnel puni avec la réclusion à perpétuité ou la réclusion entre 5 à 20 ans, ou d'un des délits intentionnels cités à l'article 380 al. 2 C.pr.pén. Dans l'autre cas (art. 381 C.pr. pén.), il doit s'agir d'un délit intentionnel puni avec une peine maximum supérieure à 5 ans de réclusion, ou encore d'un des délits prévus par l'article 381 al. 2 C.pr.pén. ; 2) en ce qui concerne le *fermo*, pour lequel la flagrance n'est pas requise, l'article 384 al. 1 C.pr.pén. prévoit que le délit commis doit être puni avec la perpétuité ou la réclusion allant d'un minimum de 2 à 6 ans maximum,

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5 Aux termes de l'art. 383 c.p.p., un particulier peut aussi appréhender un individu en flagrance, s'il s'agit d'un crime ou d'un délit pour lequel il subsisterait l'obligation d'arrestation de la part de la police.

6 Il faut préciser tout de même qu'aux termes de l'art. 384 al. 1 C.pr.pén., une personne peut être soumise à *fermo* aussi suite à un décret du procureur de la République.

7 Dans les cas où l'arrestation est facultative, la police judiciaire a l'obligation d'évaluer la gravité concrète du fait commis et la dangerosité sociale de son auteur avant de décider si procéder à l'arrestation ou non (art. 381 al. 4 C.pr.pén.).

ou encore le délit doit concerner les armes de guerre, le terrorisme ou les actes subversifs contre l'ordre démocratique ; 3) à propos des ordonnances du juge sur la liberté de la personne mise en examen, il faut faire une distinction entre l'ordonnance qui prévoit la détention provisoire (art. 280 al. 2 C.pr.pén., normalement impose que le délit faisant l'objet de la procédure soit puni avec une peine maximum supérieure à 4 ans de réclusion) et celle qui dispose d'une limitation réduite de la liberté de la personne (par exemple : interdiction de résidence), car, dans ce cas, le seuil minimum de la peine demandée passe de 4 à 3 ans (art. 280 al. 2 C.pr.pén.).

Par conséquent, un individu ne peut être placé en détention provisoire s'il a commis une infraction qui n'est pas passible d'emprisonnement. Mais cette même interdiction s'applique aussi aux cas d'espèces pour lesquels la détention est prévue en théorie mais n'est pas applicable dans la réalité : par exemple, lorsque le juge considère que le sursis doit être appliqué à la peine ou s'il subsiste une cause d'irresponsabilité ou une cause d'extinction du délit ou de la peine (art. 273 al. 3 C.pr.pén.).

La gravité de l'infraction en soi ne suffit pas à justifier la limitation de la liberté individuelle de la personne mise en examen. Le code de procédure pénale pose en effet d'autres conditions qui ont été en partie déjà mises en exergue. Nous avons vu que l'arrestation de la part de la police judiciaire peut avoir lieu uniquement en cas de flagrance de délit et elle peut procéder au *fermo* seulement s'il existe le risque de fuite du prévenu au delà des graves indices de culpabilité. D'une manière analogue, pour que le juge puisse prononcer une ordonnance disposant une mesure coercitive à l'encontre d'une personne mise en examen, non seulement il faut que de graves indices de culpabilité pèsent sur elle (art. 273 al. 1 C.pr.pén.) mais aussi qu'au moins une des situations suivantes soit présente : a) il existe le danger d'altération des preuves[8] ; b) la personne mise en examen s'est enfuie ou risque de prendre la fuite, à condition que le juge estime que cette personne est passible d'une peine de réclusion supérieure à deux ans ; c) il existe la possibilité concrète que la personne mise en examen commette de nouveaux délits graves au moyen d'armes ou d'autres moyens de violence, des délits contre l'ordre constitutionnel ou des délits de criminalité organisée ou de la même catégorie que celle pour laquelle elle est poursuivie. Si d'une part, le juge ne peut ordonner la détention en maison d'arrêt que lorsque toute autre mesure se révèle inadéquate[9], d'autre part il doit opter pour cette mesure lorsque la personne mise

[8] Concernant cette hypothèse, le juge doit fixer la date d'échéance de la mesure (art. 292 al. 2 lettre *d* C.pr.pén.) et, à défaut de son renouvellement avant la date d'échéance, la mesure perd immédiatement son efficacité (art. 301 al. 1 C.pr.pén.).

[9] Exception faite pour des cas exceptionnels, la détention en maison d'arrêt ne peut être ordonnée à l'encontre de la femme enceinte ou mère d'enfants de moins de trois ans, ni à l'encontre de ceux qui sont dans un état de santé particulièrement grave, ne leur permettant pas de recevoir les soins nécessaires pendant la détention (voir l'art. 205 al. 4, 4-*bis* e 4-*quinquies* C.pr.pén.).

en examen est accusée d'un des délits particulièrement graves énumérés par l'article 275 al. 3 C.pr.pén. (par exemple: association de malfaiteurs de type mafieux).

L'ordonnance disposant la mesure coercitive n'est pas précédée par l'interrogatoire du prévenu, qui doit cependant être entendu par le juge ayant adopté cette mesure dans un délai de 5 jours (si son placement dans une maison d'arrêt a été ordonné) ou de 10 jours (si une autre mesure coercitive a été disposée) à compter du jour de la notification de l'ordonnance à la personne concernée. Bien sûr le prévenu peut exercer son droit au silence et il bénéficie de l'assistance du défenseur. En cas d'arrestation en flagrance et de *fermo*, les garanties de défense sont à faire valoir pendant l'audience de validation de la garde à vue de la part du juge (art. 391 C.pr.pén.): le défenseur de la personne privée de sa liberté doit y participer tandis que cette dernière a le droit, mais pas l'obligation, d'y intervenir.

III.3. PROTECTION CONTRE LES PRIVATIONS DE LIBERTÉ ILLÉGALES OU EXCESSIVEMENT LONGUES

Même si la validation de l'arrestation en flagrance et du *fermo* de la part du juge doit être demandée par le procureur de la République, celle-ci peut être considérée comme quasiment automatique car, comme nous l'avons dit, une telle requête est imposée par la loi. Par contre, il n'existe aucun mécanisme permettant *automatiquement* de contrôler le respect des conditions requises par la loi pour prononcer une ordonnance coercitive. Pour que ce contrôle ait lieu, l'intéressé ou son défenseur doivent formuler une requête spécifique pour saisir de la question un tribunal – composé de trois juges – connu sous le nom de tribunal de la liberté (art. 309 C.pr.pén.); ce dernier, selon les cas, peut confirmer ou annuler l'ordonnance ou encore la modifier *in melius*, en disposant, par exemple, l'assignation du prévenu à domicile. Comme nous l'avons dit, ce contrôle, que le législateur a appelé « riesame », vise à vérifier le respect des conditions requises par la loi pour prononcer une ordonnance coercitive: si on prend en considération cette prémisse, on se rend compte du motif pour lequel, au moins en principe, on ne peut recourir qu'une seule fois à la procédure de « riesame ».

Mais il faut aussi envisager une autre hypothèse. L'intéressé et son défenseur peuvent demander la mise en liberté, ou le remplacement de la mesure coercitive ordonnée par le juge, par une mesure plus légère[10], si la situation de départ a changé entre temps.

Aux termes de l'article 279 C.pr.pén. c'est le juge chargé du procès qui statue sur cette requête, qui peut être présentée de nombreuses fois, à savoir à chaque

[10] Si, en règle générale, une requête de l'intéressé ou de son défenseur est nécessaire, dans certaines situations circonscrites le juge peut intervenir d'office (art. 299 al. 3 C.pr.pén.).

fois que l'intéressé estime que, grâce, par exemple, à la présentation d'une preuve en sa faveur, les graves indices de culpabilité n'existent plus, ou qu'il n'existe plus de motifs suffisants pour le retenir dans une maison d'arrêt, car, par exemple, le danger d'altération des preuves est désormais inexistant. En cas d'annulation de la mesure, la personne mise en examen n'est plus soumise à aucune obligation ; en cas de remplacement *in melius*, elle est soumise aux obligations qui découlent de la nouvelle mesure.

La durée maximale de la détention provisoire est fixée par l'article 303 C.pr. pén. Etablie en fonction de la gravité des délits, elle est proportionnelle aux peines prévues pour chacun d'entre eux. Par ailleurs, elle se divise en périodes maximales, correspondant aux différentes étapes et aux degrés de la procédure. Ainsi, une personne mise en examen pour un délit punissable avec la perpétuité ou une peine supérieure à vingt ans ne peut plus rester en détention provisoire si un an s'est écoulé entre le début de la détention provisoire et l'ordonnance de renvoi en jugement, ou bien un an et demi est passé entre l'ordonnance de renvoi en jugement et le prononcé du jugement de condamnation en première instance. En outre, en faisant toujours référence aux délits les plus graves visés à l'article 303 C.pr.pén., le prévenu doit être mis en liberté si un an et six mois se sont écoulés depuis le jugement de condamnation à la détention à perpétuité ou à une peine supérieure à dix ans en première instance ou en appel, sans que l'arrêt du juge d'appel ou, respectivement, de la Cour de cassation ait été prononcé entre-temps.

En tout état de cause, la durée globale de la détention provisoire, compte tenu d'éventuelles prolongations envisageables dans un nombre restreint de cas prévus par la loi concernant essentiellement les enquêtes difficiles, ne pourra excéder : a) deux ans pour les délits punissables d'une peine d'emprisonnement égale ou inférieure à six ans ; b) quatre ans pour les délits punissables d'une peine d'emprisonnement comprise entre six et vingt ans ; c) six ans pour les délits punissables d'une peine de prison perpétuelle ou supérieure à vingt ans (art. 303 al. 4 C.pr.pén.).

III.4. INFORMATION, REPRÉSENTATION LÉGALE, INTERPRÈTE, INFORMATIONS AUX TIERS

En cas d'arrestation en flagrance et de *fermo*, la police judiciaire informe immédiatement le défenseur choisi par la personne mise en garde à vue ou, accessoirement, un défenseur d'office (art. 386 al. 2 C.pr.pén.). Toutefois lors de son interpellation, l'intéressé n'est pas automatiquement informé des motifs de son arrestation. Cela se déroule uniquement dans un deuxième temps. Plus précisément : si le procureur de la République décide d'interroger la personne mise en garde à vue, alors il doit l'informer préalablement de la nature de l'infraction sur laquelle porte l'enquête et des raisons de son arrestation (art. 388

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al. 2 C.pr.pén.) Autrement, l'intéressé est informé uniquement lors de l'audience de validation.

Lorsque le juge décide l'adoption d'une mesure coercitive, le prévenu est informé dans un délai plus court. En effet, sur l'ordonnance qui lui est remise ou notifiée doit figurer, sous peine de nullité, non seulement l'accusation et les graves indices de culpabilité, mais aussi l'exposition des dangers possibles pouvant être encourus si la personne mise en examen était laissée en liberté.

Au moment de l'exécution de l'ordonnance disposant la détention provisoire ou une autre mesure ordonnée par le juge, la police judiciaire informe la personne mise en examen de sa faculté de nommer un défenseur. Le cas échéant, un défenseur d'office est nommé. Non seulement : l'intéressé a le droit de se faire assister gratuitement par un interprète, s'il ne comprend pas ou ne parle pas la langue italienne. Il s'agit d'un droit qui est garanti depuis le tout début de l'enquête préliminaire par l'article 143 C.pr.pén., qui prévoit également pour les personnes appartenant à une minorité linguistique le droit à des services de traduction des documents.

L'article 29 al. 1 de la loi pénitentiaire (ci-après dénommée l.pénit.[11]) reconnaît à la personne incarcérée suite à l'exécution d'une mesure coercitive le droit d'informer immédiatement ses proches et les autres personnes qu'elle a éventuellement indiqués à son entrée dans l'établissement. Ce droit est également garanti par l'article 387 C.pr.pén., qui confie à la police la tâche d'informer qui de droit immédiatement après l'arrestation en flagrance ou le *fermo*. Au delà de satisfaire des besoins affectifs élémentaires, ces deux dispositions doivent être coordonnées avec l'article 96 al. 3 C.pr.pén., permettant à un membre de la famille d'une personne détenue de nommer le défenseur de son choix.

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III.5. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

Il n'y a aucun doute qu'un des principaux objectifs du Code de procédure pénale en vigueur est de se conformer aux dispositions contenues dans les conventions internationales que l'Italie a ratifiées. Cette affirmation est bien confirmée dans l'article 2 de la loi de délégation sur le nouveau Code de procédure pénale (loi n° 81 du 16 février 1987), là où il énonce les 105 directives auxquelles le législateur aurait dû se conformer et adopte aussi comme points de repère obligés la Constitution italienne de 1948 et les conventions internationales. Ceci engendre des retombées importantes, car la violation éventuelle des dispositions contenues dans les instruments internationaux de la part des normes codifiées aurait constitué une violation de la loi de délégation et, en application de l'article 76 Const., aurait ainsi permis à la Cour constitutionnelle de déclarer l'illégitimité de ce texte.

[11] Il s'agit de la loi n° 354 du 26 juillet 1975.

La limitation de la liberté individuelle pendant le procès est un des domaines qui a beaucoup évolué par rapport à la réglementation du Code de procédure pénale de 1930[12], et dans lequel l'influence des conventions internationales est plus évidente. On fait référence notamment à l'art. 5 de la Convention EDH et à l'article 9 du Pacte international relatif aux droits civils et politiques, qui réglementent la matière de façon plus détaillée par rapport à la Charte constitutionnelle (art. 13, 27 al. 2, 111 al. 7). En principe, on peut dire que les indications tirées de ces deux sources ont été respectées par le Code de 1988. Et même, sous certains aspects, la législation nationale offre des garanties supplémentaires. Par exemple, le contrôle que la détention soit légale, visé à l'article 5 al. 4 de la Conv. EDH, revient à une autorité (le tribunal de la liberté) distincte de celle qui a décidé la mesure coercitive, même si pour la jurisprudence de la Cour Européenne ceci n'est pas une *conditio sine qua non*.[13] Au contraire, toujours en matière de contrôle, il faudrait considérer davantage l'attention ponctuelle que la Cour Européenne prête à l'effectivité du droit de recours.[14]

III.6. DÉVELOPPEMENTS LES PLUS IMPORTANTS

Suite à l'entrée en vigueur du Code de procédure pénale, le législateur italien est intervenu à plusieurs reprises sur le thème de la détention provisoire en dictant, selon les circonstances, une réglementation qui a soit aggravé le système originaire, soit inséré des dispositions dont le but était d'accroître la protection du prévenu. En ce qui concerne la première tendance, il faut tout d'abord préciser que la réglementation d'origine dans le Code s'appliquait à tous les prévenus sans faire aucune distinction en terme de gravité de l'infraction contestée. À partir de 1991 (décret-loi n° 152 du 13 mai 1991, converti en la loi n° 203 du 12 juillet 1991 ; décret-loi n° 292 du 9 septembre 1991, converti en la loi n° 356 du 8 novembre 1991), le législateur a modifié l'article 275 al. 3 C.pr.pén. Il a défini un groupe d'infractions – récemment enrichi par le décret- loi n° 11 du 23 février 2009, converti en la loi n° 38 du 23 avril 2009 – qui impose au juge d'opter pour le placement du prévenu dans une maison d'arrêt, s'agissant de la mesure plus lourde, à moins qu'il ne soit en mesure d'exclure tout risque si le prévenu reste en liberté.

La seconde tendance ressort des lois suivantes : 1) la loi n° 332 du l. 8 août 1995, qui non seulement réduit les infractions visées à l'article 275 al. 3 C.pr.pén., mais précise aussi de façon explicite que l'absence d'admission de faute du

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[12] Il suffira rappeler qu'aux termes de l'art. 243 du Code de procédure pénale de 1930, la détention provisoire du prévenu dans une maison d'arrêt pouvait être établie par décision du procureur de la République. Pour l'affirmation selon laquelle ce texte constituait une violation de l'art. 5 al. 3° Conv.EDH, v. CEDH, 26 novembre 1992, *Brincat c. Italie*.

[13] V. CEDH, 24 octobre 1995, *Iribarne Pérez c. France*, par. 30.

[14] Dans ce sens, v. Spagnolo, *op.cit.*, p. 287.

prévenu n'implique pas automatiquement que, si celui-ci est laissé en liberté, il entravera la bonne marche de la justice (art. 274 al. 1 lettre *a* C.pr.pén.) ; 2) la loi n° 63 du 1er mars 2001, qui a inséré dans le texte de l'article 273 C.pr.pén. l'alinéa 1-*bis*, dans lequel il est établi que, lorsqu'il dispose une mesure coercitive, le juge doit évaluer les déclarations accusatoires des coaccusés sur la base des mêmes paramètres qu'il utilise dans l'évaluation de ces déclarations lorsqu'il s'agit de prononcer un jugement de condamnation.

Ces interventions fréquentes (et antithétiques, sous certains aspects) du législateur doivent être interprétées en tenant compte de certaines difficultés liées au fonctionnement du procès pénal italien – sa lenteur pathologique notamment – qu'on a parfois essayé de résoudre en attribuant à tort à la détention provisoire une mission de défense sociale. Cela a porté à d'autres moments à se concentrer – comme une sorte de réaction – sur les garanties du prévenu qui ont fait l'objet de mesures législatives faussées par une vision trop unilatérale et donc inadéquate pour l'obtention d'un point d'équilibre satisfaisant.[15]

IV. ELÉMENTS FACTUELS SUR LA DÉTENTION (ÉTABLISSEMENTS) ET DROITS DES PERSONNES DÉTENUES AVANT JUGEMENT

Lorsqu'on discute des modalités d'exécution de la détention avant jugement, ce n'est pas la réglementation du code de procédure pénale qui est mise en avant, mais celle de la loi pénitentiaire (l. 26 juillet 1975, n. 354), qui, cependant, concerne principalement ceux qui ont été définitivement condamnés. En outre, de ce point de vue, en plus du cadre législatif, « l'état de santé » du système pénitentiaire est important. Il suffit de penser aux conséquences négatives du surpeuplement qui, dans notre Pays est très élevé : le droit de défense peut être sérieusement compromis si un prévenu se trouve dans une maison d'arrêt très éloignée du cabinet de son défenseur. Il ne s'agit pas que de cela : lorsqu'on parle du nombre élevé de suicides dans les prisons – à mi-2010 on enregistre déjà 35 cas – il ne faut pas oublier que les personnes les plus à risque sont justement les prévenus. Parmi les spécialistes du droit pénitentiaire revient l'affirmation que, pour différents motifs, qui est en prison au titre de prévenu est désavantagé par rapport à qui est emprisonné au titre de condamné. Il s'agit, sans aucun doute, d'une vérité qui s'applique aussi à la situation italienne.

[15] Pour cette critique, v., par exemple, Grevi, *Più ombre che luci nella l. 8 agosto 1995, n° 332 tra istanze garantistiche ed esigenze del processo*, dans « *Misure cautelari e diritto di difesa nella l. 8 agosto 1995, n° 332* », Milano, 1996, p. 6.

IV.1. ÉTABLISSEMENTS

Les personnes placées en garde a vue (art. 386 al.4 C.pr.pén.), ainsi que celles privées de leur liberté individuelle suite à l'exécution d'une ordonnance de détention provisoire sont accompagnées dans une maison d'arrêt. La police judiciaire est tenue de passer rapidement les consignes, dans la mesure où il lui est interdit d'interroger la personne privée de sa liberté, tel qu'il est énoncé dans les articles 350 al. 1 et 370 al. 1 C.pr.pén.

IV.2. CATÉGORIES ET HÉBERGEMENT

La loi pénitentiaire distingue les établissements de détention provisoire (art. 60 l.pénit.) et les établissements pour l'exécution des peines (art. 61 l.pénit.), même si cette loi (art. 61 al. 3 l.pénit.) et son règlement d'application (ci-après dénommé r.app.) admettent que les condamnés soient logés dans les maisons d'arrêt (art. 110 al. 2 et 3 r.app.).[16] Cette exception est devenue aujourd'hui la règle en raison du grave surpeuplement qui afflige le système pénitentiaire italien, en engendrant de nombreux effets nuisibles: ce n'est pas par hasard que les effets du surpeuplement carcéral ont été comparés à ceux d'une gangrène.[17]

Ceci rend par ailleurs difficile l'application de l'isolement cellulaire: lorsqu'il s'agit de prévenus qui ne doivent pas communiquer entre eux, l'autorité judiciaire le signale[18] et la direction de la maison d'arrêt adopte les mesures nécessaires (par exemple: hébergement dans des sections différentes de la maison d'arrêt).

Heureusement, les prévenus mineurs ne sont pas touchés par les effets nuisibles du surpeuplement carcéral, car ils ne sont jamais incarcérés dans les établissements pour adultes, mais dans des établissements qui leur sont réservés et où ils peuvent rester jusqu'à l'âge de vingt et un ans. Indépendamment du fait que la règlementation pénitentiaire italienne ne prévoit pas l'isolement sur demande de l'intéressé, le surpeuplement carcéral rend difficile la protection des prévenus vulnérables (détenus transsexuels, accusés d'atteintes à l'intégrité des enfants, etc.). De toute façon, la direction de la maison d'arrêt tend toujours à mettre en isolement le prévenu vulnérable. Seulement s'il s'agit d'un *condamné*, l'administration pénitentiaire se charge, dans le meilleur des cas, de l'incarcérer dans les établissements où il existe des sections qui appliquent des traitements pénitentiaires spécifiques pour répondre aux besoins de ce type de condamné (c'est le cas, notamment, des détenus condamnés pour délinquance sexuelle).

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16 La règle générale est celle prévue à l'art. 14 al. 3 l.pénit., où il est affirmé qu'est « garantie la séparation entre les prévenus et les condamnés et internés ».

17 V. Hmso, *Prison Disturbances April 1990. Report of an Inquiry by Lord Justice Woolf and Judge Tumin*, Londres, 1991, p. 281.

18 V. art. 96 dispositions d'application, de coordination et transitoires du Code de procédure pénale.

Les détenus très dangereux se trouvent dans une position en quelque sorte diamétralement opposée par rapport aux détenus vulnérables: ceci concerne notamment les accusés d'appartenir à des groupes terroristes ou d'avoir commis un des délits graves visés à l'article 4-*bis* al. 1 l.pénit. Ces détenus sont soumis à un régime carcéral différencié prévu par l'article 41-*bis* l.pénit. – qui a été récemment endurci par la loi n° 94 du 15 juillet 2009 – dans le but d'empêcher aux détenus membres de la criminalité organisée de rester en contact avec leur association criminelle. Par conséquent, l'article 41-*bis* l.pénit. néglige dans une large mesure les aspects propres de la rééducation. Toujours en suivant la logique de la différenciation, l'administration pénitentiaire, en ayant recours à l'article 14 l.pénit. et à l'article 32 r.app., a édicté une circulaire pour l'institution de deux circuits pénitentiaires de haute sécurité[19], destinés à héberger des détenus qu'il convient de séparer des détenus communs à cause de leur dangerosité. Sans rentrer dans les détails, on peut affirmer que l'isolement à peu près complet du prévenu est l'élément commun entre le régime établi par l'article 41-*bis* l.pénit. et les sections de haute sécurité.

La cohabitation d'un nombre excessif de détenus dans la même cellule est un autre effet délétère du surpeuplement carcéral. En vérité, l'article 6 al. 4 l.pénit. établit que les prévenus doivent être hébergés dans une cellule pour une seule personne, mais il admet une dérogation à cette règle « si la situation particulière de l'établissement ne le permet pas ». Ceci signifie concrètement que les prévenus sont hébergés dans des cellules occupées par plusieurs personnes sauf en cas d'isolement judiciaire. Il est vrai que l'article 6 al. 3 l.pénit. demande au personnel de l'établissement de réserver une attention particulière au choix des personnes qui cohabitent dans les cellules à plusieurs places, mais le surpeuplement carcéral se répercute inévitablement aussi sur le respect de cette prescription.

Puisque la réglementation italienne n'indique pas les dimensions minimales d'une cellule, l'administration pénitentiaire a adopté comme paramètre celui indiqué par le Ministère de la santé dans l'arrêté ministériel du 5 juillet 1975 en matière de conditions d'hygiène et sanitaires requises pour les locaux d'habitation.[20] Selon l'article 2 de cet arrêté, une chambre à coucher doit avoir une surface de 9 mètres carrés minimum pour une personne, de 14 mètres carrés pour deux personnes, avec une augmentation de 5 mètres carrés pour toute personne supplémentaire. Il s'agit de paramètres plus difficiles à respecter par rapport à ceux qui ont été indiqués par le Comité européen pour la prévention de la torture (CPT), qui a fixé à 7 mètres carrés par personne la surface minimale

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[19] En italien: « A.S. » (haute sécurité) et « E.I.V. » (index de vigilance élevé). Il faut cependant préciser que la circulaire ministérielle datée du 21 avril 2009, n° 3619/6069 a aboli le circuit « E.I.V. ».

[20] V. Vitello, Commentaire de l'art. 6 de la loi pénitentiaire, dans « *Ordinamento penitenziario. Commento articolo per articolo* », sous la direction de V. Grevi, G. Giostra, F. Della Casa, Padova, 3me éd., 2006, p. 109.

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souhaitable pour une cellule de détention.[21] Cependant, on ne peut pas s'abstenir de rappeler que l'Italie vient d'être condamnée par la Cour européenne des droits de l'homme car un détenu bosniaque (Monsieur Izet Sulejmanovic) avait dû partager sa cellule de 16,20 mètres carrés avec cinq autres personnes pendant plus de deux mois et demi.[22] Dans ce cas examiné par la Cour européenne, il s'agissait d'un détenu en exécution de peine, mais des situations similaires peuvent sûrement concerner aussi les prévenus.

IV.3. INFORMATION

Aux termes de l'article 32 al. 1 l.pénit. « les détenus […], au moment de leur entrée dans l'établissement […] sont informés des dispositions générales et particulières concernant leurs droits et devoirs, la discipline et le traitement ». Il faut en outre tenir compte de l'article 23 al. 3 r.app. là où, dans le but de règlementer le premier entretien du prévenu avec un membre du personnel – normalement, il s'agit de l'éducateur –, il prévoit qu'il lui soit remis un extrait des textes de loi concernant plus particulièrement la personne placée en détention, et qu'il soit également informé sur la possibilité de « signaler les éventuels problèmes personnels et familiaux qui nécessitent des interventions immédiates ». À son tour, l'article 69 al. 2 r.app. précise que l'extrait indiqué ci-dessus est fourni dans les langues les plus répandues parmi les détenus étrangers et qu'il faut indiquer au détenu le lieu où il est possible de consulter les textes intégraux.[23]

IV.4. DROIT À UN TRAITEMENT HUMAIN

La Constitution italienne contient des dispositions qui évoquent le contenu de l'article 10 du Pacte international relatif aux droits civils et politiques. A l'article 13 al. 4, il est affirmé que « toute violence physique et morale sur les personnes soumises de quelque manière que ce soit à des restrictions de liberté est punie ». En outre, l'article 27 al. 3 Const. dispose que « les peines ne peuvent consister en des traitements contraires aux sentiments d'humanité ». Il est vrai que, dans ce cas, le condamné est le destinataire de la garantie, mais elle est valable, à plus forte raison, aussi pour le prévenu qui bénéficie de la présomption d'innocence. Pour citer une source de niveau inférieur à la Constitution, il

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21 Murdoch, « *The Treatment of Prisoners. European Standards* », Strasbourg, 2006, p. 214.

22 CEDH, 16 juillet 2009, *Sulejmanovic c. Italie*, *requête n° 22635/03*.

23 Aux termes de l'art. 69 al 1 r.app. « chaque institut pénitentiaire est tenu de mettre à disposition, dans la bibliothèque ou dans un autre local qui peut être accessible aux détenus, les textes de la loi, du présent règlement, du règlement interne ainsi que les autres dispositions concernant les droits et les devoirs des détenus et des internés, la discipline et le traitement ».

convient de rappeler l'article 277 C.pr.pén., selon lequel les restrictions imposées aux prévenus ne doivent concerner que les droits dont l'exercice est incompatible avec les objectifs légitimes pour lesquels elles ont été imposées.

En référence plus particulièrement au respect de la dignité de la personne humaine, il convient de mentionner aussi bien l'article 7 al. 3 l.pénit., pour lequel « les prévenus et les condamnés à moins d'un an de détention peuvent porter des vêtements qui leur appartiennent, à condition qu'ils soient propres et convenables »[24], que l'article 7 al. 2 r.app., qui établit l'obligation pour l'administration pénitentiaire d'installer dans une pièce annexée à chaque cellule des toilettes avec l'eau courante et une douche. Toutefois, il y a encore des établissements qui ne sont pas aux normes, même si le délai attribué à l'administration pénitentiaire pour l'adaptation (cinq ans, tel qu'il est établi par l'art. 134 al. 1 r.app.) est échoué le 20 septembre 2005. Dans un tel contexte, les dispositions visées à l'article 134 al. 3 r.app. acquièrent une importance toute particulière, là où elles établissent que tant que l'administration pénitentiaire n'aura pas complété la mise aux normes, les détenus sont autorisés à prendre un douche chaude chaque jour.

En ce qui concerne les contacts du prévenu avec le monde extérieur, c'est l'ordonnance de détention provisoire qui en établit les limites, du moment où elle peut décider de limiter soit le courrier et les communications téléphoniques, soit l'accès aux moyens d'information, soit, encore, les entretiens avec les conjoints et les concubins.[25] Si, au contraire, ces limites n'ont pas été imposées ou si elles ont été révoquées, le prévenu peut disposer d'un éventail de contacts avec l'extérieur comme le condamné, ce dernier pouvant toutefois bénéficier des permissions à titre de récompense (art. 30-*ter* l.pénit.), niées par définition au prévenu.[26]

Toutefois, il faut aussi tenir compte des limites aux contacts avec le monde extérieur dues au régime de détention auquel le prévenu est soumis : par exemple, partant du fait que le prévenu de droit commun peut bénéficier de six visites par mois (art. 37 al. 8 r.app.), s'il est soumis au régime visé à l'article 41-*bis* l.pénit., il n'a droit qu'à une visite par mois des conjoints et des concubins (art. 41-*bis* al. 2-*quater* lettre *b* l.pénit.). Il en est de même pour les accusés d'un des graves délits visés à l'article 4-*bis* al. 1 l.pénit., pour lesquels le nombre d'entretiens est limité à quatre par mois. En général, même si nous manquons de chiffres à ce

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[24] En réalité presque tous les détenus – prévenus ou condamnés qu'ils soient – utilisent leurs propres habits. Dans les rares cas contraires, le détenu s'habille avec des vêtements fournis par l'administration de l'établissement pénitentiaire, qui aux termes de l'art. 7 al. 3 l.pénit. doivent être de couleur différente pour le prévenu et le condamné.

[25] Au contraire, l'interdiction d'entretiens avec son défenseur est prévue par l'art. 104 al. 3 C.pr. pén., seulement en tant que « mesure de précaution exceptionnelle » et pour un laps de temps limité à cinq jours.

[26] Le prévenu peut sortir en permission seulement « en cas de risque imminent de mort d'un membre de sa famille ou d'un/une concubin/e » (art. 30 l.pénit.), étant bien entendu que le juge peut imposer l'escorte.

sujet, la personne en détention provisoire n'est pas privée de visites régulières des membres de sa famille et, lorsque cela se produit, la durée de l'interdiction est brève et cesse dès que le danger de dissimulation des preuves n'est plus avéré : étant bien entendu que, sur autorisation expresse du juge chargé du procès, les entretiens en prison peuvent être écoutés et enregistrés.

L'humanité du traitement dépend aussi du nombre d'heures que le prévenu est autorisé à passer en dehors de sa cellule. Il faut préciser à cet égard que la loi pénitentiaire ne fournit aucune indication contraignante ; elle se borne à établir qu'en règle générale le détenu doit pouvoir « rester au moins deux heures par jour en plein air ». La loi ajoute par la suite que « ce laps de temps peut être réduite à une fraction non inférieure à une heure par jour que pour des raisons exceptionnelles » (art. 10 al. 1 l.pénit.). Le législateur ne tient compte que de la période en plein air (sans considérer le temps passé en dehors de la cellule) et, de plus, il ne fixe que la durée minimum. Sur le terrain, le nombre d'heures que le prévenu peut passer en dehors de sa cellule dépend du règlement intérieur de chaque établissement. D'après un recensement récent, les différences sont remarquables : dans la maison d'arrêt de Brescia (Lombardie) les prévenus restent enfermés dans leurs cellules vingt-deux heures par jour, tandis que dans celle de Massa Marittima (Toscane) les portes des cellules sont ouvertes de 8h20 à 22h00.[27]

Relativement aux heures passées hors de la cellule, il est important de s'interroger sur l'opportunité des prévenus de travailler. Les statistiques élaborées par l'administration pénitentiaire ne répondent pas à cette question, puisqu'elles fournissent simplement le pourcentage des détenus (condamnés et prévenus) qui travaillent par rapport au nombre total des détenus présents (d'après un relevé effectué en mai 2006, 25,3 % des détenus travaillaient, à savoir 15.577 sur un total de 61.369[28]). Ceci dit, la pénurie de travail amène les directions à établir des roulements des détenus qui sont en mesure de travailler. Cette pratique s'applique aussi aux prévenus, pourvu que l'ordonnance de détention provisoire n'empêche pas la possibilité de travailler. Enfin, il faut ajouter que, suite à la réduction des sommes affectées au travail carcéral dans le budget de l'État, les places disponibles en 2009 ont diminué de plus de 20 %.[29]

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27 V., pour ces données, *Osservatorio online sulle condizioni di detenzione nelle carceri italiane* (tenu par l'association « Antigone ») (www.associazioneantigone.it/Index3.htm).

28 Tagliafierro, *Tutti i numeri del carcere*, dans « Le due città », 2006, n° 5, p 43.

29 Département de l'administration pénitentiaire : rapport 2008 de la Direction générale des détenus et du traitement (www.ristretti.it).

IV.5. PROTECTION ET SOINS DES PERSONNES EN DÉTENTION AVANT JUGEMENT

On sait très bien que l'incarcération d'un prévenu pose normalement à la direction de l'établissement plus de problèmes que l'entrée d'un condamné. Dans de nombreux cas, en effet, le prévenu est encore choqué d'avoir perdu sa liberté, surtout s'il s'agit de sa première expérience d'emprisonnement, et s'il ne sait pas combien de temps sa détention provisoire pourra durer. De plus, les maisons d'arrêt sont des lieux plus inhospitaliers que les établissements pour peine en vertu des espaces très restreints et du surpeuplement carcéral.

Afin de réduire le risque d'altercation entre détenus et, surtout, le risque de suicide[30], l'administration pénitentiaire a édicté une circulaire datée du 6 juin 2007[31], pour mettre à jour les circulaires précédentes en la matière. Tout d'abord, la création d'une section d'accueil, composée de cellules plus confortables que les cellules ordinaires, est prévue; une équipe pluridisciplinaire travaille dans cette section; elle a la mission d'identifier les problèmes spécifiques du nouveau venu – pathologies physiques (VIH/SIDA), psychiatriques, problèmes de toxicomanie, etc … – afin de fournir en temps utile des réponses adéquates et de placer la personne dans le lieu de l'établissement qui lui convient le plus. La permanence dans la section d'accueil est limitée à une semaine, car autrement sa fonction serait dénaturée. Naturellement, s'il s'agit d'un toxicomane, un médecin du « SERT » (service pour la lutte contre la toxicomanie), est tout de suite contacté, pour qu'il programme un traitement de désintoxication. Les médiateurs culturels font aussi partie de l'équipe pluridisciplinaire pour avoir des entretiens plus approfondis avec les prévenus étrangers. Mais parfois l'administration pénitentiaire est contrainte de faire appel à une solution radicale soit pour prévenir les altercations, soit pour mieux protéger la santé du détenu. Dans ces cas d'espèce, elle le transfère dans un autre établissement pour des raisons disciplinaires, ou dans un centre pénitentiaire d'observation clinique.

En général pour ce qui est de la protection de la santé du prévenu en détention provisoire, il faut rappeler que le décret du Président du Conseil des ministres daté du 1er avril 2008 a achevé la réforme de la médecine pénitentiaire initiée par le décret législatif n° 230 du 22 juin 1999, qui a rendu la compétence de protection de la santé des personnes détenues au système national de santé. Ainsi, sans compter les difficultés organisationnelles (plus graves dans certaines régions), il

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[30] Dans les prisons italiennes, il y a eu 57 suicides en 2002; 65 en 2003: il s'agit d'une incidence 17 fois plus élevée que chez les personnes non détenues. Parmi les détenus en attente de jugement, le pourcentage de suicide est double par rapport aux condamnés avec jugement définitif; en 2002 ils ne représentaient pas plus de 19 % de la population carcérale, mais il y a eu 38,2 % de cas de suicide. Pour ces chiffres, v. Manconi-Boraschi-Lo Voi, « *Così si muore in galera. 2° rapporto sui suicidi nelle carceri romane e italiane* » (www.ristretti.it).

[31] V. circulaire D.A.P. 6 juin 2007, dans « *Il codice penitenziario e della sorveglianza* », par Zappa et Massetti, 11ème éd., Piacenza, 2009, p.814.

est actuellement possible d'affirmer, qu'en principe, les prévenus bénéficient de soins équivalents à ceux dispensés dans la société libre.

La situation est particulièrement délicate (pour les retombées psychologiques qu'elle peut engendrer) lorsque le prévenu en détention provisoire est soumis à l'isolement cellulaire par disposition du juge. La loi pénitentiaire prévoit l'adoption de certaines précautions (art. 39 al. 2 et 3), même s'il reste de l'incertitude liée au fait qu'elles ne sont expressément prévues qu'en cas d'isolement disposé en tant que sanction disciplinaire. Suite à l'entrée en vigueur du règlement d'application actuel les doutes n'ont plus de raison d'exister. En effet, l'article 73 al. 7 r.app. fait référence *à tous* les cas d'isolement et établit que le médecin doit effectuer des contrôles quotidiens et que le personnel pénitentiaire doit mettre en œuvre une surveillance continue.

Aux termes de la règle 81.3 des Règles pénitentiaires européennes, le personnel appelé à travailler avec des groupes de détenus spécifiques doit recevoir une formation adaptée à ses tâches. Les prévenus peuvent aussi être considérés comme un groupe ayant des exigences particulières et différentes de celles des condamnés : malgré cela, le personnel de surveillance des maisons d'arrêt ne reçoit aucune formation particulière, alors qu'elle serait souhaitable. D'ailleurs, le fait qu'un seul établissement – la maison d'arrêt – réunisse prévenus et condamnés, sans qu'il y ait une distinction nette entre les deux catégories de détenus, n'aide certainement pas à aller dans cette direction.

IV.6. VOIES DE RECOURS DES PRÉVENUS

En cas de mauvaises conditions de détention, la protection est assurée par l'article 35 l.pénit., qui attribue aux condamnés et aux prévenus le droit d'exercer des recours écrits et verbaux, même sous enveloppe fermée, auprès de différentes autorités (directeur de l'établissement, inspecteur régional, Ministre de la justice, Président du Conseil régional, Chef de l'État) et, notamment, au juge de surveillance. Dans ce domaine, l'arrêt de la Cour constitutionnelle n. 26 de 1999 a joué un rôle primordial[32], là où il déclare que l'article 35 l.pénit. est inconstitutionnel et affirme que, lorsque le détenu se plaint de la violation d'un de ses droits par l'administration pénitentiaire, il doit non seulement pouvoir présenter un recours au juge de surveillance, mais celui-ci doit statuer en suivant une procédure contradictoire, avec la conséquence que sa décision devient opposable à l'administration pénitentiaire. L'article 14-*ter* l.pénit. indique la procédure à suivre[33], qui prévoit une audience en chambre du conseil à laquelle

[32] Della Casa, Commentaire de l'art. 69 de la loi pénitentiaire, dans « Ordinamento penitenziario. Commento articolo per articolo », sous la direction de F. Della Casa, Padova, 3me éd., 2006, p. 833.

[33] V. Cass. pén., sections unies, 24 février 2003, n° 25079.

participent obligatoirement le procureur de la République ainsi que le défenseur du détenu. L'intéressé et l'administration pénitentiaire peuvent présenter des mémoires. Le procureur de la République ainsi que le défenseur du détenu peuvent se pourvoir en Cassation contre la décision prononcée par le juge de surveillance.

En tout cas, souvent les droits du détenu sont violés suite à des carences organisationnelles qui ne peuvent être influencées par des décisions du juge de surveillance, car elles dépendent de choix politiques au sens large : il suffit de penser au surpeuplement ou à la carence de personnel. En outre, souvent, la détention provisoire du prévenu est de courte durée[34], ne permettant pas au juge de surveillance de prendre une décision en temps voulu. En général, au cours du procès, la violation des droits sur la détention provisoire ne peut être invoquée, à l'exception des cas de violation d'un droit reconnu par le Code de procédure pénale (par exemple : la mise en liberté refusée même une fois dépassée la durée maximale de la détention provisoire) ou de violations ayant eu des conséquences sur le procès : c'est le cas des aveux rendus suite à de mauvais traitements subis pendant la détention provisoire.

IV.7. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

Les dispositions de la loi pénitentiaire de 1975 sont très importantes pour les institutions affectées à la détention provisoire et pour les droits du prévenu. Le législateur italien aurait pu s'inspirer pour leur élaboration à deux sources internationales portant une attention toute particulière à ce domaine. Il s'agit de l'article 10 al. 2 lettre *a* du Pacte international relatif aux droits civils et politiques[35] et aux Règles minima pour le traitement des détenus adoptées par le Comité des ministres du Conseil de l'Europe en 1973 (Résolution n. R (73) 5). D'ailleurs, pendant les travaux préparatoires de la loi pénitentiaire, un des objectifs déclarés avait été l'adaptation à ce second *corpus*[36], qui n'a été atteint qu'en partie. D'une part, le législateur n'a pas élaboré les dispositions visant à établir un traitement carcéral diversifié par rapport à celui des condamnés[37], et d'autre part, il n'a pas suffisamment transposé, ni dans la loi, ni dans la pratique surtout, la règle de l'article 85 n. 1 des Règles européennes de 1973 selon laquelle

[34] Sidoni, *Le detenzioni di brevissima durata. Gli aspetti statistici*, dans « *Le due città* », 2008, n.6, p. 30 et suivantes.

[35] Aux termes de l'art. 10 al. 2 lettre *a* du Pacte ONU « les prévenus sont, sauf dans des circonstances exceptionnelles, séparés des condamnés et sont soumis à un régime distinct, approprié à leur condition de personnes non condamnées ».

[36] V. di Gennaro, Bonomo, Breda, « *Ordinamento penitenziario e misure alternative alla detenzione* », Milano, 1977, p. 12.

[37] Dans ce sens, Grevi, *Diritti dei detenuti e trattamento penitenziario a cinque anni dalla riforma*, dans « *Diritti dei detenuti e trattamento penitenziario* », Bologna, 1981, p. 15.

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« aucun prévenu ne doit contre son gré être mis en contact avec des détenus condamnés ».

IV.8. LES DÉVELOPPEMENTS PLUS IMPORTANTS

L'introduction de l'article 41-*bis* dans la loi pénitentiaire en vertu du décret-loi n° 306 du 8 juin 1992 (converti en la loi n° 356 du 7 août 1992) a institué un régime carcéral plus dur pour les individus appartenant à la criminalité organisée ou à une association terroriste (v. *supra*, §III). Non seulement les condamnés, mais aussi les prévenus peuvent être soumis à ce régime, récemment endurci par la loi n° 94 du 15 juillet 2009. Ce régime de détention peut être imposé par décision motivée du Ministre de la justice, uniquement en cas d'accusation ou de condamnation concernant l'un des délits prévus par l'article 4-*bis* al. 1 l.pénit.

Pour le prévenu, ces dispositions ont des retombées qui vont bien au delà d'un durcissement du traitement carcéral, car elles se répercutent aussi sur l'exercice du droit de la défense. Tout d'abord, les prévenus soumis à cette détention spéciale bénéficient d'un nombre restreint d'entretiens et d'appels téléphoniques avec leur défenseur : trois appels ou trois entretiens en vis à vis hebdomadaires maximum (art. 41-*bis* al. 2-*quater* lettre *b*). En deuxième lieu, si on rattache l'article 41-*bis* l.pénit. à l'article 146-*bis* des dispositions d'application, de coordination et des dispositions transitoires du Code de procédure pénale, il ressort que cette catégorie particulière de prévenus ne peut participer aux débats qu'à distance, grâce à une liaison audiovisuelle entre un poste prévu à cet effet dans la prison où ils sont détenus et la salle d'audience.

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V. ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

Alors que les mesures alternatives en faveur du condamné ont été introduites par la loi pénitentiaire (l. 26 juillet 1975, n. 354), les mesures alternatives à la détention provisoire sont apparues sept ans plus tard et ont obtenu leur vraie consécration avec le code de procédure pénale de 1988. Leur introduction n'a pas amené à une baisse notable de condamnés soumis à la détention provisoire, ce qui a reproposé la question – toujours présente lorsqu'on parle de mesures conçues pour remplacer la prison – si, en réalité, les mesures alternatives à la détention provisoire ne vont pas toucher des prévenus qui, avant leur introduction, restaient complètement libres (*net widening effect*). D'un autre point de vue, on s'est demandé si les mesures alternatives se prêtent à accentuer les diversités de traitement entre prévenus, en fonction de leur *status* social. Même si cela est dans une certaine mesure inévitable, car, par exemple, on ne

peut assigner à résidence qui est dépourvu d'une habitation, il faut pour le moins donner acte au législateur italien d'avoir abordé le problème : la caution ne fait pas partie des mesures alternatives à la détention provisoire, justement car il en ressort, de manière manifeste, que la perte de la liberté personnelle peut être directement conditionnée par l'absence de ressources économiques.

En accord avec les suggestions de la Recommandation R(80)11 du Comité des ministres du Conseil de l'Europe, à compter du début des années quatre-vingt (loi n° 532 du 12 août 1982 ; loi n° 398 du 28 juillet 1984), la réglementation italienne prévoit des mesures alternatives à la détention provisoire. Le Code de procédure pénale a étendu et perfectionné ces mesures et a énoncé le principe fondamental suivant : « la détention du prévenu dans une maison d'arrêt ne peut être ordonnée que lorsque toute autre mesure se révèle inadéquate » (art. 275 al. 3 C.pr.pén.). Il faut faire une distinction entre les mesures coercitives et celles d'interdiction (v. *supra*, §II). La première catégorie inclut : l'interdiction de sortie du territoire italien (art. 281 C.pr.pén.), l'obligation de se présenter à la police (art. 282 C.pr.pén.), l'éloignement du domicile (art. 282-*bis* C.pr.pén.), l'interdiction et l'obligation de séjour (art. 283 C.pr.pén.), l'assignation à domicile (art. 284 C.pr.pén.). L'introduction récente dans le Code pénal du délit de harcèlement obsessionnel [*stalking*] (art. 612-*bis* C.pén.), avec la loi n° 38 du 23 avril 2009, a impliqué la création parallèle d'une nouvelle mesure coercitive : l'interdiction de s'approcher des lieux fréquentés habituellement par la victime (art. 282-*ter* C.pr.pén.).

L'éventail des mesures d'interdiction est plus restreint. Elles sont de trois types : l'interdiction d'exercer l'autorité parentale (art. 288 C.pr.pén.), l'interdiction d'exercer une fonction publique (art. 289 C.pr.pén.) ou une activité professionnelle (art. 290 C.pr.pén.).

Il n'y a pas de chiffres ni de statistiques sur le nombre et le pourcentage des mesures alternatives à la détention provisoire.

V.1. CAS, MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

Aux termes de l'article 280 al. 1 C.pr.pén., lorsque le délit commis est punissable d'une peine de prison supérieure à trois ans, il est possible d'ordonner une alternative à la détention provisoire.[38] C'est-à-dire que lorsqu'il s'agit d'un délit puni avec moins de trois ans de réclusion (et, à plus forte raison, si c'est une infraction non passible d'emprisonnement), aucune limitation de la liberté

[38] Cette condition s'applique aux mesures coercitives (art. 280 al. 1 C.pr.pén.) et d'interdiction (art. 287 C.pr.pén.) : mais, pour ces dernières, les art. 288 al. 2, 289 al. 2, 290 al. 2 C.pr.pén. permettent dans un grand nombre de cas de figure d'ordonner une mesure d'interdiction aussi lorsque les poursuites concernent des infractions punies par moins de trois ans de détention.

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individuelle n'est admise. Quant aux conditions de fond, il faut que de graves indices de culpabilité pèsent sur la personne mise en examen (art. 273 C.pr.pén.) et, parallèlement, qu'au moins une des circonstances de l'art. 274 C.pr.pén. (v. *supra*, §II) se soit vérifiée, telles que la personne susmentionnée risque de s'enfuir, de porter préjudice à l'administration de la justice, de commettre de nouvelles infractions. Mais encore, puisqu'il existe plusieurs mesures adoptables, le juge doit établir celle qu'il doit appliquer selon les critères suivants : a) choisir la mesure qui sacrifie le moins possible la liberté individuelle du prévenu, étant bien entendu qu'il doit s'agir d'une mesure choisie pour éviter le risque envisagé (art. 275 al. 1 C.pr.pén.) ; b) ordonner une mesure proportionnelle à la gravité de l'infraction et à la sanction prévisible (art. 275 al. 2 C.pr.pén.).

Il faut cependant rappeler que, après avoir fixé ces règles générales, le législateur définit des situations pour lesquelles des dispositions spécifiques sont établies. En effet, l'article 275 al. 3 C.pr.pén., dont le domaine d'application a été étendu par la loi n° 38 du 23 avril 2009, dispose que si le délit fait partie des infractions mentionnées à l'alinéa 3 de l'article 275 C.pr.pén. susvisé, la seule mesure que le juge peut ordonner est la détention dans une maison d'arrêt. Voici quelques unes des infractions énumérées par l'article 275 al. 3 C.pr.pén. : meurtre, prostitution de mineurs, pornographie des mineurs, viol, viol en groupe, actes de terrorisme, association de malfaiteurs de type mafieux, réduction en esclavage, séquestration de personne.[39] Au contraire, la détention provisoire n'est pas autorisée, le juge pouvant ordonner uniquement une mesure alternative à la détention provisoire (art. 275 al. 4 et 4-*bis* C.pr.pén.), si la personne mise en examen a plus de 70 ans, est une femme enceinte ou une mère d'enfants de moins de trois ans, si elle est atteinte du SIDA ou d'une autre maladie grave qui serait incompatible avec le placement dans une maison d'arrêt. Dans tous les autres cas qui sont en dehors des deux situations, dans une certaine mesure extrêmes, dont nous venons de parler, c'est le juge qui décide, au cas par cas, si : a) rejeter *in toto* la demande du ministère public et laisser donc en liberté la personne mise en examen ; b) ordonner une mesure coercitive différente de la détention en prison ; c) disposer la détention provisoire. Même si les alternatives à la détention provisoire ne sont pas soumises à examen régulier, lorsque la situation de départ se modifie, ces variations peuvent se répercuter sur la mesure alternative ordonnée par le juge. Sur demande du procureur de la République, il est possible de décider une mesure plus restrictive – telle que l'assignation du prévenu à domicile au lieu de l'obligation de se présenter à la police – si, en vertu des circonstances, la mesure adoptée à l'origine n'est plus adaptée face au risque de fuite (art. 299 al. 4 C.pr.pén.). Mais, conformément aux

[39] Dans son arrêt du 21 juillet 2010, n° 265, la Cour constitutionnelle a, cependant, déclaré l'inconstitutionnalité de l'art. 275 al. 3 C.pr.pén. en ce qui concerne l'incitation à la prostitution de mineurs (art. 600-*bis* al. 1 C.pén.), le viol (art. 609-*bis* C.pén.) et les actes sexuels avec un mineur (art. 609-*quater* C.pén.) : en présence d'un de ces délits, le juge doit pouvoir décider, si, en l'espèce, avoir recours à une mesure moins lourde que le placement du prévenu dans une maison d'arrêt peut suffire.

dispositions de l'article 275 al. 1 et al. 3 C.pr.pén., à la demande du prévenu, il est aussi possible d'adopter une solution à l'opposé (art. 299 al. 2 C.pr.pén.).

L'article 276 C.pr.pén. prévoit une situation différente pour laquelle il est justifié de remplacer une mesure par une autre plus lourde et donc de passer d'une mesure alternative au placement de la personne mise en examen dans une maison d'arrêt. Il s'agit de la violation des prescriptions relatives à la mesure alternative à laquelle elle est soumise. Dans ce cas, le juge peut décider une *reformatio in pejus*, en remplaçant une mesure d'interdiction par une mesure coercitive ou en cumulant l'une et l'autre.[40] Même si jusque là nous avons fait référence à la substitution d'une mesure par une autre (plus ou moins contraignante), il ne faut pas oublier qu'il existe la possibilité de révoquer la mesure (art. 299 al. 1 C.pr.pén.), lorsque les graves indices de culpabilité sont devenus inexistants ou les conditions prescrites par l'article 274 C.pr.pén. (danger d'altération des preuves, de fuite, de récidive) n'ont plus aucune raison d'être.

V.2. SUIVI DES MESURES ALTERNATIVES

Les alternatives à la détention provisoire ne sont pas soumises à un examen régulier (v. *supra*, §IV). Certaines d'entre elles peuvent être soumises à des restrictions particulières : par exemple, aux termes de l'article 283 al. 4 C.pr.pén., lorsque le juge ordonne l'obligation de séjour, il peut aussi imposer au prévenu l'obligation de ne pas s'éloigner de sa maison à certaines heures de la journée. L'article 284 al. 2 C.pr.pén. propose un autre cas de figure : si la personne mise en examen est assignée à domicile, le juge peut lui interdire de communiquer avec des personnes autres que celles avec lesquelles il cohabite.

V.3. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

L'introduction en Italie des mesures alternatives à la détention provisoire (v. *supra*, §IV), a lieu peu après la Rec. (80)11, dans laquelle le Comité des Ministres du Conseil de l'Europe, suivant une indication contenue dans la Rec. (65) 11, a suggéré aux États d'introduire dans leurs législations nationales des mesures alternatives à la détention provisoire, dont certaines ont été définies dans ce même document. D'autre part, le circuit carcéral italien souffre fortement depuis longtemps d'un nombre excessif de détenus, la plupart d'entre eux étant encore en attente d'une condamnation définitive (v. *supra*, §II). Il s'agit d'un problème qui touche aussi d'autres réglementations, et qui a amené le Comité des Ministres

[40] Conformément à l'art. 280 al. 3 C.pr.pén., il est possible dans ce cas d'ordonner la détention même si le délit faisant l'objet de poursuites est puni d'une peine inférieure à 4 ans, mais supérieure à 3.

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du Conseil de l'Europe à suggérer, entre autres, d'utiliser fréquemment les mesures alternatives à la détention provisoire (v. Rec. (99) 22, §III).

V.4. DÉVELOPPEMENTS LES PLUS IMPORTANTS

Le Code de procédure pénale prévoit un éventail assez large de mesures – coercitives et d'interdiction – applicables à la personne mise en examen. Les modifications apportées dans ce domaine après l'entrée en vigueur du Code (24 octobre 1989) sont essentiellement de deux types. D'une part, on peut parler d'un perfectionnement : en effet, l'article 1 al. 2 de la loi n° 154 du 4 avril 2001 a introduit la mesure de l'éloignement du domicile (art. 282-*bis* C.pr.pén.) et, récemment, l'art. 8 du décret-loi n° 11 du 23 février 2009 (converti en la loi n° 4 du 19 janvier 2001) a réglementé l'interdiction de s'approcher des lieux fréquentés habituellement par la victime (art. 282-*ter* C.pr.pén.) (v. *supra*, §IV). En outre, le décret-loi n° 341 du 24 novembre 2000 (converti en la loi n° 4 du 19 janvier 2001) a introduit l'article 275-*bis* C.pr.pén., permettant au juge d'ordonner que la personne assignée à domicile soit soumise, avec son consentement, à un contrôle au moyen d'instruments électroniques.[41] Même s'il faut ajouter que, jusqu'à aujourd'hui, cette méthode de contrôle n'a pas encore été mise en œuvre sur le terrain.

D'autre part, le champ d'application des mesures alternatives à la détention provisoire a été délimité : pour ce faire, le législateur est intervenu à plusieurs reprises pour modifier l'article 275 al. 3 C.pr.pén. et définir un certain nombre d'infractions graves pour lesquelles, s'il est nécessaire de limiter la liberté individuelle de la personne mise en examen, on ne peut recourir qu'au placement dans une maison d'arrêt.

VI. CONCLUSION

En essayant de tirer les conclusions de ce qui a été dit jusqu'ici, on peut affirmer que les dispositions du code de procédure pénale en matière de liberté personnelle sont satisfaisantes. Il faut cependant ajouter que, sur le plan pratique, le mauvais fonctionnement du procès pénal dans son ensemble est à la base du recours excessif à la détention provisoire. Si, en effet, on sait à l'avance qu'il faudra des années avant d'arriver au jugement définitif, et qu'il faut compter aussi sur la possible prescription du délit, la tentation d'utiliser la détention provisoire comme s'il s'agissait d'une « peine anticipée » peut être forte. Comme pour une espèce de réaction en chaîne, cette distorsion entraîne le surpeuplement

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41 À propos de la chevillière électronique, en tant qu'instrument de contrôle moins évident que le bracelet, v. décret du ministre de l'intérieur, 2 février 2001, n° 10362.

du circuit carcéral et, par contrecoup, de très mauvaises conditions matérielles de détention. Pire de celles des condamnés, car, selon l'article 27 al. 2 Const., les prévenus sont considérés innocents jusqu'au jugement définitif de condamnation : ce qui dispense l'administration pénitentiaire de l'obligation de les soumettre à un traitement rééducatif. Pour conclure, on peut aussi évoquer une critique, partagée, cependant, uniquement par une partie des « spécialistes ». Sur la base de cette critique le juge qui statue sur la liberté personnelle serait bien disposé envers la requête du ministère public, car les deux sont des magistrats : en d'autres termes, l'argumentaire du « collègue » serait, par définition, plus convaincant que celui du défenseur du prévenu. Habituellement, cette critique, qui n'est pas confirmée par les statistiques, est formulée par ceux qui souhaitent la création, au sein de la magistrature, de deux carrières séparées : une pour les juges et une autre pour les magistrats du ministère public. Il s'agit évidemment d'un problème très complexe, qui ne peut être examiné de façon adéquate ici : il faut donc considérer suffisante l'esquisse qui a été faite.

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PRE-TRIAL DETENTION IN JAPAN

Kunihiro MATSUO*

I. INTRODUCTION

In Japan, the old Prison Law was totally revised and named "Act on Penal Detention Facilities and Treatment of Inmates and Detainees", which entered into effect in 2007. The Act reflects the theory of modern correctional administration which urges us to enhance the reintegration of sentenced inmates into society through correctional treatment and to clearly stipulate the rights and obligations of the inmates and detainees. It was entirely due to the long perseverance of members of the Ministry of Justice of Japan and of relevant bodies that this total revision was finally achieved, about which I know very well as the former Vice-Minister of Justice and the former Prosecutor-General, Japan. Accordingly, it is my great pleasure and honour to introduce the new Act on this opportunity, especially in connection with pre-trial detention in Japan.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Japan is a member of the United Nations (UN). It has been so since 18 December 1956. Japan is a contracting party to the UN *International Covenant on Civil and Political Rights* since 21 June 1979, the *Convention on the Rights of the Child* since 22 April 1994, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* since 29 June 1999.

In Japan, the treaties to which Japan is a contracting party are recognized generally as of the same effect as the domestic law. For example, The Act on

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Penal Detention Facilities and Treatment of Inmates and Detainees and the practice based on the Act, fulfil or follow the treaties.

However, regarding the *Convention on the Rights of the Child*, Japan made the following reservation:

> "In applying paragraph (c) of Article 37 of the Convention on the Rights of the Child, Japan reserves the right not to be bound by the provision in its second sentence, that is, 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so', considering the fact that in Japan, as regards persons deprived of liberty, those who are below twenty years of age are to be generally separated from those who are of twenty years of age and over under its national law."

II.2. NATIONAL HUMAN RIGHTS / CIVIL RIGHTS

Fundamental human rights are directly enforceable through the domestic courts, and pertaining to (pre-trial) detention, it is provided that "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel."[1]

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

Arrest and detention are distinguished in the Japanese criminal procedural law system. Some statistics on detention during the first instance trials in 2007 are shown below for reference.

Table 1. Detention during the first instance trials (2007)[2]

Category	Total number of defendants (A)	Number of defendants detained (B)	Length of detention			Detention rate (B/A) (%)	Number of defendants released on bail (C)	Bail rate (C/B) (%)
			1 month or less	3 months or less	Over 3 months			
District courts	70,610	57,882	10,636	33,771	13,475	82.0	8,982	15.5
		(100.0)	(18.4)	(58.3)	(23.3)			
Summary courts	11,482	9,770	1,151	7,875	744	85.1	566	5.8
		(100.0)	(11.8)	(80.6)	(7.6)			

Note: Figures in parentheses are per cent ratios against the total number of defendants detained.

1 Constitution of Japan, Article 34.

2 Source: Annual Report of Judicial Statistics.

III.1. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

Concerning the interval between the arrest of a suspect and the request to a judge for the detention of the suspect, the followings are provided:

- When a judicial police officer has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant, […] he/she shall immediately release the suspect when he/she believes that it is not necessary to detain the suspect, or shall carry out the procedure of referring the suspect […] to a public prosecutor within 48 hours of the suspect being placed under physical restraint when he/she believes that it is necessary to detain the suspect.[3]
- When a public prosecutor has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant (excluding such suspect as is referred in accordance with the preceding Article), […] he/she shall immediately release the suspect when he/she believes that it is not necessary to detain the suspect, or shall request a judge to detain the suspect within 48 hours of the suspect being placed under physical restraint when he/she believes that it is necessary to detain the suspect; provided, however, that when the public prosecutor has instituted prosecution during the time limitation, he/she shall not be required to request detention.[4]
- When a public prosecutor has received a suspect referred pursuant to the provision of Article 203, he/she […] shall immediately release the suspect when he/she believes that it is not necessary to detain the suspect, or shall request a judge to detain the suspect within 24 hours of receiving the suspect when he/she believes that it is necessary to detain the suspect.[5]

III.2. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS

A person can be taken in pre-trial detention when he/she is suspected of an offence for which imprisonment is not provided as a penalty, and the minimum level of suspicion required shall be the case when there is probable cause to suspect that the accused has committed a crime. A judge makes the decision to detain the accused by the following provision:

[3] Code of Criminal Procedure, Article 203 (1).
[4] Code of Criminal Procedure, Article 204 (1).
[5] Code of Criminal Procedure, Article 205 (1).

- The court may detain the accused when there is probable cause to suspect that he/she has committed a crime and when:
  (i) The accused has no fixed residence;
  (ii) There is probable cause to suspect that he/she may conceal or destroy evidence;
  (iii) The accused has fled or there is probable cause to suspect that he/she may flee.[6]

The accused can be detained for any offence by the above provision, except that with regard to cases which shall be punished with a fine of not more than 300,000 yen, a misdemeanour detention or petty fine, only when the accused has no fixed residence. This exception is provided as follows and complex:

- With regard to cases which shall be punished with a fine of not more than 300,000 yen (with regard to crimes other than those under the Penal Code, the Act on Punishment of Physical Violence and Others (Act No. 60 of 1925), and the Act on Penal Provisions related to Economic Activities (Act No. 4 of 1944), 20,000 yen for the time being), a misdemeanour detention or petty fine, the provision of paragraph (1) of this Article shall apply only when the accused has no fixed residence.[7]

Before the accused is detained, he/she should be informed of the case and a statement should be taken from him/her by the judge, as provided as follows:

- The accused may not be detained unless he/she has been informed of the case and a statement has been taken from him/her; provided, however, that this shall not apply when he/she has fled.[8]

III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

In connection with the regular review and the limits on the length of time permitted for pre-trial detention, the followings are provided.

6 Code of Criminal Procedure, Article 60 (1).
7 Code of Criminal Procedure, Article 60 (3).
8 Code of Criminal Procedure, Article 61.

Prior to the institution of prosecution

When a public prosecutor has not instituted prosecution against a suspect regarding a case in which the suspect was detained [...] within ten days of the request for detention, he/she shall immediately release the suspect.[9]

When a judge deems unavoidable circumstances exist, he/she may extend the period set forth in the preceding paragraph upon the request of a public prosecutor. The total period of such extensions shall not exceed ten days.[10]

After the institution of prosecution

The period of detention shall be two months from the date of institution of prosecution. In cases where it is especially necessary to continue the detention, the period may, by a ruling with a specific reason (by the court), be extended for additional one-month periods [...][11]

Also, a suspect/defendant can initiate proceedings for release by Habeas Corpus as provided as follows: Any person who is physically restrained without due legal procedure may apply for its recovery in accordance with the provisions of this law.[12]

III.4. INFORMATION, LEGAL REPRESENTATION, INTERPRETER, INFORMING OTHERS

Concerning information to a suspect at the time of his/her arrest, the followings are provided.

When a judicial police officer has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant, he/she shall immediately inform the suspect of the essential facts of the suspected crime and the fact that the suspect may appoint defence counsel and then, giving the suspect an opportunity for explanation, [...].[13]

When a public prosecutor has arrested a suspect upon an arrest warrant or has received a suspect who was arrested upon an arrest warrant (excluding such suspect as is referred in accordance with the preceding Article), he/she shall immediately inform the suspect of the essential facts of the suspected crime and the fact that the suspect may appoint defence counsel and then, giving the suspect an opportunity for explanation, [...].[14]

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9 Code of Criminal Procedure, Article 208 (1).
10 Code of Criminal Procedure, Article 208 (2).
11 Code of Criminal Procedure, Article 60 (2).
12 Habeas Corpus, Article 2 (1).
13 Code of Criminal Procedure, Article 203 (1).
14 Code of Criminal Procedure, Article 204 (1).

Also, it is provided that "The accused under detention may request the court to disclose the grounds for detention."[15]

As regards the interpreter/translation of documents when in pre-trial detention, the followings are provided: When the court has a person who is not proficient in the national language make a statement, it shall have an interpreter interpret it.[16] The court may have letters or marks written in languages other than the national language translated.[17]

With regard to informing family, friends, et cetera, the following is provided: When the accused has been detained, his or her counsel shall be notified immediately. When no counsel has been appointed for the accused, notification shall be given to the person who has been specified by the accused from among his/her legal representative, curator, spouse, lineal relatives and siblings.[18]

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

IV.1. FACILITIES

Based on the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, pre-trial detainees are kept in penal detention facilities (i.e. penal institutions, detention facilities, or coast guard detention facilities).

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IV.2. CATEGORIES AND ACCOMMODATION

Pre-trial detainees are accommodated separately from sentenced prisoners by using different rooms.

The adulthood age is 20 and over in Japan, and pre-trial detainees under the age of 20 are always accommodated separately from those aged 20 and over.

If it deems necessary, vulnerable groups of pre-trial detainees are accommodated separately from the others by using different rooms, for instance, but there are no special groups who are held in special facilities and who are subject to special conditions/procedures.

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15 Code of Criminal Procedure, Article 82 (1).
16 Code of Criminal Procedure, Article 175.
17 Code of Criminal Procedure, Article 177.
18 Code of Criminal Procedure, Article 79.

Concerning the amount of space, although there exist differences between old and new facilities, the total floor areas including the common space, such as lavatory, closet and so on, are approximately 6 to 7.5 square meters for single rooms and 23 to 27 square meters for shared rooms with a capacity of 6 detainees. The interior measurements of shared rooms are set to be 2.5 square meters per person, excluding the common space.

As regards the room assignment for pre-trial detainees in penal institutions, it is provided that "The room of an unsentenced person […] shall be a single room if there is a risk of causing a hindrance to the prevention of destruction of evidence; even when the risk is not found, the room shall be a single room as much as practicable except where deemed appropriate to accommodate him/her in a shared room."[19]

With regard to the room assignment for pre-trial detainees in detention facilities and coast guard detention facilities, it is provided that "A detention method without the detainee's room for singular accommodation may be opted for to detain unsentenced persons […] only in the cases where it is deemed that there is no risk of causing a hindrance to the prevention of destruction of evidence."[20]

Pre-trial detainees who share accommodation are assessed beforehand in order to ensure that they are suitable to associate with each other. Behaviour and development of a pre-trial detainee in the institution until then are checked and his/her room is assigned after considering the results.

IV.3. INFORMATION

Based on the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, at the commencement of commitment to the penal detention facilities, pre-trial detainees are notified of the following matters:

(i) Matters pertaining to lending, supplying, and self-supplying of articles;
(ii) Matters pertaining to the handling of money and other goods, such as self-retained articles;
(iii) Matters pertaining to hygiene and medical care;
(iv) Matters pertaining to religious acts;
(v) Matters pertaining to access to books, et cetera (i.e. books, magazines, newspapers, and other documents and drawings (except for letters));
(vi) Matters pertaining to the compliance rules;
(vii) Matters pertaining to visits and correspondence;

[19] Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Article 35 (2).
[20] Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Article182 (2) and Article 243 (2).

(viii) Matters pertaining to the claim for review, such as the measures against which a claim for review may be filed, the reviewing agency, and the filing period of the claim for review;
(ix) Matters pertaining to the report, such as the acts against which a report may be filed, the destination of the report, and the reporting period;
(x) Matters pertaining to the filing of complaints.

The above notification can be checked also from the booklet provided in each room.

With regard to the methods of seeking information, requests made by pre-trial detainees are adequately addressed by providing them with the explanation about the nationwide government information disclosure system and the address of reception window when they make requests for the information about how they make disclosure requests.

IV.4. RIGHTS TO HUMANE TREATMENT

International law holds that all persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person. This international obligation is codified in the Act on Penal Detention Facilities and Treatment of Inmates and Detainees as follows: The purpose of this Act shall be to conduct adequate treatment of inmates, detainees, and coast guard detainees with respect for their human rights and in accordance with their respective circumstances, as well as to achieve the appropriate management and administration of penal detention facilities (i.e. penal institutions, detention facilities, and coast guard detention facilities).[21]

In the penal detention facilities, a rest room is installed in each room and generally speaking pre-trial detainees can freely use it. Pre-trial detainees are allowed to take a bath at least twice a week.

Based on the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, pre-trial detainees are allowed to wear their own clothes except where there is a risk of causing a hindrance to either the maintenance of discipline and order or the management and administration of the penal detention facilities.

In cases where a person requests to visit a pre-trial detainee, the warden, detention services manager or coast guard detention services manager shall permit the pre-trial detainee to receive the visit except where receiving visit is not permitted by the provisions of the Code of Criminal Procedure. As a general rule, correspondence is also permitted.

Treatment (except exercise, bathing, visits, and other occasions) is, in general, conducted in a detainee's room throughout day and night, except where deemed

21 Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Article 1.

appropriate to conduct it in the outside of the detainee's room. However, except Sundays and other days specified by the ordinances concerned, pre-trial detainees are provided with the opportunity to take adequate exercise which shall be in the open air as much as practicable for more than 30 minute in order to maintain their good health.

Pre-trial detainees in penal institutions can engage in prison work during their free time if they wish by contracting with parties outside of penal institutions as "self-contracted-work" stipulated by Article 39 of Act on Penal Detention Facilities and Treatment of Inmates and Detainees. Though it can be said that all pre-trial detainees in penal institutions have opportunities to work, there are very few pre-trial detainees who wish to engage in prison work.

IV.5. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

At the place where pre-trial detainees make contact with other inmates, preventive measures are taken such as that officers are stationed and that a security video camera is in place for monitoring.

In order to prevent pre-trial detainees from committing suicide, several measures are taken such as conducting interviews with pre-trial detainees by officers to grasp their emotional situations when new inmates are admitted, imposing some restrictions on their belongings which might be used as means to suicide, and accommodating in the rooms aimed to prevent suicide if necessary.

Concerning health care, necessary cure are given to the pre-trial detainees with disease to maintain their health condition. Also, pre-trial detainees can obtain assistance opportunities such as interviewing and consultation with, and receiving advices from, private voluntary visitors with expertise.

As regards solitary confinement/isolation punishment in penal institutions, the following is provided: In executing a disciplinary confinement, the warden of the penal institution shall obtain the opinion of a medical doctor on the staff of the penal institution about the health condition of the inmate concerned."[22]

It is provided that "The prison officers shall be given training and discipline necessary for promoting a better understanding of the human rights of inmates and for acquiring and improving knowledge and technique necessary for appropriate and effective practice of treatment of inmates."[23], which inevitably aims to enable the prison officers to take account of the different status, and the different needs, of pre-trial detainees from sentenced prisoners.

[22] Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Article 156 (2).
[23] Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Article 13 (3).

IV.6. COMPLAINTS BY PRE-TRIAL DETAINEES

Pre-trial detainees have the right prescribed in law to make complaints with regard to their pre-trial detention. Inmates including pre-trial detainees can commence a civil suit (Code of Civil Procedure) and an administrative suit (Administrative Case Litigation Act) and demand the protection of personal liberty (Act on Protection of Personal Liberty) to the court. They can also make a complaint and/or accusations (Code of Criminal Procedure) to the investigative organization if they are not satisfied with measures taken by the penal detention facilities.

They can also file human rights infringements to Regional Legal Affairs Bureau.

Further, the Act on Penal Detention Facilities and Treatment of Inmates and Detainees provides inmates including pre-trial detainees with three Appeal Mechanisms as follows.

Claim for Review and Reclaim for Review: For example, a person who is dissatisfied with the measures taken by the warden of the penal institution, such as restriction on correspondence and disciplinary punishment, may file a claim for review with the Director of the Regional Correction Headquarters. If he/she is dissatisfied with the determination on a claim for review, he/she may file a reclaim for review with the Minister of Justice.

Report of Cases: For example, an inmate against whom a staff member of the penal institution has committed the illegal or unjust acts such as physical assault may report the case to the Director of the Regional Correction Headquarters. The Director of the Regional Correction Headquarters confirms whether or not the case has happened and notifies him/her. If dissatisfied with the contents of the notification, the inmate may report the case to the Minister of Justice.

Filing of Complaints: For example, an inmate may file a complaint with the Minister of Justice, the inspector or the warden of the penal institution with regard to any treatment he/she has received.

The contents of these appeals are kept secret to the staff members of the penal institution concerned, for example, and inmates are never treated adversely as a consequence of filling complaints.

Breaches of pre-trial detention rights can be raised during trial and the right of pre-trial detainees to make complaints can never be restricted because of their pending status.

IV.7. MOST IMPORTANT DEVELOPMENTS

The most important development in Japan as regards penal detention facilities and the rights of pre-trial detainees in the last 10–15 years is the total revision of

the Prison Law, to which effect was given in 2007. Under this revision, the name of the law was changed to "Act on Penal Detention Facilities and Treatment of Inmates and Detainees." The Act is applied to inmates and detainees accommodated in penal detention facilities, clarifying their rights and obligations and stipulating necessary matters to implement appropriate treatment for them more positively than before. This Act is applied to all pre-trial detainees, not only to the pre-trial detainees of certain categories.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

In Japan, the bail system for the accused is the sole alternative for pre-trial detention, about which the followings is provided: The accused under detention or his/her counsel, legal representative, curator, spouse, lineal relative or sibling may request bail.[24] The request for bail shall be granted, except when:

(i) The accused has allegedly committed a crime which is punishable by the death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work whose minimum term of imprisonment is one year or more;
(ii) The accused was previously found guilty of a crime punishable by the death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work whose maximum term of imprisonment was in excess of ten years;
(iii) The accused allegedly habitually committed a crime punishable by imprisonment with or without work whose maximum term of imprisonment was in excess of three years;
(iv) There is probable cause to suspect that the accused may conceal or destroy evidence;
(v) There is probable cause to suspect that the accused may harm or threaten the body or property of the victim or any other person who is deemed to have essential knowledge for the trial of the case or the relatives of such persons;
(vi) The name or residence of the accused is unknown.[25]

The court may, when it finds it appropriate, grant bail ex officio.[26] Some statistics on bail during the first instance trials in 2007 are shown *supra* in section III, Table I.

24 Code of Criminal Procedure, Article 88(1).
25 Code of Criminal Procedure, Article 89.
26 Code of Criminal Procedure, Article 90.

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PRE-TRIAL DETENTION IN THE NETHERLANDS: IMPROVEMENTS ARE STILL MANDATORY

Peter J.P. TAK*

I. INTRODUCTION

Although in the fifties and sixties of the previous century the Dutch Minister of Justice issued some directives to the prosecution service to limit use of pre-trial detention to the most serious crimes, it was widely believed that pre-trial detention was used inappropriately. The decision to limit use of pre-trial detention was based on several considerations. Pre-trial detention infringes one of the most essential human rights – the right to liberty – before the court has established that a person has committed an offense.

There were indications that pre-trial detention often was used in effect as an anticipation of the prison sentence; pre-trial detention increased the chances a prison sentence would be imposed. Pre-trial detention may be more severe than a custodial sentence because the suspect has had no opportunity to prepare for the loss of liberty; furthermore the place and manner of pre-trial detention compare unfavourably with detention following sentence and the suspect is uncertain how long he will be locked up.

A new law, adopted in 1973, aimed to restrict the use of pre-trial detention by establishing more restrictive criteria and by limiting its duration. Two statutory requirements must be met. The first concerns the kind of cases in which pre-trial detention may be applied. The second deals with the grounds on which detention decisions must be based. Other rules limit the length of pre-trial detention. Three more rules give further instructions for the application of pre-trial detention:

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- the full period of pre-trial detention must be deducted from any term of imprisonment,
- pre-trial detention is not permitted if the offender is unlikely to be sentenced to imprisonment, and
- pre-trial detention must end when it is likely that the expected actual term of imprisonment will last no longer than the pre-trial detention already served.

Despite the new criteria and other rules aiming to reduce use of pre-trial detention, quite a substantial number of inmates in Dutch penitentiary establishment are pre-trial detainees.[1]

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

The Netherlands is member of the following international organisations: United Nations (UN, 1945), Council of Europe (COE, 1949) and the European Union (EU, 1950).

As far as it concerns International human rights treaties and conventions, the Netherlands is contracting party, among others, to:

- the UN 1966 International Covenant on Civil and Political Rights (since 1969)
- the UN 1985 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (since 1985)
- the UN 1989 Convention on the Rights of the Child (since 1990)
- the COE 1950 European Convention on Human Rights (1950)
- the COE 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (since 1987), and Protocols I (1994) and II thereto (1994) (COE).[2]

[1] See for background information Peter J. Tak, Sentencing and Punishment in the Netherlands, in Michael Tonry & Richard S. Frase (Eds), *Sentencing and Sanctions in Western Countries*, Oxford University Press, 2001, p. 151–187, with further literature references.

[2] All the instruments mentioned in this contribution are contained in P.H.P.H.M.C. van Kempen (ed.), *International and Regional Human Rights Documents*, Nijmegen: Wolf Legal Publishers 2010.

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With regard to international law, The Kingdom of the Netherlands applies a monistic system:[3] all international law – both written and unwritten – that is in force for the Kingdom of the Netherlands is automatically part of the domestic legal order. No transformation legislation is needed. Moreover, Article 93 of the Constitution specifies that 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' In addition, Article 94 establishes that 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.' So international and regional human rights and humanitarian law treaties have power over national law (even over statutes and the Constitution), and the provisions in those treaties can be invoked by individuals and must be applied in court if and only if they are 'binding on all persons'.

With regard to (pre-trial) detention the Netherlands made a reservation when signing up the ICCPR. The reservation concerns Article 10 and reads:

> "The Kingdom of the Netherlands subscribes to the principle set out in paragraph 1 of this article, but it takes the view that ideas about the treatment of prisoners are so liable to change that it does not wish to be bound by the obligations set out in paragraph 2 and paragraph 3 (second sentence) of this article."

Because of the monistic system all fundamental human rights in treaties and conventions that are in force are directly enforceable through the domestic courts.

Dutch citizens do have a right of complaint to the European Court if the state has allegedly violated fundamental and human rights of the European Convention on Human Rights and if all national legal remedies have been exhausted.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

The Netherlands has a Constitution with a Bill of Rights from which citizens can derive rights pertaining to (pre-trial) detention. In Article 15 of the Dutch Constitution the right to protection against arbitrary deprivation of liberty is ruled: except in cases ruled by law no-one can be deprived of his liberty. For every case of deprivation of liberty a statutory basis is needed.

[3] See on the status of international law in the Dutch legal order, Piet Hein van Kempen, The Protection of Human Rights in Criminal Law Procedure in The Netherlands, *Electronic Journal of Criminal Law*, May 2009 (www.ejcl.org/132/art132–1.pdf), or in: Jorge Sánchez Cordero (ed.), *The Impact of Uniform Law on National Law. Limits and Possibilities / L'Incidence du Droit Uniforme Sur Le Droit National. Limites et Possibilités*, Universidad Nacional Autónoma de México, 2010, p. 610–660.

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK[4]

Deprivation of liberty before and whilst awaiting trial of a person suspected of having committed a criminal offence can be divided into five phases:

- police arrest in order to be questioned;
- police custody;
- remand in custody;
- remand detention;
- detention pending trial.

The decision of police arrest and police custody rests with the public prosecutor or a senior police officer if seeking the permission of the prosecutor would cause undue delay.

The decision to remand a suspect into custody, remand detention and detention pending trial rests with the judiciary, a single judge or a full bench of the court.

The minimum level of suspicion required for police custody is reasonable suspicion; for remand it is grave suspicion *i.e.* it must be likely that the suspect is guilty of having committed the crime.

The first and second phase (police arrest and police custody) are according to Dutch law not considered to be part of the pre-trial detention. The latter three phases, even the detention pending trial, form the statutory pre-trial detention.

Police arrest

Police-arrest (*aanhouding*, Sects 53–54 CCP) is possible for any offence where offenders are caught red-handed, or otherwise for crimes which carry a statutory prison sentence of four years or more. Arrests have to be ordered by a public prosecutor or a senior police officer (*hulpofficier van justitie*) where the order of the public prosecutor would cause undue delay, or in urgent cases by any police officer.

The aim of arrest by the police is the interrogation of the suspect by a (senior) police officer in the interest of the investigation of a criminal offence. During the first interrogation, the police officer must ensure that the right person has been arrested, that the arrest was lawful, and that continuation of the arrest seems

[4] More detailed information can be found in Peter J.P. Tak, *The Dutch Criminal Justice System*, Nijmegen: Wolf Legal Publishers, 2008, 189 pp, and in Aya Gruber, Vicente de Palacios & Piet Hein van Kempen, *Practical Global Criminal Procedure: the United States, Argentina, and the Netherlands*, Contextual Approach Series, Durham, North Carolina: Carolina Academic Press, 2012.

necessary. This is the so-called verification interrogation. The verification interrogation is the most appropriate moment to comply with the obligation to inform the arrested person of the reasons for his arrest (Sect. 5 ECHR).

The person arrested has the right to be assisted by his defence counsel only during this verification interrogation, but in practice a counsel is hardly ever present. The same applies for an interpreter. In line with the ECtHR decision in Salduz vs. Turkey (appl. 36391/02) and Pishchalnikov vs. Russia (24/09/2009,(appl.7025/04) the arrested person has the right to consult for half an hour his defence counsel prior to the police interrogation. The police has a duty to inform a defence counsel and to wait two hours for his arrival before they can start the interrogations.

The police arrest may last up to six hours, not including the hours between midnight and nine a.m., during which the detainee can be further interrogated about the crime allegedly committed by him (Sect. 61 CCP). In this interrogation the suspect has no right to assistance by a defence counsel. A defence counsel is not yet assigned to him. The client can see a counsel of his own choosing after this questioning.

The term of six hours starts at the moment when the person arrested arrives at the place of questioning. As transport to the place of questioning may take some time, the deprivation of liberty can take much longer than six hours.

During the police arrest, an additional term of six hours arrest – not including the hours between midnight and nine a.m. – may be ordered for the identification of offenders caught red-handed during which investigative measures may be taken, such as fingerprints, photographs, observation, haircut and so on.

Police custody

After expiry of the term for police-arrest, the suspect has to be either released or taken into police custody (*inverzekeringstelling*, Sect. 57 CCP). Police custody is ordered by the public prosecutor or by a senior police officer. Police-custody can only be applied in the interest of the investigation of criminal offences for which pre-trial detention is possible.

The police custody order contains a description of the criminal offence, the reasons why the order was issued (in the interest of the investigation), and the circumstances which have resulted in the supposition of these reasons (mostly: interrogation of witnesses/confrontation/further interrogation of the suspect is necessary).

From the moment of the police custody order, the suspect has the right to an assigned defence counsel with free access to the suspect, unless this is abused to hamper the finding of the truth. The defence counsel may also have access to the police files on the case. The suspect can be restricted in his rights to receive visits and to communicate by telephone and letters.

The police custody order holds good for three days. The order can be extended once for up to three days by the public prosecutor (Sect. 58 CCP).

Ultimately, after three days and fifteen hours, the arrested person has to be brought before the investigating judge. The judge may only examine the lawfulness of the police custody. The person in custody may be assisted by his defence counsel.

Remand in custody

After the expiry of the term of police arrest and police custody (six days and fifteen hours) the suspect has to be released or brought before the investigating judge who can order remand in custody (*bewaring*, Sect. 63 CCP) for fourteen days at the request of the public prosecutor. The remand in custody order can also be issued without preceding police custody.

The suspect is heard by the investigating judge. His counsel may be present at this interrogation. The remand in custody is the first phase of the pre-trial detention.

Remand detention

If the grounds for pre-trial detention after expiry of the term of remand in custody are still valid, the prosecutor requests the full bench of the court to order the suspect be remanded (*gevangenhouding*, Sect. 65 CCP). The maximum period of remand detention may not exceed ninety days(or in cases of terrorism: 2 years). The request is dealt with by the court in chambers. The suspect is heard in processing this request. The suspect can at all times request cancellation of the remand detention, and has the right to be heard during the first request.

Detention pending trial

If the suspect is still in pre-trial detention after one hundred and four days (the term of the remand in custody plus that of the remand detention), the public prosecutor has to present the case to the court for trial. Unless the case is ready for trial, the trial may be adjourned. In either case, the remand detention order may remain valid until sixty days after the final court decision, provided that the verdict in the first instance and on appeal results in a prison sentence exceeding the period spent in detention. In case of an acquittal or discharge or a prison sentence in length not exceeding the pre-trial detention, the order has to be cancelled with immediate effect.

In the majority of cases, the offender is released before the full-term of pre-trial detention (hundred and four days) has expired. Limiting the duration of pre-trial detention has the result that cases against detained suspects are tried by courts with priority.

III.1. CASES, GROUNDS, AND LEVEL OF SUSPICION FOR THE APPLICATION OF PRE-TRIAL DETENTION

Two statutory requirements for the application of pre-trial detention must be met. The first requirement regards cases in which pre-trial detention may be applied. The second deals with the grounds on which pre-trial detention may be applied. Section 67 of the Code of Criminal Procedure enumerates the cases in which pre-trial detention may be applied. Pre-trial detention can be ordered if a serious suspicion exists that the offender has committed an offence:

- which carries a statutory prison sentence of four years or more; or
- which is specifically designated, *e.g.* embezzlement, fraudulent misrepresentation and threat; or
- which carries the penalty of imprisonment whilst the suspect does not have a fixed residence or regular place of abode in the Netherlands.

No-one can be taken in pre-trial detention when he or she is suspected of an offence for which imprisonment is not provided as a penalty.

Section 67a CCP specifies the grounds on which pre-trial detention may be applied. According to this Section, for the application of pre-trial detention there must be a danger that the suspect will abscond or will pose a serious danger to public safety. A serious danger to public safety exists:

- if the offence carries a maximum statutory sentence of at least twelve years imprisonment and public order has been seriously affected by the offence;
- if there is a serious risk that the offender will commit a crime, that carries a maximum statutory sentence of not less than six years of imprisonment; or which may jeopardize the safety of the state or the health or safety of persons; or create a general danger to property;
- if there is a serious suspicion that the offender has committed designated offences such as property offences, threat, embezzlement or money laundering and will re-offend, and less than five years have passed since he was sentenced to a deprivation or restriction of liberty or a community service order; or
- if it is necessary to detain the offender in order to establish the truth by methods other than through his own statement.

Remand in custody is not permitted if it is not likely that the offender will be sentenced to unsuspended imprisonment. Furthermore, pre-trial detention has to end if it is likely that the actual term of imprisonment (taking into consideration the provisions on early release) will be shorter than the period spent in pre-trial detention.

III.2. FIGURES[5]

On 31 August 2009: 4,279 persons were held in pre-trial detention (excluding the ones appealing their sentence). at a total prison population of 11,476 persons. In 2009 the influx of pre-trial detainees was 18,068. Around 50% (9,095) of them were released in 2009 either because the pre-trial detention was suspended prior to the start of their trial or after the service of the sentence.[6] The average number of days that pre-trial detainees were imprisoned and who left prison in 2008 was 65 days (including the ones sentenced to a period as long as or shorter than their pre-trial detention) (the average for 2004 was 72 days and for 2005 69 days[7]). The influx of pre-trial detainees as well as the average number of days is decreasing since 2004, but the pre-trial detainees are still the largest group in prison.[8]

III.3. INFORMATION, LEGAL REPRESENTATION AND COMMUNICATION

Those placed in pre-trial detention will, in principle, have access to all procedural documents, and are entitled to free contact with the outside world. In the interest of the investigation, the examining judge can, however, also impose temporary restrictions with respect to acquisition of information in whatever form and with respect to maintaining contact with persons both inside and outside the institution.

Anyone who is arrested will be informed at the time of the arrest of the reason for the arrest and shall he/she be promptly informed of any charges against him/her. A person in respect of whom pre-trial detention is being sought is legally represented in such proceedings. Pre-trial detainees have a right to an interpreter or translation of documents and have a right to inform family, friends, et cetera, when they have been arrested or taken in pre-trial detention.

[5] Figures on pre-trial detention in the Netherlands over previous years may be found in A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standard in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Nijmegen: Wolf Legal Publishers, 2009, p. 689–716.

[6] P. Linckens & J. de Loof, *Gevangeniswezen in getal 2005–2009* (Prison system in numbers), DJI, Ministerie van Justitie Den Haag, Juni 2010, p. 11 and 43–44.

[7] See J. uit Beijerse *et al.*, *Rechter-Commissaris en inverzekeringstelling: een paar apart?* [Investigative Judge and pre-trial detention], Den Haag: Boom Juridische Uitgevers 2008, p. 71.

[8] S.N. Kalidien & A.Th.J. Eggen, *Criminaliteit en rechtshandhaving 2008* (Criminality and law enforcement 2008), Den Haag: Boom Juridische Uitgevers, 2009, p. 175–177.

III.4. INTERNATIONAL INSTRUMENTS AND DECISIONS

The main cause of recent changes with regard to the Criminal Procedural Law Framework is the need to meet the demands stemming from international human rights instruments concerning persons accused of crimes and of persons deprived of liberty in so far as these instruments are directly applicable under Dutch law.

The Netherlands has no constitutional court and Section 120 of the Dutch Constitution explicitly prohibits (constitutional judicial) review of Acts of Parliament (statutes) by courts: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the court". However, the Dutch Constitution obliges the courts to review all domestic legislation, including Acts of Parliament, with regard to their compatibility with directly applicable provisions of international treaties to which the Netherlands is a contracting party, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.

All provisions in this Convention that do not need further legislative implementation or operationalisation are regarded as directly applicable. Where a Dutch statutory provision is found to be in conflict with a directly applicable provision of the Convention, the court must apply the provision of the Convention instead of the national provision. Section 94 of the Constitution reads: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".

Standards on the application of directly applicable provisions of the Convention elaborated in case-law by the European Court of Human Rights (ECtHR) in Strasbourg must also be applied by Dutch courts. This is not only the case with regard to ECHR decisions involving the Netherlands, but also with regard to decisions involving other Member-States of the Council of Europe, in as far as these decisions contain standards regarding the provisions of the Convention. This means that apart from decisions against the Netherlands, other decisions of the court also may have an impact on Dutch criminal procedural legislation and trial practice.

The ECtHR's decisions in the Brogan case urged the Netherlands to change the statutory term for judicial review of the police custody from four days to three days and fifteen hours after the commencement of the police custody.[9] In compliance with the European Court's Judgment in the case of *Salduz versus Turkey*[10] the right of access to a defence counsel is now granted in practice prior to the first interrogation by the police. The person arrested or detained may now

9 ECtHR, 29 November 1988, *Brogan v the UK*, Appl.11209/84, par. 62.
10 ECtHR, 27 November 2008, *Salduz v Turkey*, Appl.36391/02.

communicate with his defence counsel before the first interrogation starts (but in principle not during it).

III.5. MOST IMPORTANT DEVELOPMENTS REGARDING PRE-TRIAL DETENTION

Important legislative development in the Netherlands in the last five years have been the introduction of a wide range of anti-terrorism measures. One of these measures concerns the possibility of pre-trial detention. Normally pre-trial detention is only allowed if there exists a 'grave presumption' of guilt against the suspect. In case of terrorism suspects a lower degree suffices. During the first 14 days of their pre-trial detention a 'reasonable suspicion' will.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

The main legislation on the enforcement of sentences and pre-trial detention is the 1998 Penitentiary Principles Act (PPA: *Penitentiaire beginselenwet*), and the attached Penitentiary Rules (a Royal Decree) in which principles laid down in the PPA are elaborated in more detail. The core of the Penitentiary Principles Act consists of four topics. The Act:

- legalizes some restrictions of human rights;
- takes as a starting point that the implementation of prison sentences and pre-trial detention does not take place under the principle of separation, but under the principle of association;
- guarantees a minimum of facilities and activities for detainees; and
- provides detainees with legal safeguards.

The Penitentiary Principles Act also elaborates the principles in respect of classification of prisons, level of association, selection of prisoners, use of control on and violence against prisoners, degree of contact with the outside world, social, spiritual and medical care, prison work, recreation, discipline and the complaint procedure for prisoners.

The PPA is both applicable to prisoners and to pre-trial detainees. As a rule, the legal position of a pre-trial detainee is similar to that of a convict. The PPA provides rights and obligations for all persons detained, regardless of the title of detention – prison sentence, pre-trial detention order, fine default detention,

detention of persistent offenders measure or expel detention order (Sect. 1 PPA). No special training is given to prison staff who work with pre-trial detainees, in order to enable them to take account of the different status, and the different needs, of pre-trial detainees from sentenced prisoners.

IV.1. FACILITIES, CATEGORIES AND ACCOMMODATION

With a deviation margin of 10%, a cell for one or two detainees should have a minimum surface area of 10 square metres, be 2 metres wide and have a clear height of 2.5 metres. The standard surface area for a cell in a newly built prison is 12 square metres, including the shower inside the cell. The Netherlands has cells with or without shower and toilet.

Pre-trial detainees are always accommodated in remand houses and separately from sentenced prisoners, though they can be accommodated in the same penitentiary establishment. Penitentiary establishments may have multiple departments such as a remand house a prison for male offenders and/or a prison for female offenders, but the departments are physically separated.

Juveniles[11] in pre-trial detention or sentenced juveniles are placed in special correctional institutions for juvenile offenders. They are therefore separated from adult detainees. However, it might happen that a juvenile offender is convicted under adult criminal law, due to the seriousness of the crime committed. In those cases, the juvenile will be placed in a correctional institution for adults.

Arrangements for vulnerable groups

There are arrangements made to protect specially vulnerable groups of pre-trial detainees, such as: homosexuals, transsexuals, sex offenders, those accused of offences against children, those who are HIV positive and former policemen or other former law enforcement officials

As far as it concerns sex offenders and offenders accused of offences against children no arrangements are made but it is an agreed practice within the prison system that these categories should be kept apart as much as possible from the other pre-trial detainees.[12]

[11] Those who are younger than 18 years of age.

[12] Article 11a Regulations on the selection, placement and transfer of detainees, (Artikel 11a Regeling selectie, plaatsing en overplaatsing gedetineerden) provides the prison governor to place a detainee who is unsuitable to associate with other detainees in an individual regime. The unsuitability of a detainee can be related to his mental disturbance, his addiction, his state of health, the circumstances of the crime he is accused of and the restrictions that were imposed on the detainee.

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Furthermore there are special groups (terrorists, 'dangerous' criminals et cetera) who are held in special facilities and who are subject to special conditions or procedures.

After a number of spectacular escapes in 1991, the system of extra high security units was introduced for prisoners who present a high escape risk, and who were labelled as extremely dangerous. A decision was made to build one fully-fledged EHS-prison (extra high security prison) in Vught. All the facilities are inside the walls of the prison

Wings for suspects or convicts of terrorist crimes

Recently two special wings for terrorist inmates have been established, an eighteen cell wing in the penitentiary establishment in Vught and a twelve cell wing in the penitentiary establishment in Rotterdam. The level of security in both wings is that of extended security. The main reason for concentrating the detention of terrorist suspects and convicts in two separate wings is the fear that they would otherwise infect other inmates with their fundamentalist ideas. Therefore the risk for radicalization and recruitment needed to be reduced.

All terrorist inmates operate under an individual regime. The prison governor decides whether the detainee may take part in individual or common activities. Juvenile terrorist inmates over 16 years are detained in the same wing with adult terrorist inmates. The Netherlands has made a reservation with regard to Section 27 sub c Convention on the Rights of the Child to this effect.

Every twelve months the penitentiary consultant assesses whether a detainees stay in the special wing for terrorists has to be continued. The governor may refuse visits by visitors or telephone calls with persons for a total of 12 months in order to maintain order and safety of the prison establishment, to protect public order and national security, to prevent criminal offences and to protect victims of crime.

The main objective of the regime in the wing for terrorists is re-socialisation. The prisoners' rights are similar to the prisoners' rights in regular prisons; there is however no possibility offered to take part in labour activities. Many prisoners' rights in the terrorists wings may be restricted in order to maintain order and safety in prison, to protect public order and national security, to prevent criminal offences and to protect victims of crimes.

In fact, the EHS prison is a small prison within a larger prison. Given the limited capacity, placement in an extra high security prison takes place only after a thorough assessment of risks of escape. Detainees who present an extremely high escape risk, and whose escape would be unacceptable for society in terms of recidivism for serious violent crimes or in terms of considerable societal unrest, may be placed in an EHS-prison.

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The regime in the EHS-prison is very restricted. No contact is allowed with detainees of other units. Regular body-checks and special cell-check take place. Visits by family and friends take place in a room separated by a glass wall. Visitors are searched prior to the visit. Detainees are checked prior to and after the visit. All talks with visitors are recorded. In exceptional cases the detainee has to wear handcuffs outside the cell.

Deprivation of liberty in association

Deprivation of liberty as a rule is implemented in association. The Minister of Justice decides the level of association of each individual penitentiary institution (Sect. 19 PPA). A distinction is made between complete freedom of association (Sect. 20 PPA), and limited association (Sect. 21 PPA).

Under the regime of complete freedom of association, detainees spend their daytime in common quarters. They have common meals, common recreational activities and common labour activities. Under limited association, detainees are confined to their cells except for periods of communal or group activities. In the case of complete association, communal activities are the rule and confinement to cell an exception; in the case of limited association it is the other way round. Thus, for example, in a detention facility for those deemed unfit to mix with other detainees, association is restricted to work, outdoor exercise, church services and, in special cases, educational and recreational activities. The level of association can therefore vary from being let out of the cell only for work, exercise, church and recreation, to staying out of the cell all day long. Whatever the level of association, night-time is always spent in the cell.

In order to decide under what level of association a detention will be implemented, the Minister of Justice sets criteria. Based on these criteria, a decision is taken as to whether a detainee is placed in a single cell or in a common cell with two or more detainees. For detainees who are not able to serve their detention in full or restricted association with others, an individual regime is applied (Sect. 22 PPA). The characteristic of an individual regime is that even on a daily basis it can be decided whether and to what extent the detainee is fit to participate in common activities. Otherwise he has the right to take part in activities without association with others.

Until 1993, the Dutch prison system operated a principle whereby no more than one detainees may occupy each cell. By force of circumstances, in particular the lack of detention capacity in the early 1990's, the one-detainee-per-cell rule came under pressure. Exceptions to the rule were adopted. Since 1993, detainees for fine default, and those who are placed in detention due to an expulsion order, may be accommodated in a common cell. Furthermore pre-trial detainees in remand houses may be accommodated in common quarters.

Since the reform of Section 21 PPA in 2004, detainees who serve under a limited association in some penitentiary establishments can also be placed in a double cell provided that they consent. The majority of detainees serve only short-terms in a penitentiary facility. For them a double cell or a multi-person cell as a rule may be appropriate.

A rough estimate is that 70% of all Dutch detainees are held in single cells. Article 11 of the Regulations on the selection, placement and transfer of detainees, rules that detainees can be placed in an individual regime in lieu of in association. This decision can be based on the grounds that the personality, behaviour or other personal circumstances, the nature of the committed offence which the detainee is suspected to have committed, are a serious risk to the detainee or to others who as a consequence is not able to function in or is suitable for a regime in association.

IV.2. INFORMATION

At the reception in a remand house pre-trial detainees are provided with information on:

- the regulations concerning the requirements of the institution,
- the methods of seeking information and making complaints, and
- how to seek assistance on health or social issues

They receive a copy of the model prison rules (*huisregels*) that is available in quite a number of foreign languages.

IV.3. RIGHTS TO HUMANE TREATMENT

International law holds that all persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person (cf. Article 10 ICCPR, Principle 1 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, et cetera).

Though this international obligation is not expressly codified in the Penitentiary Principles Act, Article 2 rules that persons subject to detention will not be met by other restrictions of fundamental rights than those deemed necessary for the purpose of the deprivation of liberty and for maintaining order and security within the penitentiary establishment.

In the Explanatory Memorandum of the PPA reference is made to the principle of minimal restrictions which means that the implementation of a deprivation of liberty should be made instrumental to the preparation of the

return of the detainee to society. Restrictions on fundamental rights are laid down in the PPA, whereas the right to complain functions as a complement to these restrictions. The Memorandum states also that as a result of the implementation of deprivation of liberty the State has to care for the detainees as far as it concerns food and material care as well as mental, medical and social care. The possibility to take part in activities, an adequate system of leave in preparation on return to society, and contact with the outside world are also part of the obligations resting on the State.[13]

Personal hygiene

For personal hygiene, the penitentiary establishment provides soap, toothpaste, a toothbrush, shaving equipment, a comb and shampoo, and sanitary towels for female inmates. In the prison canteen an inmate may buy supplementary products for personal hygiene. In principle, an inmate may have a beard or moustache. The governor ensures that a hairdresser is regularly available to cut hair, beards or moustaches. After sport activity, and at least twice a week, an inmate is obliged to take a shower. No right to a daily shower exists, but it is quite often permitted. Nearly all cells have their own toilet.

Private clothes or prison uniform?

The inmate is entitled to wear his own clothes and shoes or footwear, unless these pose a possible risk to order and safety or personal health (*e.g.* when the pre-trial detainee is in the prison hospital). He may be obliged to wear specially adapted clothes or footwear during work or sport. If the inmate refuses to wear these clothes or footwear, he may be excluded from labour or sport. The pre-trial detention facility has to take care that clothes are laundered.

IV.4. CONTACT WITH THE OUTSIDE WORLD

Visitors

The inmate has a right to receive visitors for at least one hour per week at the times and places determined in the model prison rules (Sect. 38 PPA). Pre-trial detainees, however, who are detained under restrictions set by the examining judge, do not have this right unless the public prosecutor or examining judge issues directions to the prison governor to allow the pre-trial detainees to receive a visitor.

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[13] The Explanatory memorandum is published in *Handboek Rechtspositie Gedetineerden* (Handbook legal position of detainees), Den Haag, SDU Uitgevers, 2006, p. 65 ff.

Those who wish to visit an inmate must obtain prior permission by telephone or in writing. Visitors may be refused in the interest of maintaining order and safety of the penitentiary establishment, the protection of public order and national security, the prevention of criminal offences or the protection of victims of a crime. It is unknown what percentage of pre-trial detainees are denied regular visits from family members on these grounds.

The governor may limit the number of visitors simultaneously admitted to the detainee if it is in the interest of maintaining order or safety of the penitentiary establishment. The visit takes place in visiting rooms supervised by prison wardens. In visiting rooms, as a rule, other detainees receiving their visitors are present as well. Individual visits, however, may be granted by the prison governor.

The conversation between the inmate and his visitor may be overheard or intercepted, provided that the prison governor informs the inmate prior to the visit that this may happen.

As a rule, there is no glass or plastic screen between the inmate and his visitor. The governor, however, may decide that such a screen will be placed and that communication must take place through intercom. Visitors must wear an identity card and their clothing may, prior to the visit, be examined for the presence of objects that may be a risk to order or safety in the institution. The examination may also concern objects brought by the visitor. The governor has the authority to confiscate objects for the duration of the visit. The visitor must pass a detection gate. Visitors may not hand over anything to the inmate.

Before and after visiting hours, the inmates' clothing may be searched or the inmate may be ordered to undergo a bodily examination.

Lawyers may visit their clients without time restrictions. Lawyers must identify themselves and pass a detection gate. Their belongings may be examined.

Detainees serving a long-term prison sentence may be granted the right to receive a so-called non-supervised visit. These visits may be used for sexual relations. The request for non-supervised visits by pre-trial detainees, however, will be granted only in very, very exceptional circumstances. A long stay in pre-trial detention and deterioration of the relationship with the prisoner's partner are not seen as sufficient reasons for granting a non-supervised visit.

Telephone calls

Except where restrictions have been placed upon a pre-trial detainee, every detainee has the right to have telephone calls with persons outside the penal establishment for ten minutes at least once a week. Telephone calls are at the expense of the detainee, unless the prison governor determines otherwise. The detainee can buy telephone cards in the prison canteen (shop). If he is found in

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possession of more telephone cards than are needed for regular use, this may constitute an offence against the order in the penal establishment, which may be punished with a disciplinary sanction.

The governor may decide to supervise telephone calls conducted by or with the pre-trial detainee if this is necessary to establish the identity of the person with whom the detainee calls or for the following reasons:

- the maintenance of order or safety in the penal establishment;
- the protection of public order and national security;
- the prevention or investigation of criminal offences; or
- the protection of victims of crimes.

The supervision may include interception or recording of the telephone conversation. Prior to the telephone calls, the detainee must be informed of the nature and reason for the supervision.

The governor may deny the detainee the opportunity to make telephone calls, or may terminate a telephone conversation within the time allotted for the reasons previously mentioned. The decision to deny the detainee the opportunity to make telephone calls remains in force for a maximum of twelve months.

Free telephone calls without restrictions can be made to persons and bodies listed in Section 37 PPA (*e.g.* judicial authorities, the Ombudsman, and so forth), provided that the necessity and opportunity for those telephone calls exist. No other supervision shall be exercised over these telephone calls than that necessary to establish the identity of the person called. Lawyers frequently complain that telephone conversations are supervised, despite the statutory guarantee that telephone calls with their clients may not be intercepted. The Minister of Justice has issued instructions to prison governors to stop supervision of telephone calls between inmates and their lawyers. Pre-trial detainees, who are detained under restrictions as set by the examining judge, are not allowed to make telephone calls except to their lawyers, in urgent cases at any time, in non-urgent cases during regular telephone hours.

E-mail, telefax and mobile phones are outside the legal scope of Section 39 PPA, and may not be used therefore.

Letters and parcels

As a rule, a detainee can send, at his own expense, and receive as many letters as he wishes. The prison governor, however, has the authority to restrict the number of letters in order to maintain order and safety.

The prison governor has the authority to examine covers and other postal items and check the content for contraband. He may also supervise letters or postal items sent by or intended for a detainee. This supervision may comprise

the copying of letters or of other postal items. The detainee shall be notified beforehand that letters or postal items will be examined and supervised.

The governor may refuse to distribute certain letters or other postal items and he may confiscate objects if this is necessary in order to maintain order or safety in the penal establishment, to protect public order and national security, to prevent or investigate criminal offences, or to protect victims of – or those involved otherwise in – criminal offences.

Non-distributed letters are returned to the sender, kept for the detainee, destroyed with his consent or handed over to the police in order to prevent or investigate a criminal offence. Each detainee has an unrestricted right to send letters to Members of the Royal Family, Members of Parliament, the Minister of Justice, judicial authorities, the National Ombudsman and the Council for the Administration of Criminal Justice and Youth Protection (Sect. 37 PPA).

The right to send and receive letters is also restricted for pre-trial detainees who are detained under restrictions. All letters they send or receive must be checked and supervised.

On the occasion of a birthday or at Christmas, the detainee may receive a parcel of a restricted value (€ 33 maximum).

IV.5. DAY-PROGRAM OF PRE-TRIAL DETAINEES

In 2003 proposals for a new prison regime were formulated, aiming at a flexible and functional implementation of deprivation of liberty sanctions and measures. The effect of these proposals was that the day program in the regime of full association is 59 hours, of which 45 hours for activities (work, education, sports, recreation and time outdoors) which means that detainees spend 109 hours per week in their cells ((7 × 24) – 59). At 17.00 hours, detainees are locked in their cells and remain there until 08.00 hours the next morning. In a regime of limited community the number of hours for activities is 43.

Prison labour for pre-trial detainees

The 1994 prison memorandum formulated the new prison policy. The core of that policy was that a standard regime for all detainees in closed (secure) penitentiary institutions would be applied, in which productive labour for 26 hours was a central element. The intention was that labour would be profitable and could increase the budget of the penitentiary institution. Next to the 26 hours of labour, a daily activity program including open air visits, recreation and sports was offered. Labour, however, never became the core of regime activities nor became profitable. Nowadays in virtually all remand houses prison labour has been abolished due to high costs and small profits. This means that pre-trial detainees spend most of their time in their cells.

IV.6. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Violence and suicides

Despite the measures taken by prison governors to prevent violent actions amongst detainees every year more than 1200 violent act are registered against detainees. The Prison Inspection (Inspectie Sanctietoepassing) recently claimed that the prevention policy set up by the Prison authorities was not successful, that not every prison had adopted or implemented rules for detainees on how to behave nor were security cams available.

In recent years (2005:24; 2006:20; 2007:20; 2008:13) annually around 20 suicides in penitentiary facilities were committed,[14] but the number is reducing. In case of a suicide or unnatural death the prison governor has the duty to carry out an investigation.[15] Each prison facility has a protocol regarding the investigation of suicides and unnatural deaths. The right to life (Article 2 ECHR) includes the obligation to prevent that a detainee dies through violence, suicide or ill treatment. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and in those cases involving State agents or bodies to ensure their accountability for deaths occurring under their responsibility.[16]

Physical health care

Medical care is provided by a physician who is (as a rule, part-time) employed by the penitentiary establishment (Sect. 42 PPA). The inmate has a right to consult a physician of his choice, however, at his own expense. The physician or his substitute, employed by the penitentiary establishment, will have regular consultation hours or will be present if this is necessary in the interest of the prisoner's health and will examine inmates in order to assess whether they are fit to participate in sports or other activities.

The prison governor is responsible for ensuring that medical care is properly arranged, that medication prescribed by a physician is provided, and that medical treatment prescribed takes place inside or outside the penitentiary establishment. In many penitentiary establishments, a physician is assisted by one or more nurses who select the requests by inmates to consult the physician in order to set priorities. The costs for medical care are borne by the State, except the costs of consultation of a physician of the prisoner's own choice. There is one fulltime physician for every three hundred detainees, and one nurse for every fifty.

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14 DJI Jaarbericht 2008 (Prison Department Annual report 2008), May 2009, p. 43.

15 See A. Hendriks & M. van Dijk, Overlijden tijdens detentie; speciale aandacht geboden (Dying in prison; special attention is mandatory), *Sancties* 2008, p. 70–93.

16 ECtHR 15 May 2007, *Ramsahai v the Netherlands*, Appl 52391/02.

A physician provides medical care but has other responsibilities as well. He supervises inmates who are, by decision of the prison governor, confined to their cell as a disciplinary measure or placed in an isolation cell as a measure to ensure order. Furthermore, the physician, by request of the prison governor, may perform a bodily examination in cases where there is a serious threat to health.

Medical care includes regular dental care, but on request only. Some expensive or time-consuming dental care like inlays, false teeth, and so forth, is merely provided to long-term prisoners and not to pre-trial detainees, except when the inmate has maintained good dental care prior to his detention and the Dental Care Consultant at the Ministry of Justice gives permission for it.

Mental health care

One of the major problems in penitentiary establishments is the large number of inmates with mental health problems. Sixty percent of the detainees have psychological problems due to drug addiction. For inmates who need special psychiatric or psychological help, Individual Treatment Wards are present in penitentiary establishments.

In situations of crisis, mentally disturbed (pre-trial) detainees can be transferred to the Forensic Observation and Treatment Ward (FOBA) in Amsterdam with a capacity of 60 male and 6 female inmates. In the Forensic Observation and Treatment Ward, permanent psychiatric treatment for mentally disturbed inmates is provided. In cases in which a (pre-trial) detainee is – due to his mental disturbance – unfit to be detained, he may be placed in a forensic psychiatric clinic or in a psychiatric hospital.

The medical care in prison is at least at the level and quality as in the free society or even somewhat higher (more particularly dental and psychological/ psychiatric care).

Drugs

In spite of numerous measures taken in prison to prevent drugs being brought in, it is generally known that drugs are available in Dutch prisons; mainly soft drugs like hashish or marihuana, but sometimes even hard drugs, such as heroin and cocaine. Drugs are smuggled in by visitors or detainees returning from prison leave or by prison personnel.

There are a number of drug addicts in Dutch prisons that ask for special care. A special drugs discouragement policy has been established. Care and counselling is offered at the Drugs counselling wing.

A number of prisons possess drug-free wings that function autonomously, and are for inmates this wish to kick their addiction. Transfer to a drug-free wing, where the treatment is both of a medical and psychosocial nature, depends

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inter alia on the prisoner's acceptance of certain conditions. On the basis of the Penitentiary Rules, the prison governor may – for the benefit of order, security or the smooth operation of the penitentiary institution – require a prisoner to hand over urine for a test on the presence of drugs, order cell inspections or bodily examinations.

Protection against drugs cannot be offered outside the drug-free wings. The possession and use of drugs is of course forbidden and results in the application of sanctions. A positive urine test result or the refusal to submit to such a test will lead to disciplinary sanctions. Short-term prisoners, who in open society took part in a methadone-program, may get their dose in the prison as well. For long-term prisoners (> 6 months) who were part of a methadone program a gradual reduction of methadone per day is advised by the medical advisor of the Ministry of Justice, except for those addicts with serious psychiatric pathology, or for HIV-infected or pregnant detainees.

Social care of pre-trial detainees

Sentenced prisoners can sometimes obtain welfare advice, counselling or support on personal problems from a social worker, educator, pedagogue, case manager or, if the problem is psychological, from a psychologist. Pre-trial detainees may obtain such assistance by probation officers or behavioural experts as well.

IV.7. DISCIPLINARY SANCTIONS

Disciplinary sanctions can be imposed by the prison governor where the behaviour of the inmate is in conflict with good order, security and discipline (*e.g.* the possession of a small quantity of marihuana or alcohol or serious misbehaviour during transport; Sect. 50 PPA). Before a sanction can be imposed, the inmate must be heard, preferably in a language that he understands (Sect. 57 1 sub j PPA). The most severe sanction is solitary confinement of two weeks maximum. Solitary confinement is implemented in a cell separate from the premises. The cell contains only a toilet, a mattress and a foam rubber block to sit upon. During solitary confinement, the prisoner may not take part in prison labour and recreational activities. He may, however, receive mail and visitors, attend religious services and he may also spend one hour per day in the open air (Sect. 55 PPA). The prison governor may, however, reduce these contacts with the outside world. In cases in which the solitary confinement exceeds 24 hours, the prison governor has to inform the Supervisory Committee and the prison physician or his substitute promptly.

IV.8. COMPLAINTS BY PRE-TRIAL DETAINEES

In 1976, the Legal Status of Prisoners Act came into force, since which time prisoners have had the right to lodge a complaint against decisions taken by or on behalf of the prison governor:

- to impose a disciplinary sanction;
- to refuse to distribute or post letters sent to the prisoner or written by him or to refuse prison visits; or
- against any measure imposed by him or on his behalf which infringes the prisoner's statutory rights.

Complaints also can be filed on the grounds of delayed or the absence of decision-making. No complaints are possible on general rules or regulations, or concerning the actual behaviour by, or on behalf of, the governor.

This right is regulated in Sections 60–73 PPA. The complaint is put before the complaints committee, which is appointed by the Prison Supervisory Board attached to every prison and consists of three members of this Board. The Chairman of the committee is preferably a member of the judiciary.

In the written complaint, the decision of the governor must be cited and the reasons for the complaint must be given. The written complaint has to be submitted within seven days after the day on which the prisoner was notified of the decision complained of. Within four weeks, a decision on the complaint has to be rendered.

The session of the complaints committee is not public. The prison governor sends in writing his reaction to the committee. Both the complainant and prison governor have the right to give oral statements related to the complaint. The complainant has the right to legal aid and interpretation. The verdict of the complaint committee is in writing and declares either the complaint inadmissible or ill-founded or declares the complaint well-founded.

In cases in which the complaint is declared well-founded, the complaints committee either takes a new decision or instructs the governor to take a new decision in conformity with the verdict of the complaint committee. Where the complaint committee annuls the governors' decision, but the decision had already been implemented, (financial) compensation to the prisoner is possible. The prisoner or prison governor may appeal against decisions of this committee to the appeal committee of the Council for the Administration of Criminal Justice and Youth Protection.

Several thousands complaints are filed annually with the complaint committee. A quarter of the complaints concern the enforcement of disciplinary measures; the majority of the complaints concern measures that deviate from what the detainees see as their valid rights, for example placement in a single cell

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instead of a common cell, the refusal to grant leave or the prescription of medicaments by the penitentiary institution's physician. In exceptional cases, the detainee may address the National Ombudsman, whose task, however, since the introduction of the PPA is very restricted.

IV.9. THE IMPACT OF INTERNATIONAL INSTRUMENTS AND DECISIONS ON THE DUTCH PRISON POLICY

The Dutch Penitentiary Principles Act and the Penitentiary Rules have been influenced by the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules of the Council of Europe (Rec. 2006)2).[17] Other COE recommendations on aspects of deprivation of liberty such as Rec(84)12) on the detention of foreign prisoners have influenced the prison legislation and practice as well. Of great importance are the reports by the CPT.[18] Four times the CPT visited prisons and penitentiary facilities in the Netherlands. Critical remarks in the CPT reports were made in relation to the regime in the extra high security prisons. As a rule the Dutch government seems willing to follow the CPT recommendations, but sometimes with great reservations. The remarks made by the CPT on the poor regime in the very high security prisons did not result in a change in the regime. First after the ECtHR in the *Lorse and others* judgement (Appl. 52750/99) declared the combination of routine strip searches with other stringent security measures in the very high security prison a violation of Article 3 ECHR (inhuman or degrading treatment), the Government took action.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

The Dutch criminal justice system does not allow for alternatives for pre-trial detention nor have alternatives been developed as good practice. The only possibility offered by the Dutch Code of Criminal Procedure to reduce the length of the pre-trial detention is the suspension or postponement of the pre-trial detention as ruled in Sections 80–86 CPP. When the pre-trial detention is postponed the decision to apply pre-trial detention is taken but the implementation of the pre-trial detention is not effected. A suspended pre-trial detention means that the detention is effected but at a certain moment

[17] See Explanatory memorandum, p. 3.

[18] See J. de Lange, *Detentie genormeerd: een onderzoek naar de betekenis van het CPT voor de inrichting van vrijheidsbeneming in Nederland* [Detention regulated. A research on the influence of the CPT on the deprivation of liberty in Dutch prisons], Nijmegen, Wolf Legal Publishers, 2008.

suspended. The conditions and procedure for the postponement are the same as for the suspension of the pre-trial detention.

Suspension of pre-trial detention

The court may either ex officio or at the request of the public prosecutor or the offender decide that the pre-trial detention will be suspended when the offender, with or without bail, declares that he will comply with the conditions set by the court. Section 80 CPP gives the court power to formulate appropriate individual conditions but one condition is compulsory: the offender will not back out of a further implementation of the pre-trial detention after a cancelation of the suspension or of the implementation of the prison sentence. The individual conditions should contribute to the achievement of the objectives of the pre-trial detention. A recent research shows that the main individual conditions are the obligation to comply with the instructions given by the probation service, the obligation to follow a drug treatment or day training program, or the obligation to comply with a restraining order.[19]

The main reasons to apply a suspended pre-trial detention include:

- the fact that the offender has never had any prior contact with the police and judicial authorities;
- the fact that the offender would otherwise lose his job
- the fact that it is important that the offender can continue a training he is following
- the fact that the offender fully cooperated with the police investigation; or
- the offender's state of health.

In order to ensure that the defendant complies with the conditions, he or a third party will be required to pay a guarantee sum/bail, or a third party will have to act as guarantor for the defendant. The court will determine the manner in which the guarantee has to be provided, and the amount thereof, in its decision. In practice, bail (Section 80(3) CCP) is hardly if ever applied.[20]

Revocation of the suspension takes place at the request of the public prosecutor when the offender does not comply with the conditions or when there are indications that he will abscond (Sect. 84 CPP).

[19] M. Jacobs, M. von Bergh & A.M. van Kalmthout, *Toepassing van bijzondere voorwaarden bij voorwaardelijke vrijheidsstraffen en schorsing van de voorlopige hechtenis bij volwassenen* (Application of special conditions in case of conditional release and suspension of pre-trial detention relative to adults), WODC Den Haag 2006.

[20] See A.R. Houweling, *Op borgsom vrij* [Remand on money bail], Den Haag, Boom Juridische uitgevers, 2009, chapter 6, particularly p. 367 (see also p. 507–509 of the summary in English).

VI. CONCLUSION

Due to the implementation of the fundamental rights, the legal prerequisites for pre-trial detention have been formulated rather strictly because the most essential fundamental right – the right of freedom to come and go – is at stake. Every effort is therefore requested to reduce the frequency and the duration of pre-trial detention as far as possible. The strict legal prerequisites lead to a restricted number of pre-trial detainees in the Netherlands. There is no doubt that a low number of pre-trial detentions also has a positive effect on the number of prison sentences in the Netherlands, since courts seem to be very reluctant to impose prison sentences in cases in which no pre-trial detention has been applied; once pre-trial detention has been applied, it seems to work the other way around.[21]

Furthermore, the pre-trial regulations guarantee that the lawfulness of the detention and its extension is regularly reviewed. The right of the arrested offender to be tried within a reasonable time is guaranteed by statute as well, since the public prosecution has to bring the case before the court within 100 days for adjudication. Only in exceptional cases the public prosecutor needs more time to properly prepare the trial.

As far as it concerns the alternatives to pre-trial detention, little has been done to develop alternatives and a further reduction of the number of pre-trial detainees seems to be possible and thus necessary.

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[21] See Lonneke Stevens, 'Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten? [Pre-trial detention and imprisonment. The criminal court confronted with accomplished facts?], *Nederlandse Juristenblad* 2010, p. 1520–1525. Cf J. uit Beijerse *et al.*, *Rechter-Commissaris en inverzekeringstelling: een paar apart?* [Investigative Judge and pre-trial detention], Den Haag: Boom Juridische Uitgevers 2008, p. 56–57 en 72–73.

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PRE-TRIAL DETENTION IN NEW ZEALAND

Warren Young*

I. INTRODUCTION

In common with all jurisdictions that have their roots in the English common law, New Zealand's criminal justice system is essentially adversarial rather than inquisitorial in nature. Criminal procedure is partly codified and partly laid down by the courts through case law.

Criminal proceedings generally commence with an arrest and the laying of a charge by the police or other law enforcement agency. There is no independent prosecution agency (although in serious cases the prosecution will be taken over by a prosecutor in private law practice after the charge has been laid). As a result, there is no judicial or prosecutorial oversight of the investigative process before the charge is laid.

The conduct of a criminal case after court proceedings commence is essentially in the hands of the prosecution and the defence. They are responsible for the way in which the case comes to court; the nature of the evidence to be presented and the number of witnesses to be called; and the manner in which the trial is conducted in court. The role of the judge before trial is to ensure that procedural matters are attended to so that the case is ready for trial and to make ancillary decisions such as those relating to pre-trial detention. Such decisions are made in open court in the presence of the defendant.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

New Zealand laws on pre-trial detention, and on the rights of those who are subject to such detention, are governed by a number of international treaties and instruments to which New Zealand is a party. First, New Zealand is a member of the United Nations.[1] It is therefore a party to the following seven core United Nations Human Rights Instruments:

- International Covenant on Civil and Political Rights (ICCPR)[2]
- International Covenant on Economic, Social and Cultural Rights (ICESCR)[3]
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[4]
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[5]
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[6]
- UN Convention on the Rights of the Child (UNCROC)[7]
- UN Convention on the Rights of Persons with Disabilities.[8]

New Zealand has also ratified various optional protocols to the key international human rights treaties, including the Optional Protocol to the ICCPR (Individual Petition) and the Optional Protocol to the CAT, both of which permit individuals to complain to the relevant treaty bodies.

International agreements do not automatically become part of the law of New Zealand simply by process of ratification, accession or acceptance. For an international agreement to have domestic effect, either its provisions must be

[1] New Zealand was one of the 51 founding members of the UN. The UN charter was signed on 26 June 1945 and ratified by the founding members on 24 October 1945.

[2] Although New Zealand has not incorporated the ICCPR into law, it took measures to give effect to many of the rights contained within it by passing the New Zealand Bill of Rights Act in 1990.

[3] New Zealand ratified the ICESCR on 28 January 1978.

[4] New Zealand ratified the CERD on 22 November 1972.

[5] New Zealand ratified the CEDAW in January 1985.

[6] New Zealand ratified the CAT on 10 December 1989.

[7] New Zealand ratified the Convention on 6 April 1993 with reservations concerning the right to distinguish between persons according to the nature of their authority to be in New Zealand, the need for legislative action on economic exploitation – which it argued was adequately protected by existing law, and the provisions for the separation of juvenile offenders from adult offenders.

[8] New Zealand ratified the Convention on 26 September 2008.

reflected already in New Zealand's existing law, or new legislation must be enacted. Before becoming a party to an international human rights instrument, therefore, the Government reviews New Zealand's domestic law to see what additional legislation, or amendments to existing legislation, would be necessary to ensure the full and effective implementation of the agreement in New Zealand law, or whether reservations would be necessary.

With respect to the international obligations contained in the various United Nations instruments, the most significant statutes that give effect to them are the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. All new legislation is vetted for compliance with the New Zealand Bill of Rights Act 1990. Accordingly, criminal procedure is heavily influenced by international legal obligations.

New Zealand's legislation is significantly at odds with only one of the United Nations instruments: the United Nations Convention on the Rights of the Child. In particular, in relation to pre-trial detention New Zealand has entered a reservation to UNCROC regarding the separation of juvenile offenders from adult offenders. In New Zealand, the age threshold at which offenders enter the adult jurisdiction is 17. Accordingly, defendants aged 17 cannot be remanded in custody to a juvenile residence and are kept in adult remand prisons. This is in contravention of UNCROC which treats those under 18 as children.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

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New Zealand's key constitutional arrangements are a mix of statute law and convention. There is therefore no single document that forms a written constitution or sets out the relationships between state and citizen or the fundamental rights of the individual citizen.[9]

The Constitution Act 1986 is a key formal statement of New Zealand's system of government, in particular the executive, the legislature and the judiciary. The Act recognises the Queen of England as the Head of State of New Zealand and the Governor-General as her representative. Other laws that outline the powers and functions of the three branches of government in more detail include the State Sector Act 1988, the Electoral Act 1993, the Judicature Act 1908 and the Supreme Court Act 2003. Other important legislation includes the Treaty of Waitangi Act 1975, the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and some British laws, such as Magna Carta 1297 and

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9 An explanation of New Zealand's constitutional arrangements can be found in the Core Document lodged with the Office of the High Commissioner for Human Rights (to be found on the OHCHR website: www.unhchr.ch/tbs/doc.nsf/(Symbol)/976b05d5948fbdafc125729700 1a50c0?Opendocument).

the Bill of Rights 1688, which have been incorporated into New Zealand law by the Imperial Laws Application Act 1988.[10]

Where the wording of the statutes permits, the courts will interpret them in a way that is consistent with, and gives effect to, international law. Failure to consider relevant international instruments also renders a Government decision-maker liable to judicial review.

As noted above, the most significant statutes that protect individual rights are the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. These Acts are directly influenced by, and give domestic effect to, international instruments such as the ICCPR. In particular, the New Zealand Bill of Rights Act sets out the fundamental rights to which New Zealand citizens are entitled. This Act is not entrenched law. Unlike the equivalent charter in Canada, it cannot be used by the courts to strike down legislation, and its provisions can be amended by a simple majority in Parliament. However, wherever possible the courts are required to interpret legislation in a way that is consistent with the rights and freedoms contained in the Bill of Rights Act. In doing so, the courts are heavily dependent upon and regularly refer to international human rights jurisprudence.

oHowIn the context of the criminal law, the Act includes the right not to be subjected to torture or cruel, degrading or disproportionately severe punishment;[11] the right to be secure against unreasonable search and seizure;[12] the right not to be arbitrarily arrested or detained;[13] and the right to certain specified minimum standards of criminal procedure.[14] But the most important and detailed rights applying in the context of pre-trial detention are set out in section 23, which provides:

> *"Rights of persons arrested or detained*
>
> (1) Everyone who is arrested or who is detained under any enactment –
> - (a) Shall be informed at the time of the arrest or detention of the reason for it; and
> - (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
> - (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
>
> (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
>
> (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

10 See at: www.gg.govt.nz/role/constofnz.htm.
11 Section 9.
12 Section 21.
13 Section 22.
14 Section 25.

(4) Everyone who is –
(a) Arrested; or
(b) Detained under any enactment –
for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."

In addition, section 24 is relevant where the person is charged with an offence:

"Rights of persons charged
Everyone who is charged with an offence –

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and
(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
(c) Shall have the right to consult and instruct a lawyer; and
(d) Shall have the right to adequate time and facilities to prepare a defence; and
(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and
(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court."

Of particular note is section 24(b) conferring a right to be released pending trial unless there is a good reason for the person to be detained.

Some of these rights are reflected in the Corrections Act 2004, which is the statute governing the operation and management of the corrections system. For example, section 5(1)(a) of the Corrections Act 2004 states that the purpose of the corrections system in New Zealand is "to manage sentences and orders that are imposed by the courts in a safe, secure, humane, and effective manner." Section 6(1) of the Corrections Regulations 2005 also sets out the responsibilities of prison managers as being "the good management and the fair, safe, secure, orderly, and humane management and care of its prisoners."

All other human rights protections continue to apply to persons detained prior to trial.

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III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

III.1. INITIAL DETENTION IN POLICE CUSTODY

Apart from a few limited exceptions that allow short-term detention for specific purposes,[15] suspects may only be detained if they are arrested for an offence. Detention for the purposes of questioning is generally not permitted.

On arrest, suspects are immediately taken into police custody and transported to the police station. Most of those arrested are released on police bail[16] after they have been processed and charged with the offence and given a date and time (usually the next day) at which they must appear in court. However, the police (generally on the authorisation of the sergeant in charge of the police station to which the suspect is taken by the arresting officer) have the authority to detain them until their first court appearance. In this event, they must be taken before the court as soon as practicable. There is no specific maximum period of police custody. Generally, however, it is practicable to take a suspect to court within 24 hours, so that any period in excess of that would be unlawful. Occasionally (for example, in provincial areas during the weekend when courts are not sitting), it may be legitimate to hold a suspect in police custody for up to 48 hours.

III.2. RIGHTS OF THOSE ARRESTED FOR AN OFFENCE

As noted above, unless a person is detained for a specific purpose (such as detoxification) under a specific statutory power, he or she may be detained only if he or she is arrested. An arrest may generally only be made when the arresting officer has good cause to suspect that the person has committed an offence punishable by imprisonment.

When a person is arrested, section 316 (1)-(3) of the Crimes Act 1961 sets out the information to which the person is entitled. This provides as follows:

> "(1) It is the duty of every one arresting any other person to inform the person he is arresting, at the time of the arrest, of the act or omission for which the person is being arrested, unless it is impracticable to do so, or unless the reason for the arrest is obvious in the circumstances. The act or omission need not be stated in

[15] For example, intoxicated persons may be detained by the police for up to 24 hours so that they can sober up, and persons may be required by the Director of the Serious Fraud Office to attend an interview and answer questions in relation to a specific offence.

[16] Provision for police bail is contained in sections 21–26 of the Bail Act 2000.

technical or precise language, and may be stated in any words sufficient to give that person notice of the true reason for his arrest.

(2) It is the duty of every one who arrests any other person pursuant to any process or warrant –
- (a) if he has the process or warrant in his possession at the time of the arrest, to produce it if required by that person to do so:
- (b) if he does not have the process or warrant in his possession at the time of the arrest, to show it to the arrested person as soon as practicable after the arrest, if that person so requires.

(3) Where under any enactment any person other than a constable has, by virtue of his office, a power of arrest without warrant, he shall, whenever he arrests any other person pursuant to that power, –
- (a) if he has evidence of his appointment to that office in his possession at the time of the arrest, produce it if required by that person to do so:
- (b) if he does not have evidence of his appointment in his possession at the time of the arrest, show it to the arrested person as soon as practicable after the arrest, if that person so requires."

These provisions are reinforced in more general terms by section 23 of the New Zealand Bill of Rights Act 1990. Subsection (1)(a) requires that anyone who is arrested or is detained under any enactment must be informed at the time of the arrest or detention of the reason for it. Subsection (1)(b) provides that he or she has the right to consult and instruct a lawyer without delay and to be informed of that right. Subsections (2) and (3) provide that anyone who is arrested for an offence has the right to be charged promptly and brought as soon as possible before the court, or released.

In practice, the right to consult and instruct a lawyer is given effect through the Police Detention Legal Assistance Scheme, under which publicly funded lawyers are rostered to provide legal advice to arrested persons in police custody.

The courts have held that the requirement to provide reasons for arrest and access to legal advice will only be satisfied if the information is provided to the suspect in a form that he or she can understand. It follows that, where the person's knowledge of English is limited or non-existent, he or she must be provided with an interpreter so that he or she can understand the information that is given.

III.3. PRE-TRIAL DETENTION BY ORDER OF THE COURT

After suspects make their first appearance in court, a decision to hold them in pre-trial detention can only be made by order of the court. This is known as a "remand in custody".

The defendant will be remanded in custody by the judicial officer presiding over the court. Generally this will be either a professional judge or a lay justice of

the peace or community magistrate. However, sometimes the court will be presided over by the Registrar, who is the administrative officer responsible for the operation of the court. In this event, the Registrar may remand the defendant in custody only with his or her consent. If the defendant does not give that consent or withdraws it at any time, he or she must be brought before a court presided over by a judicial officer at the earliest opportunity for the matter to be reconsidered.[17]

The defendant will generally appear in person before the court that is responsible for making the remand decision. However, legislation called the Courts (Remote Participation) Act 2010 was enacted in 2010. This enables the defendant to appear by way of audio-visual link to the court so that he or she does not always need to be brought to the court in person.

Those on remand in pre-trial detention fall into three categories: those who have not yet pleaded to the charge because they have not yet arranged legal representation or received particulars from the prosecution as to the nature of the alleged offending; those who have pleaded not guilty and are awaiting trial; and those who have pleaded guilty and are awaiting sentence.

III.4. RIGHTS OF THOSE APPEARING IN COURT

If an arrested person is charged with an imprisonable offence and does not have adequate means to obtain private legal representation, he or she is entitled to obtain legal aid (funded by the State). This is reinforced by a provision in section 30 of the Sentencing Act 2002 that no court may impose a sentence of imprisonment on an offender who has not been legally represented at the stage of proceedings at which the offender was at risk of conviction, unless the offender was informed of his or her rights relating to legal representation, fully understood and had an opportunity to exercise them, and refused or failed to do so.

III.5. CRITERIA JUSTIFYING PRE-TRIAL DETENTION / BAIL

The rules relating to remands in custody and on bail are codified in the Bail Act 2000. The nature of "bail" is discussed further in Section V below.

A defendant may be remanded in custody if:

- the offence with which he or she is charged is not "bailable as of right"; and
- the court is satisfied that there is just cause for continued detention.

[17] Section 46 Summary Proceedings Act 1957.

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A defendant is generally bailable as of right if:

a. the offence is punishable by less than 3 years imprisonment, unless the offence relates to assault on a child, assault by a male on a female or contravention of a protection order under the Domestic Violence Act; or
b. it is one of the following offences:
   - false statements or declarations
   - a failure to provide the necessaries of life
   - a failure of a parent or guardian to provide necessaries
   - a failure by an employer to provide necessaries to an employee
   - abandoning a child under 6
   - injuring by an unlawful act
   - setting traps.

However, if the defendant is charged with an offence punishable by imprisonment and has previously been convicted of an offence punishable by imprisonment, he or she will not be bailable as of right. At a minimum, therefore, no defendant may be remanded in custody unless he or she has been charged with an offence that may result in a sentence of imprisonment.

As noted above, where the offence is not bailable as of right, the court may only remand the defendant in custody if the court is satisfied that there is just cause for continued detention. The word "satisfied" does not require any particular threshold or minimum level of suspicion. It is sufficient for the court to reach a view on reasonable grounds.[18]

In considering whether there is just cause for continued detention, the Bail Act 2000 requires the court to take into account whether there is a risk that the defendant may fail to appear at his or her next appearance, or may interfere with witnesses or evidence, or may offend while on bail. The court must also take into account any other matter that would make it unjust to detain the defendant – for example, the impact of detention on a defendant who needs to be kept in solitary confinement for his or her own safety, or the impact of a refusal of bail on others such as family members.

In assessing whether there is a risk of the type specified above, the court may take into account the following factors: the nature and seriousness of the offence; the strength of the evidence and the probability of conviction; the likely sentence if the defendant is convicted; the character and past conduct of the defendant; whether he or she has a history of offending on bail or breaching court orders; the likely length of time before the matter comes to trial; and the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody. However, unlike in an inquisitorial system, the judge will generally have little or no information about the strength of the evidence against

[18] See *R v Leitch* [1998] 1 NZLR 420.

the defendant in making a decision whether or not to remand in custody, at least in the early stages of court proceedings. The primary considerations, therefore, are the nature and seriousness of the alleged offence, the defendant's previous criminal record and any history of failing to appear in court when required.

Where the offence with which the defendant is charged is against the Domestic Violence Act, the court's paramount consideration in deciding whether or not to grant bail is the need to protect the victim of the alleged offence.

When the defendant is awaiting sentence after conviction, the rules are more restrictive: section 13 of the Bail Act 2000 provides that the court must not grant bail unless satisfied on the balance of probabilities that it would be in the interests of justice to do so. In determining what is in the interests of justice, the court is to take into account whether the defendant is likely to receive a prison sentence; the likely length of time before sentence; and the personal circumstances of the defendant and the defendant's immediate family. The onus is on the defendant to show cause why bail should be granted.

There are also some other specific restrictions that limit the grant of bail or the Court that can grant it:

– bail for offences of treason or espionage may only be granted by a High Court judge;
– bail for drug dealing offences may only be granted by a High Court judge or, if the defendant has no previous convictions for such an offence, by a District Court judge;
– defendants charged with a specified serious violent or sexual offence who are have a previous conviction for a specified offence must be remanded in custody unless they satisfy a High Court judge or District Court judge on the balance of probabilities that they will not commit any offence involving violence or danger to public safety while on bail;
– no such defendant may be granted bail at all while awaiting sentence after conviction;
– defendants with 14 or more previous sentences of imprisonment and with a history of offending while on bail must be remanded in custody unless they satisfy a High Court judge or District Court judge on the balance of probabilities that they will not commit any offence involving violence, danger to public safety while on bail, burglary or other serious property offence.

There is a presumption against the remand in custody of defendants under the age of 20 years.

Most of the restrictions on bail listed above have been made in the last 10 years. Some of them were inserted into bail laws for the first time when the Bail Act (the statute governing the remand in custody or on bail of those awaiting trial or

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sentence) was enacted in 2000. Although that Act to a large extent codified previous law that was laid down by the courts, it imposed some restrictions on the granting of bail that did not previously exist. Other restrictions have been inserted by way of amendment since that time. As a result, bail has become harder to get. Moreover, at the time of writing the government has just released a further discussion paper[19] recommending yet more restrictions on the extent to which defendants may be released on bail. One of the proposals in that discussion paper is to remove the presumption against the remand in custody of defendants under the age of 20 years. The progressive tightening of the bail laws has arisen from political and public concern about further offending committed by defendants awaiting trial. But the result has been a growth in the proportion of the prison population comprising remand prisoners (as noted below). Arguably it has also led to an unduly risk averse approach to defendants who are presumptively denied bail because of the characteristics of the group to which they belong rather than an individualised risk assessment, who have not yet been found guilty of an offence and who are entitled to the presumption of innocence.

III.6. RIGHTS OF REVIEW

Where a defendant is refused bail and remanded in custody, or is remanded on bail with conditions, he or she may appeal against that decision as of right.[20] If the appeal is dismissed, the defendant has no further right of appeal except on a point of law. However, if the defendant has a change of circumstances or is able to present new evidence, he or she may reapply for bail at any time,[21] and then has a further right of appeal if that application is dismissed.

An appeal is conducted by way of a re-hearing and therefore a reconsideration of the issues considered by the judge at first instance. However, the appellant must show that the judge at first instance applied the wrong principles, or considered irrelevant matters (or failed to consider relevant ones) or that the decision was plainly wrong.

The defendant can bring an application for habeas corpus if he or she has been wrongly detained in custody. However, this is not a substitute for appeal. It would be the appropriate remedy, for example, when the defendant is not challenging the validity of the decision but is alleging that he or she is the wrong person. Habeas corpus applications may be brought at any time, but section 15 of the Habeas Corpus Act 2001 prohibits repeated applications if there are no new circumstances.

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[19] Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System*, Wellington, 2010.

[20] Sections 41 and 66 of the Bail Act 2000.

[21] See *R v Goldberg* 13/2/04, CA446/03; *R v Voong* 5/12/07, Asher J, HC Auckland CRI-2006–004–26227.

In the absence of any reapplication or appeal by a defendant who is remanded in custody, he or she is held in custody until the next scheduled court appearance, at which time the order will be reviewed. Apart from this, there is no requirement for regular review by the Court.

III.7. THE SIZE OF THE REMAND PRISON POPULATION

By comparison with other Western countries, New Zealand has a very high prison population. As at September 2010, the overall prison population per 100,000 of the total population stood at 199, an increase of nearly 60% since 2002. Remand prisoners have made a disproportionate contribution to the substantial rise in the prison population over the last 10 years: the proportion of the prison population comprising remand prisoners has significantly increased from 13.1% in June 1999 to 22.9% in June 2009. As at 15 November 2009, there were 8,446 prisoners in the custody of the Department of Corrections; of these, 6,633 (79%) were sentenced prisoners and 1,813 (21.47%) were on remand prior to conviction and/or sentencing.[22]

III.8. LENGTH OF TIME ON REMAND

There is no maximum period of pre-trial detention. Successive orders that defendants be held in custody may be made until such time as they are sentenced.

There has been some increase in the length of time that defendants spend on remand awaiting trial, driven by increasing court delays. A large scale project has been undertaken by the New Zealand Law Commission and the Ministry of Justice to streamline and simplify criminal processes so that the drivers of delay are removed or minimised. That has culminated in the introduction into Parliament of a Criminal Procedure (Reform and Modernisation) Bill in November 2010. It will be at least two years before that Bill is enacted and comes into force. In the meantime, the system will continue to be characterised by undue delay before cases are finally disposed of.

As at 13 June 2009, the average period of time prisoners spent remanded in custody prior to the imposition of sentence was 47 days. However, it is not uncommon for serious offenders to spend between one and two years in prison prior to sentence. Such lengthy periods on remand are problematic for two reasons. First, although time spent in custody prior to sentence is automatically deducted from any prison sentence imposed, that benefit is obviously not

[22] Statistics from the Ministry of Justice (personal communication) and from the Department of Corrections (see the Corrections website at: www.corrections.govt.nz/about-us/facts_and_statistics.html (last visited 1 July 2011)).

available to those who are acquitted or receive non-custodial sentences. Secondly, if offenders do receive a prison sentence from which the remand period can be deducted, the delay in bringing their case to trial may affect the fairness of proceedings: witnesses' memories may have faded, and the ability of the defendant to mount an effective defence accordingly compromised.

The fact that a defendant has spent a lengthy period on remand in custody has sometimes been regarded as a relevant factor in granting bail. For example, Courts have found custodial remand periods of 18 months and two years respectively to be excessive and have granted bail as a consequence.[23] They have also found that it would be wrong in principle to remand a defendant in custody for longer than the period of the likely prison sentence.[24] Moreover, if there is undue delay in bringing a case to trial, it is possible for the court to dismiss the prosecution on the grounds that there has been an abuse of process.[25] This has happened on isolated occasions in recent years. Thus, while it is arguable that the absence of clear limits on the time that a defendant can spend in pre-trial detention gives rise to the potential for injustice, there are some indirect safeguards and remedies in the event that remand time is in fact excessive.

The defendant's pre-trial detention status ends at the point of sentence, even if he or she lodges an appeal. However, in some cases a defendant who is sentenced to imprisonment and then appeals may be remanded on bail pending the determination of the appeal.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

IV.1. REMAND FACILITIES

Prisoners on remand are mostly housed in prison facilities. However, the Corrections Act 2004 allows the Department of Corrections to use police cells and court cells to house prisoners for limited periods of time. Although this has occasionally happened during periods of prison overcrowding, it is an objectionable practice, since such cells were not designed to house remand prisoners and do not meet the standards set down for their accommodation.

There is one dedicated prison that caters only for prisoners held on remand awaiting trial or sentence. Apart from that, prison facilities may cater for both remand and sentenced prisoners. However, remand prisoners are kept separate

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23 See *Harris v Police* 10/3/06, Frater J, HC Auckland CRI-2004–004–24934; *Yin v Police* 23/6/06, Potter J, HC Auckland CRI-2006–404–188.

24 See *B v Police (No 2)* [2000] 1 NZLR 31.

25 See *Martin v District Court at Tauranga* [1995] 2 NZLR 419.

from sentenced prisoners as far as practicable. Where it is not possible to accommodate remand prisoners in a separate identified unit, they are accommodated in the same unit as sentenced prisoners but are managed under a separate regime. Where the Prison Manager believes there are exceptional circumstances justifying the mixing of a particular remand prisoner with a sentenced prisoner, an application must be made to the General Manager Prison Services for written approval.

Although New Zealand legislation stipulates what facilities and features a prison cell must have, it does not stipulate minimum cell sizes. Cell standards used by the Department of Corrections are based on international best practice and, to date, have been 7.5m^2 for a single cell, 13m^2 for a (double) shared cell, and 12m^2 for a cell with wheelchair access. However, the Department of Corrections is currently reviewing cell standards as part of its plans to increase cell-sharing across the prison estate in order to relieve prison overcrowding.

Prisoners are kept in single cells wherever practicable. However, remand prisoners are placed in shared accommodation at some facilities when muster pressures require this. Furthermore, the Department has been increasing the number of double-bunked cells to manage the projected increase in prisoner muster in the next few years. As at the end of 2009, prisons had 9,131 beds, and 21% of these (or 1,918 beds) were in shared cells. By 2018, the Department will need around 9,811 beds to meet capacity, according to the 2009 forecast, 43% of which (4,218) will be in shared cells.

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IV.2. ARRANGEMENTS FOR PARTICULAR CATEGORIES OF REMAND PRISONER

There are specific arrangements for particular categories of remand prisoner.

First, the corrections regulations stipulate that all prisoners, including remand prisoners, who are youth (aged 17 years) or young adults (aged 18 or 19 years) and are assessed as being vulnerable, must be kept separate from adult prisoners as far as practicable. The only exception to this relates to young female remand prisoners. New Zealand has only a small population of female prisoners.[26] Because of this, young female remand prisoners are generally mixed with older prisoners in order to facilitate their proper management and minimise their isolation.

Secondly, all prisoners entering prisons are subject to a formal New Arrival Risk Assessment. Prisoners who are identified as being vulnerable because of age,

[26] On 30 September 2010, there were 558 female prisoners including those sentenced and held on remand – approximately 6.4% of the total prison population.

offence type and so on, are directed into segregated accommodation that is separate from the mainstream prison population. Prisoners who believe they are at risk from others may also request to be placed in segregated accommodation.

Prisoners who are identified as at risk of suicide or self-harm, either on their arrival or subsequently, are not placed in a shared cell but are placed in an at-risk cell. They are subject to regular physical observations (not by camera) at intervals that are not less than every 15 minutes until an at-risk management plan is developed. They may also have items removed from their possession (such as shoe laces etc.) to minimise the risk of self-harm. From 11 May 2009, remand prisoners' access to shaving razors was limited to limit the ability of prisoners to attempt suicide using razor blades. Prisoners who wish to use a razor for shaving will be supplied with a disposable safety razor by custodial staff who will monitor their issue and ensure the razor is returned and disposed of within one hour.

The at-risk management plan is developed by custodial staff and overseen by the manager of the prison Unit (called the "Unit Manager"), in consultation with appropriate personnel and support people including Health Services medical staff, cultural advisors and family. The plan will state the frequency of observations (or the decision to place the prisoner under continuous observation) and any other measures that should be taken, such as the removal of the prisoner's clothing (which could be used as a ligature) and the issuing of anti-suicide clothing. At some sites the decision to use anti-suicide clothing is dictated by the frequency of observation. For example, those on 15 minute or fewer observations may be placed in suicide gowns. Once an at-risk management plan has been developed it must be reviewed and signed by the Unit Manager (or his delegate) every 24 hours. Any decision to lengthen the amount of time between observations requires the Unit Manager's (or his or her delegate's) written authority.

All prisoners who are under the age of 17, or charged with murder or manslaughter, are automatically deemed to be at risk of self harm or suicide and are managed in accordance with this procedure. All non-English-speaking prisoners are deemed at risk until an interpreter is available to translate assessment documents and report accordingly.

Thirdly, where the Chief Executive is satisfied that a transgender prisoner has completed gender reassignment surgery, the Chief Executive must promptly ensure that the prisoner is placed in accommodation that accords with the prisoner's new gender.

Finally and more generally, when cells are to be shared there is now a process, introduced in 2009, to assess the suitability of prisoners being placed in shared cells. This is known as a Shared Accommodation Cell Risk Assessment (SACRA).

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The SACRA process supports staff allocating prisoners to shared accommodation by outlining a process to manage prisoners unsuitable to share accommodation and providing a readily accessible record about cell-sharing risks as a prisoner moves between wings and prisons. As far as practicable, a SACRA is conducted by custodial staff rostered in the unit or wing where the prisoner will be required to share a cell. The assessment process produces a matrix which is then cross-referenced against other prisoners to check compatibility prior to prisoner placement in a shared accommodation cell. The SACRA report and compatibility matrix does not replace staff judgement based on the information available at the time of assessment. If additional information becomes known to staff at a later date that may impact on the prisoner's placement, that placement would be immediately reviewed. If the prisoner is assessed as not suitable to be placed in shared accommodation, a 'Not to Double Bunk' (NTDB) alert must be entered on the Department's computerised prisoner management system.

IV.3. RIGHTS TO HUMANE TREATMENT

The right to humane treatment is contained in the New Zealand Bill of Rights Act 1990, the Corrections Act 2004 and Corrections Regulations 2005.

Section 23(5) of the New Zealand Bill of Rights Act 1990 stipulates that "everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."

Section 5(1)(a) of the Corrections Act 2004 sets out the purpose of the corrections system in New Zealand "to manage sentences and orders that are imposed by the courts in a safe, secure, humane, and effective manner."

Section 6(1) of the Corrections Regulations 2005 sets out the responsibilities of prison managers as being "the good management and the fair, safe, secure, orderly, and humane management and care of its prisoners."

Collectively, these provisions are designed to ensure that remand prisoners are managed in a fair, safe, secure, orderly, and humane manner and are treated in a way that acknowledges their particular legal status.

The enactment of the Corrections Act 2004 is perhaps the most important development in the clarification and enhancement of prisoner entitlements in the last 10 years. Prior to that time, the minimum entitlements of prisoners (such as cell standards, property entitlements, frequency of visits, and rights to telephone calls) were contained in regulations, which could be amended by way of an executive decision. However, since the enactment of the Corrections Act 2004, many of the minimum entitlements of prisoners are now contained in formal legislation which has made those entitlements more transparent and remedies for their breach more easily obtained. Those entitlements can now only be amended by an act of Parliament.

Prescribed rights and entitlements are given effect in a number of ways, as the following makes clear.

Information

Each prisoner is provided verbally and in writing, on reception or within 72 hours of being received, with accurate and timely information on the operation and rules of the prison and the entitlements of prisoners. Prisoners are informed in a way they can understand about their obligations, rights, privileges and access to services such as educational and health services within the prison. They are also told how they can go about making a complaint. They are not provided with much information more generally about social issues. However, a prison officer or Unit Manager is likely to provide information on request or refer prisoners to some other service within the prison for assistance, and as noted below prisoners are given a list of external agencies that they can contact for assistance and are given unrestricted access to a telephone for that purpose.

Each prisoner who is a citizen of another country is given, in writing, advice that they may inform a consular representative of their detention and may forward any correspondence to a representative without delay.

Staff orally instruct prisoners about each procedure before the procedure commences, to ensure that the prisoner understands each procedure. Induction information is provided to each prisoner in a way that is useful and can be easily understood. Staff are trained to carry out the induction programme. Each unit documents and displays its current rules and procedures in a way which is readily available to and understood by prisoners. A locally developed pamphlet to help prisoners understand the prison's rules and practices is available in several languages.

Access to sanitation

All remand prisoners in prison facilities have access to a sink and toilet in their cells. Prisoners who do not have a shower in their cell have daily access to a cell ablutions block where showers are available.

Regulation 64 of the Corrections Regulations 2005 allows prisoners who are suspected of concealing unauthorised items to be placed in a cell that does not have a toilet, running potable water, or a modesty screen. Unless the medical officer directs otherwise, the Manager must ensure that a registered health professional visits the prisoner concerned at least once per day. The medical officer must advise the Prison Manager in writing, as soon as he or she believes that there has ceased to be any justification for continuing to deny or restrict the opportunity of the prisoner to associate with other prisoners.

Right to wear own clothes

Remand prisoners awaiting either trial or sentence may wear their own clothing. However, the Prison Manager must require a prisoner to wear clothing and footwear provided by the prison if the prisoner's own clothing or footwear is generally insufficient or unfit for use, or insufficient or unfit for a specific activity or work in which the prisoner is engaged. Clothing (other than clothing that is issued for a specific activity or work) that is issued to a remand prisoner must be distinguishable from clothing that is issued to other prisoners. Remand prisoners are provided with facilities to launder their clothes. Unless a medical officer directs otherwise on the grounds of health, safety or cleanliness, the hairstyle and facial hairstyle of a remand prisoner awaiting trial or during trial may be cut or shaved only to the extent necessary to preserve the appearance of that prisoner as it was at the time of his or her admission to the prison.

Outside contact and visits

Section 73 of the Corrections Act 2004 entitles a prisoner to receive at least one private visit each week for a minimum duration of 30 minutes. Visiting arrangements are prescribed in Regulations 98–106 of the Corrections Regulations 2005. In practice, remand prisoners are allowed more frequent visits and the prison manager of a prison must ensure that visiting times for remand prisoners are as flexible as possible. In addition, section 74 of the Corrections Act 2004 permits a legal adviser to visit a prisoner at any time agreed to by the prison manager for the purpose of discussing the prisoner's legal affairs. If the manager does not agree to a particular time for a visit, he or she must nominate an alternative time that is reasonable in the circumstances. The interview between the prisoner and the legal adviser must be in private. More generally, the prison manager is expected to allow a visit by, and facilitate contact between, a remand prisoner and any adviser or assistant (other than another prisoner) helping the prisoner prepare his or her defence or plea. Visiting agencies are able to meet with remand prisoners by appointment without unreasonable delay.

Remand prisoners must be given access to a telephone, free of charge, at all reasonable times, for the purpose of communicating with their legal adviser, communicating with an official agency or arranging bail. Apart from that, section 77 of the Corrections Act 2004 entitles every prisoner to make at least one outgoing telephone call of up to 5 minutes' duration per week.

Section 76 of the Corrections Act 2004 permits a prisoner to send and receive as much mail is the prisoner wishes, subject to provisions that allow mail to be vetted and withheld in certain specified circumstances.

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Hours of unlock

Remand prisoners have the same hours of cell unlock as convicted prisoners. Hours vary between facilities because of factors such as the types of prisoner at the facility (and the possible need to separate these), muster pressures, and staffing levels. Legislation specifies that prisoners are entitled to at least one hour of unlock per day and, in practice, prisoners' hours of unlock greatly exceed this.

Availability of work or other productive activity

Section 66 of the Corrections Act 2004 states that any prisoner who is detained only because he or she is awaiting trial or on remand or who is detained under the Immigration Act 1987 may be employed under this section if he or she asks to be employed. However, a prison manager cannot direct these prisoners to work against their will. Where work is available it is provided for remand prisoners. However, because these prisoners are generally only in prison for short periods, the Department of Corrections generally prioritises longer-serving sentenced prisoners for employment opportunities. As a result, employment or other vocational training activities are not available to the extent that would be desirable, and not all prisoners who wish to be engaged in some activities are able to do so. In 2008–2009, 53% of the general prison muster were engaged in employment or vocational training activities, but a much smaller proportion of the remand population.

Access to services to meet physical health, mental health, safety and security needs

Section 49 of the Corrections Act 2004 dictates that every prisoner is assessed promptly after reception at a prison to identify any immediate physical or mental health, safety, or security needs, and that any needs identified by that assessment are addressed. This includes the New Arrival Risk Assessment, as discussed above, that is completed within 4 hours of the reception of all prisoners. The responses obtained during this assessment are cross-referenced with other information from the prisoner's file and the electronic information database of the Department of Corrections (called the "Integrated Offender Management System") to reconcile the responses given in the assessment with other information already available.

Section 75 of the Corrections Act 2004 stipulates that all prisoners, including remand prisoners, are "entitled to receive medical treatment that is reasonably necessary" and that "the standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public."

In the light of all the information available, an appropriate Risk Treatment Plan is developed, which may involve counselling, psychological/psychiatric evaluation and treatment and action to meet other immediate spiritual, cultural, religious, medical, mental health, special or personal needs.

Prisoners are observed by staff and by closed-circuit television cameras in communal areas. Those who are deemed to present a risk to others may be segregated from other more vulnerable prisoners. Similarly, prisoners who consider themselves to be at risk of harm from others are able to go voluntarily into units that are separate from mainstream prison areas. Where this occurs, so that the prisoner is denied the opportunity to associate with other prisoners, section 75 of the Corrections Act 2004 directs that the medical officer must be notified reasonably promptly by the prison manager.

Drugs

Remand prisoners who are drug addicts are given health treatment to manage their withdrawal symptoms. From December 2006, all prisoners with addictions who are on government-funded registered Methadone Maintenance Treatment (MMT) programmes at the time of imprisonment have been able to continue the treatment in prison. Previously, once they were imprisoned, most prisoners with addictions were required to gradually withdraw from the drug, often involuntarily. If they still needed the treatment on release they would have to rejoin a waiting list – and would often re-offend during this waiting period in their desperation to get drugs. Addicted prisoners maintained on methadone are less likely to re-offend on release, or try to obtain illegal drugs while in prison. Prisoners on MMT are also offered support to voluntarily withdraw from methadone while in prison.

Access to facilities to assist in litigation

Section 24 (d) of the New Zealand Bill of Rights Act 1990 enshrines a right for a person to have "adequate time and facilities to prepare a defence". That is given effect in Regulation 193 of the Corrections Regulations 2005, which applies to any prisoner who is appealing against conviction or sentence, is preparing his or her defence or plea in mitigation of sentence or is preparing for any process or proceeding under the Immigration Act. It requires the manager of the prison, as far as is reasonably practicable in the circumstances, to ensure that the prisoner is provided with adequate facilities to prepare for the case, to the extent that this is consistent with the maintenance of safety and security requirements.[27]

[27] For more detailed information, see the Corrections website (at: www.corrections.govt.nz/policy-and-legislation/ps-operations-manual.html (last visited 1 July 2011)).

Access to other assistance

The induction interview for all prisoners, including remand prisoners, identifies immediate issues relating to each prisoner's physical, social, cultural and accommodation needs and the needs of disabled prisoners. Where needs are identified, prisoners are given assistance or are provided with information on how to access assistance.

All prisoners, including remand prisoners, have access to the prison Chaplain, and to the PARS (Prisoners' Aid and Rehabilitation Society) workers. If any psychological issues are suspected or if a prisoner requests this, remand prisoners may be interviewed and assessed by a forensic psychologist.

All prisoners are also given unrestricted free access to the telephone numbers on the Global 0800 and 0508 list and there will be no time limit placed on these calls. The toll-free numbers for the following assistance agencies and services are provided to prisoners:

- 0800 JAIL SAFE[28]
- Australian Child Support Agency
- Career Services
- Child, Youth & Family Services (CYFS)
- Elections New Zealand
- Health and Disability Commission
- Health and Disability Commission Advocacy Service
- Human Rights Commission
- Inland Revenue Child Support
- Inland Revenue General Business
- Inland Revenue Return & Debt Collection
- Inspector of Corrections
- Ministry of Social Development (Work and Income)
- Ministry of Social Development Data Matching
- Office of the Ombudsmen
- Office of the Privacy Commissioner
- Open Polytechnic Free-phone
- Quitline
- StudyLink
- The Commissioner for Children
- The Police Complaints Authority
- Work and Income Debt Inquiries

[28] JAILSAFE is a Department-run toll-free number for prisoners, staff, and the public to provide any information about criminal behaviour, or any concerns about prisoners, anonymously to prison intelligence operatives.

IV.4. COMPLAINTS BY REMAND PRISONERS

Prisoners can make complaints about any breaches of pre-trial detention rights, or any other matters, to Unit staff, to an Inspector (who is employed by the Department of Corrections but is expected to act independently of the Department) or to the Ombudsman who is entirely independent. The complaints process is explained to all prisoners, including remand prisoners, within 24 hours of their arrival in the prison, and this information includes a description of the complaints system and the contact details of the Office of the Ombudsmen and the Inspector of Corrections. This information clearly indicates that a prisoner may make a complaint not only to the prison staff but to the Ombudsman or an Inspector of Corrections at any time (including after they have been released). Notices explaining the complaints process are prominently displayed on Unit notice boards and in other common prisoner areas. These notices provide information about how prisoners can obtain forms for making complaint requests for information, and the right for prisoners to request assistance, at any time, from Inspectors of Corrections or the Ombudsmen. Notices of future visits by an Inspector of Corrections or the Office of the Ombudsmen must be prominently displayed in each Unit at least 24 hours before the visit.

Once a complaint has been formally lodged with staff it is documented, entered on the Department's computerised prisoner management system, and monitored. Prisoners who have or appear to have a communication difficulty in English, or difficulties with oral or written communication, are given assistance (including an interpreter where necessary) to fill out any required documents and prepare and present their case.

Every effort is made to resolve any issues at the lowest possible level within the organisation and in a timeframe that reflects the urgency of the complaint. Staff dealing with prisoner complaints will attempt to resolve the complaint informally before it gets to the "written" (and therefore "formal") stage. This will typically involve the staff member talking to the prisoner and as a result of this discussion agreeing to undertake some action that will result in the complaint being resolved to the prisoner's satisfaction. However, if the complaint cannot be resolved or is not resolved to the prisoner's satisfaction, the prisoner is made aware of the "formal" complaints process. If prisoner concerns cannot be dealt with at one level, the matter is formally referred to the next level.

A prisoner may complain directly to an Inspector of Corrections, who is independent but is employed by the Department, or directly to the Office of the Ombudsmen. An Inspector of Corrections may at any time enter a prison and have access to all parts of the prison and to prisoners for the purpose of investigating a complaint. The Prison Manager must ensure that all reasonable steps are taken to facilitate interviews between an Inspector of Corrections and a

prisoner (*e.g.* make interview rooms available and ensure that prisoners are available to attend interviews).

While a breach of pre-trial detention rights will not be a relevant consideration at the trial for the offence in respect of which a prisoner has been detained, he or she can bring a court action for damages if his or her rights under the Bill of Rights Act have been breached.

Complaints of unlawful discrimination can also be determined through the complaints mechanism of the United Nations Human Rights Committee.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

If a person charged with an offence is not detained by way of a remand in custody, he or she is either "remanded at large" or "remanded on bail".[29] A "remand at large" means that the offender is freed without any conditions or obligations pending trial. In contrast, a "remand on bail" generally has a number of conditions attaching to it – for example, a requirement to regularly report to a police station, to reside at a specified address, not to associate with specified persons, to surrender passports etc.

Of those appearing before the court in 2008 for imprisonable offences, only 13% were remanded in custody at some stage in the proceedings and 87% were remanded at large or on bail with or without conditions. Thus pre-trial detention is the exception rather than the rule. The most common outcome when an offender appears in court before conviction is a remand on bail (although as already discussed this has become more restrictive in recent years so that the proportion remanded in custody has increased).

Since 2007 New Zealand has also been trialling the release on bail of offenders who would otherwise have been remanded in custody, with a condition that they be subject to electronically monitored home detention. Occasionally judges remand defendants on bail with a 24 hour curfew and a direction that the feasibility of electronic monitoring be explored. However, the more usual practice is that defendants are remanded in custody and are given the opportunity then to apply for electronically monitored bail. An assessment of their home environment is undertaken, which usually takes three weeks. If the court is satisfied on the basis of the assessment that they will not pose an undue risk, they are then released on bail with a condition of electronically monitored home detention at their next court appearance. About 40% of applications are granted. As at December 2010, the numbers on electronically monitored home detention are around 170, and average time spent subject to the order is about 165–170 days.

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[29] On procedural requirements regarding bail, see *supra* section III (under: Criteria justifying pre-trial detention / Bail).

The offender's status is reviewed at each court appearance. An offender who has been remanded in custody might be released on bail at some stage during the proceedings if the case is taking a long time to come to trial or the offender's circumstances have changed. Conversely, a defendant who has been remanded on bail might be remanded in custody if he or she is charged with committing a further offence while on bail or has breached a condition of bail.

There is a clear distinction between the verdict and sentence stage of proceedings in the New Zealand system. As a result, much of the information that is relevant only to sentence is not provided to the court until a conviction has been entered. In more serious cases, this necessitates that the proceedings be adjourned to enable the required information (including a pre-sentence report from a probation officer) to be collated and provided. It is more difficult for a defendant to obtain bail at this stage of the proceedings than it is before conviction. Indeed, section 13 of the Bail Act provides that the court must not grant bail pending sentence unless it is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so, with the onus being on the defendant to show cause why bail should be granted. If a substantial term of imprisonment is inevitable, bail will not normally be granted. Conversely, if a defendant is unlikely to receive a custodial sentence a remand in custody will rarely, if ever, be warranted. This is reinforced by section 13(4), which provides that if the defendant is unlikely to receive a sentence of imprisonment, this must count against the defendant being remanded in custody.

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VI. CONCLUSION

New Zealand has a closely regulated system of pre-trial detention. Those who are arrested for an offence and taken into police custody cannot be held by the police for questioning; they must be either released or charged and taken before the court as soon as practicable. The court may then order that they be held in pre-trial detention awaiting trial or be remanded at large or on bail. The decision of the court in that respect is governed by the detailed provisions of the Bail Act 2000. In broad terms, a defendant is bailable as of right if the offence with which he or she is charged is not punishable by imprisonment. Otherwise a remand in custody or on bail is at the discretion of the court, subject to the detailed presumptions and restrictions set out in the Bail Act.

Most offenders who appear in court on a charge and are awaiting trial or sentence are in fact remanded on bail or at large. Only a minority (around 13%) are remanded in custody at some stage of the proceedings before sentence. However, the size of that minority has increased in the last 10 years. That has been the result of the enactment of more restrictive bail laws, prompted by

political and public concerns about the commission of further offending by defendants who are allowed to remain in the community. As a consequence, the proportion of the prison population comprising remand prisoners has increased by about 75% in the last 10 years.

The rights and entitlements of those held in police custody or on pre-trial detention are governed by three pieces of legislation – the Bill of Rights Act 1991, the Human Rights Act 1993 and the Corrections Act 2004 – which have all been heavily influenced by the international human rights instruments that have been ratified by the New Zealand government and by international human rights jurisprudence. The Bill of Rights Act, in particular, is a key statute. While it is not entrenched law and does not enable courts to strike down legislation that is inconsistent with it, it prescribes the fundamental rights of New Zealand citizens; it is used by the courts to interpret the parameters of more specific statutory entitlements; and it gives rise to a claim of damages when it is breached.

The Corrections Act 2004 is also a significant development. It sets out in primary legislation a large number of minimum entitlements of prisoners that were previously contained in regulations set by the executive government. The system *is* therefore more transparent than previously and remedies for breaches of entitlements more readily obtained.

Despite these protections, the growth in the prison population (and particularly the remand population) over the last few years has placed increasing pressure on prison management and challenged its ability to ensure the preservation of basic rights and entitlements and access to the services that are required to ensure humane treatment. If the forecast of a further growth in the prison population materialises, the future will hold a greater challenge.

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PRE-TRIAL DETENTION IN NORWAY

Anne Li Ferguson, Agnes Inderhaug & Nils Erik Lie*

I. INTRODUCTION

This report discusses and analyses the legal situation in Norway concerning pre-trial detention. The impact and importance on the domestic situation of international conventions and instruments will be given special attention. The prison standards applying to pre-trial detainees as compared to prisoners serving sentences will also be analysed.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Norway has been a member of the United Nations (UN) since the foundation in 1946 and is also one of the 10 nations which established the Council of Europe in 1949. Norway is not a member of the European Union, but has adapted most of the legal framework of the Union through the EEA (European Economic Area), with Norway, Iceland and Liechtenstein as present members. Through this framework Norway is also a party to the Schengen treaty, and a party as well to several of the EU regulations concerning judicial and police matters.

Norway is also a contracting party to most of the important international human rights treaties and conventions. Of the relevant United Nations documents

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Norway ratified the *International Covenant on Civil and Political Rights* in 1972, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* in 1986, and the *Convention on the Rights of the Child* in 1991. Of the important Council of Europe documents Norway joined the *European Convention on Human Rights* (ECHR) in 1950 and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) in 1987.

An amendment in 1994 to the Norwegian Constitution of 1814 established an obligation for the authorities to respect and protect the human rights.[1] Under the 1981 Criminal Procedure Act of 22 May 1981, Article 4, the articles of the Code are subject to the limitations recognized in international law or following from treaties with other nations. The complex question of priority between domestic legislation and international treaties have been discussed in legal theory in Norway since the sixties – especially with respect to the ECHR. Since 1984 it has been accepted by the Supreme Court that Norwegian internal legislation should be interpreted in accordance with international law, although with the limitation that internal law should have priority in case of clear conflict.

In 1999 the situation was changed, due to the Parliament passing the Strengthening the Status of Human Rights in Norwegian Law Act,[2] incorporating the aforementioned central Conventions with Protocols – namely the ECHR, the UN Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child – as internal Norwegian law. The Act states explicitly that these Conventions shall have priority in case of conflict between convention and internal legislation. Thus it might be said that these Conventions have a sort of semi-constitutional status. They are directly enforceable under Norwegian law, and Norwegian citizens have a right to complain to the relevant international judicial bodies, namely the European Court of Human Rights or the UN Committee of Human Rights. In connection with the ratification of the various Conventions and treaties mentioned above, Norway has not made any reservations with regard to pre-trial detention.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

Norway has no separate Bill of Rights additional to the Constitution and the international treaties. However, several articles of the Constitution concern fundamental rights which otherwise would be addressed in a Bill of Rights. Article 96 expressly forbids torture and states that nobody can be sentenced unless according to the law or be punished without a sentence. Article 97 forbids

1 The Norwegian Constitution of 17 May 1814, Article 110 c.
2 Act of 21 May 1999, No. 30.

retroactive legislation. Article 99 states that nobody can be detained by the authorities unless according to law and following the procedure set out in the relevant legislation.

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

The Norwegian criminal procedural law system we recognizes arrest by police officers, police arrest for up to two days, and remand in detention, both awaiting the decision to prosecute or not, and awaiting trial (details are discussed *infra*).

Remand in custody and the execution of sentences are regulated by the Criminal Procedure Act and the Execution of Sentences Act of 18 May 2001, with relevant regulations and guidelines. If a sentence is appealed, imprisonment of the convicted person is called "remand in custody" until processing of the case has been concluded (and an unappealable final judgment is available).

The population of Norway is around 4.8 million, and in 2007, there were on average 88.2 inmates per 100,000 population. Around 20% of prison capacity is used for remand prisoners, and in 2008, there were 3181 new remand committals. The average time spent in custody is 67 days.[3]

III.1. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

The competence to decide the apprehension of a person lies with the prosecution authority (Criminal Procedure Act, Article 175). In Norway, the prosecution is independent of the Courts and the judiciary. At the top level we have an independent prosecution authority responsible for the serious cases. In addition the police lawyers and other senior police officers with a law degree represent the prosecution at a lower level. Requests to the Courts for detention will normally be made by the police lawyers.

Arrests of suspects can also be made on the spot by police officers, which is a very practical alternative, but in such cases the decision must be confirmed as soon as possible by a police officer with prosecutorial competence (Criminal Procedure Act, Article 176). There is no legislation concerning the period allowed to elapse between the arrest and the decision to place the apprehended person in police custody. If the prosecution wants to keep the arrested person in custody, they must, however, present a request for remand to the municipal Court, not later than the third day after the apprehension (Criminal Procedure

3 Norwegian Correctional Services Annual Statistics.

Act, Article 183). Only judges can make decisions concerning remand. It should be kept in mind that Norway does not have any "juges d'instruction" and no administrative Courts. All judges represent the ordinary Court system.

The police are also allowed to apprehend any person who is present at a place where a crime may have been committed, even if they are not suspected for a crime, but are not allowed to keep these persons in police custody for more than 4 hours.[4]

III.2. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS

Arrest and remand may be decided if there is probable cause for suspicion against the apprehended person. In practice this means that the prosecution officer handling the case and the Court must find it more than 50% probable that the apprehended person is guilty of the offence in question. Remand may be ordered in cases concerning offences with minimal a maximum penalty of more than 6 months' prison. In practice this includes all offences which are defined as crimes under the Norwegian Criminal Code of 22 May 1902, with amendments, but not the misdemeanours. If the Court considers pre-trial detention a disproportionate infringement – an assessment generally depending upon the seriousness of the crime in question and the personal circumstances of the suspect – it cannot be used. Neither can it be used if the relevant statute does not provide for prison penalty as an alternative.

If these general conditions are fulfilled, pre-trial custody may be ordered if:

a. there is reason to believe that the suspect will evade prosecution or the execution of a sentence,
b. there is an obvious risk that s/he will destroy evidence, or
c. if such custody is considered necessary to prevent him/her from committing new criminal acts with a maximum prison penalty of more than 6 months.

If the maximum sentence for the actual offence is more than 10 years' prison, or if there are circumstances present which considerably strengthen the suspicion against the arrested person, such as a confession, and a release must be considered to be against the public's sense of justice, the conditions under *a.* to *c.* do not apply. This alternative is mainly used in cases concerning premeditated homicide, serious rape or serious sexual misuse of children.

The person in question will always have the right to appear in person at the Court hearing on the remand question. In nearly all cases the suspects use that right. Generally they are also expected to appear, but waivers may be accepted by

[4] Police Act of 4 August, 1995, Article 8.

the Court if they have confessed or have other compelling reasons not to be present. As a general rule the hearings are public, but the doors may be closed under certain circumstances.

III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

If remand is decided, the Court shall always set a fixed time limit for the duration of the remand period. As a main rule this limit shall not exceed 4 weeks. It may be prolonged for 4 weeks at the time. The limit may be longer if it is evident from the circumstances in the case that a review after 4 weeks will be without any influence on the remand question. If the prosecution wants the remand period extended, they must present a request for an extension to the Court, explaining why an extension is necessary, and why the conditions for remand are still met.

A suspect on remand can always demand release. Such demands shall be brought promptly before the relevant Court, whose task it is to consider such demands, unless release is decided by the prosecution. Persons on remand shall be immediately released if the reasons for the remand are no longer present (Criminal Procedure Act Article 187a). There are no regulations concerning the question of how often such habeas corpus actions can be taken. Without any statistics it can nevertheless be said that habeas corpus proceedings during a remand period are instigated very sparingly. In practice the person in question usually waits for the next hearing on the extension of the remand period before s/he requests release.

Norwegian legislation does not provide any regulations on maximum time permitted for pre-trial detention. We have had a very few cases where circumstances have made it necessary to accept remand periods for up to three years. The guarantee against excessive remand periods lies in the prohibition of disproportionate infringement, mentioned above. If the remand period is considered too long by the Court – if, for instance, there is a real risk that the remand period will exceed the actual prison sentence – this guarantee will come into effect.

If a defendant on remand receives an unconditional prison sentence, the prosecution may keep him/her on remand for a period of 4 weeks without any decision from the Court (Criminal Procedure Act, Article 187). Continued pre-trial detention awaiting appeal may – on request from the prosecution – be decided by the Court after this period, if the general and special conditions for such detention are still present. Generally it may be said that they usually will be present when a person has been sentenced by the first instance Court.

All municipal Court decisions on remand can be appealed to the relevant Court of Appeal, where the decision will be based on the documents in the case, and appealed further to the Appeal Committee of the Supreme Court.

III.4. INFORMATION, LEGAL REPRESENTATION, INTERPRETER, INFORMING OTHERS

All persons apprehended shall be informed of the offence that they are suspected of having committed (Criminal Procedure Act, Article 177). The apprehended person has the right to a public defending attorney as soon as it is clear that s/he will not be released within 24 hours after the arrest. S/He also has the right to a public defender at the Court hearing where the question of pre-trial detention is decided, and as long as s/he is kept on remand (Criminal Procedure Act, Article 98).

The suspect has the right to a translator whenever s/he gives statements to the police and in Court hearings. Concerning documents, s/he has the right to translations of the indictment and of all Court decisions. As far as it is necessary to take care of his/her interest in the case, s/he also has the right to translation of the investigation documents. These translation costs shall be borne by the public (Prosecution Rules of 28 June 1985, Article 2–8).

Concerning information to friends, family et cetera, Norwegian legislation contains no regulations on this matter for the period between the arrest and the first Court hearing. It is up to the police to decide if they will let the defendant give such information at this time. Usually the defending attorney will inform the relatives. During the remand period the suspect is allowed to receive visits and communicate with the outside under the same regime as the convicted inmates (Execution of Sentences Act, Article 51), unless the Court has forbidden such communication or decided that all communication shall be supervised by the police. This topic is elaborated further in section IV *infra*.

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III.5. INTERNATIONAL INSTRUMENTS AND DECISIONS

In 2008 the Human Rights Committee (HRC) declared[5] in a case of a Norwegian convict, that summary rejections without grounds of appeals from convicted persons violated SP Art. 14 No. 5. Accordingly, the Supreme Court decided the same year[6] that such decisions should have grounds, even if the Criminal Procedure Act expressly stated that such grounds were not necessary.[7] The Act will within a short time be changed to the effect that such decisions shall have grounds, after an initiative from the Ministry of Justice.

Even if these decisions apply to all convicted persons (not only detainees), they illustrate the willingness of the Norwegian authorities and Courts to harmonise their understanding of Norwegian law to relevant international

[5] Communication No. 1542/2007.

[6] HR-2008–2175-S.

[7] Criminal Procedure Act Article 321 5th paragraph compared to Article 53.

instruments and decisions. Noteworthy is also that there is quite a quantity of decisions from the Norwegian Supreme Court where decisions from ECHR have played a decisive role in their interpretation of the law, but none, as far as the authors are aware of, which expressly concern detainees and their situation.

III.6. MOST IMPORTANT DEVELOPMENTS

Particularly two developments should be noted here. Both of these apply to all detainees.

The right to be brought promptly before a judge

Section 183 of the Criminal Procedure Act (mentioned above under item 5); which defines the time-limit for bringing an arrestee before a judge with a request for remand, was amended in 2002. The amendment entered into force on 1 July 2006. Before the mentioned amendment entered into force, an arrestee should be brought before a judge promptly and – as a main rule – the day after the arrest, but the time-limit was not absolute. As a result of the amendment, the arrestee must be brought before a judge promptly and – by the latest – the third day after the arrest. Hence, the amendment introduced a maximum 3 day-limit to be brought before a judge. The intention was to reduce the need for remand detention and, thus, reduce the total time arrestees spent in detention during criminal investigation.

The statistics that have been collected so far indicate that the number of persons in police custody for more than 48 hours (before they are brought before a judge) has increased. Furthermore, they indicate a reduction in the number of persons who spend less than 15 days in pre-trial detention. However, an increase in the number of pre-trial detentions lasting between 15 and 29 days seems to have occurred. This increase is more than twice the number of reductions in pre-trial detentions lasting less than 15 days, and this was not expected. The Ministry of Justice and the Police is currently in the process of evaluating whether the amendment has had the intended effect. Depending on the result of the said evaluation, the time-limit will either be maintained or suggested changed (*i.e.* made shorter). The Ministry endeavours to finish the evaluation within the end of 2010.

Duration of pre-trial detention

In recent years, the courts have imposed increasingly strict requirements for progress in investigations if extended detention on remand is to be approved. The law also instructs the court to pre-schedule the main hearing in cases where

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the accused remands in custody. These measures also contribute to the reduction of the pre-trial detention period.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

IV.1. FACILITIES

Norway has currently 3582 prison beds divided between 47 prisons. Many of the prisons are very small, and the prison structure is not well adapted to demographic factors. The Norwegian Correctional Services are organised in three levels: the national level (the central administration of the Norwegian Correctional Services/the Correctional Services of the Department of the Ministry of Police and Justice), the regional level and the local level. The local level is made up of the individual units, *i.e.* prisons and probation services. The prisons are generally divided into two security levels: prisons with a high security level (closed prison) and prisons with a lower security level (open prison) (see also *infra*).

Police custody

Persons detained by the police can for a short period be placed in a police detention cell, but they are to be transferred to prison at least two days after being detained, unless this is impossible for practical reasons.[8] The use of police custody in Norway has led to criticism, *i.e.* from the UN Committee against Torture (CAT).[9] This criticism has been based on the fact that the detainee is not always transferred from police custody to an ordinary prison cell within two days of his/her arrest. In 2008, a total of 21907 persons were placed in police detention. 1365 of these (6.23%) stayed for more than 48 hours in police custody.[10]

The main reason for the excessive time spent in police custody has been the lack of available cells for remands in ordinary prisons, but also the fact that vacant prison cells cannot always be found within a reasonable distance from the police district concerned. This is partly because Norwegian prisons have for several years had capacity problems, and partly because of demographic factors. In some parts of Norway, the considerable distances between the police

8 Regulations on the Use of Police Custody of 30 June 2006, No. 749, Article 3–1.

9 Norway's 5th Periodic Report to the UN Committee Against Torture (CAT/C/81/Add. 4).

10 The 6th Periodic Report of Norway to the Human Rights Committee (2009), p. 26, par. 123, *in fine*.

custodies, the ordinary prisons and the courts render it difficult to provide the necessary and timely transportation of the arrested person. However, the situation has been followed closely, and considerable work has been done to reduce the time spent in police custody, *i.e.* by elimination of the former so-called *prison queue* (sentenced persons waiting to serve their sentence; see *infra*).

Thus, the prisons are now able to accommodate persons in custody. Nevertheless, in order to assess the need for concrete measures, Norway has introduced an improved tool for recording statistics on the use of police custody. The situation will be followed closely, and if improvements cannot be measured, the Government will make sure that appropriate action is taken.[11]

Prison queue

Overcrowding in prisons, a phenomenon common in other countries, has not occurred in Norway as persons convicted of less serious crimes have had to wait for a prison place to become available. This has resulted in the so-called 'prison queue', an undesirable consequence – but seen as more humane and less damaging than overcrowding. Those forced to wait more than two months after their sentences have become legally binding, have been regarded as being 'in the queue'. Both the previous and present Governments have set the removal of the prison queue as a primary goal and have implemented specific targeted initiatives aimed at its reduction and total removal. These initiatives can be summed up as follows:

- Effective use of available prison places. A usage rate of 94% has been the goal and has been achieved to an acceptable degree. (Between 96% in 2003 and 93% in 2008.)
- The creation of new, permanent and temporary, prison places. Since 2006, 398 new prison places have been opened and a new prison with 251 places is due to open in the town of Halden in 2010.
- As a temporary measure, all prisoners have been considered for extra early release, on a sliding scale up to 20 days before the normal release date. In 2008 extra early release saved 43 000 prison days. This initiative has now been phased out.
- Doubling up. The placing of two inmates in a cell designated as a single person cell has been used to a limited degree, normally with the cooperation of the inmates concerned, and only in cells where an extra bed was seen as acceptable. Doubling up was the least desirable initiative and the first to be withdrawn as of April 2008.

[11] The 6th Periodic Report of Norway to the Human Rights Committee (2009), par. 125.

- Electronic monitoring (EM). Although the prison queue was not the main reason for implementing EM, it helped justify the investment necessary to start a pilot project.
- There are currently (on 1 October 2009) 47 prisons in Norway and 3582 prison places. On 30 June 2006 the prison queue reached a peak of 3380 persons. By 1 October 2009 the figure was down to 350. This downward trend is expected to continue but at a slower rate and will most likely level out a little above zero.

IV.2. CATEGORIES AND ACCOMMODATION

Special remand prisons

Norway does not have special remand prisons. Remand prisoners are therefore committed to prisons where convicted persons are serving their sentences. Some prisons have separate departments for remand prisoners, but most commonly remand prisoners are held in the same department as convicted persons. On this point, Norway does not observe the Recommendations of the European Prison Rules.[12] The justification for this is that due to the country's geography, its scattered population and the prison structure, establishing special remand prisons would be impractical.

Young and vulnerable detainees

Pre-trial detainees under the age of 18 are not always accommodated separately from those aged 18 and over in Norway. The age of criminal responsibility in Norway is 15 years.[13] Between the ages of 15 and 18, children are criminally responsible and subject to the ordinary provisions of criminal law, but with certain modifications due to their young age. Furthermore, they have special rights that must be protected even when they commit a crime. The Government's aim in regard of juveniles is that they pay the penalty of a crime in ways other than by serving a sentence in prison (e.g. restorative justice) to the extent possible.[14] Likewise, it is an aim to avoid juveniles being held in the same facilities as adult prisoners and those on remand in custody.

Norway has made a reservation regarding ICCPR Article 10, Paragraphs 2 b) and 3, regarding the obligation to keep young criminal offenders and convicted

12 Recommendation Rec.(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

13 The General Civil Penal Code with subsequent amendments, the latest made by Act of December 2005, No. 131, Section 46.

14 The 6th Periodic Report of Norway to the Human Rights Committee (2009), par. 154–155.

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persons separated from adult prisoners. The justification of the reservations made is twofold: Firstly, a guiding principle of the Norwegian Correctional Services is that a convicted person should serve his/her sentence in close proximity to his/her home.[15] Secondly, there are very few juveniles in Norwegian prisons (usually between five and ten individuals in all).[16] If the principle of juveniles' separation from the adult population is to be adhered to, along with the principle of proximity, the result would be to place the juveniles in almost total isolation. Such a solution is not considered to be in the child's best interest, and is therefore regarded as unsatisfactory.[17]

However, changes in this relation are being strived for. To avoid the occurrence of juveniles serving their sentences in prisons together with adults, Norway is presently establishing two separate prison units for young offenders, one of which is already operational.[18] These facilities will contain small flats providing accommodation for the offenders' families to spend time with them while they serve their sentence.[19] Moreover, the juveniles will, to a much greater extent than in normal prisons, be able to partake in the prison community. Multidisciplinary follow-up programs will also be provided upon release. There is reason to stress that by such actions, Norway does not wish to facilitate juvenile imprisonment to a greater extent than today.[20] The goal is, on the contrary, to be able to provide a better alternative than general imprisonment in those cases where the penalty of a crime cannot be paid in any other way than through service of a sentence in prison.[21]

There is no provision in Norwegian national law protecting especially vulnerable groups of pre-trial detainees explicitly. All prisons are, however, obliged to undertake measures to ensure that vulnerable groups do not experience offences of any kind.[22] In some prisons, sexual offenders are kept in separate departments. Prisoners may also apply for solitary confinement.[23] Prisoners belonging to vulnerable groups frequently utilise this opportunity to achieve separation from other prisoners.

Detention in maximum-security departments

The Execution of Sentences Act allows for keeping special groups in maximum-security departments.[24] Convicted persons and remand prisoners assumed to

15 Execution of Sentences Act Article 11–1.
16 Correctional Services Annual Statistics.
17 The 6th Periodic Report of Norway to the Human Rights Committee (2009), par. 151.
18 Unit for juvenile offenders, Bergen Prison.
19 White Paper No. 37 (2007–2008), item 11.6.2; cf. report NOU 2008:15 "Barn & straff".
20 Ibid.
21 The 6th Periodic Report of Norway to the Human Rights Committee (2009), par. 153 *in fine*.
22 See *inter alia* Sections 2, 37, 38 and 46 of the Execution of Sentences Act.
23 Guidelines to the Execution of Sentences Act, item 3.40.
24 Execution of Sentences Act, Section 11(2).

represent a particularly high escape risk, a risk of actions from the outside to assist in escaping, a risk of hostage-taking or a risk of new, particularly serious crime, may be committed to such departments. The assessment criteria for such committal are to include:

– Affiliation to organised, criminal groups, terrorists, extreme political and religious groups
– Police information and other information about inmates received by the central administration of the Correctional Services
– The type of offence, the length of the sentence and previous prison conduct, such as new, serious criminal acts

In connection with decisions on the correct security level, and to assist in the assessment of whether the requirements for committal to a maximum security department are present, an information system has been established between the police and the prison administration (INFOFLYT). This may include information that has emerged in the course of police investigations and intelligence about specific prisoners and other persons.

The regional level of the correctional services decides whether the requirements for committal to a maximum-security department have been met.[25] A decision on committal can be of six months' duration at a time.[26] The regional level also takes decisions on continued stay, transfer to another maximum-security department and transfer to a high-security prison or department.[27]

Committal to a maximum-security department is very rare, and only one prison has such a department in operation.[28] Due to the risk of isolation injury, restricted participation in joint activities and the need to be able to offer other measures, the correctional services prefer to spread prisoners in this target group to ordinary departments in several prisons.

Accommodation for remand prisoners

Remand prisoners are accommodated in the same type of cells as convicted prisoners. The correctional services have not laid down any particular requirements for the size of each cell. The size differs therefore in the various prisons, but all cells are within the health authorities' requirements for air quantity, et cetera. Since 1990, four new large closed prisons have been built[29]

25 Regulations to the Execution of Sentences Act, Section 6–1(1).
26 Regulations to the Execution of Sentences Act, Section 6–1(2).
27 Regulations to the Execution of Sentences Act, Section 6–1(1).
28 Ringerike Prison.
29 Bergen, Skien, Ringerike, and Halden prisons.

and others have been modernised. These prisons have cells that are of around 11 sq. m., including a separate bath and toilet. In some older prisons, the smallest cells are of around 6.5 sq. m.

As a rule, each inmate is to have his/her own room. Remand prisoners are primarily committed to high-security prisons where 95% of all prisoners have a single room.[30] Moreover, for investigation purposes and due to court restrictions, all remand prisoners have in practice single cells. Remand prisoners cannot without their own consent be ordered to share rooms with others unless indicated by health conditions or for considerations of space.[31]

IV.3. INFORMATION

On being received in prison, remand prisoners are to be given information about the prison, the routines and the regulations that are in force and the rights they have under the Execution of Sentences Act. As soon as possible after committal, the remand prisoner must be given an opportunity for a talk with one of the prison employees, for example to discuss problems following from the arrest/imprisonment and to try to solve any such problem or to communicate information to the proper authority. On request and if needed, prison employees must help remand prisoners write letters to his/her defence counsel, the prosecuting authority or the judge, and also help them lodge any complaint with a superior authority.[32] In all prisons, each prisoner is to be offered a "contact officer" from among the staff, and this person will have special responsibility for contacts with and follow-up of the prisoner.[33]

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IV.4. RIGHTS TO HUMANE TREATMENT

As explained supra in section II, to strengthen the status of human rights in Norwegian law, the Parliament passed the Human Rights Act[34] in 1999, thereby incorporating the ECHR, ICESR, ICCPR, CRC and CEDAW into Norwegian law. In the event of conflict, the provisions of the conventions incorporated through the Human Rights Act prevail over other Norwegian legislation.[35] International law obligations to treat all persons under any form of detention in

30 Norwegian Correctional Services Annual Statistics.

31 Execution of Sentences Act, Article 47(3).

32 Guidelines to the Execution of Sentences Act, item 4.1 a).

33 Correctional Services (KSF), Directive No. 02/2002.

34 The Strengthening of the Status of Human Rights in Norwegian Law Act of 21 May 1999, No. 30.

35 The Strengthening of the Status of Human Rights in Norwegian Law Act of 21 May 1999, No. 30, Section 3.

a humane manner and with respect for the inherent dignity of the human person do thus apply in Norway.

Personal hygiene

As a principal rule, pre-trial detainees can access sanitary installations and have a bath or shower when needed.[36] All new and modernised prisons are to have cells with a separate toilet and shower. Some prisons only have a toilet in the cell, but many prisons have common bathrooms and toilets in the prison corridor. Where remand prisoners are placed in cells without a separate toilet and shower, an officer has to let them out of the cell and into the common toilet and bathroom.

Private clothes or prison uniform?

Remand prisoners are allowed to use their own clothes. If an inmate does not have suitable clothing, the prison must ensure that s/he is provided with this. Clothing liable to create fear or contempt among other prisoners, such as clothes with Nazi, MC or Satanist symbols, may not be used.[37]

IV.5. CONTACT WITH THE OUTSIDE WORLD

The court may, to the extent indicated by due consideration for the investigation of the case, by order decide that the person in custody is not to receive visits or send or receive letters or other consignments, or that visits or exchange of letters may only take place under police control.[38] This does not apply to correspondence with and visits from any public authority unless expressly provided in the order.[39] The court may also decide that persons in custody are not to have access to newspapers or broadcasts, or that s/he is to be excluded from the company of other specified prisoners or of all of them.[40] Remand prisoners who are not subject to restrictions can receive visits on a par with convicted persons.[41] Special time-limits apply to the duration of each period of isolation.[42] Of all discontinued remand cases in 2008 (3344), restrictions were imposed on 16% (1086 cases in all). 423 prisoners on remand were subjected to

[36] Guidelines to the Execution of Sentences Act.
[37] Guidelines to the Execution of Sentences Act, item 3.24.
[38] Act relating to legal procedure in criminal cases [The Criminal Procedure Act] With subsequent amendments, the latest made by Act of 30 June 2006 Section 186(2), first Clause.
[39] The Criminal Procedure Act, Section 186(2), 2nd Clause.
[40] The Criminal Procedure Act, Section 186(2), 3rd Clause.
[41] The Criminal Procedure Act, Section 186(5).
[42] The Criminal Procedure Act, Section 187.

total isolation; a further 86 cases concerned partial isolation and in 95 cases, a ban on visits was imposed. In the first nine months of 2009, no one has been subjected to total isolation for more than 90 days and only one person between 60 and 89 days.[43]

IV.6. DAY-PROGRAM OF PRE-TRIAL DETAINEES

Prisoners should as far as possible be allowed out in the open air every day (at least one hour).[44] Where feasible, prisoners may be allowed extended stays outdoors. Remand prisoners who have not been subjected to restrictions can also as far as practicable take part in work, training, programmes or other measures.

The objective is that 80% of remand prisoners are to be offered activities.[45] This is a performance target that units and regions have to attain and that is reported to the central administration of the correctional services on a quarterly basis. Some prisons offer cell work also for those who are subject to restrictions. However, many Norwegian prisons do not have suitable employment measures for all prisoners. In practice therefore, the extent to which remand prisoners are offered work will vary.

Tuition in primary, secondary and upper secondary education, as well as theoretical and practical courses, are provided in all prisons. During 2010, prisoners who are studying will get limited access to the Internet.[46] This to ensure that the education offered is in accordance with the prevailing public curriculum framework.

IV.7. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Violence and suicides

Joint activities in high-security prisons must be under constant supervision and control, and as a rule, at least one employee must be present. Technical monitoring equipment may also be used.[47] Joint activities can be restricted in the interests of peace, order and security or if it is in the interest of the prisoners themselves or other prisoners.[48]

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43 Norwegian Correctional Services Annual Statistics.
44 Guidelines to the Execution of Sentence Act, item 3.20.
45 Target goals set by the Ministry of Justice.
46 Correctional Services Directive 5/2009.
47 Guidelines to the Execution of Sentence Act, item 3.28.
48 Execution of Sentence Act, Section 37.

From 1956 to 1991, 3 of 4 suicides in prison were committed during the period of remand. This trend continued during the 1990s (19 of 27).[49] A handbook on suicide prevention has been prepared, which is used in the training of prison officers and other employees in the correctional services.[50] This handbook explains how to deal with persons with a high risk of committing suicide. To prevent self-inflicted injury and suicide, the signals prison employees receive in their daily contacts and dialogues with prisoners are important to find out whether prisoners have health problems and to identify those in need of mental health care. If a risk of suicide is found to be present, the staff will see to the prisoner at short intervals and in special cases constantly.

Health care

Prisoners have the same patient rights as the population in general, limited by security restrictions only.[51] Prison employees are to arrange for contact between prisoners and the health service if requested by the prisoner and must at their own initiative arrange for such contact if there are any indications that a prisoner is ill.[52] Health services are provided by the municipal health service where the prison is located and correspond to the health services offered to society in general. Remand prisoners are in principle also entitled to use their own doctor and dentist if reasonable grounds for this are present. Medicines must be prescribed in consultation with the prison health service.[53]

There are different types of programmes for prisoners, such as teaching, skills training and/or structured talks. The treatment of addiction to intoxicating substances can form part of such programmes. Remand prisoners will as far as practicable be offered participation in such programmes should there be a need for this and if it is within the scope of the remand order. The correctional services cannot order remand prisoners to participate in such activities.[54]

In collaboration with other governmental agencies, the correctional services must ensure that convicted persons and remand prisoners receive the services they are entitled to under current legislation.[55] As mentioned above, all prisoners will get a contact officer with special responsibility for having contact with and following up the prisoner. Many prisons have their own social welfare officers. Remand prisoners are offered specialist health services through the

49 Hammerlin, Yngve, *Selvmord i norske fengsler Del 2(Suicide in Norwegian Prisons, Part Two),* Suicidologi 2000, Årg. 5, nr. 1.

50 Hammerlin, Yngve, *Selvmord og selvmordsnærhet norske fengsler,* KRUS Håndbok Nr. 3, 2009.

51 Specialist Health Services Act (Act of 2 July 1999, No. 61), Section 2–1a.

52 Regulations to the Execution of Sentences Act, Section 3–16(1), first Clause.

53 Execution of Sentences Act, Section 51.

54 Regulations to the Execution of Sentences Act, Section 1–4(2).

55 Execution of Sentences Act, Section 4.

prison health service. In special cases, remand prisoners' right to use their own doctor and dentist can be extended to include other health personnel, for example a psychologist.[56]

Special measures are taken by the health and justice authorities in order to meet certain health challenges among prisoners. Some examples are:

- During the years from 2007 to 2010, a total of 12 units for coping with substance abuse were established in Norwegian prisons
- The opportunity to serve a sentence in health-care institutions providing treatment for drug abuse and mental illness will be further strengthened.[57]

If a prisoner is partly or completely excluded from company, notification must be given to a doctor without undue delay.[58] The doctor must see to the prisoner as soon as possible if there is information to suggest that s/he is ill or otherwise in need of medical treatment. Health personnel must notify the prison management if the prisoner's physical or mental health condition indicates modifications of any measure taken or the implementation of alternative action.[59]

As far as possible, a medical opinion must be obtained before using a restraining bed or a security cell.[60] A doctor must otherwise be notified as soon as possible to consider what further action to take.[61] Remand prisoners transferred to a maximum-security department must receive regular medical attention.[62]

IV.8. PRISON STAFF TRAINING

There are no special training programmes for officers who are to work with remand prisoners. Norway does not have separate remand prisons, and all prison officers working in high-security prisons will come into contact with remand prisoners. The prison officer training programme is of two years and includes information about the special needs of remand prisoners.[63]

56 Guidelines to the Execution of Sentences Act, item 4.6.
57 This is being done by facilitating better information to prisoners regarding this opportunity; as well as assisting prisoners in writing applications.
58 Execution of Sentences Act, Section 37(6), 2nd clause.
59 Guidelines to the Execution of Sentences Act, item 3.40.
60 Execution of Sentences Act, Section 38(2), 3rd clause.
61 Guidelines to the Execution of Sentences Act, item 3.41.
62 Regulations to the Execution of Sentences Act, Section 6–7.
63 Correctional Staff Academy (KRUS) – Syllabus 2010.

IV.9. COMPLAINTS BY PRE-TRIAL DETAINEES

Remand prisoners can lodge complaints against prison conditions and the decisions made there. When a prisoner lodges a complaint, the rules of procedure of the Public Administration Act[64] apply with a few exceptions. The complaint must first be made to the prison where the remand prisoner is being held. An appeal against this decision can be submitted to the regional level.[65]

Prisoners can also submit a complaint to the Parliamentary Ombudsman.[66] The Parliamentary Ombudsman may point out that an error has been made or that negligence has been shown, but s/he cannot alter the facts in issue.[67]

In addition, each region is to have a supervisory council that is to exercise supervision of prisons in the region, pursuant to further rules.[68] The supervisory council is entitled to talk with prisoners without staff present if they request this.[69]

A breach of rights during remand in custody can be raised at an extended remand hearing. The judge will then be able to enter in the court records that the conditions for the prisoner are to be improved. In the main hearing, a convicted person can also raise questions concerning service of the prison sentence, though this cannot entail any further deductions for time spent on remand. The judge can independently, however, use difficult serving conditions as an aspect in the sentencing.

IV.10. INTERNATIONAL INSTRUMENTS AND DECISIONS

Norwegian national law and practice have been, and still are, influenced by international law in various ways. Ratification and incorporation of international conventions is one example. Amendment of national law due to international decisions, *e.g.* from the European Court of Human Rights is another. As afore-mentioned, criticism from regional and international monitoring agencies, such European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN Committee against torture (CAT), or in connection with periodic reports to UN agencies, might also cause direct influence in this regard. Below, some of the most important developments within

64 Act of 10 February 1967 relating to procedure in cases concerning the public administration as subsequently amended, most recently by Act of 1 August 2003, No. 86.

65 Guidelines to the forms of procedures pursuant to the Public Administration Act and the Execution of Sentences Act Section 7 of 12 January 2001, item 5.1, Cf. the Public Administration Act, Section 28.

66 Act of 22 June 1962, No. 8.

67 Act relating to the Parliamentary Ombudsman for the Public Administration, Section 10.

68 Execution of Sentences Act, Section 9.

69 Regulations to the Execution of Sentences Act, Section 2–3(2).

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the legal framework for pre-trial detention will be examined and most of them are, if not caused by, at least influenced by, international law.

IV.11. MOST IMPORTANT DEVELOPMENTS

The legal framework for pre-trial detention has been substantially amended in recent years. Some of the most important developments will be referred to in the following. On 1 October 2002, several amendments regarding pre-trial detention entered into force. These include the following.

Solitary pre-trial confinement

The Criminal Procedure Act entered into force on 1 October 2002. Section 186a of the Act clearly states that longer periods of isolation can only be imposed in exceptional cases, and only where serious crimes are involved.[70] Simultaneously, the Execution of Sentences Act, Section 46, was amended. This provision states that the Correctional Service shall give priority to initiatives aimed at reducing the negative effects of isolation.[71]

A maximum limit to the duration of solitary confinement for remand prisoners was considered during discussions on the amendments to the Criminal Procedure Act. The Ministry of Justice and the Police found that longer periods of isolation could be necessary in exceptional cases, and therefore chose not to impose an absolute maximum limit. The Norwegian Parliament endorsed this view. Longer periods of isolation are particularly likely in cases involving transnational crime, or cases otherwise involving investigation abroad, where there is a danger of interference with evidence.

Pursuant to the Criminal Procedure Act, Section 186(2), the "order shall state the manner in which the investigation will be impaired if the person remanded in custody is not subject to the prohibition or control specified there. It shall also appear from the order that use of the prohibition or control is not a disproportionate intervention".

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70 The court shall set a specific time-limit for the isolation. The time-limit shall be as short as possible and must not exceed two weeks. It may be extended by court order by not more than two weeks at a time (or four weeks; under specific circumstances). The person remanded in custody may not be kept isolated for a continuous period of time exceeding six weeks when the charge relates to a criminal act punishable by imprisonment for a term not exceeding six years, and 12 weeks when the charge relates to a criminal act punishable by imprisonment for a term exceeding six years.

71 Cf. Regulations to the Execution of Sentences Act, Section, Section 4–1.

Deduction for time spent in custody in isolation

If a convicted person has been kept in custody pending trial; the judgement shall stipulate that the whole of this period shall be deducted from the sentence so that it may even be considered to have been completely served.[72] On 1 October 2002, an important amendment to the said provision came into force: If the period in custody has been spent in complete isolation, an additional deduction shall be made equivalent to one day for each 48-hour period commenced while the convicted person was subjected to complete isolation.[73]

Improved conditions for remand prisoners

New regulations concerning the use of police detention facilities were introduced in July 2006.[74] A central concern behind the new regulations was the need to avoid deaths during police detention and generally improve conditions for remand prisoners. The 2006 regulations state that a person who is unable to take care of him/herself because of intoxication must be examined by a doctor before being placed in a police cell.[75] During a stay in police custody, every prisoner has the right to contact a doctor for necessary health assistance.[76] Prisoners who are ill or appear to be intoxicated, must under all circumstances be subject to inspection at least every half hour.[77]

The new regulations established one central as well as several local control mechanisms. The central mechanism is composed of representatives from the National Police Directorate and the relevant state prosecutor's office. They carry out inspection visits to ensure that detention facilities are equipped and used according to all relevant regulations, especially matters concerning the prisoners' health conditions. Each police district must in addition establish a local control mechanism, which also has a responsibility for ensuring that prisoners are given proper information about their rights.[78]

In 2008, the Ministry of Justice and the Police appointed a commission to consider various control mechanisms concerning the police.[79] The commission submitted its report in May 2009.[80] An important finding was that the new

[72] The General Civil Penal Code with subsequent amendments, the latest made by Act of December 2005, No. 131, Section 60(1), par. 1.
[73] The General Civil Penal Code with subsequent amendments, the latest made by Act of December 2005, No. 131, Section 60(1), par. 2.
[74] Regulations relating to the Use of Police Detention of 30 June 2006.
[75] Regulations relating to the Use of Police Detention of 30 June 2006, Section 2–3(2).
[76] Regulations relating to the Use of Police Detention of 30 June 2006, Section 2–3(3).
[77] Regulations relating to the Use of Police Detention of 30 June 2006, Section 2–5(2).
[78] Regulations relating to the Use of Police Detention of 30 June 2006, Section 4–1.
[79] The so-called 'Finstad-utvalget'.
[80] NOU 2009:12: "Et ansvarlig politi – åpenhet, kontroll og læring" ('A Responsible Police Force – Transparency, Control and Comprehension').

control mechanisms for detention facilities represented an important step forward in both exposing and preventing unwanted incidents. The commission recommended that representatives of civil society should be included as members of the control mechanisms. It was also recommended that a written information folder for prisoners be produced.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

The Criminal Procedure Act allows for alternatives to pre-trial detention. Article 188 specifies the following alternatives:

- orders to present oneself before the police at given times
- orders not to leave a certain place
- delivery of passport or equivalent documents, or
- bail

The court may also order placement in an institution or a community owned apartment, with the consent of the community. No such alternatives may, however, be ordered unless the general conditions for the use of pre-trial detention as described under item 6 above, are fulfilled. The scope for the use of alternatives is thus the same as the scope for use of pre-trial detention. In practice the alternatives will be considered when pre-trial detention will be considered a disproportionate infringement while all other conditions are met. Unfortunately we have no statistics concerning the use of alternatives.

In general, it might be said that the alternatives are used relatively seldom. The most practical alternatives are delivery of passports and orders to present oneself to the police at given times. In practice bail is never used as an alternative.

Alternatives may in theory be used for all sorts of offences. In practice they will never be considered for the most serious crimes, such as homicide, serious drugs offences and serious sexual offences, and will neither be considered if there is a real risk that the offender will evade abroad, which is relatively easy under the Schengen regime, also without a passport. For other offences the seriousness of the act will be the major factor in deciding whether alternatives should be used.

Alternatives may also as a main rule be decided for no longer than 4 weeks, and shall be reviewed on the same conditions as decisions on pre-trial detention.

VI. CONCLUSION

On the whole, one might conclude that the situation for pre-trial detainees in Norway is satisfactory. The Norwegian legislation is adequate and the relevant international instruments are respected. Due to our special demographic and geographic conditions it is nevertheless, as discussed in this paper, difficult to attain every goal in the national and international legal framework. A special problem has turned out to be the excessive use of police custody, which has evoked the attention of the CPT, and which hopefully will be set right within the nearest future. This does not, however, influence the main impression of a mainly satisfactory situation mentioned above.

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PRE-TRIAL DETENTION IN POLAND

Lech Krzysztof Paprzycki & Jacek Pomiankiewicz*

I. INTRODUCTION

Poland started the long lasting process of transformation into a democratic state based on the rule of law in 1989. The new Code of Criminal Procedure and the Code of Execution of Criminal Sentences adopted in 1997 considerably strengthened the position of the accused in criminal proceedings. In particular, the Code of Criminal Procedure introduced several guarantees for a suspect against unlawful or unjustified arrest or detention and improved procedural rights of detainees in the course of the proceedings aimed at prolongation of this preventive measure. The new model of applying detention on remand in Poland has developed under the strong influence of the standards derived from the *European Convention on Human Rights* (ECHR) and the new Polish Constitution of 1997.

As will be demonstrated in the subsequent chapters of this report, the provisions of the Code concerning preventive measures in criminal proceedings seem to be consistent with international requirements. However, the practice of applying detention on remand still has to be improved.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Poland is a member of the following international organizations: the United Nations (UN) (since 1945); the Council of Europe (COE) (since 1991), the European Union (EU) (since 2004) and the Organization for Security and Co-operation in Europe (OSCE) (since 1973).

Poland is a contracting party to the following international human rights treaties, to none of which it made any reservations with regard to pre-trial detention: the UN *International Covenant on Civil and Political Rights*[1]; the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[2]; the UN *Convention on the Rights of the Child*[3]; the COE *European Convention on Human Rights*[4]; the COE *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*[5] and *Protocols I* and *II* thereto.[6] Moreover, Poland is a party to many other international treaties concerning human rights but not related directly do the right to liberty and detention on remand.

Pursuant to Article 91 §1 of the Polish Constitution, after promulgation in the Official Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. Ratification of international agreements concerning freedoms, rights or obligations of citizens requires prior consent granted by the statute. Thus, the Polish Parliament must issue a statute expressing consent for ratification of every treaty concerning human rights. A treaty ratified upon the consent of the Parliament has a special status in the hierarchy of sources of the law. Pursuant to Article 91 §2 of the Constitution an international agreement ratified upon prior consent granted by the statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. Polish courts shall apply directly all self-executing provisions of international human rights treaties.

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1 Ratified on 18 March 1977, published in the OJ of 1977, No. 38, item 167.
2 Ratified on 26 July 1989, published in the OJ of 1989, No. 63, item 378.
3 Ratified on 7 June 1991, published in the OJ of 1991, No. 120, item 526.
4 Ratified on 19 January 1993, published in the OJ of 1993, No. 61, item 284, thereafter referred to as "ECHR".
5 Ratified on 10 October 1994, published in the OJ of 1995, No. 46, item 238.
6 Both ratified on 24 March 1995, published in the OJ of 2000, No. 21, item 261..

Polish citizens and all other people within the jurisdiction of the Polish State may bring individual complaints to the European Court of Human Rights (ECtHR) claiming violation of any right guaranteed in the ECHR. Since Poland is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights, citizens are also entitled to bring individual communications to the UN Human Rights Committee.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

The Polish Constitution provides for several rights of defendants in criminal proceedings. It guarantees, *inter alia*, presumption of innocence, the right to defence, the right to a fair trial and the right to liberty and security of person. Article 41 §1 of the Constitution states that personal liberty and security shall be ensured to everyone and any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. The subsequent paragraphs of Article 41 reads as follows:

> "2. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.
> 3. Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal.
> 4. Anyone deprived of liberty shall be treated in a humane manner.
> 5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation."

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

The Polish Code of Criminal Procedure of 1997 (CCP) distinguishes two phases of deprivation of liberty in the course of the criminal proceedings: arrest and detention on remand.

Arrest (zatrzymanie)

Arrest is executed by the police or other competent organs, like for example officers of Central Anti-Corruption Office. An apprehended person may be kept in the police custody for up to 48 hours. This time-limit starts to run from the moment of apprehension. Before the expiry of this time-limit, s/he must be either released or placed at the disposal of the court together with the motion of the public prosecutor for application of detention on remand. Such a motion may be submitted to the court only with reference to a person who has been charged with criminal offence (a suspect).

Detention on remand (tymczasowe aresztowanie)

Within the subsequent 24 hours after the police custody the court may decide to keep a suspect in detention pending criminal proceedings. Only the court is competent to order detention on remand. If no decision imposing detention is taken, a suspect must be released no later than before the expiry of the above mentioned 24 hours. Consequently, a suspect with reference to whom the court refused to apply detention on remand may be deprived of liberty under arrest no longer than 72 hours after his apprehension. Detention on remand may be applied in the course of entire criminal proceedings, until the judgment against the applicant will become final. During the pre-trial detention (applied before indictment is brought to the court) a detainee is at the disposal of the public prosecutor. During judicial proceedings a detainee is at the disposal of the court competent to examine the case.

As transpires from the official statistical data published by the Central Prison Administration, on 30 April 2009, 85,835 people were kept in all penitentiary facilities in Poland. This number included 9,777 persons detained on remand (417 women). In accordance with the most recent data (31 July 2010) the total number of inmates placed in penitentiary facilities was 81,351 including 8,591 detained persons. The prison population has decreased during three recent years: on 31 December 2007 exactly 87,776 inmates were kept in penitentiary facilities, including 11,441 detained persons; on 30 November 2009 there was 85,336 persons kept in penitentiary facilities, including 9,874 detainees.[7] Altogether 84,003 persons were serving their sentences in Polish prisons and remand prisons on 4 January 2010 (maximum capacity: 84,118), including 9,460 pre-trial detained, 74,116 convicted and 427 punished.[8] Life sentence was

[7] See, information published on: www.sw.gov.pl.

[8] Established rate doesn't take into account those who are staying outside the penitentiary facility as a result of a wilful lengthening the time of the pass, escape, stay at the medical centre, at the police facilities or are sent to another country to act as a witness in a criminal

served by 280 persons, including 8 women. The status of a „dangerous" inmate had 337 persons, there were 2,779 inmates from organised crime groups.

The average length of detention in Poland amounts to 5,5 months. In the first half of 2008 with reference to 23% of all detained in the course of judicial proceedings (i.e. 1,852 persons) this measure had been applied for more than 1 year but shorter than 2 years. During the same period of time 11% (860 persons) of all defendants placed in detention during the judicial proceedings had been kept therein for more than 2 years. In the course of pre-trial proceedings 3% of all detentions lasted for longer than 12 months. With reference to 0.2% of suspects (9 persons) detention applied in the course of investigation or inquiry lasted longer than 2 years.[9]

III.1. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

As was mentioned above, the arrested person may be kept in police custody no longer than 48 hours and may be released before the expiry of this time-limit without being brought before the court. Thus, there is no legal obligation to bring such a person to the court if the public prosecutor does not see the grounds for applying to the court for his/her detention.[10] However, if there are convincing reasons for detention, the public prosecutor must bring charges against the arrested person in the written form (a decision on presenting charges must be issued, a suspect must be acquainted with this decision and heard as a suspect). Only with reference to a suspect and only before the expiry of the above mentioned time-limit of 48 hours the public prosecutor may file the motion for detention of the arrested person with the District Court having jurisdiction over the region in which the pre-trial proceedings is conducted (Article 250 §§1 and 2 CCP). The Court shall examine such motion no later than within further 24

procedures which are being in progress, based on data of the Central Board of Prison Service, www.sw.gov.pl/.

[9] Information about activities of the Polish Ombudsman in 2008 (Informacja o działalności rzecznika praw obywatelskich w roku 2008 oraz o stanie przestrzegania wolności i praw człowieka i obywatela) (document no. 1865) (at: http://orka2.sejm.gov.pl/Debata6.nsf/main/78BDF112).

[10] This is in line with the European Court of Human Rights' case-law. The Court several times expressed the opinion that "no violation of Article 5 §3 […] can arise if the arrested person is released „promptly" before any judicial control of his detention would have been feasible" (see, inter alia, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, §58). However, some authors argue that lack of *ex officio* judicial supervision of arrest is contrary to Article 41 of the Polish Constitution. See, J. Skorupka, *Zatrzymanie procesowe osoby podejrzanej*, Prokuratura i Prawo No. 11/2007, p. 31; P. Kardas, *Upływ określonego w art. 41 ust. 3 Konstytucji i w art. 248 §2 k.p.k. 24-godzinnego terminu a możliwość wydania postanowienia o tymczasowym aresztowaniu*, Czasopismo Prawa Karnego i Nauk Penalnych No. 1/2008, p. 130–131).

hours. In case of refusal to impose detention on remand, a suspect must be released immediately.

III.2. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS TAKEN INTO ACCOUNT WHEN APPLYING DETENTION ON REMAND

The CCP does not distinguish types of cases in which arrest/detention may be applied. Both measures may be applied in all criminal proceedings if grounds for applying them are found to exist in the case.

As a rule detention on remand shall not be applied when the facts of the case permit presumption that the court will sentence the accused to the penalty of deprivation of liberty with conditional suspension of its execution, or to a less severe penalty, or that the term of detention would exceed the expected sentence of deprivation of liberty without a conditional suspension (Article 259 §2 CCP). Principally detention on remand cannot be imposed if the offence carries the penalty of deprivation of liberty not exceeding one year, unless a suspect was caught in the act of committing an offence or apprehended in a pursuit undertaken directly following the commission of an offence (Article 259 §3 CCP). Both limitations in applying detention on remand listed in Article 259 §§2 and 3 CCP shall not apply if a suspect has remained in hiding, persistently failed to appear when summoned or when his identity cannot not be established (Article 259 §4 CCP). The above mentioned limitations do not apply to arrest.

The CCP indicates different grounds for arrest and for detention on remand. For this reason they are presented separately below.

Grounds for arrest

The Polish Code of Criminal Procedure provides for two basic types of arrest. Pursuant to Article 244 CCP, the Police shall be authorised to arrest a suspected person if there is good reason to suppose that he has committed an offence, and it is feared that such a person may go into hiding or destroy the evidence of his offence or if his identity could not be established or there are grounds for conducting special, speedy proceedings against a suspected person. The newly introduced Articles 244 §§1a and 1b[11] provide additional grounds for arrest. The police may arrest every person suspected of having committed violent crime against persons living together with him/her in one flat or home, if there is a risk that s/he would commit another violent crime against flatmates.

[11] See the Act of 10 June 2010 (published in the Official Journal No. 125, item 842), which entered into force on 1 August 2010.

Another type of arrest, the so called "arrest for bringing a person to an procedural organ" may be ordered only by a public prosecutor or by a court. As transpires from Article 247 CCP, a public prosecutor may order that a suspected person be arrested and brought to him if 1) there is justified fear that such a person will not appear before that organ upon a summon or 2) if there is an immediate need to apply preventive measures against a suspected person. Furthermore, if the accused fails to appear without justification before the public prosecutor or the court, he may be brought under duress (Article 75 §2 CCP). In such a case the public prosecutor or the court may order his immediate arrest.

Grounds for detention on remand

Detention on remand may be applied by the court only with reference to persons charged with an offence and only then, when other preventive measures appeared to be insufficient in the circumstances of the case (Article 257 §1 CCP). As transpires from Article 249 CCP, detention on remand may be applied only if the evidence collected in the case indicates a *high probability* that a suspect has committed an offence and only in order to secure the proper conduct of the proceedings, and exceptionally, to prevent a new serious offence from being committed by a suspect. The above mentioned grounds are of general character and apply to all types of preventive measures (also non-isolatory preventive measures like police supervision, bail). In order to apply detention on remand the court must establish that apart from general grounds at least one special prerequisite justifies detention of a suspect. The special prerequisites (special grounds) are listed in Article 258 CCP which provides that detention on remand may occur if:

> "1) there is good reason to fear that the accused may take flight or go into hiding, particularly if he has no permanent residence in this country or when his identity cannot be established or
> 2) there is good reason to fear that the accused would induce other persons to give false testimony or attempt to obstruct the criminal proceedings in some other manner.
>
> §2. If the accused has been charged with a crime or with a misdemeanour carrying the statutory maximum penalty of deprivation of liberty of a minimum of 8 years, or if the court of the first instance sentenced him to a penalty of deprivation of liberty of no less than 3 years, the need to apply the preliminary detention in order to secure the proper conduct of proceedings may be justified by the severe penalty threatening the accused.
>
> §3. Detention on remand may also occur, in exceptional cases when there is good reason to fear that the accused charged with a crime or an intentional misdemeanour would commit an offence against life, health or public safety, particularly if he threatened to commit such an offence."

Pursuant to Article 244 CCP, in order to arrest a suspected person the police must have *a justified supposition* that he has committed an offence. Some Authors argue that justified supposition is not enough, since directly applicable Article 5 ECHR requires "reasonable suspicion" based on evidence as a condition for applying deprivation of liberty in the course of criminal proceedings.[12] Detention on remand may be applied by a court only if there is *a high probability*, based on evidence, that a suspect has committed an offence.

Apart from restrictions stemming from Article 259 §§2 and 3 CCP, the CCP lists two situations in which detention should not be applied, if there are no special reasons to the contrary. As a rule detention should be waived if deprivation of liberty:

1. might seriously jeopardise the life or health of the accused, or
2. would entail an excessive burden on the accused or his next of kin (Article 259 §1 CCP).

Usually the above mentioned grounds for waiving detention on remand are not applied in cases in which leaving a suspect at liberty would cause serious danger for the society (for example if there is a high risk that a suspect may commit another serious crime against somebody's life, health or public order).

Prior to deciding on detention on remand the court shall examine a suspect at a sitting, unless it is not possible due to the latter being in hiding or abroad (Article 249 §3 in conjunction with Article 250 §1 CCP). The defence counsel appointed for a suspect should be admitted to be present during the sitting of the court if he has appeared. However, notifying the defence counsel of the date of examination is not obligatory, unless requested by a suspect provided that it does not render the action difficult.

As mentioned above, detention on remand may be imposed also on a suspect who is in hiding. In such case, the court may deliver a decision imposing detention on a suspect for a period not exceeding 14 days from the date of his arrest.[13] A suspect in hiding may be searched upon the arrest warrant. Unfortunately, the Polish law does not oblige procedural organs to bring immediately to the court a suspect apprehended on the basis of the arrest

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12 See, J. Skorupka, *Zatrzymanie procesowe osoby podejrzanej*, Prokuratura i Prawo No. 11/2007, p. 20–22; M.G. Węgłowski, *Zatrzymanie procesowe – uwagi polemiczne,* Prokuratura i Prawo No. 9/2008, p. 36–37.

13 See Section 209 of the Ordinance of the Minister of Justice of 24 March 2010,"Rules of Internal Functioning of Public Prosecution Offices", Official Journal No. 49, item 296.

warrant.[14] Thus, in practice such suspect is brought to the court only a few days after his arrest, together with a motion to prolong his detention over the above mentioned period of 14 days. The European Court of Human Rights condemned this practice in the judgment of 18 March 2008 in the case of *Ladent v. Poland*.[15] The Court found violation of Article 5 §3 of the ECHR which provides for the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention.[16]

III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

Different measures of supervision are applicable to the police custody and detention on remand. For this reason they are presented separately. As was submitted above, time limits for arrest are strictly indicated in the Polish Constitution and the Code of Criminal Procedure. Although no strict, maximum time limits apply to detention on remand, the CCP provides for a few measures of supervision of its length in the course of criminal procedure. All are presented below.

Every arrested person has the right to lodge an appeal with the court. In this appeal the arrested person may request an examination of the grounds and legality of his arrest and the correctness thereof. The interlocutory appeal shall be immediately referred to the district court having jurisdiction for the place of arrest, which shall examine the matter immediately. In the event that the arrest has been found to be unjustified or illegal, the court shall rule the immediate release of the arrested person. In the case of finding lack of justification or illegality of the arrest or serious irregularities in the conduct thereof, the court shall notify the state prosecutor and the agency in control of the organ which made the arrest (Article 246 CCP). A person whose arrest was manifestly unjustified has a right to lodge a motion for compensation and redress to the competent court (Article 552 §4 CCP).

The detained suspect may appeal against the detention order to the higher court. Also every subsequent decision prolonging detention on remand may be subject to appeal to the higher court or the same court sitting in another panel of judges. By the initial detention order a suspect may be detained for no longer than 3 months. The second decision prolonging detention for a period exceeding

[14] See on this issue: M. Wąsek-Wiaderek, *Problemy do litygacji strategicznej w sprawach karnych* (cz. II), Prawo Europejskie w praktyce No. 2(44)/2009, p. 87.

[15] Appl. 11036/03.

[16] Mr Ladent, a French national, was arrested by the border guard officers on the basis of the arrest warrant and the decision on detention issued in his absence. He spent 10 days in a detention centre and was released without being brought before the court.

3 months in the course of the pre-trial stage of the proceedings is issued by the court competent to examine the case. This decision is also subject to appeal to the higher court. In practice usually decisions prolonging detention on remand are issued for periods not exceeding 3 months, although the CCP restricts only the period of detention applied by the initial decision on detention issued at the pre-trial stage of the proceedings. Thus, the supervision of legality and length of detention on remand is inseparable form the procedure of prolongation of detention on remand within the framework of time-limits of this preventive measures, as discussed below in the last part of this chapter of the report.

Pursuant to Article 249 §5 CCP the suspect's defence counsel shall be notified of the date of the court session regarding the extension of the preliminary detention and examining the interlocutory appeal against the application or extension of this preventive measure. A failure to appear by a defence counsel who has been properly notified of the date shall not prevent the examination of the case.

It is worth mentioning that apart from the above presented "appeal procedure", connected with the prolongation of detention on remand, every detained person has a right to initiate supervision of his detention at any times by the special proceedings provided in Article 254 CCP (Habeas Corpus). Pursuant to this provision a defendant may at any time request his release. At the pre-trial stage of the proceedings his motion shall be examined by the public prosecutor and during judicial proceedings – by the court before which the case is pending. Both organs shall decide upon the motion within the time-limit of 3 days.

A defendant may appeal against a decision refusing his motion for release if it was submitted after expiry of at least 3 months from the date of delivery of the recent decision concerning his detention on remand (Article 254 §2 CCP).

Although the Code of Criminal Procedure determines time limits for examination of requests for release and appeals against decision on detention on remand[17], they are not binding upon procedural organs. Consequently in practice quite often requests for release and appeals against decisions on detention are examined with certain delay. In a few judgments delivered against Poland the European Court found violation of Article 5 §4 of the ECHR[18] due to excessive length of examination of requests for judicial control of lawfulness of detention on remand.[19]

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17 Pursuant to Article 463 §2 CCP an appeal against the decision concerning detention on remand shall be transmitted for examination (to the higher court) within 48 hours. Article 252 §3 CCP determines that such appeal shall be examined "without any delay".

18 Article 5 §4 reads as follows: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

19 See, *inter alia*, ECtHR, 28 March 2000, *Baranowski v. Poland*, Appl. 28358/95; ECtHR, 21 December 2000, *Jabłoński v. Poland*, Appl. 33492/96; ECtHR, 12 February 2008, *Pyrak v.*

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Summarising, the Polish Code of Criminal Procedure provides for two paths of judicial supervision of detention on remand: the procedure initiated by the public prosecutor's motions for prolongation of this measure and various review proceedings initiated by a detained person (like appeals against every decision concerning detention on remand, motion for release under Article 254 CCP).

As a rule the court prolonging detention on remand or deciding on the request for release shall examine whether application of detention on remand, as the most severe preventive measure, is still necessary in the circumstances of the case and whether grounds for its application have not ceased to exist. The court shall also have due regard also to the prerequisites for waiving the detention as listed in Article 259 CCP.

Furthermore, as transpires from Article 257 in conjunction with Article 253 CCP, the court and in the preparatory proceedings – also the public prosecutor shall supervise the detention *ex officio* and shall immediately release a defendant if the grounds for applying this preventive measure has ceased to exist or new circumstances arise which justify the release. The detention applied by the court may also be, in the course of pre-trial proceedings, revoked or replaced by less severe preventive measure by the public prosecutor (Article 253 §2 CCP).

As was mentioned above, the Code of Criminal Procedure regulates time-limits of application of detention on remand at the pre-trial stage of the proceedings (i.e. in the course of investigations or inquiry) and during judicial proceedings before delivery of the first instance judgment. Thus, the court applying detention on remand at the pre-trial stage of the proceedings shall designate a period of this preventive measure not exceeding three months (Article 263 §1 CCP). If in view of the special circumstances of the case the preparatory proceedings cannot be completed within the above mentioned time-limit, detention may be prolonged for further period by the court competent to examine the case upon the motion of the public prosecutor. However, safe in exceptional circumstances, the entire period of detention applied in the course of pre-trial stage of the proceedings shall not exceed 12 months (Article 263 §2 CCP). Pursuant to Article 263 §3 CCP the entire period of detention on remand preceding the first judgment delivered by the first instance court shall not exceed two years. It is applied by the court competent to examine the case.

The extension of applying detention on remand beyond the above mentioned time-limits is possible only in exceptional circumstances listed in Article 263 §4 CCP and only by the competent Appeal Court. Extraordinary prolongation of

Poland, Appl. 54476/00; ECtHR, 20 January 2009, *Żywicki v. Poland*, Appl. 27992/06. For more comments concerning this issue: see, M. Wąsek-Wiaderek, *Europejski standard ochrony prawa do wolności i bezpieczeństwa osobistego a stosowanie tymczasowego aresztowania – wybrane zagadnienia [European standard of the right to liberty and security of a person and detention on remand – selected problems*], Biuletyn Biura Informacji Rady Europy No. 2/2003, p. 10–12.

detention on remand is allowed if deemed necessary 1) in connection with a suspension of criminal proceedings, 2) in connection with taking actions aimed at establishing or confirming whereabouts of a defendant, 3) due to conducting evidentiary action in a particularly complex case or conducting them abroad 4) due to intentional protraction of proceedings by a defendant. Under Article 263 §4 CCP detention on remand may be prolonged for further defined period and the law does not impose any obligatory maximum time-limit for applying this preventive measures in the circumstances described therein. Article 263 §7 CCP states only that every prolongation of detention on remand applied after delivery of the first judgment in the first instance proceedings shall be for no longer than 6 months.

The current wording of Article 263 §4 CCP has been partly determined by the ruling of the Polish Constitutional Court in the case SK 58/03. On 24 July 2006 the Polish Constitutional Court declared Article 263 §4 of the Code of Criminal Procedure unconstitutional in so far as it related to the investigative stage of criminal proceedings. The provision in question provided that the detention measure might be extended beyond 12 months in the course of the pre-trial proceedings and beyond the two years in the judicial proceedings if the proceedings could not have been completed because of "important obstacles" which could not have been overcome. The provision in question did not set any statutory time-limit for extending the detention measure. The Constitutional Court considered that the impugned provision, by its imprecise and broad wording, could lead to arbitrary decisions of the courts on pre-trial detention and thus, infringe the very essence of constitutional rights and freedoms.

In 2009 Article 263 §4 CCP was amended[20] by deleting two grounds for extraordinary prolongation of detention on remand (prior to this amendment detention could be extended beyond statutory time-limits also due to prolonged elaboration of expert opinion or prolonged psychiatric observation of a defendant).

It must be stressed that in accordance with the new Article 263 §3a CCP periods of detention applied alongside the execution of a sentence of imprisonment imposed on a defendant in another case are considered as detention for the purpose of counting time-limits indicated in Article 263 §§2 and 3 CCP.[21] With regard to this provision it is worth mentioning that such

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20 This amendment entered into force on 22 January 2009 but was published in the Official Journal of 2008, No. 225, item 1485.

21 Article 263 §3a CCP was introduced by the Act of 12 February 2009 amending the CCP as from 19 February 2009. The wording of this provision was determined by the judgment of the Polish Constitutional Court of 10 June 2008 (case no. SK 17/07). The Constitutional Court ruled that it was contrary to the Polish Constitution to deduct period of detention applied alongside with the execution of imprisonment from the entire period of detention for the purpose of counting time-limits under Article 263 §§2 and 3 CCP.

periods of detention executed together with the final sentence are deducted from the entire period of detention for the purpose of assessment of its length under Article 5 §3 of the ECHR.

Summarising, there are time-limits for applying detention on remand before the first delivery of the judgment in the course of the first instance proceedings. These time limits are not absolute since detention may be prolonged beyond them in exceptional circumstances listed in Article 263 §4 CCP. However, after delivery of the first instance judgment for the first time, these time-limits do not apply any more. Thus, in all cases in which the first instance judgment is quashed by the appeal court and the case remitted to the first instance court for re-examination, detention on remand may be prolonged by the court competent to examine the case and without any restrictions.[22]

As was stressed above, a defendant may appeal to the higher court against every decision concerning detention on remand (decision imposing or prolonging this preventive measure). Only in cases of extraordinary prolongation of detention on remand under Article 263 §4 CCP an appeal is examined by the same Appeal Court sitting in another panel of judges.

Detention on remand may be applied in the course of the entire criminal proceedings, also during the examination of an appeal against the first instance judgment. If a defendant is convicted and sentenced to imprisonment, detention on remand may be applied until commencement of execution of this sentence (Article 249 §4). If the proceedings have been discontinued by reason of the insanity of the accused, detention on remand may be maintained until the valid conclusion of the proceedings aimed at establishing the place of execution of obligatory security measure imposed on a defendant. Usually it takes a few months to find the appropriate psychiatric hospital where the security measure could be executed. The practice of applying detention pending transfer to a psychiatric hospital was condemned by the European Court of Human Rights in two cases against Poland. In the Court's view the delay of a few months in admission of a person to a psychiatric hospital and the fact that during this time such a person is placed in ordinary detention centre with no access to appropriate psychiatric treatment is contrary to Article 5 §1 of the ECHR.[23]

22 This is criticized by the Polish Ombudsman (see, Information about activities of the Polish Ombudsman in 2008, Warsaw 2009, p. 98) and in the literature: J. Grajewski, K. Papke-Olszauskas, S. Steinborn, K. Woźniewski, *O tak zwanym upraszczaniu procesu karnego (About the so-called simplification of the criminal process)*, paper presented during the meeting of Departments of Criminal Procedure in Poland, Kraków 25–28 September 2008, p. 9–10.

23 ECtHR, 6 November 2007, *Mocarska v. Poland*, Appl. 26917/05; ECtHR, 12 February 2008, *Pankiewicz v. Poland,* Appl. 34151/04.

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Although the Code of Criminal Procedure provides for time-limits in applying detention on remand, currently in practice the excessive length of detention appears to be the main problem of the Polish criminal justice system. In several judgments against Poland the European Court found violation of Article 5 §3 of the ECHR due to the fact that detention applied had exceeded reasonable time. On 6 June 2007 the Committee of Ministers of the Council of Europe delivered the Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court in 44 cases against Poland relating to the excessive length of detention on remand.[24] In this Resolution the Committee of Ministers found that excessive length of detention constituted a systemic problem in Poland and encouraged the Polish authorities:

- to continue to examine and adopt further measures to reduce the length of detention on remand, including possible legislative measures and the change of courts' practice in this respect, to be in line with the requirements set out in the Convention and the European Court's case-law; and in particular
- to take appropriate awareness-raising measures with regard to the authorities involved in the use of detention on remand as a preventive measure, including judges of criminal courts and prosecutors;
- to encourage domestic courts and prosecutors to consider the use of other preventive measures provided in domestic legislation, such as release on bail, obligation to report to the police or prohibition on leaving the country;
- to establish a clear and efficient mechanism for evaluating the trend concerning the trend concerning the length of detention on remand.

In its recent judgment in the case of *Kauczor against Poland*[25] the European Court of Human Rights also found that excessive length of detention reveals a structural problem consisting of "a practice that is incompatible with the Convention". The Court reiterated that, where it finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects. The Court stressed that Poland remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (§61 of the judgment). Finally the Court stated that, "in view of the extent of the systemic problem at issue, consistent and long-term efforts,

24 At: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1154985&Site=CM#P693_70116.
25 ECtHR, 3 February 2009, Appl. 45219/06, §60.

such as adoption of further measures, must continue in order to achieve compliance with Article 5 §3 of the Convention" (§62 of the judgment).[26]

In a few other judgments delivered in 2009 the ECHR confirmed the existence of a systemic problem of excessive length of detention in Poland.[27]

As mentioned above, detention status is retained during the ordinary appeal proceedings. However, after delivery of the first instance judgment detention is no longer subject to time-limits indicated in Article 263 §3 CCP. Furthermore, no special proceedings for its prolongation is provided. Thus, detention pending appeal as well as detention applied during the re-examination of the case by the first instance court may be prolonged by the court before which the case is pending and not by the Appeal Court (Article 263 §3 CCP). Pursuant to Article 263 §7 CCP the court may prolong application of this preventive measures without any time-limits, but every decision on prolongation may be issued for a period not exceeding 6 months.

III.4. PROCEDURAL RIGHTS OF ARRESTED AND DETAINED DEFENDANT

Since 1996 the subsequent changes of the law on criminal procedure have strengthened the procedural guarantees of arrested and detained persons. The current scope of the right of detainee to information about the reasons of arrest or detention or of his/her right to assistance of a defence counsel or interpreter seems to conform to the requirements of the European Convention. Below these

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[26] As noted by the Court in §56 of the judgment, in 2007 a violation of Article 5 §3 of the Convention was found in thirty-two cases against Poland and in 2008, the number was thirty-three. In addition, approximately 145 applications raising an issue under Article 5 §3 of the Convention were pending before the Court in February 2009. Nearly ninety of these applications had already been communicated to the Polish Government. The latter number comprises some sixty applications which had been communicated since February 2008 until February 2009 with a specific question as to the existence of a structural problem related to the excessive length of pre-trial detention.

[27] See, *inter alia*, ECtHR, 19 May 2009, *Kulikowski v. Poland*, Appl. 18353/03; ECtHR, 21 July 2009, *Janus v. Poland,* Appl. 8713/03; ECtHR, 15 September 2009, *Jamroży v. Poland*, Appl. 6093/04. During the first half of 2009 the European Court of Human Rights in 15 judgments against Poland found violation of Article 5 §3 of the Convention due to excessive length of detention on remand. See: ECtHR, judgments of 13 January 2009: *Łoś v. Poland* (Appl. 24023/06), *Filon v. Poland* (Appl. 39163/06), *Lemejda v. Poland* (Appl. 11825/07); *Rybacki v. Poland* (Appl. 52479/99); ECtHR, 20 January 2009, *Żywicki v. Poland*, Appl. 27992/06; ECtHR, 20 January 2009, *Pakos v. Poland,* Appl. 3252/04; ECtHR, 27 January 2009, *Sandowycz v. Poland*, Appl. 37274/06; ECtHR, 3 February 2009, *Kauczor v. Poland,* Appl. 45219/06; ECtHR, 3 March 2009, *Hilgartner v. Poland*, Appl. 37976/06; ECtHR, 21 April 2009, *Rusiecki v. Poland,* Appl. 36246/97; ECtHR, 28 April 2009, *Godysz v. Polsce*, Appl. 46949/07; ECtHR, 19 May 2009, *Kulikowski v. Poland*, Appl.18353/03; ECtHR, 9 June 2009, *Jan Pawlak v. Poland*, Appl. 8661/06; ECtHR, 9 June 2009, *Marzec v. Poland*, Appl. 42868/06; ECtHR, 23 June 2009, *Figas v. Poland*, Appl. 7883/07.

rights are discussed separately with reference to arrested person and detained suspect/accused.

Pursuant to Article 244 §2 CCP the arrested person shall be informed immediately after apprehension about the reasons for his arrest and his rights, including the right to assistance of the advocate. Explanations of the arrested person shall be heard and written down in the record of the arrest. Rights of the arrested person guaranteed in the CCP are the following: the right to appeal against the arrest (Article 246 CCP), the right to contact a lawyer by any means available and to talk directly to him (the person who made the arrest may reserve the right to be present during a conversation of the arrested person and a lawyer – Article 245 §1 CCP), the right to request that the fact of arrest be promptly notified to the next of kin of the arrested person or to another person indicated by him/her and the right to have the employers or the school or higher educational establishment, informed about the arrest (Article 245 §2 in conjunction with Article 261 §§1 and 3 CCP). The official record of arrest shall indicate that the detained person has been informed of the above mentioned rights.[28]

It is important to stress that there is no legal obligation to inform the arrested person of his right to silence although s/he may give statements to the police which are written down in the record of arrest. These statements do not have a value of evidence in the court, however the record of arrest is included into the case-file available to the court. Thus, it is clear that the arrested person who provides 'an explanation' in which a confession is made, might feel compelled to repeat this statement at the first formal interrogation. So, even though the first informal confession may not be used as evidence in court, it can affect the position of the arrested person and limit his possibilities to choose a defence strategy later on in the proceedings.[29]

If no charges are brought against arrested person s/he must be released no later than within 48 hours from the apprehension. If there are grounds for bringing criminal charges against the arrested person, this procedural act may have a form of written decision on bringing charges issued by the public prosecutor (*postanowienie o przedstawieniu zarzutów*) or a form of oral information about the charges given to the arrested person before the first interrogation. In both cases before first interrogation the arrested person must receive a document

[28] P. Kruszyński, *The Investigative Stage of the Criminal Process in Poland* (in:) *Suspects in Europe. Procedural Rights of at the Investigative Stage of the Criminal Process in the European Union*, ed.: E. Cape, J. Hodgson, T. Prakken, T. Spronken, Intersentia 2007, p. 192.

[29] For more critical remarks see: D. de Vocht, Country Report – Poland, in: E. Cape, Z. Namoradze, R. Smith, & T. Spronken (eds), *Effective Criminal Defence in Europe*, Intersentia 2010, p. 436–437.

containing the list of procedural rights and obligations of a suspect ("letter of rights").

In accordance with Article 300 CCP a suspect shall be informed about the right to give or refuse to provide explanations or to answer questions (the right to silence), the right to submit motions for actions in inquiry or investigation, the right to assistance of a defence counsel, the right to be acquainted with all materials gathered in the course of pre-trial proceedings at the end of investigations or inquiry, the right be heard as a suspect in the presence of a defence counsel. A suspect should confirm receipt of the letter of rights with his signature. The suspect may request the written reasons of the decision on bringing charges. In such a case the reasons shall be drafted and delivered to the suspect and his defence lawyer within the time-limit of 14 days (Article 313 §3 CCP).

In the course of investigative stage of the criminal process suspects have limited access to the case-file. Pursuant to Article 156 §5 CCP a suspect and his defence lawyer have a right of access to the case-file only with consent of the investigative organ (police or prosecutor). Generally in practice quite often such consent is refused by reference to the interests of the investigations. Although the refusal may be subject of a complaint, it is examined by the superior public prosecutor and not by the independent court. Consequently, especially in complex cases detained suspects are deprived of the right to inspect the content of the case-file until the end of investigation.[30]

In a few Polish cases denying detained suspects of their right to have access to the case-file was found by the European Court of Human Rights to be contrary to Article 5 §4 of the Convention. In accordance with the Court's jurisprudence, the proceedings for review of detention must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. In the case of *Migoń v. Poland*[31], *Chruściński v. Poland*[32] and *Łaszkiewicz v. Poland*[33] the Court found that equality of arms was not ensured in appropriate way since applicants and their defence counsels were denied access to those documents in the investigation file which were essential in order to challenge the lawfulness of their client's detention.

On 3 June 2008 Article 156 §5 CCP was declared unconstitutional with reference to suspects detained in the course of pre-trial proceedings. The Constitutional Court established that this provision undermined the effectiveness of proceedings initiated by detained suspects in order to challenge lawfulness and reasonableness of detention. Following the judgment of the

30 D. de Vocht, *Country Report – Poland*, op. cit., p. 438–439.
31 ECtHR, 25 June 2002, Appl. 24244/94.
32 ECtHR, 6 November 2007, Appl. 22755/04.
33 ECtHR, 15 January 2008, Appl. 28481/03.

Constitutional Court the new Article 156 §5a was introduced into the Code of Criminal Procedure.[34] Pursuant to this provision as a rule a detained suspect must be granted access to the evidence indicated in the motion for detention or in the motion for prolongation of detention as well as in the court's decision on detention.

However, exceptionally, the public prosecutor may refuse to grant access to the case-file if there are justified grounds to believe that:

1) access to the case-file would endanger the life and health of a victim or another participant to the proceedings;
2) access to the case-file could cause destruction of evidence or falsification of evidence;
3) access to the case-file could prevent arrest of co-suspects and other persons suspected of having committed other offences discovered during the proceedings;
4) access to the case-file would reveal conducted police operations or
5) access to the case-file could jeopardize the due course of the pre-trial proceedings in another illegal manner.

Polish law does not provide for a requirement that a person of whom pre-trial detention is being sought should be legally represented by a lawyer. Also the fact that a suspect has been detained in the course of the criminal proceedings does not form a basis for the so-called obligatory defence (cases in which a suspect must be represented by a lawyer). Consequently, like suspects at liberty, s/he may apply for *ex officio* defence counsel relying on his bad financial situation. Pursuant to Article 78 CCP, a defendant who has not appointed defence counsel, may demand that defence counsel be appointed to him *ex officio*, if he can duly prove that he is unable to pay the defence costs without prejudice to his and his family's necessary support and maintenance. In serious cases, (examined at first instance by Regional Courts – *Sądy Okręgowe*), a detained defendant must be represented by a defence counsel at every hearing (Article 80 CCP). Unfortunately no official data are collected concerning the number of detained suspects represented by defence counsels of their own choosing or appointed *ex officio*.

Thus, a suspect may be represented by a defence counsel since the very beginning of the pre-trial proceedings. He has a right to have a defence lawyer presented already during the first interview following presentation of criminal charges. However, as mentioned above, at this stage of the proceedings (the very beginning of the investigation or inquiry) a defendant may obtain the assistance

34 This amendment was published on 16 July 2009 (Official Journal No. 127, item 1051) and entered into force on 28 August 2009.

of an *ex officio* defence counsel only if s/he proves his bad financial situation. For this reasons in practice a request for a lawyer to advise at this stage is made, most frequently, by suspects who are able to pay privately.[35]

Pursuant to Article 73 §§2–4 CCP at the pre-trial stage of the proceedings during 14 days from the date of the arrest the public prosecutor may order that the communications of a detainee with his defence counsel, including the correspondence, shall be subject to a supervision executed by the public prosecutor or a person authorised by him. This may occur only for particularly justified reasons and cannot continue after the expiry of 14 days of detention. The Code of Criminal Procedure of 1969, in force until 1 September 1998, allowed for such supervision to be exercised during the entire pre-trial proceedings which was found to be contrary with the right to defence under Article 6 of the ECHR.[36]

The current regulations allowing for temporary restrictions on free communications between the detained suspect and his/her defence counsel are subject to criticisms of some Authors familiar with other systems of criminal justice.[37] However, it is worth stressing that the European Court of Human Rights in *Rybacki* case does not rule out, as contrary to Article 6 of the Convention, every, even temporary, restriction on such communications. The Court stressed that: "The right of the defendant to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 §3 (c). This right, which is not explicitly set out in the Convention, may be subject to certain restrictions (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, pp. 54–55, §63)."

Pursuant to Article 72 CCP a defendant who does not have a sufficient understanding of Polish has a right to assistance of an interpreter the costs of which are borne by the State Treasury. Procedural organs shall ensure presence of an interpreter in all procedural activities in which a defendant takes part. The most important decisions like a decision presenting charges to the suspected person, a decision amending charges brought, a bill of indictment, all decisions subject to review or decisions concluding the proceedings shall be delivered to the defendants together with a translation (Article 72 §3 CCP). The above rules apply to defendants at liberty and to detained defendants.

[35] P. Kruszyński, op. cit., p. 195.

[36] ECtHR, 13 January 2009, *Rybacki v. Poland*, Appl. 52479/99.

[37] See, D. de Vocht, op. cit., p. 453.

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III.5. MOST IMPORTANT DEVELOPMENTS OF THE LAW ON DETENTION ON REMAND

During the last 15 years rules governing detention on remand has been substantially changed. The most important developments concerned the organ empowered to impose detention on remand, and the procedure followed in order to impose this preventive measure.

Until 4 August 1996 at the pre-trial stage of the proceedings detention on remand could be imposed by the public prosecutor, whose decision was subject to appeal to the court. This appeared to be contrary to Article 5 §3 of the ECHR.[38] Consequently, the Act of 29 June 1995 amending the Code of Criminal Procedure of 1969, introduced a rule that the court is the only organ competent to apply detention on remand both at the pre-trial stage of the proceedings and during judicial proceedings.

Under the Code of Criminal Procedure of 1969, in force until 1 September 1998, a suspect did not have the right to be heard by the court before deciding on his/her detention. The new Code of Criminal Procedure of 1997 introduced an obligation to hear a suspect before deciding on application of this preventive measure.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

The basic legal act which stipulates the Polish Penitentiary System is the Act of June 6th 1997 – the Code of Execution of Criminal Sentences (CECS) which entered into force on 1st September 1998.[39] It constitutes a collection of laws regulating the way and aim of execution of imprisonment and pre-trial detention, types and kinds of penal institutions, the structure and rules of managing a correctional institution, the system of execution of the penalty of imprisonment, aims and ways of classification of the convicts.

It stipulates rights and obligations of the convicts, and other issues such as: employment, education, therapeutic help, healthcare, relations of inmates with the society, rules of post-penitentiary help. It furthermore includes the laws regulating treatment of convicts from different categories, *e.g.* juveniles, detained women including pregnant ones and mothers of children until 3 years of age.

On the basis of this legal act the minister of justice has promulgated several dozen ordinances, which regulate in detailed way procedures, rules and

38 See, ECtHR, 4 July 2000, *Niedbała v. Poland*, Appl. 27915/95.

39 The Law of 6 June 1997, published in: Official Journal of 1997, No. 90, item 557 with subsequent amendments.

standards of treatment towards inmates in specific situations. These ordinances are binding for all prison officers and civil workers of prison service.

The Code of Execution of Criminal Sentences and on its basis promulgated ordinances fully admit decisions of international conventions, which Poland ratified and accepted together with the accession to the European Union in 2004. They are, among others, the *Standard Minimum Rules for the Treatment of Prisoners* of 1957, the *International Covenant on Civil and Political Rights*, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, the *European Convention on Human Rights*, and the *European Prison Rules* of 2006.

The Polish prison system, apart from realizing the tasks resulting from its regulations, also allows imprisoned persons to take advantage of civil rights. It is done according to legal regulations binding for all citizens *e.g.* in the scope of getting married, getting divorced, getting pension or allowance benefits, regulating accommodation issues, providing identification cards, procedures in family courts concerning tutelary care towards the children, et cetera.

IV.1. FACILITIES, CATEGORIES AND ACCOMMODATION

In Poland arrested persons are kept in the police cells located at the police stations. They are designated for isolation not longer than 72 hours. They are primarily used for arrested persons but could also serve additional purposes such as detention of foreign nationals awaiting deportation, holding of inebriated persons until they sober up and temporary accommodation of prisoners in transit.[40] Detained persons are placed in detention centres which are organised as separate sections of prison facilities or as independent establishments (Article 208 §§2 and 3 CECS).[41]

In Poland there are 157 penitentiary facilities altogether, including 87 prisons, 70 remand prisons. 95 of them (more than 60%) were built before the First World War. At the moment prison infrastructure is in the phase of an intensive expansion and modernization, connected with a constant need of increasing living places for inmates and improving a technical condition of used buildings.

Penalties of imprisonment are executed in Poland in three kinds of correctional institutions: juvenile penitentiary, prison for first-time offenders and prison for re-convicted. These institutions can be organized as closed, half-

40 See, Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 15 October 2004 (available at: www.cpt.coe.int/documents/pol/2006–11-inf-eng.htm).

41 The Law of 6 June 1997, published in: Official Journal of 1997, No. 90, item 557 with subsequent amendments.

open or open prisons. Imprisonment is executed within the confines of the programmed impact system, the therapeutic system or the regular system.

Overcrowding

The biggest problem for the Polish penitentiary system is a lasting overpopulation of penitentiary facilities. The Prison service has been doping with the overpopulation of remand prisons and prisons for 9 years – in September 2000 the number of prisoners exceeded the number of available places.

The main reason for overpopulation – increase of the number of prisoners is described by the following dynamics: very rapid increase in the period 2000–2001, relative stabilization with a small increase in the period 2002–2005 and again a gradual, and substantial increase in 2006 plus the first quarter of 2007 when the number of prisoners reached the highest number – 91,078 with a capacity 75,022. Since April 2007 the number of prisoners has gradually decreased but still exceeds the capacity of the penitentiary institutions or close to the edge.

Overpopulation carries with it numerous negative consequences: favours the increase of combativeness of isolated persons, dehumanizes the conditions of imprisonment, has a negative effect on the efficiency of the work of prison officers, it overburdens the prison staff with the duties (the effect is tiredness, stress, discouragement, increase of the risk of error, high turnover of the staff) and minimizes the possibilities of an efficient educational impact on the inmates.

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IV.2. CATEGORIES OF PRISONERS AND THEIR ACCOMMODATION

As a rule detainees are accommodated separately from prisoners. Also prisoners having double status of convicts (persons sentenced to imprisonment) and detainees are accommodated separately from prisoners (Article 223a §4 CECS).

All persons kept in penitentiary facilities are divided into two main age groups: adult prisoners/detainees (over the age of 21) and young prisoners/detainees (persons aged 15 up to 21). Thus, the category of "young detainees" covers persons of various level of maturity.[42] As a rule young detainees are accommodated separately from adults except in cases in which educational reasons justify accommodation of adult detainee with a young detainee or

[42] As a rule only persons aged 17 and over can be subject to criminal responsibility. However, Article 10 §2 of the Criminal Code provides that also young persons aged 15 and over may be criminally responsible for certain, most severe crimes if their personal development and level of maturity allows for that and previously applied educational or correctional measures proved to be unsuccessful.

detainees (Article 212 §1 CECS). In these cases young detainees may be accommodated only with specially selected adult person who has good opinion and has never served the sentence of imprisonment (§12(1) of the Ordinance of the Minister of Justice of 25 August 2003[43]). While placing detainees in shared cells also other considerations are taken into account, like for example: sex (Article 87 §1 in conjunction with Article 209 §1 CECS); smoking/non smoking status (§45(1) of the Ordinance of the Minister of Justice of 13 January 2004 on administrative acts concerning execution and documentation of detention on remand, penalties and other measures of isolation[44]); previous conviction; orders of the procedural organ at the disposal of which a detainee remains.

As laid down in Article 212 §1 CECS, accommodation of detainees is organised in such manner as to protect them from demoralisation. In particular, police officers, other law enforcement officers, persons employed in criminal justice system should be separated from other detainees. Former police officers or other law enforcement officers are accommodated separately if they have been detained within the period of one year after termination of their employment (Article 212 §1 CECS in conjunction with §45(1) and (3) of the above mentioned Ordinance of the Minister of Justice of 13 January 2004). With reference to other vulnerable groups of detainees the general rules are applied. Thus, information on the character of charges brought against them is collected by the penitentiary section of every detention centre and they are accommodated in the manner protecting them from aggression. Pursuant to Article 108 §1 CECS administration of penitentiary facilities is obliged to take actions aimed at providing safety for inmates. Sensitive data concerning state of health of inmates are not disclosed to other detained persons.

Special rules of allocation within prison system apply to dangerous criminals. As laid down in Article 212a CECS detainees are classified as "dangerous" by the Penitentiary Commission, an organ functioning in every detention centre. Penitentiary Commission is also obliged to curry out periodic review of the status of "dangerous" detainee every three months. The procedural organ at whose disposal a detainee remains shall be informed thereof. "Dangerous" detainees are placed in separate unites or cells equipped with facilities providing higher level of protection of inmates. Allocation of dangerous detainees to special unites or cells is based on the character of the crime and the degree of threat which a detainee poses to the society and to the safety of the detention centre. As a rule members of organised criminal groups are classified as

43 The Ordinance concerning order and organization of execution of detention on remand, Official Journal No. 152, item 1494, thereafter referred to as "the Ordinance of 25 August 2003".

44 Official Journal No. 15, item 142.

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"dangerous". The same applies to persons charged with the most serious crimes (like, for example, terrorist attacks, crimes committed with special cruelty, attacks on the independence and integrity of the State) and to detainees who had committed grave breaches of safety and order in prison during previous incarcerations.

Dangerous detainees are subject to the special regime of supervision: their cells are monitored more often than those of ordinary inmates and equipped with special technical facilities; they are allowed to take out-of-cell time only within their own unit; they can move within the detention centre only under special supervision of the prison staff; they are subject to body search every time they leave or enter the cell; they can take outdoor exercise and visits only in designated places and under special supervision; they cannot use their own clothes (Article 212b CECS).[45]

In accordance with Article 110 CECS, every sentenced person shall be placed in an individual cell or a cell shared with other inmates and the area of the cell shall be no less than 3 square meters per detainee. Pursuant to Article 110 §§2a and 2b CECS, in particularly justified cases a governor of a prison or remand centre may decide to place detainees, for a specified period of time, in conditions where the area of the cell is less than 3 square meters per person but not less than 2 square meters. Any such decision shall be promptly communicated to a penitentiary judge. In particular, a governor of a prison may decide to place a detainee in the cell less than 3 square meters for a period up to 90 days in exceptional circumstances such as: state of emergency, fear of epidemic or other danger to the health or life of inmates. Moreover, a governor of a prison may place a detainee in such a cell for a period not exceeding altogether 28 days in 8 other situations listed in Article 110 §2 c CECS. The above indicated decisions of a prison's governor are subject to appeal to the penitentiary court.

Articles 110 §§2a and 2b CECS were introduced into the Code by the Act of 9 October 2009 which entered into force on 6 December 2009.[46] Both provisions replaced the Ordinance determining the rules which are to be followed by the relevant authorities in a situation where the number of persons detained in prisons and remand centres exceeds on a nationwide scale the overall capacity of such establishments.[47] The Ordinance and Article 248 CSCE were found contrary to the Polish Constitution[48] since they did not indicate the time limits

45 For assessment of detention facilities for dangerous detainees, see: Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 15 October 2004, p. 33–34.

46 Official Journal No. 190, item 1475.

47 The Ordinance of 19 April 2006, Official Journal No. 65, item 459.

48 Judgment of 26 May 2008, SK 25/07.

and grounds for keeping inmates in conditions where the area of the cell was less than 3 square meters per person.

As was established by the CPT during its visit in Poland in 2004, the Polish prisons and detention facilities were heavily overcrowded. At that time the average living space per prisoner had dropped to 2,6 square meters.[49] The problem was at its worse in November 2006 with the rate of overcrowding peaking at 24%. The rates of overcrowding, calculated for all detention facilities, dropped by September 2008 to 6.8% and calculated only for prisons and remand centres, to 8.1%. According to the statistics published by the prison service authorities, in June 2009 those rates were 3.2% and 4% respectively.[50] Recently in a few cases against Poland the European Court of Human Right found violation of Article 3 of the Convention due to placing applicants in overcrowded cells.[51] As transpires form the information issued by the Central Prison Administration on 6 September 2010[52], currently all inmates in Poland are placed in cells with the area no less than 3 square meters per detainee.

As was mentioned above, detained persons, like prisoners, shall be placed in an individual cell or in a cell shared with other inmates. Due to limited capacity of penitentiary facilities, detained persons are usually placed in cells together with other inmates. No data are collected concerning the number of detainees placed in individual cells. Before placing a detainee in a shared cell the administration of a detention centre gathers all necessary information about him/her and takes them into account. As was mentioned above, various aspects are considered before deciding on placing a detainee in a given shared cell.

IV.3. INFORMATION PROVIDED TO DETAINEES

Pursuant to Article 210 CECS, upon admission to a detention centre every detainee shall be informed immediately about his/her rights and duties. In particular, a detainee shall be acquainted with the provisions of the Code of Execution of Criminal Sentences concerning execution of detention and the rules of the Ordinance on execution of detention on remand. Moreover, upon admission to a detention centre every detainee shall undergo medical examination.

In accordance with the Ordinance of 25 August 2003, upon their admission to the detention centre detainees are informed about the possible sources of danger to their safety and about the risk of facing negative attitude of other

49 *Report to the Polish Government…*, op. cit., p. 29.

50 See, ECtHR, 22 October 2009, *Orchowski v. Poland*, Appl. 17885/04, §89.

51 See, ECtHR, 22 October 2009, *Orchowski v. Poland*; *Norbert Sikorski v. Poland*, Appl. 17599/05.

52 Information published at: www.sw.gov.pl/Data/Files/_public/2011–07–01_komunikat-w-sprawie-zaludnienia-zakladow-karnych-i-aresztow-sledczych.pdf.

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inmates. Newly admitted detainees are also informed about the obligation to notify the staff of the centre of all cases of threats to their personal safety.

IV.4. RIGHTS TO HUMANE TREATMENT

The protection against inhumane or degrading treatment or punishment is codified in the Polish Constitution. Article 40 of the Constitution reads: "No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment." Moreover, with reference to persons in detention Article 41 §4 of the Constitution provides: "Anyone deprived of liberty shall be treated in a humane manner."

Furthermore, pursuant to Article 4 §1 of the Code of Execution of Criminal Sentences, penalties and other measures of isolation, including detention on remand, shall be executed in humane manner with due regard to human dignity of a person deprived of liberty. Torture, inhumane or degrading treatment or punishment are prohibited. In accordance with Article 4 §2 CECS, a person deprived of liberty shall have the right to exercise civil rights and liberties which may be subject to limitations stemming from the law or from a final decision of the appropriate organ issued on the basis of the law.

Personal hygiene

Detainees, as other inmates, are provided with access to facilities allowing to take care of their personal hygiene. Pursuant to §32(4) and (5) of the Ordinance of 25 August 2003, male detainees have the right to take at least one hot shower per week. Female detainees have the right to take two hot showers per week. All detainees have access to sanitary installations located in their cells. In every cell inmates have access to the cold running water. In some detention centres there is also access to the worm running water in cells. Each cell has a sanitary corner with a toilet bowl and a sink.

Private clothes or prison uniform?

As a rule detained persons are allowed to wear their own clothes while in detention (Article 216 CECS). However, for safety and sanitary reasons a detainee may be obliged to wear clothes provided by the detention centre. "Dangerous" detainees are not allowed to wear their own clothes (Article 212b point 9 CECS).

IV.5. CONTACT WITH THE OUTSIDE WORLD

As a rule, a detainee is entitled to contacts with the outside world upon the consent of the organ at whose disposal s/he remains. Pursuant to Article 217 of the Code of Execution of Criminal Sentence a detainee is allowed to receive visitors, provided that he obtained permission from the investigating prosecutor (at the investigative stage) or from the trial court (once the trial has begun). Prior to 8 June 2010 Article 217 §1 CECS did not list any grounds for denying a detained person visits from family members. This was found to be contrary to the Polish Constitution and to the ECHR in the judgment of the Constitutional Court of 2 July 2009 (case no. K 1/07). The Constitutional Court also found that the lack of judicial supervision of the public prosecutor's order denying family visits to a detainee is contrary to the Polish Constitution. By the act which entered into force on 8 June 2010[53], Article 217 was amended. Currently this provision clearly stipulates that a detainee has a right to receive visitors from family members once a month. The competent organ may refuse to grant a visit if there is a real risk that the visit could facilitate illegal action aimed at jeopardizing the criminal proceedings or if a visit could facilitate the commission of an offence. A decision refusing a visit may be subject to appeal initiated by a detainee or by persons requesting a visit.

Prior to recent amendments of the CECS, in practice family members who had the status of witnesses in the proceedings conducted against a detainee were not allowed to visit him/her in detention centre. In a few judgments against Poland the European Court of Human Rights found this practice to be contrary to the right to private and family life as provided in Article 8 ECHR.[54]

No data concerning the percentage of denied visits are collected by the administration of detention centres.

Pursuant to Article 217a CECS, a detainee's correspondence shall be censored by the authority at whose disposal s/he remains, unless the authority decides otherwise. The correspondence with a defence counsel, with the Ombudsman and with other national or international bodies acting in the field of protection of human rights is not subject to censorship. Pursuant to Article 217c CECS detainees are not entitled to make or receive phone calls except the phone calls to and from a lawyer.

In cases which are especially important for a detainee, s/he may be allowed to leave the detention centre, if necessary under the escort of prison officers, for a period not exceeding 5 days. The permission for leaving the detention centre

[53] The Act of 5 November 2009 published in the Official Journal No. 206, item 1589.

[54] See, *inter alia*, ECtHR, 3 April 2003, *Klamecki (no. 2) v. Poland*, Appl. 31583/96; ECtHR, 20 May 2008, *Ferla v. Poland*, Appl. 55470/00.

may be granted by the organ at whose disposal a detainee remains (Article 217d in conjunction with Article 141a §1 CECS). In practice detained persons are allowed to leave detention centres only exceptionally.[55]

Pursuant to Article 221a CECS, a detainee is allowed to move within the detention centre in accordance with the rules which shall secure proper conduct of criminal proceedings. S/he may stroll in the courtyard one hour a day in a company of other inmates according to the internal schedule approved by the principal of the detention centre. A detainee is also allowed to participate in sport exercises, recreational and cultural events organized by the staff in accordance with the internal schedule of the centre.

Pursuant to Article 218 CECS a detainee is obliged to do some routine work within the premises of the detention centre in order to keep order therein. A detained person may do other work within the detention centre only upon his/her consent. In addition s/he may work outside the detention centre only upon the permission of the organ at whose disposal s/he remains. Currently (data as of 30 September 2009) 451 out of total number of 9939 detainees were given the opportunity to work (4,5%[56]). The paid work was offered to 159 inmates and unpaid work was curried out by 292 detainees.

IV.6. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

As mentioned above, detainees are allocated within cells in accordance with the rules whose aim is to provide them with the highest possible level of safety. Pursuant to Article 212 §1 CECS, while allocating detainees the administration of the detention centre shall take into account: the necessity to prevent aggression, self-aggression or crimes; the need to keep order and safety in the detention centre and the need to develop appropriate relationship between inmates.

Medical recommendations are also taken into consideration while allocating inmates in cells. In order to provide safety in the detention centre, previously sentenced detainees are separated from those who have not yet collected criminal record. Moreover, directions of the organ at whose disposal a detainee remains are also taken into account (Article 212 §2 CECS).

55 In the case of *Płoski v. Poland* the European Court of Human Rights stated that the refusals of leave to attend the funerals of the applicant's parents, were not "necessary in a democratic society" as they did not correspond to a pressing social need and were not proportionate to the legitimate aims pursued. Consequently the Court found a violation of Article 8 of the Convention (ECtHR, 12 November 2002, Appl. 26761/95).

56 At the same time 33.7% of convicts were given the opportunity to work.

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"Dangerous" detainees are under constant supervision. Their cells are monitored by means of cameras and recording of conversations (Article 212b §2 CECS).[57] "Dangerous" detainees and detainees charged with a felony cannot be allocated in one cell with young detainees (§12(2) of the Ordinance of 25 August 2003).

Once a month all cells are inspected by the director of the detention centre accompanied by the heads of wards. During those inspections inmates are allowed to submit motions and requests. Inmates could also ask for individual talks with the director of the detention centre and with the head of the Penitentiary Division of the detention centre.

Pursuant to the Instruction No. 2/04 of the Head of Central Prison Administration, issued on 24 February 2004, special measures should be undertaken by prison staff in order to prevent self-aggression of inmates. Under this instruction the staff of the detention centre is obliged to take three categories of measures to prevent detainees from committing suicide:

1. preventive measures of the first level, addressed to all detainees and aimed at developing appropriate relations between inmates and the staff of the detention centre.
2. preventive measures of the second level directed to detainees exposed to the risk of suicide – they shall be subjected to psychological diagnosis and the special program of action shall be applied to them;
3. preventive measures of the third level directed to detainees who attempted to commit suicide in the past – they are subjected to therapeutic and psychological care.

Pursuant to Article 116 §5a CECS, if it is justified by medical reasons or for safety of a detainee, he may be subjected to constant supervision by means of video monitoring.

Detainees, like sentenced persons, are entitled to medical health free of charge (Article 115 §1 CECS). A level of health care offered to detainees is equivalent of medical care outside.

Pursuant to Article 115 CECS:

> "4. Medical care is provided, above all, by health care establishments for persons serving a prison sentence.
> 5. Health care establishments outside of the prison system shall cooperate with the prison medical services in providing medical care to sentenced persons if necessary, in particular

[57] Article 212b §2 was introduced into the Code of Execution of Criminal Sentences by the Law of 18 June 2009 (Official Journal No. 115, item 963) and entered into force on 22 October 2009.

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> 1) to provide immediate medical care because of a danger to the life or health of a sentenced person;
> 2) to carry out specialist medical examinations, treatment or rehabilitation of sentenced person;
> 3) to provide medical services to a sentenced person who has been granted prison leave or a temporary break in the execution of the sentence…"

On the basis of Article 115 §10 CECS, the Minister of Justice issued the Ordinance of 31 October 2003 on the detailed rules, scope and procedure relating to the provision of medical services to persons in confinement by health care establishments for persons deprived of liberty.

Unlike persons outside prison, detainees cannot choose a doctor, dentist, nurse and hospital providing them with medical care (Article 115 §1a CECS).[58]

Special treatment, like drug addiction treatment in separated therapeutic wards of prisons, is offered to sentenced inmates. Detainees may be subjected to detoxification and are provided with ordinary medical treatment of illnesses connected with addiction.

Pursuant to Article 222 §1 CECS, a detainee may be subject to disciplinary penalty for intentional breach of orders or prohibitions laid down in the law or in internal rules of the detention centre. Disciplinary penalties listed in Article 222 §2 CECS encompass solitary confinement for a period not exceeding 14 days. As transpires from Article 145 §3 CECS, before placing a detainee in isolated cell, the administration of the detention centre must obtain written opinion of a doctor or a psychologist as to whether a detainee is fit to sustain such penalty.

IV.7. PRISON STAFF

The prison service exists of a professional group responsible for a lawful execution of decisions from the area of penitentiary law. Since 1956 it has been subordinate to the minister of justice, its activity is based on a separate law.[59] The number of all officers of prison service on 31st December 2009 was 27,549 (including 4,481 women) and the number of civil workers was 1,927 (including 806 women).[60]

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[58] Medical care offered to detained persons was found to be unsatisfactory in a few judgments of the European Court of Human Rights delivered against Poland. See, *inter alia*, ECtHR, 20 January 2009, *Sławomir Musiał v. Poland*, Appl. 28300/06; ECtHR, 3 February 2009, *Kaprykowski v. Poland,* Appl. 23052/05.

[59] Act of April 26th 1996 about Prison Service (The Journal of Laws, No. 61, item 283 as amended).

[60] Data from Human Resources and Training Office at the Central Board of Prison Service in Warsaw from 12th January 2010.

Prison officers who are helping imprisoned persons are obliged to obey the rules and procedures, created by the proper state authorities. Resocialisation (rehabilitation) tasks are realized in a direct contact with the inmates by a specialist sector called penitentiary service. Its structure constitutes: penitentiary divisions, therapeutic divisions, diagnostic centres, prison schools and two houses for mothers with children. Prison officers and civil workers of penitentiary sector have university degree, they are: psychologists, case managers, pedagogues, addiction therapists, specialists of occupational therapy.

The staff of all penitentiary facilities is trained in the Central Training Centre of Prison Service in Kalisz. The program of training for prison service encompasses also various aspects concerning specific status of detained inmates. In particular, the prison staff is informed about the obligation to respect the presumption of innocence of all detained suspects, stemming from various international treaties and from Article 42 §3 of the Polish Constitution. Furthermore, the staff of detention centre is informed about the need to follow directions of the organ at whose disposal a detainee remains and to respect all rights of detainees.

IV.8. COMPLAINTS BY PRE-TRIAL DETAINEES

Detention and prison establishments in Poland are supervised by penitentiary judges who act under the authority of the Minister of Justice.

Pursuant to Article 6 §2 CECS inmates are entitled to make applications, complaints and requests to the authorities enforcing the sentence. The right of a detained person to submit petition, complaint or request to the competent organs is also confirmed in §§21–22 of the Ordinance of 25 August 2003.

Article 7 §§1 and 2 CECS provides that a convicted person and a detainee (respectively) can challenge before a court any unlawful decision issued by a judge, a penitentiary judge, a governor of a prison or a remand centre, a regional director or the Director General of the Prison Service or a court probation officer. Applications relating to the execution of prison sentences and detention orders are examined by a competent penitentiary court. As transpires from Article 7 §§3–5 CECS, appeals against unlawful decisions shall be lodged within seven days of the date of the pronouncement or the service of the decision; the decision in question shall be pronounced or served with a reasoned opinion and with an instruction as to the right, deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority which issued the contested decision. If that authority does not consider the appeal favourably, it shall refer it, together with the case file and without undue delay, to the competent court. Having

examined the appeal, the court shall decide either to uphold the contested decision, or to quash or vary it; the court's decision shall not be subject to an interlocutory appeal.

In addition, under Article 33 of the Code of Execution of Criminal Sentences, a penitentiary judge is entitled to make unrestricted visits to detention facilities, to acquaint himself with documents and to be provided with explanations from the management of these establishments. A penitentiary judge also has the power to communicate with persons deprived of their liberty without the presence of third persons and to examine their applications and complaints. Under Article 34 CECS a penitentiary judge is competent to quash an unlawful decision issued by, *inter alia*, the governor of a detention centre, concerning a person deprived of his liberty. Moreover, in the event of finding that the deprivation of liberty is not in accordance with the law, a penitentiary judge shall, without undue delay, inform the authority in charge of the person concerned of that fact, and, if necessary, shall order the release of the person concerned (Article 34 §4 CECS).

Lastly, Article 102 §10 CECS guarantees a convicts and detainees a right to lodge applications, complaints and requests with other competent authorities, such as the management of a prison or remand centre, heads of units of the Prison Service, penitentiary judges, prosecutors and the Ombudsman. Detailed rules on the procedure are laid down in the Ordinance of the Minister of Justice issued on 13 August 2003 on dealing with applications, complaints and requests by persons detained in prisons and remand centres.

Complaints concerning breaches of pre-trial detention rights, in particular breaches of the right to contact freely with a defence counsel, can be raised by a detainee during the trial as well as in his appeal against the first instance judgment.

IV.9. MOST IMPORTANT DEVELOPMENTS

In 1998 the new Code of Execution of Criminal Sentences entered into force. It was further amended in 2003. These amendments strengthen the right to defence of a detained person by providing in Article 207a CECS that execution of this preventive measure shall not restrict procedural rights of a detainee.

As was mentioned above, during the last few years the Polish prison system has coped with the problem of overcrowding. Currently this problem seems to be solved and all detainees are provided with adequate living space in detention centres.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

The Polish Law on Criminal Procedure provides for six non-isolatory preventive measures which can serve as alternative for pre-trial detention. The non-isolatory measures are bail (*poręczenie majątkowe*), police supervision (*dozór policji*), guarantee by a responsible person (*poręczenie osoby godnej zaufania*), guarantee by a social entity (*poręczenie społeczne*), temporary ban on engaging in a given activity (*zawieszenie oskarżonego w określonej działalności*) and prohibition on leaving the country (*zakaz opuszczania kraju*).

Bail

Under Polish Law the bail is a separate, independent preventive measure. Consequently, "release on bail" does not mean release on condition that a detainee undertakes to pay a specified sum to the court if he fails to appear before it, but release on condition that the required security is paid to the court by either the detainee himself or sureties before the detainee is released.

Pursuant to Article 266 §1 CCP bail, in form of cash, securities, a bond, or a mortgage, could be deposited by the accused, or by another person. Determination of the sum, form and all relevant modalities of the bail should be made, regard being had to the financial situation of the accused and, as the case may be, another person depositing bail, as well as to the assessed damage which could have been caused by the offence concerned and to the character of the offence (Article 266 §2 CCP).

A person posting bail shall be informed about the consequences of a breach of bail's conditions and shall be notified on each occasion that the accused is summoned to appear (Article 267 CCP). The property and obligations which constitute bail shall be subject to forfeiture or collection if the accused escapes or goes into hiding. If the course of the criminal proceedings is otherwise hindered, such property may be subject to forfeiture or collection pursuant to an appropriate decision (Article 268 §1 CCP). Pursuant to Article 269 CCP the property or sum of money constituting bail which has been forfeited or collected, shall be transferred or paid in to the State Treasury; the injured person shall then have priority in satisfying his claims resulting from the offence, if damages cannot be redressed by other means. If bail ceases to be necessary, the property constituting the same and the sum of money pledged shall be released; if, however, the accused is sentenced to a deprivation of liberty, bail shall be withdrawn only after he has begun serving his sentence. If the accused fails to appear to serve his sentence, the values constituting bail may be subject to forfeiture.

The withdrawal of bail shall become effective only with the acceptance of other bail, the imposition of another preventive measure, or the waiver of the relevant preventive measure.

In the course of investigative stage of the criminal process the bail may be imposed by the public prosecutor. However at this stage of proceedings only the court having jurisdiction over the case, acting upon the motion of the public prosecutor, is competent to decide about the forfeiture of the property constituting bail or the collection of the sum pledged (Article 270 §1 CCP). The defendant (a suspect, the accused in judicial stage of the process) and the person posting bail shall have the right to participate in the court session or to file written statements. A defendant deprived of liberty shall be brought to such session if the president of the court or the court itself consider it necessary (270 §2 CCP). A decision ordering the forfeiture of the sum constituting a bail shall be subject to appeal to the higher court (270 §3 CCP).

Police supervision

Pursuant to Article 275 §1 CCP, as a preventive measure, a suspect or the accused may be committed to the supervision of the Police and, if he is a soldier, to the supervision of the soldier's commanding officer. A person under supervision shall be obligated to comply with the conditions set forth in the order of the court or the public prosecutor. These obligations may consists in the prohibition of absenting himself from a designated area of residence, in his having to report to the police in specified time intervals, and to inform the police of any intention to leave the designated area and the time of his return, as well as other limitations on his freedom of movement necessary to execute the supervision.

Guarantee by a responsible person

Apart from financial guarantee (a bail), the Code of Criminal Procedure in Articles 272–274 provides for an opportunity to accept a guaranty of any trustworthy person that the accused will appear whenever summoned and that he will not obstruct the due course of the proceedings.

When a guaranty is accepted, the guaranty-provider should be notified of the contents of the charge against a suspect/the accused, of his duties resulting from the giving of this guaranty and the possible effects in the event of his failure to discharge the duties. The guaranty-provider shall be obligated to inform the court or the public prosecutor immediately, if it should come to his knowledge that the accused is trying to avoid his duty to appear when summoned or to obstruct the course of the proceedings in some other way.

If a suspect/the accused fails to appear when summoned or obstructs the proceedings in some other manner, the organ which has imposed the preventive measure shall notify the guaranty-provider about this fact. In addition, if the

guaranty-provider neglects his duties the organ may notify his superior as well as the community organisation of which he is a member of this fact. Before sending such notice, the guaranty-provider should be summoned to give an explanation.

Guarantee by a social entity

In accordance with Article 271 CCP a guaranty may be given also by the employer, the office, the school or the higher education establishment of which a suspect/the accused is an employee or student, or by a community organisation of which he is member. Such a guaranty shall state that a suspect/the accused will appear whenever summoned and will not obstruct the course of the proceedings; if the accused is a soldier, such guaranty may be taken from the relevant collective of soldiers, declared through its commanding officer. In a motion for accepting the guarantee the collective or a social organisation concerned shall indicate the person who will undertake the duties of the guaranty-provider. Such a person shall make a statement to the effect that he accepts such duties. If the organisation or another entity providing guarantee fails to discharge its duties, the organ which has imposed the preventive measure shall notify its superior about this fact.

Temporary ban on engaging in a given activity

Pursuant to Article 276 CCP as a preventive measure, a suspect/the accused may be suspended from his official function or performance of his profession or be ordered to refrain from a specific type of activity or from driving specific types of vehicles.

Prohibition on leaving the country

As transpires from Article 277 CCP, the procedural organs may issue a decision preventing a suspect/the accused from leaving the country if there is good reason to fear of his escape. This prohibition may be combined with seizing his passport or other documents enabling him to cross the border, or with a prohibition to issue such a document. Prior to issuing the above mentioned decision, the organ conducting the criminal proceedings may retain the above mentioned documents but for a period not exceeding 7 days.

The available statistical data[61] disclose only the number of preventive measures applied at the pre-trial stage of the proceedings.

61 Table elaborated on the basis of information published on the WEB of the Ministry of Justice (at: www.ms.gov.pl/).

	2007		2008	
Detention on remand	31,722	33.8%	24,848	28.8%
Bail	15,591	16.6%	16,685	19.3%
Police supervision	33,964	36.1%	34,750	40.3%
Guarantee by a responsible person	74	0.07%	74	0.09%
Guarantee by a social entity	33	0.03%	6	0.01%
Temporary ban on engaging in a given activity	1,512	1.6%	1,127	1.3%
Prohibition on leaving the country	11,084	11.8%	8,821	10.2%

Cases, grounds, level of suspicion and other considerations

At the investigative stage of the criminal process non-isolatory preventive measures may be ordered by the public prosecutor (Article 250 §4 CCP). However, an order of the public prosecutor for a preventive measure shall be subject to interlocutory appeal to the district court having jurisdiction over a region in which the pre-trial proceedings are pending (Article 252 §2 CCP). During the judicial proceedings only the court having jurisdiction over the case may apply preventive measures. During the pre-trial stage of the proceedings all preventive measures (including non-isolatory measures) may be applied only against the person having the status of a suspect.

Non-isolatory preventive measures may be applied in every criminal case on the basis of the same grounds as detention on remand, as listed in Articles 249 and 258 CCP.[62] They may be applied cumulatively but could not be combined with detention on remand. As a rule procedural organs should first consider application of non-isolatory preventive measures. Pursuant to Article 257 CCP detention on remand shall not be applied if another preventive measure is sufficient.

In written reasons for the order on the application of a preventive measure, procedural organ shall present evidence demonstrating that a suspect/the accused has committed an offence, and refer to the facts indicating the existence of grounds necessitating the application of a preventive measure. In the case of detention on remand it should be further explained why applying other preventive measures has been regarded as insufficient (Article 251 §3 CCP).[63]

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62 See supra section II. Pursuant to Article 258 §4 CCP, provisions of §1 through 3 (indicating grounds for detention on remand) shall apply accordingly to the remaining preventive measures. No data are available how often non-isolatory preventive measures are ordered in cases concerning specific crimes such as murder, manslaughter, assault and battery, theft and embezzlement, terrorism offences, public order offences.

63 In practice courts give terse and insufficient written reasons for their decisions concerning detention on remand. No explanation is provided why other preventive measures seem to be insufficient. See, S. Momot, *Postępowanie sądowe w sprawach, w których czas trwania*

Monitoring of alternative measures

As was mentioned above, orders of the public prosecutor for a preventive measure shall be subject to interlocutory appeal to the district court having jurisdiction over a region in which the pre-trial proceedings are pending. Also court's decisions applying non-isolatory preventive measures shall be subject to appeal to the higher court (Article 252 §1 CCP). Moreover, under Article 254 CCP a suspect/the accused may request at any time that a preventive measure be lifted, changed or replaced by less severe preventive measures. At the pre-trial stage of the proceedings his request shall be examined by the public prosecutor within the time-limit of 3 days. During the judicial proceedings the request shall be examined by the court within the same time-limit of 3 days.

While supervising the application of non-isolatory preventive measures all procedural organs are bound by the general rule that such measures shall be terminated if the grounds for their application have ceased to exist (Article 253 CCP).

The law does not provide for any time limits for application of non-isolatory preventive measures.[64] As transpires from Article 249 §4 CCP, they may continue until the commencement of serving the sentence.

Most important developments

The Code of Criminal Procedure of 1997 introduced a new non-isolatory preventive measure, temporary ban on engaging in a given activity (Article 276 CCP). As described above, under Article 276 CCP a defendant may be suspended from his official function or performance of his profession or be ordered to refrain from a specific type of activity or from driving specific types of vehicles.

Most recently, on 1 August 2010, the new non-isolatory preventive measure was introduced into the Code of Criminal Procedure. The new Article 275a CCP[65] provides that a person suspected of having committed violent crime against another person living together with him/her in one flat or home, may be ordered to leave this flat or home if there is a risk that s/he would commit another violent crime against flatmates. At the pre-trial stage of the proceedings this measure could be ordered by a public prosecutor for a period not exceeding 3 months and may be prolonged for further 3 months by a court.

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tymczasowego aresztowania przekroczył 2 lata (w świetle badań aktowych) [Judicial proceedings in cases in which detention on remand has exceeded 2 years (on the basis of case-files' analysis)], Prokuratura i Prawo No. 4/2009, p. 78.

64 In two cases against Poland the European Court found that lengthy application of non-isolatory preventive measures was in breach of the European Convention on Human Rights. See, ECtHR, 15 January 2008, *Zmarzlak v. Poland*, Appl. 37522/02; ECtHR, 31 March 2009, *A.E. v. Poland*, Appl. 14480/04.

65 Introduced by the Act of 10 June 2010 (published in the Official Journal No. 125, item 842) which entered into force on 1 August 2010.

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VI. CONCLUSION

The Code of Criminal Procedure contains precise rules on detention on remand, including provisions restricting the length of application of this preventive measure at the pre-trial and judicial stage of the proceedings. Nevertheless excessive length of detention is defined by the European Court of Human Rights as a systemic problem of the Polish legal system. Recent statistics show some improvements and tendency to replace detention by non-isolatory preventive measures more frequently. This is due to raising awareness of judges that long lasting detention could be condemned by the European Court. Another reason is that the number of alternative measures has increased over the last few years.

As was underlined in the report, the Constitutional Court's jurisprudence has a great impact on improving procedural rights and accommodation of detainees in Poland. Several important rights, like for example the right to obtain visits in detention centres, the right to adequate living space in cells were recognised by the Constitutional Court whose judgments forced the legislator to improve the law on these issues. On can argue that the European Court on Human Rights together with the Polish Constitutional Court play the main role in protecting rights of detainees in Poland.

PRE-TRIAL DETENTION IN PORTUGAL

Luís de Miranda Pereira*

I. INTRODUCTION

In recent years pre-trial detention ("prisão preventiva") has gotten much attention in Portugal. The Code of Criminal Procedure (CCP), which together with the Constitution of Portugal forms the most important legal framework for pre-trial detention, was importantly amended in order to deepen the *ultima ratio* of deprivation of liberty in the pre-trial phase. Furthermore, the prison system – also relative to pre-trial detention – is seriously reorganized, while there increasingly seems to be attention for alternatives to pre-trial detention. International human rights law is actually influencing all these different aspects of pre-trial detention in Portugal.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Portugal is a member of the United Nations (UN) since 14 December 1955, of the Council of Europe (COE) since 22 September 1976, and of the European Union (EU) since 12 June 1985. Other organizations to which it belongs and that might be relevant to pre-trial detention include: the Organization for Economic Cooperation and Development (OECD), since 14 December 1960; the Organization for Security and Co-operation in Europe (OSCE); since 1 January 1995; the International Criminal Court (ICC), since 7 January 2002; the International Criminal Police Organization (INTERPOL), since 13 June 1956;

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and the International Organization for Migrations (IOM), since 17 November 1975.[1]

There are many international human rights treaties and conventions to which Portugal is a contracting party. There are first of all several international instruments, most noteworthy of which are the UN International Covenant on Civil and Political Rights (since 7 October 1976), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (since 4 February 1985), and the UN Convention on the Rights of the Child (since 26 January 1990). On a regional level there is of course the European Convention on Human Rights (since 22 September 1976), on the basis of which citizens do have the right to complaint to the European Court of Human Rights, and furthermore the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and Protocols I and II thereto (since 26 November 1987). Portugal did not make any reservations with regard to pre-trial detention when signing up to these treaties.

Article 8 of the Portuguese Constitution determines that the rules and principles of general or common international law shall form an integral part of Portuguese law. The rules set out in duly ratified or passed international conventions shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding to the Portuguese State. Rules issued by the competent bodies of international organizations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.

That the rules and principles of general or common international law shall form an integral part of Portuguese law also implies that fundamental human rights are directly enforceable through the domestic courts. The rules set out in duly ratified or passed international conventions shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese State. But also soft law instruments have their influence: for example the prison system follows most international legal instruments in this area, most notably the Council of Europe's European Prison Rules.[2]

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[1] Information on other international organizations of which Portugal is a member can be found at: www.mne.gov.pt/mne/pt/ministerio/orgint/ (Foreign Affairs Ministry webpage).

[2] Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

Portugal has a Constitution. The present Constitution was adopted in 1976 and has, since then, been subjected to seven revisions, the last of which in 2005. The Constitution stresses that the Portuguese Republic shall be a democratic State based on the rule of law, the sovereignty of the people, plural democratic expression and organization, respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers, all with a view to achieving economic, social and cultural democracy and deepening participatory democracy.

The Constitution foresees rights pertaining to pre-trial detention (see Articles 27 and 28). Everyone shall possess the right to freedom and security and no one may be wholly or partially deprived of their freedom, except as a consequence of a judicial sentence imposed for the practice of an act that is punishable by law with a prison term or the imposition by a court of a security measure.

The following cases of deprivation of freedom, for such time and under such conditions as the law may determine, shall be exceptions to this principle (Article 27 of the Constitution):

a. Detention *in flagrante delicto*;
b. Detention or remand in custody where there is strong evidence of the commission of a serious crime punishable by imprisonment for a maximum term of more than three years;
c. The imposition of imprisonment, detention or any other coercive measure subject to judicial control, on a person who improperly entered or is improperly present in Portuguese territory, or who is currently the object of extradition or deportation proceedings;
d. The imposition of disciplinary imprisonment on military personnel. Such imprisonment shall be subject to appeal to the competent court;
e. The subjection of a minor to measures intended to protect, assist or educate him in a suitable establishment, when ordered by the competent court of law;
f. Detention under a court order for disobeying a court ruling or to ensure appearance before a competent judicial authority;
g. Detentions of suspects for identification purposes, in such cases and for such time as may be strictly necessary;
h. Committal of a person suffering from a psychic anomaly to an appropriate therapeutic establishment, when ordered or confirmed by a competent judicial authority.

Every person who is deprived of his freedom shall immediately be informed in an understandable manner of the reasons for his arrest, imprisonment or detention and of his rights. Deprivation of freedom contrary to the provisions of the Constitution and the law shall place the State under a duty to compensate the

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aggrieved person in accordance with the law. See Article 27 §4 and 5 of the Constitution.

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

In the Portuguese legal framework the following situations of pre-trial deprivation of liberty are foreseen (cf. Article 27 of the Constitution):

- Detention (Detention *in flagrante delicto*; detention where there is strong evidence of the commission of a serious crime punishable by imprisonment for a maximum term of more than three years);
- Remand in custody (coercive measure);
- Internment in hospital facility (therapeutic unit) of a person with a psychic anomaly, after an order of the competent judicial authority;
- The imposition of imprisonment, detention or any other coercive measure subject to judicial control, on a person who improperly entered or is improperly present in Portuguese territory, or who is currently the object of extradition or deportation proceedings;
- Detention under a court order for disobeying a court ruling or to ensure appearance before a competent judicial authority;
- Detention of suspects for identification purposes, in such cases and for such time as it may be strictly necessary.

On 1 August 2009 there were 2,154 persons in remand in custody (preventive arrest). The total prison population was, on the same date, 11,100. The following values correspond to the average duration of pre-trial detention of defendants in criminal cases completed at the first instance courts, up until such time as a final decision is delivered in that instance and irrespective of whether such decision leads to a conviction or not: 2001: 9 months; 2002: 9 months; 2003: 9 months; 2005: 10 months; 2006: 10 months.[3] As such, it does not comprise the time elapsed until a final decision on an eventual appeal is reached.

III.1. PROCEDURAL CONDITIONS FOR PRE-TRIAL DETENTION[4]

Police custody (different than detention) does not exist in the Portuguese legal framework. Every detention must be validated by a judge. Suspect arrested who

[3] This information is not yet available for 2007 and later.

[4] See much more detailed, P. Lambertina, 'Portugal', in: A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers, 2009.

will not be judged immediately, are presented to a judge for questioning in the maximum delay of 48 hours; see Article 141 §1 of the Criminal Code of Procedure (CCP). Any detention made by the police shall be submitted to judicial scrutiny within that period of at most forty-eight hours (see also *infra*).

Remand in custody is defined, under the Portuguese legislation, as the deprivation of liberty, previous to a conviction, aiming to act as a coercive measure, in the framework of a judicial proceeding. The decision to take a person in remand is always taken by a judge. Remand in custody, as other coercive measures, is ordered by a judicial dispatch. During investigating phase a requirement of the public prosecution is mandatory and after this phase the judge can officiously apply this measure but the public prosecution has to be heard. Remand in custody shall be exceptional in nature and shall not be ordered or maintained whenever it is possible to grant bail or apply another, more favourable measure provided for by law.

Within at most forty-eight hours, all detentions shall be submitted to judicial scrutiny with a view to either the detainee's release or the imposition of an appropriate coercive measure, according to Article 28 §1 of the Constitution. The judge shall become acquainted with the reasons for the detention and shall inform the detainee thereof, question him and give him the opportunity to present a defence.

Remand in custody can only be ordered whenever all the other less grievous coercive measures are considered insufficient. This measure can be ordered when:

a. There is strong evidence of the commitment of an intentional crime punished with imprisonment of a maximum time superior to five years;
b. There is strong evidence of the commitment of an intentional crime of terrorism, violent criminality or highly organized punished with imprisonment of a maximum time superior to three years; or
c. It is a person who has entered or remains illegally in national territory and against whom an extradition or expulsion proceeding is running.

It is important to stress that it is not mandatory for the judge to apply pre-trial detention. If considered proper he can apply any other measure (see alternatives to pre-trial detention further below) as long as the legal requirements for that are met. These other measures are often all applicable. As a result, only 19% of the total prison population is made of citizens in remand in custody.

A person cannot be taken in pre-trial detention when he or she is suspected of an offence for which imprisonment is not provided as a penalty. That is however different when that person has entered or remains illegally in national territory and against whom an extradition or expulsion proceeding is running. Moreover,

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it is possible for the judge to order the detention in order to guarantee the presence of the detained before a judicial authority.

As above stressed, within at most forty-eight hours all detentions shall be submitted to judicial scrutiny with a view to either the detainee's release or the imposition of an appropriate coercive measure. The detainee can also be detained to immediately (within the scope of the 48 hours) be submitted to trial under the summary form (special simplified procedure form applicable under certain restrictions). Detention can also take place to guarantee the immediate presence of the defendant before the judge in a procedural act.

Police entities can proceed to the detention of any person committing a crime *in flagrante delicto* to which imprisonment penalty is applicable (and whenever this crime does not depend on private accusation). Out of these cases the detention can only take place under a judge order or, in cases in which remand in custody is admissible, under a public prosecutor order, whenever there are grounds to believe that the suspect would not voluntarily present himself to the judiciary authority in the time fixed for the purpose.

Detention can also be ordered by police authorities own initiative out of *flagrante delicto* when:

a. It is a case where remand in custody is legally admissible;
b. There are reasons to believe that the suspect would escape; and
c. It is not possible, considering the urgency, to wait for the intervention of the judiciary authority.

As above mentioned there is no such thing as police custody remand in the Portuguese legal system. Detention by the police is a precarious and exceptional measure, lasting at most 48 hours, necessarily designated to accomplish certain objectives determined by law.

Remand in custody is only applicable under specific circumstances and is subject to regular review. The judge re-examines the grounds of remand in custody deciding if this measure is to maintain, to replace or to revoke:

a. In the maximum delay of three months after the application of the measure or three months after the last review; and
b. When the pronouncement or accusation dispatch is released or when a final decision is taken and this decision does not determine the extinction of the measure.

Judicial review takes place automatically. The judge, accordingly to Article 213 CCP, automatically reviews the remand in custody measure.

A detained suspect /defendant can also initiate proceedings for release. *Habeas corpus* shall be available to counter the misuse of power in the form of illegal imprisonment or detention. Application for it shall be made to the competent court. Application for a *habeas corpus* order may be made by the person so arrested, imprisoned or detained, or by any citizen exercising his political rights. Within eight days of an application for habeas corpus the judge shall rule thereon in a hearing that shall be subject to pleading and counter-pleading. There is no legal limit for the number of times in which this proceeding may take place. It can be used every time the legal requirements for its application are met.

Habeas corpus is an appeal mechanism that can be used in cases of illegal detention or illegal arrest. Regarding detention, habeas corpus can be required if:

a. The time limit for judicial presentation of the detainee is exceeded;
b. The detention takes place out of the allowed places;
c. The detention was made by an authority without legal competence to do so;
d. The detention was funded in a reason not admissible by law.

Regarding imprisonment, habeas corpus can be required if:

a. The imprisonment was ordered by an authority without legal competence to do so;
b. The imprisonment was funded in a reason not admissible by law; or
c. The imprisonment is kept besides the time fixed by law or by judicial decision.

Article 215 CCP foresees time limits for pre-trial detention. Pre-trial detention is extinguished when since its beginning has passed:

a. Four months without accusation being pronounced;
b. Eight months without a decision if the instruction phase takes place;
c. A year and two months without conviction in first instance;
d. A year and six months without a *res judicata* conviction.

The above mentioned time-lines increases to 6 months, 10 months, a year and six months and 2 years respectively in cases of terrorism, violent or highly organized criminality or when it is in stake a crime punished with imprisonment penalty with a maximum superior to eight years or certain types of crimes such specifically foreseen in the Criminal Code of Procedure. The primitive time lines also increase to respectively a year, a year and four months, two years and six months and three years and four months in the same circumstances as the first mentioned increase whenever the special complexity of the crime justifies so. Special complexity can be due to the particularly large number of accused.

In principle the pre-trial detention status is retained until the determination of an appeal against conviction or sentence; remand in custody is only extinguished with the decision of the appeal against the conviction. However, if the conviction foresees an imprisonment time lower than the time that the convicted has already paid, it is immediately extinguished. On the other hand, even if there is an appeal against the absolving sentence, the remand in custody finishes immediately and does not wait for the decision on the appeal.

III.2. INFORMATION, LEGAL REPRESENTATION, INTERPRETER, INFORMING OTHERS

Every person who is deprived of his freedom shall immediately be informed in an understandable manner of the reasons for his arrest, imprisonment or detention and of his rights (Article 27 of the Constitution).

Accordingly to the Criminal Code of Procedure, a person assumes the quality of defendant (*arguido*) when he is subject to detention (to be presented to a judge in 48 hours or for summary trial or to be presented in 24 hours to judiciary authority). The defendant (*arguido)* has the right to be informed of the facts that are imputed to him before he pays any declaration before any entity. He has also the right to be informed on his rights. On the first questioning of detained defendant (*arguido*), that happens in the 48 hours subsequent to the detention, the judge informs the defendant (*arguido*) of the motives of the detention, of the specific fact that are imputed to him (including, whenever possible about the circumstances, the time, the place and the *modus*) and of the elements of the proceeding that indict the imputed facts (as long as this does not compromise the investigation, does not difficult the search of truth and does not put in danger life, physical or psychological integrity of the victims).

The *arguido* (defendant) has the right to be assisted by a legal representative in all procedural acts in which he has to participate and, when subject to detention, he has the right to communicate in private with the legal representative. Besides, Article 92 §2 CCP determines that when a person that does not understand Portuguese has to intervene in a procedural act, an interpreter shall be appointed. Suspects do furthermore have the right to inform their family when they have been arrested or taken in pre-trial detention. And according to Article 28 §3 of the Constitution, notification of any court order that institutes or maintains a measure entailing the deprivation of freedom shall immediately be given to such relative or other person of trust as the detainee may nominate.

III.3. MOST IMPORTANT DEVELOPMENTS

The recent amendment to the Criminal Code of Procedure operated by Law nr. 48/2007, of 29 August, which entered into force on 15 September 2007, introduced the most important changes of the last years in the pre-trial detention regime (remand in custody). The most relevant changes affect the range of crimes for which remand in custody may take place and the maximum time-limit for pre-trial detention.

Article 193 CCP was changed in order to comprise the principle of necessity facing the application of pre-trial detention (remand in custody). As for the home detention (also a form of deprivation of freedom) this is now only applicable when all the other coercive measures are considered insufficient. Remand in custody is still a last resort measure.

As regards the range of crimes for which remand in custody may take place, the application of remand in custody is now limited to intentional crimes punished with imprisonment of maximum superior to five years (before, the limit was three years). However, bearing in mind some important criminal phenomenon, the Code sets forth that intentional crimes of terrorism, violent criminality or highly organized crime admit preventive arrest (remand in custody) even if punished with imprisonment with maximum only superior to three years.

The maximum time-limit for pre-trial detention was also moderately reduced. It became also stated that the judge may not impose a coercive measure more grievous than the one required by the public prosecution. The Code furthermore reinforced the need of justification of the decision of imposing a coercive measure, setting forth in detail the minimum content of the justification.

It should also be mentioned that, as regards compensation to a person who was subject to pre-trial deprivation of liberty, the cases where compensation may take place were extended to home detention cases and to cases when the procedure concludes that the person didn't commit the crime.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

When a suspect is arrested by the police he may be kept in special facilities of the police for a maximum of 48 hours (which is, as explained *supra*, the maximum period after which the suspect much be presented to a judge for questioning). After that, they will normally be transferred to a penitentiary establishment.

Pre-trial detainees are in principle accommodated separately from sentenced prisoners. The separation of prisoners by status (pre-trial detention / sentenced) is set forth in the Portuguese Penitentiary Law and has been promoted by the prison services administration. The prison facilities have both sentenced and pre-trial detainees in the same establishment. However, the separation is promoted through the placement of the prisoners in different wings accordingly to their status.

It is important to underline that Portugal is now implementing a global project of reorganization of the prison system. This project reorganizes and distributes the prison population considering their penal status (pre-trial defendant/ sentenced), the regimen in which the penalty is being executed (closed, open or security) and other relevant criteria, making the spaces autonomous.

The separation of prisoners by age is set forth in the Portuguese Penitentiary Law and has been promoted by the prison services administration. For example, the Prison of Leiria is exclusively for young prisoners. As for the other facilities where both young and adult prisoners are kept, the separation is promoted through the placement of the prisoners in different wings accordingly to their age.

Regardless of the status of the prisoners, there is the care to protect all of them and, necessarily, the ones belonging to especially vulnerable groups. It is also important to highlight that specific programs for sexual crimes prisoners are being developed.

As many other countries, Portugal must deal with terrorists and other dangerous criminals. The prisoners in these categories are placed in security zones. This security zones exist in some Central Prisons and in the maximum security prison available in the system.

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Cells for pre-trial detainees have the same size as cells for convicted.

The prisoner's placement policy (pre-trial or convicted) is one prisoner for cell. In exceptional situations (cases of overpopulation, which now do not exist), it was necessary to place more than one person in a cell. Exception is made in the facilities in which the space is organized in large rooms (*camaratas*).

The architectonic distribution of the cell spaces as well as the internal regulations and the practice of recess, working, training, learning and physical activities allows the contact among prisoners regardless of their status (pre-trial or convicted).

All prisoners, pre-trial and convicted, when entering the prison facilities are informed on the rules and are informed on the Internal Regulation (which is usually available on the library) and, in some prisons, is delivered a leaflet, in English and Portuguese, containing a summary of the regulation. All prisoners entering have to be received, in the first 72 hours, by the education and health services. In some cases an interview with the prison Director also takes place.

The Portuguese Constitution stresses that no one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment. Portugal is furthermore bound by International law holds that all persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person (see, *e.g.*, Article 10 ICCPR and Articles 3 and 8 ECHR).

All prisoners have unlimited access to sanitary installations and bath. All cells (and large rooms – *camaratas*) are provided with these facilities. All prisoners may use their own clothes. The Portuguese imprisonment system does not have as a common practice the supply of uniforms to the prisoners. Only working clothes are supplied.

Pre-trial detainees, as well as convicted persons, have in principle access to media. Television sets are allowed in cells. Pre-trial detainees may receive daily visits, as long as the Internal Regulation are observed.

Regardless of exceptional and punctual situations, the prisoners may leave the cells at 8 a.m. and have to be back between 5 and 5h30 p.m. In this period, and out of school or labour hours, they can stay in open sky areas or in covered common spaces, depending on their own individual option. All pre-trial detainees may work as long as there is enough offer and they are available to do so.

Besides the above mentioned promoted separation, there are regular security rules and surveillance in order to prevent conflicts and assault between prisoners, regardless of their criminal status. And apart from the regular suicide preventive measures, whenever a pre-trial detainee enters in the system with the indication of having suicidal behaviour and/or depressive, or that considering the nature of the crime in stake may have that risk, surveillance is tightened.

Pre-trial detainees have a medical interview just the moment they enter the prison system. While they are at the prison, they have medical and nursing treatment as well as all other prison population. These treatments include the access to both public and private hospitals and clinics. It is important to highlight that all prisons in Portugal have medical and nursing staff. The health area is also now being subject to a specific improvement program.

If a pre-trial detainee is to be placed in solitary confinement/isolation punishment, a medical officer will check beforehand that he/she is fit to sustain such punishment. Moreover, during the execution of the disciplinary sanction the medical surveillance continues.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

The legal system of Portugal does allow for alternatives for pre-trial detention. The freedom of citizens can only be limited, totally or partially, according to the

preventive demands of a proceeding, by the coercive or patrimonial measures foreseen by law. These measures should be applicable according to criteria of proportionality, need and sufficiency. The measures foreseen by law are the following:

- Term of identity and residence;
- Security deposit;
- Obligation of periodical presentation before an authority;
- Suspension of the exercise of a profession, function, activity and rights;
- Prohibition and imposition of conduct;
- Home detention (with eventual use of electronic bracelet);
- Remand in custody.

Regarding the data from the completed cases in the judicial courts during 2008 (preliminary data), the following table shows the distribution of the measures applied to the suspected offenders. It is important to refer that each offender can have more than one measure applied in each case.

Alternative measure	**2008**	**%**
Term of identity and residence	36,919	94%
Security deposit	64	0%
Obligation of periodical presentation before an authority	1,482	4%
Suspension of the exercise of a profession, function, activity and rights	54	0%
Prohibition and imposition of conduct	295	1%
Home detention (with eventual use of electronic bracelet)	111	0%
Remand in custody	491	1%
Total	**39,416**	**100%**

According to Article 28 §2 of the Constitution, remand in custody shall be exceptional in nature and shall not be ordered or maintained whenever it is possible to grant bail or apply another, more favourable measure provided for by law. Thus, remand in custody can only be ordered whenever all the other less grievous coercive measures are considered insufficient. As for the other measures:

- *Term of identity and residence* – is always applicable;
- *Security deposit* – If the imputed crime is punished with imprisonment penalty the judge may impose to the accused the obligation to pay a security deposit;
- *Obligation of periodical presentation before an authority* – If the imputed crime is punished with imprisonment penalty of maximum superior to six months the judge may impose to the accused the obligation to present himself before a

judiciary authority or a specific criminal police authority in specific days and hours bearing in mind his professional demands and place of residence;

- *Suspension of the exercise of a profession, function, activity and rights* – If the imputed crime is punished with imprisonment penalty of maximum superior to two years, the judge may impose to the accused together with any other measure (if the case justifies) the suspension of the exercise of a profession, function, activity and rights, whenever this suspension is possible to be imposed as an effect of the imputed crime;
- *Prohibition and imposition of conduct* – If there is strong evidence of the practice of an intentional crime punished with imprisonment penalty of maximum superior to three years the judge may impose to the accused (together with any other measure if the case justifies) certain obligations (for example, the obligation not to travel abroad or the obligation not to stay in certain area, among others);
- *Home detention* (with possible use of electronic bracelet) – If the other measures are considered insufficient, the judge may impose to the accused the obligation of remain (and not leave or not leave without authorization) from his house or from any other place in which he lives at the moment or from health or social support facility, whenever there are strong evidence of the practice of an intentional crime punished with imprisonment penalty of a maximum superior to three years.

Meanwhile, a person cannot be subjected to alternatives when he/she is suspected of an offence for which imprisonment is not provided as a penalty, except for the measure of *term of identity and residence*. Moreover, no coercive measure (except for again the measure of term of identity and residence) can be imposed to a specific case if, at the time of the application there is no:

- Escape or risk of escape;
- Risk of disturbing the investigation or the proceeding and risk of losing or keeping evidence; or
- Danger related to the crime or the personality of the defendant, namely of committing further offences or causing public disorder.

Article 218 CCP determines that *security deposit* and the *obligation of periodical presentation before an authority* are extinguished when, since it's application, have passed:

a. Eight months without accusation being pronounced;
b. Sixteen months without a decision if the instruction phase takes place;
c. Two years and four months without conviction in first instance;
d. Three years without a *res judicata* conviction.

Prohibition and imposition of conduct and *home detention* are extinguished according to the same delays of remand in custody:

a. Four months without accusation being pronounced;
b. Eight months without a decision if the instruction phase takes place;
c. A year and two months without conviction in first instance;
d. A year and six months without a *res judicata* conviction.

The above mentioned time-lines increase to 6 months, 10 months, a year and six months and 2 years respectively in cases of terrorism, violent or highly organized criminality or when it is in stake a crime punished with imprisonment penalty with a maximum superior to eight years or certain types of crimes such specifically foreseen in the Criminal Code of Procedure. The primitive time lines also increase to respectively a year, a year and four months, two years and six months and three years and four months in the same circumstances as the first mentioned increase whenever the special complexity of the crime justifies so. Special complexity can be due to the particularly large number of accused.

Some alternatives for pre-trial detention are subject to regular review. The judge, accordingly to Article 213 CCP, not only automatically reviews the remand in custody measure, but also home detention. The judge re-examines the grounds deciding these measures are to maintain, to replace or to revoke:

a. In the maximum delay of three months after the application of the measure or three months after the last review; and
b. When the pronouncement or accusation dispatch is released or when a final decision is taken and this decision does not determine the extinction of the measure.

The coercive measures are immediately revoked by a judicial dispatch whenever: a) They were applied without respect for the conditions foreseen by law; b) The conditions under which they were applied no longer exist. As for the other measures, the revoking and replacement takes place at the judge's own initiative or under requirement of the public prosecution or the defendant (Article 212 CCP).

By reinforcing the exceptionality of remand in custody, the aforementioned recent amendment to the Criminal Procedure Code operated by Law nr. 48/2007, of 29 August, intended to improve the enforcement of alternatives to pre-trial detention. It is nevertheless important to bear in mind that these alternatives, just like remand in custody, are exceptional measures (coercive measures) applicable to an innocent person (until proof to the contrary) during a proceeding and respecting pre-requirements. It is stated that the judge may not

impose a coercive measure more grievous than the one required by the public prosecution. The Code also reinforced the need of justification of the decision of imposing a coercive measure, setting forth in detail the minimum content of the justification. Regarding the measure "prohibition and imposition of conduct", the number of possible impositions or prohibitions was extended.

VI. CONCLUSION

Several important improvements relative to pre-trial detention have been implemented in the law and prison organization. It is now up to the Portuguese courts, law officials and prison administration to actual effectuate them and keep effectuating them.

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PRE-TRIAL DETENTION IN SOUTH AFRICA: TRIAL AND ERROR

Deon van Zyl*

I. INTRODUCTION

There are sound reasons for speaking of "trial and error" when discussing the topic of pre-trial detention in South Africa. Chief among these is the fact that approximately one third of the persons detained or incarcerated in the currently 239 operational prisons in South Africa are not yet convicted or, if convicted, have not yet been sentenced in a court of law. This means that, on average over the past five years or so, there have, at any given time, been some 50,000 pre-trial or awaiting trial detainees out of a total of around 160,000 persons held in such prisons.

There have, over the years, in both the previous political dispensation and the new democratic dispensation which commenced on 27 April 1994, been various means of dealing with, or attempting to deal with, the problem of vast numbers of pre-trial detainees. Even before the new *Constitution*, and the *Bill of Rights* contained in chapter 2 thereof, came into operation on 8 May 1996, it was fully realised that a person arrested and charged with having committed a criminal offence was innocent until convicted and sentenced on such charge by an appropriately qualified court of law. The detention of such person was hence required to be distinguished from that of a convicted and sentenced offender, and likewise from that of a convicted but not yet sentenced offender. This has not, however, been a simple task since there have always been a limited number of detention facilities and pre-trial detainees have to date been held in such facilities together with convicted and sentenced criminal offenders.

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Over the years various attempts have been made to achieve the required distinction, but in practice these attempts have proved to be substantially ineffective – whence the suggestion that pre-trial detention has been characterised by "trial and error." Most recently, however, as will be pointed out in the ensuing discussion, steps have been taken to address the "error" and amending legislation is in the offing directed at creating "remand detention facilities" for pre-trial detainees, who will be referred to as "remand detainees." To what extent this will be practicable and effective is yet to be seen, but it is certainly a bold step in the right direction.

II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

South Africa is presently a member of the United Nations and the African Union and has been so since 1945 and 2002 respectively. It has also been a member of other internationally recognised organisations, as appears from what follows.

The establishment of the United Nations in 1945 accorded South Africa considerable international prestige[1] as a result of its being largely responsible for the drafting of the preamble to the United Nations Charter, which reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[2] The subsequent policy of *apartheid*, however, which commenced "officially" when the National Party came into power in 1948, and particularly the savage and unbridled police violence directed at peaceful demonstrators at Sharpeville in 1960, resulted in South Africa's falling woefully short of upholding the *United Nations Charter* clauses which promote human rights.[3] Despite this, and perhaps as a direct result of the international opposition to *apartheid*, South Africa's contribution to the development of international law during this period was nevertheless substantial in that it actively participated in the evolution of new rules relating to international treaties and the development of customary law with a view to promoting human rights, racial equality and decolonisation in Africa and elsewhere.[4]

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1 J. Barber & J. Barrat (eds) *South Africa's Foreign Policy: The Search for Status and Security* 1945–1988 (1990).

2 W.K. Hancock *Smuts* vol 2: *The Fields of Force* 1919–1950 (1968),p. 428–433.

3 Articles 55 and 56 of the Charter. See further chapter 14 of John Dugard, *International Law: A South African Perspective*, Kluwer 2006.

4 John Dugard, *International Law: A South African Perspective*, Kluwer 2006, p. 20. See also the *International Convention on the Suppression and Punishment of the Time of Apartheid* (1973).

The advent of the new political dispensation in South Africa on 27 April 1994, when Nelson Mandela was sworn in as its first democratically elected President, dramatically changed its position in the world. *Apartheid* made way, initially, for an *Interim Constitution* in 1993 and, in 1996, for a new *Constitution* (Act 108 of 1996) founded on "human dignity, the achievement of equality and the advancement of human rights and freedoms." It resumed its seat in the General Assembly of the United Nations and was elected to full membership of a number of specialised agencies of the United Nations. It was further readmitted to the Commonwealth of Nations, from which it had withdrawn in 1961, and it became a member of the Organisation of African Unity (OAU), the Non-Aligned Movement and the Southern African Development Community (SADC).[5] In recent times South Africa has hosted United Nations conferences on racism (Durban, September 2001) and sustainable development (Johannesburg, September 2003), and likewise hosted the inauguration of the African Union (July 2002), of which it became an active member from its inception.

Prior to 1994 South Africa was a signatory to various international conventions and protocols, including the *Convention for the Suppression of the Traffic in Women and Children* (1921, signed in 1922), *Convention for the Suppression of the Traffic in Women of Full Age* (1933, signed in 1935), the *Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, plus Final Protocol* (1950, signed in 1951), the *Convention on the Political Rights of Women* (1953, signed in 1993) and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984, signed in 1993).

On its re-admission to the international scene in 1994 South Africa signed or ratified a number of international human rights treaties and conventions, including the *Convention on the Elimination of all Forms of Racial Discrimination* (1966, signed in 1994), the *Convention on the Elimination of all Forms of Discrimination against Women* (1979, ratified in 1995), *Convention on the Prevention and Punishment of the Crime of Genocide* (1948, signed in 1998), *Convention on the Rights of the Child* (1989, ratified in 1995), *African Charter on Human and Peoples' Rights* (adopted 1981, promulgated 1986, acceded to by South Africa in 1996), *African Charter on the Rights and Welfare of the Child* (1990, signed in 1997, ratified in 2000), *Hague Convention on the Civil Aspects of International Child Abduction* (1980, signed in 1997), *SADC Declaration on Gender and Development for the Prevention and Eradication of Violence against Women and Children* (adopted and signed in 1997), *Addendum to the 1997 SADC Declaration on Gender and Development for the Prevention and Eradication of Violence against Women and Children* (adopted and signed in 1998), *International Covenant on Civil and Political Rights* (1966, ratified in 1998), *Optional Protocol to the International Covenant on Civil and Political Rights,*

5 John Dugard, *International Law: A South African Perspective,* Kluwer 2006, p. 22.

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dealing with claims by individuals that they are the victims of human rights violations (1976, signed in 2002), *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death sentence* (1989, signed in 2002) and the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT 2002, signed in 2006 but not yet ratified).

Since its democratisation South Africa has been dynamic in developing human rights in line with international standards through its social, justice and correctional initiatives. These initiatives did not evolve without challenges as the country has continued to face structural and normative changes which might have had the effect of infringing upon or neglecting human rights, something which has, to some extent, been evident in the correctional system. In the meantime, however, various domestic laws and policies, directed at upholding human rights in accordance with international standards, have been introduced.

It should be noted that, prior to the *Interim Constitution* of 1993 referred to above, no mention was made in any constitutional document to the place of international law in the South African legal order. In the 1996 *Constitution*, however, South African common law expressly includes international agreements in its municipal law. Reference may be made in this regard to section 231 of the *Constitution* which provides, in subsection (4), that "any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament."[6]

On the application of international law in the interpretation of legislation section 233 of the *Constitution* confirms the significance and relevance of international law when it provides that "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

The *Bill of Rights* contained in chapter 2 (section 7 to 39) of the *Constitution* makes provision for fundamental human rights which are directly enforceable through domestic courts. All High Courts, with the exception of the Supreme Court of Appeal, have jurisdiction in this regard (sections 168 and 169). The Constitutional Court, however, is the highest court in all constitutional matters and makes the final decision in any such matter (section 167).

[6] See the observations of J. Sachs on section 232 in *S v Basson* 2005 (1) SA 171 (CC) at 216.

Any arrest and detention constitutes a breach of the constitutionally protected right of freedom and security of the person as provided in section 12 of the *Constitution*. Subsection (1) thereof reads:

> "Everyone has the right to freedom and security of the person, which includes the right –
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

In regard to pre-trial detention sections 35(1) and (2) of the *Constitution* provide specifically for the rights of arrested and detained persons. Section 35(1) deals with arrested persons and reads:

> "Everyone who is arrested for allegedly committing an offence has the right –
>
> (a) to remain silent;
> (b) to be informed promptly –
>   (i) of the right to remain silent; and
>   (ii) of the consequences of not remaining silent;
> (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
> (d) to be brought before a court as soon as reasonably possible, but not later than –
>   (i) 48 hours after the arrest; or
>   (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
> (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

Section 35(2) sets out the rights of detained persons:

> "Everyone who is detained, including every sentenced prisoner, has the right –
>
> (a) to be informed promptly of the reason for being detained;
> (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
> (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

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(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment, and
(f) to communicate with, and be visited by, that person's -

(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner."

The fundamental human rights referred to in the said provisions may be limited only in terms of section 36 of the *Constitution*, which provides:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restricted means to achieve the purpose.
(2) Except as provided in subsection 1 or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

South Africa's criminal procedural law framework appears from the *Criminal Procedure Act* 51 of 1977, as frequently amended over the years. It contains a number of provisions applicable to arrested and detained persons who have been deprived of their liberty. As in English criminal procedure it distinguishes between various phases of pre-trial deprivation of liberty, namely arrest, police custody, remand in custody, remand in detention and detention pending trial.

Statistics

The Judicial Inspectorate's 2008/2009 *Annual Report* indicated that, as at 31 March 2009, South African Correctional Centres accommodated a total of 165,230 inmates of whom 49,477 (33.4%) were unsentenced or awaiting-trial detainees. The percentage of females was 2.2%, which was significantly lower than in several other Commonwealth countries such as Canada (9%), Australia (7%) and the UK (6%). It further found that in at least 19 overcrowded correctional centres in South Africa the conditions under which inmates were

detained were inconsistent with human dignity and the further requirements set forth in section 35(2)(e) of the *Constitution*.[7]

These figures have remained consistent during 2010 and early 2011. Thus on 31 March 2010 there were 49,030 awaiting-trial detainees out of a total of 163,312 detainees (33.3%),[8] while on 1 March 2011 there were 49,570 awaiting-trial detainees out of a total of 160,085 (32.3%). Of such 49,570 awaiting-trial detainees there were 26,682 adults over the age of 21 years, 22,621 juveniles in the age group 18 to 21 years and 267 children under the age of 18 years. Inasmuch as there is, on a virtually daily basis, a constant turn-over of awaiting-trial or remand detainees, it is difficult to gauge the average length of pre-trial detention – it varies from days to years but averages out at approximately 3 months.

Arrest

Sections 39 to 53 of the *Criminal Procedure Act* deal with arrest, an important topic in that it permits the breach of the arrested person's fundamental and constitutionally protected right to freedom as set forth in section 12 of the *Constitution.*

Section 39(1) provides that an arrest may be effected, with or without a warrant of arrest, by touching the body of the person to be arrested or, if required, by forcibly confining his or her body. In terms of section 39(2) the person carrying out the arrest must inform the arrested person forthwith of the cause of or reason for the arrest. Where the arrest is in terms of a warrant a copy thereof must, on demand or at the request of the arrestee, be handed to him or her. Such person is then, in terms of section 39(3), in lawful custody and shall be detained in custody until his or her lawful discharge or release.

Section 40, again, sets out the circumstances under which a person may be arrested by a peace officer (in terms of section 1 any magistrate, justice of the peace, police official or correctional official) without a warrant of arrest. Similarly section 42(1)(a) provides that a private person may, without a warrant, arrest a person who commits or attempts to commit a Schedule 1 offence (such as murder, rape or robbery) in his or her presence.

In terms of section 42(1)(b) a private person may also arrest someone whom he or she reasonably believes has committed an offence and is escaping from a person authorised to arrest the fugitive for the offence in question. If the arrest is duly carried out in terms of the relevant provisions of the Act, section 46 provides that the person carrying out the arrest will be exempt from liability for what may later turn out to be a wrongful arrest. If necessary premises may be broken open or force used, in terms of sections 48 and 49, to carry out the arrest.

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7 *Annual Report* 2008/2009 p 15–17.

8 *Annual Report* 2009/2010 p 13–15.

The *Criminal Procedure Act* does not stipulate the period between arrest and detaining a suspect in police custody. It only provides in section 50(1)(a), quoted *infra*, that the arrested person must be brought to a police station "as soon as possible". Commentaries on the said Act interpret this as meaning "as soon as is practicably possible". A delay could be caused, for example, by the need to verify certain facts before a formal charge can be laid against the suspect.[9] Once an arrested person has been taken to a police station, the power of the police to detain such person is limited. Although both the *Constitution* and *Criminal Procedure Act* provide for an arrested person to be brought before court within 48 hours, the police are not obliged to detain such a person for the full 48 hours.'[10]

Police custody in a police holding cell or remand in a correctional facility usually takes place only in the case of suspected serious offences for which a sentence of imprisonment may be imposed. It does happen, however, that persons suspected of committing minor offences may also be arrested and detained until such time as a senior officer or a court realises that the person should not be detained. This may, from time to time, give rise to civil litigation.

Procedure after arrest

Section 50 deals with the procedure after arrest and is in line with the provisions of section 35 of the *Constitution* as set out above. Subsection (1) reads:

> "(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.
> (b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.
> (c) Subject to paragraph (d), if such an arrested person is not released by reason that –
> (i) no charge is to be brought against him or her; or
> (ii) bail is not granted to him or her in terms of section 59 or 59A,
> he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.
> (d) If the period of 48 hours expires –
> (i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;
> (ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought

9 E. du Toit, F.J. De Jager, A. Paizes, A.S.T. Quintin Skeen, S. van der Merwe, *Commentary on the Criminal Procedure Act*, (Service 16), 1996, p. 5–39.

10 Idem, p. 5–39.

before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court. Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or

(iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court."

Section 50(3) provides that nothing in the section should be construed as modifying the provisions of the Act or any other law in terms of which a detained person may be released on bail, on warning or on written notice to appear in court. This subsection is subject to the provisions of section 50(6) which requires that, at his or her first appearance in court, the detainee must be informed of the reason for his or her further detention or must be charged and given the opportunity to apply for release on bail. If the detainee is not so informed or charged, he or she shall be released forthwith.

It is clear from these provisions that a person suspected of having committed a criminal offence may not be detained indefinitely without the knowledge of or intervention by a lower court.[11] The court should hence be aware of the arrest and detention of a detainee from the time of his or her first appearance before it and must remain so aware throughout the pre-trial process, which is essentially under its control.

The aim of section 50 is to ensure that an arrested person is brought before a court as soon as possible and certainly within a reasonable time after his or her arrest. This is primarily directed at discouraging police officials from clandestinely and irregularly arresting and detaining suspects in criminal matters. In addition it grants a limited scope to a court to order the further detention of an arrested and detained person.[12] It is indeed the function of the court "to guard against the accused being detained on unsubstantial or improper grounds and to ensure that his detention is not unduly extended".[13]

[11] Idem, p. 5–38.
[12] Idem, p. 5–39.
[13] See *Minister of Law and Order v Kader* 1991(1) SA 41 (A) at 49F – 51B.

The arresting officer or, if he should have limited authority, a senior officer to whom he reports, makes the decision to take a person into police custody after his or her initial apprehension. This decision must be made within a reasonable time, usually a matter of hours. Within 48 hours or, if the arrest takes place before a weekend or public holiday, as soon as possible after arrest, the person must be brought before a lower court magistrate who may order that the person be remanded in custody, usually in a correctional centre (prison), until his or her next appearance in court.

Requirements against undue delay

A contributing factor giving rise to overcrowding in prisons is lengthy and unreasonable court delays. A court has a wide discretion, in terms of section 168 of the *Criminal Procedure Act*, to adjourn pending criminal proceedings to any future date. It may do so if it deems it "necessary or expedient" and may lay down terms which it regards as proper and not inconsistent with any provision of such Act. Particularly relevant in this regard is section 342A(1), the relevant provisions of which deal specifically with unreasonable delays in trials:[14]

> "(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
> (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
> (a) The duration of the delay;
> (b) the reasons advanced for the delay;
> (c) whether any person can be blamed for the delay;
> (d) the effect of the delay on the personal circumstances of the accused and witnesses;
> (e) the seriousness, extent or complexity of the charge or charges;
> (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
> (g) the effect of the delay on the administration of justice;
> (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
> (i) any other factor which in the opinion of the court ought to be taken into account.

[14] This section was inserted by section 13 of Act 86 of 1996 and subsection (7) was added by section 7 of Act 55 of 2005. It was recommended by the South African Law Commission in its Project 73 August 1995: *Interim Report on the Simplification of Criminal Procedure*.

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(3) If the court finds that the completion of the proceedings is being delayed unreasonably the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order –

(a) refusing further postponement of the proceedings;
(b) granting a postponement subject to any such conditions as the court may determine;
(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the Director of Public Prosecutions;
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
(e) that –
  (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
  (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against the person responsible for the delay.

(4) (a) An order contemplated in subsection (3)(a), where the accused has pleaded guilty to the charge, and an order contemplated in subsection (3)(d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends applying for such an order […]"

The innovative subsection (7) provides:

"(a) The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding –

(i) 18 months from date of arrest, where the trial is to be conducted in a High Court;
(ii) 12 months from date of arrest, where the trial is to be conducted in a regional court; and
(iii) Six months from date of arrest, where the trial is to be conducted in a magistrate's court.

> (b) The Cabinet member responsible for the administration of justice must, within 14 days of receipt of a report contemplated in paragraph (a), table such report in Parliament."

The Table of Awaiting Trial Accused contains eight columns under the following headings, which must be completed, submitted and tabled as aforesaid: court and case number; name and age of accused; particulars of charge(s); period in detention; number of court appearances; date of next court appearance; reasons why trial has not commenced; whether bail has been granted and if so, the conditions of bail.

On the question of delays in finalising a trial a number of cases which came before the South African Constitutional Court were dismissed prior to the recommendation regarding the right to a fair trial and delays in finalising such trial.[15] In international context the United States case of *Barker v Wingo* 407 US 514 S 14 (1972*)* dealt with the issue of a permanent stay of prosecution on the ground that the constitutional right to a fair trial within a reasonable time had been violated.'[16] The Constitutional Court subsequently considered and refined the approach in the *Barker* case in the matter of *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) par [25]-[30], where it held that the three primary factors for consideration in this regard were: (a) the nature of the prejudice suffered by the accused; (b) the nature of the case; and (c) the systemic delay. Prison records reflecting statistics of awaiting-trial inmates, however, show that, despite the principles set forth in the *Sanderson* decision, courts do not readily make rulings in terms of section 342A(7) quoted above.

Time frames for finalisation of criminal cases

Once an accused person is arrested and remains in custody either because bail is refused or the bail amount is too high to be met or the accused does not wish to bring a bail application, the accused will be dealt with in accordance with law. The court process, however, can take months, if not years, depending on the circumstances of the case, and often develops into a bottle-neck where a detained accused is found to be at the far-end of the process. The *Criminal Procedure Act* does not assist much in laying down time frames for finalisation of criminal cases and leaves much scope for abuse. Reference may be made in this regard to the provisions of section 168 and 342A of the Act, cited above, in terms of which a court has a wide discretion to adjourn or postpone pending criminal proceedings from time to time, but is also called upon to investigate unreasonable delays in the finalisation of proceedings.

15 *Du Preez v Attorney-General, Eastern Cape* 1997 (2) SACR 375 (E); *Wild and Another v Hoffert NO and Others* 1997 (7) BCLR 974 (N).

16 E. du Toit, F.J. De Jager, A. Paizes, A.S.T. Quintin Skeen, S. van der Merwe, *Commentary on the Criminal Procedure Act*, (Service 16), 1996, p. 33–16, 16A.

Bail

An important aspect arising from pre-trial deprivation of liberty is the procedure relating to the release of an accused detainee on bail as set forth in sections 58 to 72A of the *Criminal Procedure Act*. The effect of release on bail is described in section 58 as follows:

> "The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail is adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or where sentence is not imposed forthwith, after verdict and the court in question extends bail, until sentence is imposed […]."

Section 59 of the Act provides that bail may be granted by a police official of or above the rank of a non-commissioned officer before the first appearance of an accused in court, provided the alleged offence does not fall within Part II or III of Schedule 2 of the Act (such as murder, rape or robbery). Section 59A provides that a Director of Public Prosecutions or a duly authorised public prosecutor may, in respect of offences referred to in Schedule 7 of the Act (such as public violence, culpable homicide or housebreaking) and in consultation with the investigating police officer, release an accused on bail. If bail is not granted by the police or prosecutor the accused may, in terms of section 60 read with section 50(6) referred to above, apply for bail in court.

In terms of section 60(4) the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

This should be read with section 35(1)(f) of the *Constitution* which provides for an arrested person "to be released from detention if the interests of justice permit, subject to reasonable conditions." In this regard the *onus* is on the prosecution in all cases except those provided for in section 60(11) of the Act, which is regarded as placing a justifiable limitation on the right to bail.[17] In terms of section 60(11)(a) the accused must, in the case where he or she has been charged with a Schedule 6 offence (such as premeditated murder or murder of a law enforcement officer), be given a reasonable opportunity to adduce evidence with a view to satisfying the court that exceptional circumstances exist which, in the interests of justice, permit his or her release. Section 60(11)(b), again, has regard to an accused who has been charged with the commission of a Schedule 5 offence (such as murder or rape in general), in which event the accused must be given a reasonable opportunity to adduce evidence directed at satisfying the court that the interests of justice permit his or her release. The standard with which the accused must comply is hence a civil one, namely proof on a balance of probabilities.[18]

The courts have regarded the burden imposed by section 60(11)(a) as a heavy one.[19] In this regard the remarks made by the Constitutional Court in *S v Dlamini*[20] are apposite and instructive as to the differences between sections 60(11)(a) and (b). Inasmuch as subsection (b) stipulates that an accused must satisfy a magistrate that the interests of justice permit his or her release, there is clearly an *onus* on the accused to adduce the relevant evidence.

Section 62 of the said Act empowers the court to supplement the conditions of bail. This includes, in terms of section 62(f), a condition providing that the accused be placed under the supervision of a probation officer or correctional official. Section 63, again, provides that conditions of bail may be amended by increasing or reducing the amount of bail.

An important innovation in this regard is contained in section 63A, which provides for the amendment of bail conditions on account of the conditions in the correctional centre where an accused is being detained. Section 63A was inserted by section 6 of the *Judicial Matters Amendment Act* 42 of 2001 and came into operation in December 2001. It provides for the possible release of accused persons who fall into a prescribed category, such as being unable to pay

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17 Idem, p. 9–41. See Steytler, *Constitutional Criminal Procedure*, 1998, p. 140–1 and W. De Villiers, The Onus of Proof in Bail Proceedings under South African and Canadian Law, *Journal for Contemporary Roman-Dutch Law (THRHR)* 65 (2002) 497 at 510–12.

18 *S v Mauk* 1999(2) SACR 479 (W).

19 *S v Vanqa* 2000 (2) SACR 371 (Tk) 372 j and *S v Botha en 'n Ander* 2002 (1) SACR 222 SCA par [21].

20 *S v Dlamini; S v Dladla &Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) par [65].

the bail set by a lower court, and who find themselves in a correctional centre where the head of the centre is satisfied that the centre's population "is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused concerned…"[21]

In a recent study it was pointed out that South Africa is struggling to counter the increasing rate of violent crime and the large number of overcrowded prisons. It found that bail decisions might be a key factor affecting both issues.[22] The study aimed to create awareness of the consequences of bail and "to assist policy-makers, court managers, Members of Parliament and civil society in understanding how bail functions in South Africa".[23] What is of value is that there are courts which support the notion that bail is entirely non-penal in character and that continued imprisonment which follows upon a decision to refuse bail does not imply the imposition of a penalty or sentence.[24]

Although release on bail is the most frequently occurring form of release from pre-trial detention, release on warning is regularly used in lieu of bail. Section 72 of the *Criminal Procedure Act* provides that a police official or court may, under certain circumstances, release an accused from custody and warn him or her to appear before a specified court at a specified time in connection with the offence with which he or she has been charged. Such release may be made subject to appropriate conditions.

The bail process is required to be a speedy one as the constitutionally protected freedom of an arrested person (who is presumed innocent until proven guilty) is at stake. Section 50(6)(d) of the *Criminal Procedure Act* empowers a lower court to postpone any bail proceedings or bail application for a period not exceeding seven days at a time. It may do so on terms which the court may deem proper and which are not inconsistent with any provision of the Act, provided:

"(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
(ii) the prosecutor informs the court that the matter has been or is going to be referred to the Director of Public Prosecutions for the issuing of a written confirmation referred to in section 60(11A);
(iii) […]
(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to-

21 E. du Toit, F.J. De Jager, A. Paizes, A.S.T. Quintin Skeen, S. van der Merwe, *Commentary on the Criminal Procedure Act*, (Service 16), 1996, p. 9–1 to 9–2.
22 V. Karth, M. O'Donovan, J. Redpath, *Between a Rock and a Hard Place' Bail decisions in three South African courts*: Report prepared for the Open Society Foundation for South Africa, 2008, p. 1.
23 Idem, p. 3.
24 *S v Acheson* 1991 (2) SA 805, with reference to *S v Visser* 1975 (2) SA 342 (C).

(aa) procure material evidence that may be lost if bail is granted; or
(bb) perform the functions referred to in section 37; or
(v) it appears to the court that it is necessary in the interests of justice to do so."

Judicial officers should, of course, be careful to ensure that section 50(6)(d) is not abused in that frequent postponements or remands resulting in further, protracted, detention can be a major contributing factor to the over-population of correctional centres. It may indeed constitute "a material and imminent threat to the human dignity, physical health or safety of an accused", as described in section 63A(1) mentioned above.

Right to legal representation

The consideration of release in the instances set forth above indicates clearly that an accused person may, at any stage from arrest on whatever charge or charges, suffer substantial prejudice if he or she does not have the benefit of legal representation. The *Criminal Procedure Act* provides, under such circumstances, that legal representation be made available to an accused on his or her first appearance in court. In this regard section 73 provides that an accused is entitled to the assistance of a legal adviser from the time of his or her arrest for the duration of the criminal proceedings against him or her. More specifically section 73(2A) provides thus:

"Every accused shall -
(a) at the time of his arrest;
(b) when he or she is served with a summons in terms of section 54;
(c) when a written notice is handed to him or her in terms of section 56;
(d) when an indictment is served on him or her in terms of section 144(4)(a);
(e) at his or her first appearance in court,
be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid […]."

This is in line with sections 35(3)(f) and (g) of the *Constitution* which expressly provide that the right of an accused to a fair trial includes the right to choose and be represented by a legal practitioner assigned to him or her by the State at State expense, if "substantial injustice" would otherwise result. It is therefore appropriate that an accused, who cannot afford to pay for legal representation at the time of his or her arrest or at any subsequent stage of the criminal proceedings, including an application for bail, be furnished with such legal representation at the instance and expense of the State.

Communication with family and others

The *Criminal Procedure Act* does not make mention of communication or notification with family upon arrest of accused over the age of 18 years. However, as mentioned above[25], section 35(2)(f) of the *Constitution* does state that anyone who is detained has the right to communicate with, and be visited by, that person's spouse or partner, next of kin, religious counsellor and medical practitioner. No specific time or procedure for such visits is stipulated but reliance may be placed on section 2 of the *Constitution*, which provides that it is "the supreme law of the Republic" and that "conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". The manner in which such rights, and compliance with such obligations, are enforced will usually be provided in relevant legislation and regulations to this effect. Thus in section 49 of the *Correctional Services Act* 111 of 1998 it is provided that, subject to restrictions which may be prescribed by regulation, unsentenced offenders, who are categorised as pre-trial or awaiting-trial detainees, "may receive visitors and write and receive letters and communicate telephonically."

Most important developments: children

It is clear that South Africa has come a long way in catering for the needs of children as pre-trial detainees within the limits of the national criminal procedure framework. This is in line with section 28(2) of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child." It likewise accords with article 3 of the international *Convention of the Rights of the Child*, which provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

It goes without saying that the correctional system in South Africa, as also the nature of detention and treatment of detainees, is based squarely on the *Correctional Services Act* 111 of 1998, as substantially amended by the *Correctional Services Amendment Act* 25 of 2008. As stated in the 2005/2006 *Annual Report* of the Judicial Inspectorate of Correctional Services (the Judicial

[25] See supra section II, under: National human rights framework.

Inspectorate),[26] awaiting-trial or remand detainees, including those whose application for bail was refused or where the bail amount was too high and could not be paid by the detainee, are held throughout the country at correctional centres nearest the courts where they will be tried.

It is of concern that these detainees are subjected to overcrowded prisons and in many instances are far worse off than sentenced detainees in that they do not have the benefit of rehabilitation programmes, skills training or schooling and seldom have access to recreational activities. In many cases they await finalisation of their court cases for periods ranging from a few days to several years.[27] The Judicial Inspectorate found that what contributes significantly to overcrowding is the treatment of awaiting-trial detainees through the criminal procedure process. In this regard they were frequently subjected to unjustified arrests, unaffordable bail, overly restrictive bail conditions and unjustifiable court delays.[28]

While detainees are being transported in police vehicles between police holding cells and court cells or between court cells and correctional centres, they are in the custody of the police. At court and in court cells they are the responsibility of the Justice authorities. Once in a correctional centre, however, they are in the custody of the head of such correctional centre. This means that liability and accountability for their care and safety alternates between the cluster of police, justice and corrections. This also the reason why, in South Africa, there are regular meetings of representatives of such cluster.

IV.1. FACILITIES, CATEGORIES AND ACCOMMODATION

The *Constitution* and *Criminal Procedure Act* do not define a place of detention, so that guidance must be sought in the legal provisions authorising the pre-trial detention in custody of arrested persons. Places of detention are primarily police holding cells or "lock-ups", where such persons are initially held until their first appearance in a lower court. There they may be held in a court cell until their appearance in court and during adjournments of the court on the day or days of their hearing in such court. If the hearing should not be finalised on that day (by way of a withdrawal of charges or an acquittal) the presiding magistrate would normally order, in terms of a so-called J7 warrant, that they be further detained in a correctional centre situated within its area of jurisdiction pending the finalisation of their trials.

[26] *Annual Report* 2005/2006 p. 13.
[27] *Annual Report* 2005–06, p. 14.
[28] *Annual Report* 2005–06, p. 28–29.

Accommodation and categories

In regard to their accommodation in correctional centres, section 7(1) requires that inmates be held in cells which comply with the prescribed regulatory requirements relating to "floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions." Such requirements "must be adequate for detention under conditions of human dignity". Section 7(2) specifies that sentenced offenders must be kept separate from persons awaiting trial or sentence while male and female inmates must likewise be kept separately. Section 7(2)(c) confirms that children "must be kept separate from adult inmates and in accommodation appropriate to their age" while section 7(2)(e) gives the National Commissioner a discretion to accommodate inmates in single or communal cells depending on availability. In terms of section 7(2)(d) the National Commissioner may detain inmates of specific age, health or security risk categories separately. Section 7(2)(f) deals specifically with pre-trial detainees in providing that where there is a danger of persons that they may defeat the ends of justice by their association with one another, the National Commissioner is required to detain them apart.

Investigation of mental condition of detainee

If at any stage during the course of criminal proceedings it appears to the court that the accused is, by reason of mental illness or mental defect, incapable of understanding the proceedings, it may order an investigation, as envisaged in sections 77 to 79 of the *Criminal Procedure Act*, into his or her mental condition with a view to establishing whether he or she is capable of appreciating the wrongfulness of his or her act or omission and acting in accordance with such appreciation. An arrested person who is subject to such investigation may be detained in a mental health care institution or psychiatric hospital or in the hospital section of a correctional centre pending a finding as to his or her criminal responsibility.

Children

Reference must also be made to places of detention for arrested children (persons under the age of 18 years) as provided in the *Child Justice Act* 75 of 2008. Section 1 of such Act defines "detention" as including "confinement of a child prior to sentence in a police cell or lock-up, prison or a child and youth care centre" which may be interpreted as including the erstwhile "places of safety, secure care facilities, schools of industries and reformatories'.[29] If a child and

[29] Jacqui Gallinetti, *Getting to know the Child Justice Act*, Child Justice Alliance, 2009, p. 13 (at: www.childjustice.org.za/publications/Child%20Justice%20Act.pdf).

youth care centre is not available, the child may, in terms of section 27(a), be detained in a police cell or "lock-up". This is, however, subject to the special protection accorded children detained in police custody as set forth in section 28. In this regard section 28(1) provides that such child must be:

> "(a) detained separately from adults and boys must be held separately from girls;
> (b) detained in conditions which take into account their particular vulnerability and will reduce the risk of harm to that child, including the risk of harm caused by other children;
> (c) permitted visits by parents, appropriate adults, guardians, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of law, is entitled to visit; and
> (d) cared for in a manner consistent with the special needs of children, including the provision of –
>   (i) immediate and appropriate health care in the event of any illness, injury or severe psychological trauma; and
>   (ii) adequate food, water, blankets and bedding."

In terms of section 29(1) a presiding officer may order the detention of a child, who is alleged to have committed an offence, in a designated child and youth centre. When such a placement is made consideration must, in terms of section 29(2), be given to the following factors:

(a) The age and maturity of the child;
(b) the seriousness of the offence in question;
(c) the risk that the child may be a danger to himself, herself or to any other person or child in the child and youth care centre;
(d) the appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence allegedly committed by the child; and
(e) the availability of accommodation in an appropriate child and youth centre.

Detention of a child in a designated prison may, in terms of section 30(1), be ordered only if:

(a) an application for bail has been postponed or refused or bail has been granted but one or more conditions have not been complied with;
(b) the child is 14 years or older;
(c) the child is accused of having committed an offence referred to in Schedule 3 [various traffic offences];
(d) the detention is necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention; and

(e) there is a likelihood that the child, if convicted, could be sentenced to imprisonment.

In addition section 30(3) requires that a court must consider any recommendations in the probation officer's assessment report and any other relevant information or evidence relating to:

(a) the best interests of the child;
(b) the child's state of health;
(c) previous convictions, previous diversions or charges pending against the child;
(d) the risk that the child may be a danger to himself, herself or to any other person or child in a child and youth care centre;
(e) any danger that the child may pose to the safety of members of the public;
(f) whether the child can be placed in a child and youth care centre, which complies with the appropriate level of security;
(g) the risk of a child absconding from a child and youth care centre;
(h) the probable period of detention until the conclusion of the matter;
(i) any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child;
(j) the seriousness of the offence in question; or
(k) any other relevant factor.

It is quite clear from the cited provisions that the Act in question is fully consonant with the protection of the rights of a child as set forth in section 28 of the *Constitution*, and more particularly in section 28(1)(g), which provides that every child has the right "not to be detained except as a measure of last resort" and then "only for the shortest appropriate period of time." This is subject thereto that he or she must be kept separately from detainees over the age of 18 years and must be "treated in a manner and kept in conditions that take account of the child's age." The child is also entitled to be assisted in civil proceedings by a legal practitioner at State expense in cases where "substantial injustice" would otherwise result. Section 28(2), as cited above, contains the general proposition that "a child's best interests are of paramount importance in every matter concerning the child."

IV.2. INFORMATION

On admission to a correctional centre an inmate must, in terms of section 6(3), be informed promptly of his or her right to the assistance of a legal practitioner at State expense "if substantial injustice would otherwise result." The inmate

must also, in terms of section 6(4), be furnished with written information concerning "the rules governing the treatment of the inmates in his or her category, the disciplinary requirements, the authorised channels of communication for complaints and requests and all such matters as are necessary to enable him or her to understand his or her rights and obligations."

IV.3. RIGHTS TO HUMANE TREATMENT

As mentioned above, the correctional system, the nature of detention and treatment of detainees in South Africa is based squarely on the *Correctional Services Act* 111 of 1998, as substantially amended by the *Correctional Services Amendment Act* 25 of 2008. The main Act is directed, *inter alia*, at providing for "the custody of all inmates under conditions of human dignity" and "the rights and obligations of unsentenced offenders". In its preamble it expresses its object as changing the law governing the correctional system and giving effect to the *Bill of Rights* contained in the *Constitution*, in particular to its provisions regarding inmates.

Chapter 3 (sections 4 to 27) of the Act provides for the custody of all inmates, including pre-trial detainees, under conditions of human dignity and deals with the general requirements, discipline and security pertaining to all detainees. In terms of section 4(2)(a) the Department of Correctional Services "must take such steps as are necessary to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre." Section 4(2)(c), again, requires that "the minimum rights of inmates as entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates in different categories." If there is no correctional centre in a district an inmate may, in terms of section 5(2)(b), be detained in a police cell but for no longer than one month, unless the National Commissioner authorises a longer period.

Personal hygiene and clothes

As soon as possible after admission, in terms of section 6(3) (see *supra* under: Information), the inmate must have a bath or shower and undergo a "health status examination," which must include testing for contagious and communicable diseases if the correctional medical practitioner is of the view that "it is necessary to protect or maintain the health of the inmates or other persons."

Although inmates must, in terms of section 9, keep their "person, clothing, bedding and cell clean and tidy," the centre must, in terms of section 10(1), provide them with clothing and bedding "sufficient to meet the requirements of hygiene and climatic conditions." In terms of section 10(2), however, pre-trial

detainees "may be allowed to retain or acquire appropriate clothing or bedding." This means that they are entitled to wear their own clothes, as confirmed in section 47 which specifies that they may not be compelled to wear the prescribed clothing allocated to sentenced inmates unless their own clothing is "improper or insanitary or needs to be preserved in the interests of the administration of justice and he or she is unable to obtain suitable clothing from another source."

It must be pointed out that this provision is earmarked for amendment in terms of section 48 of the *Correctional Matters Amendment Bill* [B41–2010], which provides that "every remand detainee must wear a prescribed uniform which distinguishes him or her from a sentenced offender for the maintenance of security and good order in the remand detention facility." The said Bill in fact envisages that pre-trial detainees will be referred to as "remand detainees" who will be detained in "remand detention facilities." The meaning of these terms will be considered below in the discussion of chapter 5 of the said Bill.

Food

Nutritional requirements are dealt with in section 8, which provides that inmates must be given "an adequate diet to promote good health" in accordance with prescribed regulations and with special attention to the needs of children, pregnant women and persons whose physical condition requires a special diet. Where "reasonably practicable," account must be taken of religious requirements and cultural preferences. Food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours. In addition clean drinking water must be made available to every inmate. In regard to pre-trial detainees section 48 provides that, "subject to restrictions which may be prescribed by regulation, unsentenced offenders may have food and drink sent to them in correctional centres."

IV.4. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Security

An important provision in the Act is that contained in section 26, which provides that every inmate (and this once again should include pre-trial detainees) has a right to "personal integrity and privacy" which is "subject to the limitations reasonably necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates." Such limitations include the right of a correctional official to search an inmate, to apply mechanical means of restraint and to use reasonable force. Searches are, in terms of section 27, subject to strict conditions directed at minimal invasion of privacy and undermining of dignity. Section 29 provides in this regard that an

inmate may, in the process, be subjected to security classification in accordance with the extent to which he or she presents a security risk. Such classification will assist the authorities in determining in which correctional centre, or in which part of a correctional centre, an inmate should be detained.

For security or medical reasons, or for giving effect to a penalty of restriction of amenities, or at his or her own request, an inmate may, in terms of section 30, be segregated by detention in a single cell. Segregation other than at the request of the inmate is subject to strict conditions, including that all instances thereof must, in terms of section 30(6), be reported to the Inspecting Judge. An inmate subjected to segregation may, in terms of section 30(7), refer the matter on review to the Inspecting Judge, who must decide thereon with 72 hours of receipt of the referral. Other than for purposes of restricting amenities as aforesaid, segregation may not, in terms of section 30(9), be ordered as a form of punishment or as a disciplinary measure.

Under carefully defined circumstances, as set forth in section 31, an inmate may be restrained by the use of mechanical restraints as prescribed by regulation. Such restraint may never be ordered as a form of punishment or disciplinary measure and must, in terms of section 31(3)(d), be reported forthwith to the head of the centre, the National Commissioner and the Inspecting Judge. In terms of section 31(5) an inmate subjected to such restraints may appeal to the Inspecting Judge who must decide on the matter within 72 hours of receipt thereof.

Similarly, in terms of section 32, the use of minimum and proportionate force to detain an inmate in safe custody is permitted where no other means are available and where it is authorised by the head of the centre or where, in urgent circumstances, it is reasonably believed that authorisation would be granted. Where there has been no authorisation it must be reported to the head of the centre as soon as reasonably possible and must, in terms of section 32(6), be reported forthwith to the Inspecting Judge.

It is noteworthy that sections 26 to 35 are, despite their apparently general application to all inmates, not applicable to pre-trial detainees. Furthermore, although there are no special measures in place to prevent pre-trial detainees from being assaulted by other detainees or by correctional officials, such incidents are regularly reported to the Judicial Inspectorate by independent visitors. In serious cases, or where death ensues, special attention is given to the incident and it may be investigated by Judicial Inspectorate officials at a higher level. Section 15 of the Act requires that all deaths, be they classified as natural or unnatural, must be reported forthwith to the Inspecting Judge, who may carry out an enquiry or, in terms of section 15(2), instruct the National Commissioner to do so.

Many of the unnatural deaths are in fact suicides which are fully investigated and reported to the Minister of Correctional Services and to the Parliamentary Portfolio Committee on Corrections. There has been serious criticism of the

failure of the correctional centre authorities to prevent suicides, particularly where they have been forewarned of such an event and have taken no steps to prevent it. Some of the deaths classified as "natural" have also been suspect in that they may have resulted from a failure to ensure that medication be taken or medical treatment be given.

Drugs

In the same way there have been omissions to arrange for the treatment of drug addiction in the case of detainees who are identified as addicts. There are psychologists and welfare officers deployed in some of the correctional centres but in many others there are none. This may, of course, be attributable to a lack of financial and human resources, but it may also arise from ineffective management of the available resources.

Chapter 5 of the *Correctional Services Act* deals specifically with "unsentenced offenders." Section 46 ("general principles") reads thus:

(1) Unsentenced offenders may be subjected only to those restrictions necessary for the maintenance of security and good order in the correctional centre and must, where practicable, be allowed all the amenities to which they could have access outside [the] correctional centre.
(2) The amenities available to unsentenced offenders which may be restricted for disciplinary purposes must be determined by regulation.

In section 46(1) and (2) of the *Correctional Matters Amendment Bill* of 2010, which is discussed more elaborately further below, this is repeated under the heading "management, safe custody and well-being of remand detainees," subject thereto that "unsentenced offenders" are referred to as "remand detainees" and "correctional centre" is substituted by "remand detention facility."

Health care and exercise

Section 11 provides that every inmate must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily. Such exercise must, if the weather permits, take place in the open air. This provision must be read with section 12(1), which requires that the Department must, within its available resources, provide "adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life." This includes the right, in terms of section 12(2), to "adequate medical treatment," subject thereto that, in terms of section 12(4)(b), "no inmate may be compelled to undergo medical intervention or treatment

without informed consent unless failure to submit to such medical intervention or treatment will pose a threat to the health of other persons."

One of the difficulties raised by the Judicial Inspectorate in its reports over a number of years has been the fact that inmates of correctional centres, including pre-trial detainees, do not get sufficient daily exercise. The vast majority remain incarcerated for 23 hours per day and get no appropriate exercise and very little, in any, fresh air. In the case of sentenced inmates this is in conflict with section 40 of the Act, which requires, in subsection (1), that "sufficient work must as far as is practicable be provided to keep sentenced offenders active for a normal working day and a sentenced offender may be compelled to do such work." This, together with any number of needs-based programmes dealt with in section 41, is directed at providing them with skills to enable them to be gainfully employed in society on their release. None of this is, however, applicable to pre-trial detainees, who sometimes spend months, if not years, languishing in centres without access to work, educational or skills programmes.

IV.5. CONTACT WITH THE OUTSIDE WORLD

Visitors, letters and telephone calls

As mentioned above[30], section 35(2)(f) of the *Constitution* does state that anyone who is detained has the right to communicate with, and be visited by, that person's spouse or partner, next of kin, religious counsellor and medical practitioner. Thus all inmates, including pre-trial detainees, have the right, in terms of section 13 of the *Correctional Services Act*, to communicate with the outside world and to receive visits from at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners. Section 13(3) stipulates that they are entitled to a minimum of one hour for visits each month. In the case of pre-trial detainees there is more flexibility in that they may, in terms of section 49 and subject only to restrictions prescribed by regulation, "receive visitors and write and receive letters and communicate telephonically."

As for the pre-trial detention of children under the age of 18 years, section 50(4) of the *Criminal Procedure Act* provides that the parent or guardian of such child-detainee must, if he or she can readily be reached or traced without undue delay, be notified forthwith, by the police official charged with the investigation of the case, of the arrest of such child. In cases where a probation officer has been appointed for the child such officer must, in terms of section 50(5) of the Act, be likewise notified. If there is no appointed probation officer or such officer is not available, a correctional official on duty in the area may be notified of the arrest.

30 See supra section II, under: National human rights framework.

Legal advise

By the same token all inmates, sentenced and pre-trial, have access to legal advice and may consult with legal practitioners of their own choice but at their own expense, as provided in section 17. This includes the right, as stipulated in section 17(3), to "be provided with the opportunities and facilities to prepare their defence."

Reading materials

All inmates similarly have access, in terms of section 18, to available reading material of their own choice "unless such material constitutes a security risk or is not conductive to his or her rehabilitation." The proviso relating to "rehabilitation" clearly refers to sentenced inmates who are subject to rehabilitation programmes, but in all probability it will also apply to pre-trial detainees if the material should be regarded as constituting "a security risk." In addition all inmates must, in terms of section 14, "be allowed freedom of conscience, religion, thought, belief and opinion."

The independent visitor

The independent visitor is a unique feature of the equally unique Judicial Inspectorate for Correctional Services, which was created in terms of sections 85 to 94 of the *Correctional Services Act* 111 of 1998. It is described in section 85(1) as "an independent office under the control of the Inspecting Judge" and its object, in terms of section 85(2), is "to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres." In terms of section 92 independent visitors are appointed by the chief executive officer of the Inspectorate, at the request of and in consultation with the Inspecting Judge, to all correctional centres in the country. Section 93 empowers them to pay regular visits to the centres at which they do duty and to conduct private interviews with inmates. They record complaints in an official diary and monitor the manner in which such complaints have been dealt with. They also discuss complaints with the head of the centre or other relevant authorities "with a view to resolving the issues internally."

IV.6. STAFF

Generally speaking the correctional members of staff who work with pre-trial detainees have no special training to enable them to distinguish appropriately between the status and needs of such detainees as opposed to that of sentenced

detainees. Despite this there has, in our view, been a marked improvement in the approach of the correctional authorities to detention facilities and the rights of pre-trial detainees over the past approximately thirteen years. This is, we believe, largely attributable to the efforts of the Judicial Inspectorate in carrying out its legislative mandate to investigate the conditions in correctional centres and the treatment of inmates accommodated there.

IV.7. THE JUDICIAL INSPECTORATE

Special consideration has been given by the Inspectorate to the large number of pre-trial detainees held in correctional centres throughout the country and to role played by them in the perennial problem of burgeoning overcrowding in so many centres. Although the improvement has, to date, been gradual, with good cooperation and teamwork more significant progress should be made. In our view the activities of the Judicial Inspectorate have, since its commencement as an oversight body in 1998, constituted one of the most important factors in addressing conditions in detention facilities and the rights of pre-trial detainees in South Africa.

IV.8. COMPLAINTS BY PRE-TRIAL DETAINEES

On the subject of complaints or requests all inmates are entitled, on admission and thereafter on a daily basis, to make complaints or direct requests to the head of the centre as provided in section 21. The complaints and requests must be recorded and dealt with promptly and the inmate must be informed of the outcome. When the complaint relates to an alleged assault, the inmate must be subjected to an immediate medical examination and receive the treatment prescribed by the correctional medical practitioner. If the inmate should not be satisfied with the response to his or her complaint, he or she may indicate his or her dissatisfaction therewith, together with the reasons for such dissatisfaction, to the head of the centre. The head of centre is obliged to refer the matter to the National Commissioner, whose response thereto must be communicated to the inmate. If the inmate should be dissatisfied with the National Commissioner's response, he or she may refer the matter to the Independent Correctional Centre Visitor (independent visitor), who is required to deal with it in accordance with the provisions of section 93.

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IV.9. CORRECTIONAL MATTERS AMENDMENT BILL

In section 1 of the Correctional Matters Amendment Bill [B41–2010] "inmate" includes a person detained in a "remand detention facility" and "remand detainee" is defined as "a person detained in a remand detention facility awaiting the finalisation of his or her trial until being convicted or acquitted, inclusive of the period during which the conviction or acquittal are subject to review or appeal, if such person has not commenced serving such sentence or is not already serving a prior sentence."

A "remand detention facility" means "a place established under this Act as a place for the reception, detention or confinement of a person liable to detention in custody, and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of detention, protection, treatment or otherwise, and all quarters used by correctional officials in connection with any such remand detention facility, and for the purposes of sections 115 and 117 includes every place used as a police cell or lock-up." (section 1(b)(ii) of the Bill). Such sections deal respectively with "aiding escapes" and "escaping and absconding."

Significantly section 46(3) of the Bill confirms that the provisions of section 6 to 24 of the *Correctional Services Act*, as dealt with above, apply to "remand detainees" subject to "such changes as may be required by the context." This includes the provisions relating to discipline and order for security purposes in correctional centres, disciplinary infringements and procedures and penalties as set forth in sections 22, 23 and 24 respectively. It does not, however, include "safe custody" as provided in section 26 and dealt with above, nor does it include any other security measures as set forth in sections 26 to 35.

Reference has already been made to the provisions relating to "clothing" and "food and drink" as set forth in sections 47 and 48 of the Act with significant amendments envisaged to such sections in the Bill. Of some interest is that section 49 of the Act, which deals with the right of pre-trial detainees to receive visitors and use other means of communication with the outside world, does not appear in the Bill, which contains a new section 49 under the heading "safekeeping of information and records."

Section 49(1) provides that "any person requesting information relating to the incarceration of a remand detainee, must use the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), to make such request." Section 49(2), again, provides that "information and records, as prescribed by regulation, must be kept at the relevant detention facility for the periods as provided for in the Archives Act, 1996 (Act No. 43 of 1996)."

The new section 49 of the Bill is followed by new sections 49A to 49G. Section 49A provides that a remand detainee who claims to be pregnant must immediately be referred to a registered medical practitioner for a medical

examination to confirm the pregnancy. If so, appropriate accommodation and diet must be made available to such person.

Similar provisions for disabled, aged and mentally ill remand detainees appear in sections 49B, 49C and 49D. Section 49E, again, provides that the head of a remand detention facility may, on the recommendation of a medical practitioner treating a terminally ill or severely incapacitated remand detainee, apply to a court for the release of such detainee.

Section 49F of the Bill provides that the National Commissioner of Correctional Services may authorise the surrender, for a period not exceeding seven days, of a remand detainee to the police for purposes of further investigation of charges other than those for which he or she is being detained. On good cause shown the National Commissioner of Police may apply to the National Commissioner of Correctional Services for extension of the seven-day period.

An important new provision is that contained in section 49G of the Bill, which provides that the period of incarceration of a remand detainee may not exceed two years from the initial date of admission into the remand detention facility without such matter having been brought to the attention of the court concerned. The head of the remand detention facility must, at six-monthly intervals, report all detentions of remand detainees for a successive six-month period to the relevant Director of Public Prosecutions. Cases where the detention of a remand detainee will exceed such period must be referred to the relevant court to determine the further detention of such person or his or her release under appropriate conditions.

If the finalisation of the case is further delayed, the matter must be referred back to the court on a yearly basis to determine the remand detainee's further detention or release under appropriate conditions. In this regard the National Commissioner may, in consultation with the National Director of Prosecutions, issue directives regarding the procedure to be followed by the head of a remand detention facility or correctional centre, as the case may be, and the Director of Public Prosecutions whenever it is necessary to bring an application as aforesaid.

It is envisaged that, by the time the present report is published or shortly thereafter, the aforesaid Bill will be approved by the South African Parliament and signed into law, in which event the provisions contained in the Bill will become an operative part of the amended *Correctional Services Act* 111 of 1998.[31]

[31] Note of editor: on 2 March 2011 the Portfolio Committee on Correctional Services adopted the Correctional Matters Amendment Bill 41 of 2010. The Bill still needs to be adopted by the National Assembly at the time of writing.

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V. ALTERNATIVES TO PRE-TRIAL DETENTION

Various alternatives to pre-trial detention come to the fore from the time a person is arrested on suspicion of having committed a criminal offence. The primary alternative is for arresting officers to avoid carrying out arrests and detaining people without good and justifiable reasons. It is our belief that far too many people are arrested by the South African Police on insufficiently justifiable grounds. They are then detained in police cells and subsequently detained in correctional centres to await the finalisation of their criminal trials. The period of detention is, on average, some three months[32], on the expiry of which the charges against them are frequently withdrawn and they are released for want of sufficient evidence to sustain a conviction. In a majority of the remaining cases which do indeed proceed to trial, the detainees are held to be not guilty on the preferred charges for lack of sustainable evidence and are accordingly acquitted by the presiding judicial officers. In many such cases persons have been detained wrongly or unjustifiably and should never have been detained in the first place.

Written notice

A more acceptable approach than simply arresting suspects or even issuing summons in terms of section 54 of the *Criminal Procedure Act* would be to issue written notice in terms of section 56 of the Act as a method of securing the attendance in court of the suspect or accused. In the case of minor or relatively trivial offences use should then be made, in terms of section 57 of the Act, of the procedure of admission of guilt and payment of a fine without the need for an accused to appear in court. By the same token more frequent use could be made of the procedure of admission of guilt and payment of a fine after an accused person has appeared in court, as provided in section 57A of the Act.

Responsibilities of police and prosecution during investigation

In cases where an accused person is detained pending further investigation of the case against him or her, the primary task of the police investigating officer should be to establish whether there is sufficient evidence to sustain a conviction. Should the investigation not make substantial progress in this regard, the investigator should inform the prosecutor accordingly and the prosecutor in turn should inform the court. If the prosecutor or the court is not persuaded that further investigation is justified, the charges should be withdrawn and the accused released. Alternatively the accused should be released pending further investigation. The further detention of the accused pending what may turn out to be a "fishing expedition" is in direct conflict with his or constitutionally

[32] See also *supra* section II, under: Statistics.

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protected rights to freedom and movement as set forth in sections 12 and 21 respectively of the *Constitution*.

In this regard it should be borne in mind that the prosecution becomes involved in a criminal case from the time the police docket is handed to a prosecutor for purposes of conducting a prosecution. It is then the duty of the prosecution to ensure that a fair trial is conducted in terms of section 35(3) of the *Constitution* and that the rights of an accused person brought before a criminal court are respected. Only if there is a sufficiently strong case against the accused can the breach of his or her constitutionally protected rights aforesaid be regarded as justified.

It is true that prosecutors are usually burdened with an excessive number of cases, making it difficult for them to master the content of every file they bring to court. They should, however, be adequately trained to distinguish *prima facie* weak cases from stronger ones and decline to prosecute (*nolle presequi*) in the former. Even in ostensibly strong cases the prosecutor should prevail on the court to refuse the further remand of a case where the accused has been awaiting trial for an unreasonably long period of time. This is, of course, always subject to the right of the prosecutor to reopen the case should further (sustainable) evidence come to the fore.

Bail[33]

Even if a remand should be justified, consideration should be given to non-custodial alternatives to further detention. The obvious alternative is to consider a bail application as a means of securing the detainee's release from custody, namely upon payment of a sum of money or by furnishing a guarantee to pay in terms of section 58 of the *Criminal Procedure Act*. The principles and procedures relating hereto have been discussed in some detail above and do not require revisiting. A recurring problem in this regard is that pre-trial detainees are not always able to pay, or to guarantee the payment of, the bail amount. In such cases increased use should be made of placement under supervision of a probation or correctional officer in terms of section 62(f) of the Act.

Another alternative is the procedure contained in section 63A, namely release of the detainee or amendment of bail conditions at the instance of the head of the correctional centre where the detainee is held in custody. The head of the centre applies to the court for such release or amendment on the ground that he or she "is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused," *inter alia* because the detainee is unable to pay the amount of the bail. Unfortunately this procedure is seldom if ever used in that it is regarded as lengthy and excessively complicated.

33 On the procedural aspects of bail, see *supra* section III, under: Bail.

At the same time the head of a correctional centre would normally be reluctant to admit, for purposes of a section 63A application, that his or her centre constitutes an affront to human dignity.

Plea-bargaining procedure

A further alternative is the "plea-bargaining" procedure provided in section 105A of the Act, in terms of which the prosecutor, duly authorised by the National Director of Public Prosecutions, is empowered to negotiate with a legally represented accused to plead guilty to the charge or charges in return for an agreed reasonable sentence, which will usually not include detention in a correctional centre. Although this procedure is used more frequently than the section 63A procedure, it is also extremely long and complicated and is not always "prosecutor-driven," as it should be when it is directed at the speedy resolution of less serious or "petty" offences.

Minors

Section 71 of the *Criminal Procedure Act* makes special provision for an alternative to pre-trial detention in the case where the accused is a child under the age of 18 years. It reads:

> "If an accused under the age of eighteen years is in custody in respect of any offence, and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or court may, instead of releasing the accused on bail or detaining him in custody, place the accused in a place of safety as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983), or place him under the supervision of a probation officer or a correctional official, pending his appearance or further appearance before a court in respect of the offence in question or until he is otherwise dealt with in accordance with law."

A similar provision is that contained in section 72 of the Act, in terms of which any pre-trial accused, including a child under the age of 18 years, may be released on warning in lieu of bail by a police official or a court in respect of any offence allegedly committed by the accused. Where the release is carried out by a police official there is a proviso that the offence must not be one referred to in Part II or III of Schedule 2 (such as murder, robbery, rape or housebreaking). In the case of a child accused the warning is directed at the person in whose care and custody he or she may be. Such person would normally be the parent or parents of the child, or any other person to whom the legal custody and guardianship of the child has been awarded.

Diversion

Other than the aforesaid there are no alternatives to pre-trial detention expressly provided in the South African law of criminal procedure. The practice of applying alternatives, particularly in the case of children or juveniles, is sometimes referred to as "diversion," on which Lukas Muntingh observes as follows:

> "Diversion was established in South Africa on a fairly informal basis in the early 1990's by NICRO and Lawyers for Human Rights. Advocates of diversion have campaigned for the expansion of diversion, including diversion into legislation, making it a cornerstone of juvenile justice legislation and also using it to decongest the criminal justice system. Diversion has been extremely successful in other parts of the world whereas South Africa remains without proper documented research that evaluates the performance of diversion programmes as a crime reduction measure. The advocates of diversion have campaigned for it rather successfully without providing hard evidence of its effectiveness."[34]

Grounds

The general grounds on which alternatives may be considered have already, to a large extent, been mentioned in the preceding discussion. Thus in cases where there is a risk that the accused will not appear for trial or may interfere with witnesses or evidence a court may be reluctant to grant bail or any other alternative to detention. Our courts do not work with the requirement of a "minimum level of suspicion" when considering whether or not to order an alternative.

Monitoring

Alternatives to pre-trial detention are indeed consistently monitored by the prosecutorial authorities and by probation officers or correctional officials charged with supervision of the detainee in question. As in most other jurisdictions failure to appear in court or to comply with bail or other conditions will inevitably lead to cancellation of the bail or the retraction of any release order.

Statistics

There are, to the best of our knowledge, no statistics available recording the number and percentage of cases in which alternatives to pre-trial detention have

[34] L.M. Muntingh, *The Effectiveness of Diversion Programmes – A Longitudinal Evaluation of Cases*, 2001, p. 1 (at: www.unicef.org/tdad/nicroevaluation01(1).pdf).

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been considered and applied to pre-trial detainees in the South African scenario. It may safely be stated, however, that the alternatives, generally speaking, relate to both lesser offences and more serious crimes. Crimes involving violence, such as murder, rape, armed robbery, assault with the intent to cause grievous bodily harm, terrorism, treason and serious drug offences, such as dealing in large quantities of drugs, will qualify for non-custodial alternatives such as bail only under exceptional circumstances and in conformity with strict requirements. Traffic offences, minor cases of theft, shoplifting, public order or common assault (if not recurrent) will usually qualify for bail and other alternatives to pre-trial detention with far more facility.

International instruments and decisions

The influence of international law in general terms has been as set out early on in this report. We have been unable to establish whether the consideration of alternatives for pre-trial detention has been specifically influenced by international law. It would also be inappropriate to attempt to identify the most important development in this regard during the past 10 to 15 years.

VI. CONCLUSION

It may be concluded from the preceding discussion that the general principles and policies that have evolved in regard to the procedures directed at the detention and treatment of pre-trial detainees in South Africa have much in common with those applicable in many other countries. As such they may be regarded, generally speaking, as being in line with the applicable provisions contained in the relevant international instruments.

By the same token the legislation in question, more specifically the *Correctional Services Act* 111 of 1998 as amended and soon to be further amended substantially by the *Correctional Matters Amendment Bill*, may be regarded as being consonant with the relevant provisions of the South African *Constitution* of 1996 and the *Bill of Rights* contained therein. The envisaged amendments should, indeed, address many of the problems presently experienced with pre-trial detainees.

The Judicial Inspectorate for Correctional Services firmly believes that, in cooperation with the Department of Correctional Services and other stakeholders, it will continue to address the problems presently experienced by the presence of excessive numbers of pre-trial detainees held in South African correctional centres. In the process it is hoped that a model system of pre-trial detention may eventually be achieved.

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PRE-TRIAL DETENTION IN SPAIN: CRIMINOLOGICAL NOTES ON LAW AND PRACTICE

Cristina Guerra Pérez & José Luis Díez Ripollés*

I. INTRODUCTION

In accordance to the aim of this volume, the following pages intend to give an overlook of the Spanish regulations on arrest and remand detention, the two pre-trial detention measures included in our criminal procedural law framework. After illustrating about the international obligations assumed by Spain on this issue, we describe extensively the different provisions regulating either arrests or remand detention in Spanish law. The analysis also comprises detailed information, based on statistical data, on the frequency both pre-trial detention measures are used in Spain. A specific section is devoted to the results from an empirical study about judicial decisions on remand detention. The article furthermore describes the conditions of deprivation of liberty and rights for both arrested persons under police custody and remand prisoners under the corrections system. Considerations about recently implemented alternatives to remand detention, and new proposals coming from the doctrine are included at the end of the paper, before making some concluding remarks.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

Spain belongs to the UN since 14 December 1955 and to the Council of Europe since 24 November 1977. On 1 January 1986 became a member of the EEC, a predecessor of the current European Union.

Spain has ratified the following international human rights treaties: the International Covenant on Civil and Political Rights (13/4/1977), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (13/4/2005), the Declaration of the Rights of the Child (30/11/1990), the European Convention on the Protection of Human Rights and Fundamental Freedoms (26/9/1979) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11/5/1995).

The Spanish Constitution, in addition to including a catalogue of civil rights and public liberties, establishes a system to protect them. The right to personal freedom is laid down in Article 17.1: *"Every person has the right to freedom and security"*. As guarantee of the civil rights and public liberties, the principle of legality and the safeguard of the essential contents of those rights are generally established, which in this case are specifically included in the same Article: *"No one may be deprived of his or her freedom except in accordance with the provisions of this section and in the cases and in the manner provided for by the law"*. Article 15 bans torture and any inhuman or degrading treatment or punishment.

In compliance with the provisions of Article 96 of the Spanish Constitution, ratified international treaties, once officially published in Spain, shall be part of the internal legal system. Accordingly, international rights are directly enforceable through domestic courts.[1] It is additionally established that civil rights and public liberties are binding on all public authorities.[2] Such rights are the subject of an immediate judicial review: the rights and liberties recognized in Chapter II of Title I of the Constitution (among them the one pertaining to personal freedom, which includes references to arrest and remand detention) bind, in its entirety, all judges and courts, and are guaranteed by the judiciary.[3] Besides, the Spanish Constitutional Court has jurisdiction over individual appeals for legal protection (*recurso de amparo*) on grounds of violation of fundamental rights. It should be added the case law drawn up by the European

1 Spanish Constitutional Court occasionally rules the conflicts between national law and international law.

2 Article 53.1 of the Spanish Constitution.

3 Article 7.1 of Organic Law 6/1985 of the Judiciary, of 1 July.

Court of Human Rights and the Court of Justice in Luxembourg concerning the interpretation of fundamental rights' content and scope.

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

The Spanish legal system regulates two personal precautionary measures that imply a deprivation of liberty: arrest and remand detention. An arrest implies depriving a person of his own personal freedom and its duration is short-term. It may be carried out by the authorities, the police and, under certain circumstances, by any citizen. The remand detention implies the custody of a person in a penitentiary. This can only be decided by a judge or a court, and has the time frames set forth in the law.

III.1. ARREST

Cases

Here we distinguish between an arrest made by the police and the arrest carried out by individuals.[4]

The authority or the police officials have the duty to arrest[5]:

1. Any person who tries to commit an offence, in the moment that he attempts to commit it.
   Any offender in the moment of committing an offence (red-handed offender).
   Any in absentia offender who has already been prosecuted or convicted (failing to appear before the courts).
   Any offender who escapes:

   – From the penitentiary where he is serving a sentence.
   – From the prison where he awaits the transfer to the place where he must serve a sentence, or on the journey thereto.
   – While he is under arrest or in custody for a pending trial

4 On the subject of arrest, see Hoyos Sancho, "La detención por delito" [Arrest due to offence], Aranzadi, Pamplona, 1997; González Ayala, "Las garantías constitucionales de la detención" [The constitutional guarantees of arrest], Centro de estudios políticos y constitucionales, Cuadernos y debates nº 81, Madrid, 1999.

5 Article 492 of the Spanish Code of Criminal Procedure (*Ley de enjuiciamiento criminal*) (hereinafter LECrim).

2. Any person who has already been prosecuted for an offence which is punished with a sentence of over three years in prison (*prisión menor*).
3. Any person who has been given a sentence shorter than the aforementioned one, but due to such person's records or the circumstances of the act, it is considered that he will not appear when summoned by the judicial authority (except when enough bail has been paid to guarantee his appearance).

Under the same circumstances as the previous case, any person who has not yet been prosecuted, if the authority has reasons to believe that he has taken part in the perpetration of a offence–like fact. In that instance, the case law points out that the arrest is not justified by the mere existence of a "suspicion" or the "simple belief", without any factual basis whatsoever of an offence having been committed.[6]

However, an arrest shall not be allowed for simple misdemeanours, unless the alleged defendant does not have a fixed residence or pays enough bail, in the opinion of the authority or the officer trying to arrest him.[7]

Citizens have the power or right to arrest the persons described under number 1 above.[8] If an individual arrests another individual, he must be in a position to justify that he reasonably considers that the arrested person fits in any of the cases mentioned above.[9]

Duration

The arrest may take place before, during or after a criminal procedure. Its duration is laid down in the Constitution: Pre-trial detention may not last longer than the time strictly necessary to clarify the facts. In any case, within a maximum period of seventy-two hours the arrested person must be released or brought before the judicial authority.[10]

The police official making the arrest has a maximum period of seventy-two hours to release the arrested person or to hand him over to the judge nearest to the place where the arrest has been carried out.[11] There is a special provision for the persons who are part of terrorist or armed bands, whose detention may be extended to the time needed for inquiries purposes up to a maximum limit of

6 The Spanish Supreme Court has specified the cases in which it considers that there are *rationally enough reasons*: Supreme Court Ruling (STS) of 26 March 1993 and STS of 21 October 1994.
7 Article 495 of the LECrim.
8 Article 490 of the LECrim.
9 Article 491 of the LECrim.
10 Article 17 of the Spanish Constitution (CE).
11 Article 496 of the LECrim.

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another forty-eight hours (72 + 48), provided that, once such extension has been requested by filing a founded brief within the first forty-eight hours since the arrest, it is authorized by the judge within the next twenty-four hours.[12]

A maximum period is also laid down for the duration of the judicial arrest. Depending on the reason which provoked the arrest and, at the most, within a period of 72 hours from the moment in which the detainee was handed over by the police, the judge may either order his imprisonment or his provisional release.[13]

Procedure

The police arrest may be carried out on their own initiative, or also by order of judges, magistrates and public prosecutors.[14] When a police official is aware of events that are allegedly criminal, he has the duty to carry out all the necessary inquiries in order to check such events and to find out the offender.[15] If he proceeds to arrest a suspect, the police official must identify the suspect, notify the facts attributed to him, inform the suspect of his rights, and carry out the questioning. If, after having performed all those actions, well founded reasons for such detention still remain, the official shall take the arrested person over to the judicial authority; do not persist such reasons, the arrested person shall be immediately released.[16]

Habeas Corpus

There is a procedure for taking the arrested person immediately before a magistrate's court.[17] The person deprived of freedom, his relatives, the prosecutor and the ombudsman are entitled to request said procedure, without need for the intervention of a lawyer and a legal representative. In a period not exceeding twenty-four hours, the judge of the place where the arrest was carried out shall

12 Article 520 bis of the LECrim.

13 Article 497 of the LECrim.

14 Article 494 of the LECrim and Organic Statute of Public Prosecutors, approved by Law 50/1981 of 30 December.

15 Articles 269 and 282 of the LECrim.

16 In this case it is also relevant to inform the judge on the actions carried out by the police officers, and the specific reasons which made it necessary for them to conduct the arrest, as well as the reasons for the subsequent release without charges (Articles 284 and 295 of the LECrim).

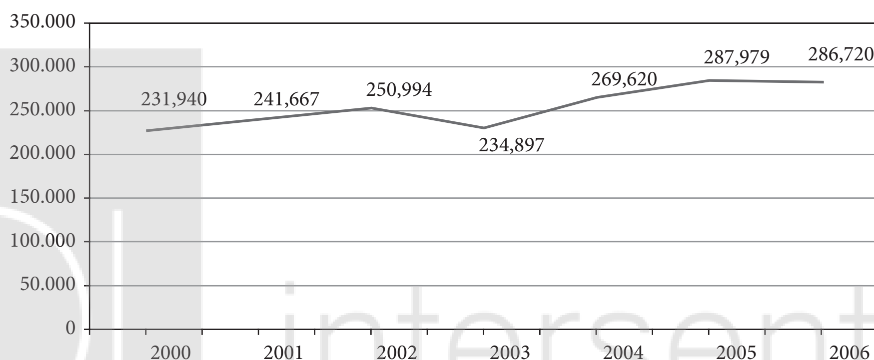
17 Organic Law 6/1984, of 24 May, governing habeas corpus for arrested persons. It is not applicable to remand prisoners.

determine if such arrest complies with legality, or if it was made or extended under illegal conditions.[18]

Statistical data on arrests in Spain

Spanish authorities provide scarce information on the arrests carried out. Its number is only specified in the annual report prepared by the Ministry of the Interior, which includes arrests made by the National Police, the Civil Guard (*Guardia Civil*) and the Basque regional police force, which should be completed with the data provided by the Catalan regional police force. The statistics only specify some aspects in relation to administrative arrests of foreigners, in accordance with the immigration laws, and to arrests of minors.

Chart 1. Evolution of Arrests in Spain[19]



As may be seen in the previous chart, the number of arrests for offences and misdemeanours shows a slightly increasing trend in the last few years.[20]

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18 The main practical problem of habeas corpus is that, against the dismissal writ (*auto de inadmisión*), or even against the initiation of proceedings writ (*incoación del procedimiento*), the law allows no appeal, and the only action left is the individual appeal for protection of fundamental rights before the Constitutional Court. Therefore, if the initial judicial control was not correct, the subsequent proclamation of infringement of the procedural rights and guarantees shall be tardy and ineffective.

19 Source: Authors' compilation based on data from the Ministry of the Interior and from the Mossos D'Escuadra (Catalan regional police force). Statistical Yearbook of the Spanish Ministry of the Interior and statistics on delinquency from the police of the Catalan regional government in the following websites: www.mir.es and www.gencat/mossos/.

20 Statistical data on arrests made since year 2007 up to present time are not included since the Spanish Ministry of the Interior has not published this information, having reduced in the last few years the content of the data provided on this subject.

III.2. REMAND DETENTION

Remand detention or provisional custody (*prisión provisional* or *preventiva*) is the deprivation of freedom of a defendant of an offence of particular severity, which is ordered by a judge, before a final criminal judgment beyond appeal is pronounced, with the purpose of ensuring the accomplishment of the criminal procedure and the future ruling.[21]

Cases of remand detention

In the Spanish legal system this measure is designed as exceptional and subsidiary: The judge must evaluate and specify the grounds for the necessity and proportionality of adopting this measure in relation to the specific case.[22]

Remand detention shall only be adopted when it is objectively necessary, and when there are no other, less burdensome, measures for achieving the same purposes. The judge or the court shall, when deciding on remand detention, bear in mind the repercussion that this measure may have on the defendant, considering his circumstances and those of the act that is the object of the proceedings, as well as the severity of the punishment which might be imposed.[23]

Remand detention may only be imposed when the following requirements are present, accumulatively[24]:

1. That in the proceedings is recorded the existence of one or several acts which show characteristics of an offence that is sanctioned with a penalty whose maximum is equal to or greater than two years of imprisonment, or with a custodial sentence for a smaller prison term if the defendant has a criminal record which was not removed nor can be removed derived from a criminal conviction for a deliberate offence.
2. That enough reasons appear in the proceedings to consider as criminally responsible of the offence the person against whom the order for remand detention is to be pronounced.

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[21] On the topic of remand detention, see Gutiérrez de Cabiedes, "La prisión provisional" [Remand detention], Aranzadi, Navarra, 2004; Odoné Sanguiné, "Prisión provisional y derechos fundamentales" [Remand detention and fundamental rights], Tirant lo blanch, Valencia, 2003.

[22] The regulation on remand detention in Spain was modified by Organic Law 13/2003, of 24 October. This reform extended the possibility of imposing this measure, reducing the minimum sentence for the committed offence from three to two years of imprisonment. Such requisite can since then even be discarded if the defendant has a criminal record or if the purpose is to protect the victim. Additionally, the reform increased the need to specify the grounds for the decision taken by the judge.

[23] Article 502 of the LECrim.

[24] Articles 503 and 504 of the LECrim.

3. That through the remand detention any of the following purposes is pursued:[25]
   - To ensure the presence of the defendant at the trial, when it may rationally be inferred that there is a risk of absconding.
   - To avoid the concealment, alteration or destruction of the sources of evidence which are relevant for the procedure.
   - To avoid the possibility of the defendant acting against the victim's rights.
   - To avoid the risk of the defendant committing other criminal acts.

Four purposes are thus established for remand detention. However, each of these purposes has its own peculiarities:

1. In case of absconding risk, if two appearance orders have already been pronounced by any judicial body in the two previous years, the minimum limit of the penalty shall not be applied.
2. The damage to the sources of evidence cannot be inferred by the simple exercise of the right of defence or by the lack of cooperation of the defendant.
3. In the scenario of protection to the victim, the case of it being a person described in Art. 173.2 of the Penal Code (hereinafter CP) is remarked[26], and the minimum limit of the penalty is not required in any case.
4. The fact of preventing the defendant from committing other criminal acts shall only be a valid purpose if the attributed criminal act is of deliberate nature and, in this case, the penalty must not exceed a certain limit. However, if the defendant acts together with other people in an organized fashion or he is a habitual offender, a minimum penalty shall not be required.

Finally, the law lays down the guiding criteria in order to assess the risk of escape, the risk of concealment, alteration or destruction of the sources of evidence and the risk of the defendant committing other criminal acts.

Duration of the remand detention

Remand detention may not be extended for longer than strictly necessary and, in any case, not longer than the term of the penalty which punishes the type of offence charged to the remand detainee. Its term may not exceed one year if the

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[25] This requisite was the result of Constitutional Court Ruling 47/2000, of 17 February, which brought about the legislative reform.

[26] Article 173.2 of the Penal Code refers to physical or psychic violence regarding the spouse or sentimental partner, or regarding descendants, ascendants or siblings by nature, adoption or affinity, who are his own or the spouse's or partner's, or regarding minors or persons under disability living in the family unit.

offence entails a prison penalty equal to or smaller than three years, or two years if the imprisonment which such offence entails is greater than three years.[27]

Nevertheless, whenever circumstances allow to predict that the case may not be judged within such terms, the judge or court may agree on a single extension of up to two years if the offence entailed a prison penalty greater than three years, or of up to six months if the offence entailed a prison penalty equal to or smaller than three years. If the sentence has already been pronounced and an appeal against it has been filed, the remand detention may be extended for up to half of the term of the penalty imposed in the sentence.

Types of remand detention

The different types of remand detention are: *comunicada* (regular imprisonment), *incomunicada* (in solitary confinement) and *atenuada* (with restricted freedom).

Regular imprisonment

This is the most customary situation. In it the inmate has the right to have visits and to communicate with the exterior by several means.

Solitary confinement

It entails the limitation of certain rights, such as notifying the fact of the arrest and the place in which the inmate is being kept, the visits, the communication by telephone, in writing or by other means, the free choice of a lawyer et cetera.

Its goal is to facilitate the investigation into the facts, since the isolation prevents the inmate from interacting with third parties which may destroy evidence or hinder the inquiries that are being carried out.

Solitary confinement may only last for as long as it is strictly necessary and, as a general rule, for a maximum of 5 days, although some exceptions are provided for by the law.[28]

Imprisonment with restricted freedom

This is established for those cases in which the confinement may entail the worsening of the state of health of the inmate. This measure is served under house arrest or through admission in a detoxification or anti-drug addiction centre.[29]

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27 There is an exception: when the goal is to protect the sources of evidence: the term shall not exceed six months, which are non-extendable.

28 For cases of crimes of terrorism or others committed in an organized fashion, the solitary confinement may be extended for a maximum of eight more days (Article 509 of the LECrim).

29 Article 508 of the LECrim.

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Procedure

For the judge to be able to adopt this decision, the Spanish Code of Criminal Procedure (LECrim) requires that a hearing should previously take place before the judicial authority with attendance of the parties, in which the pleas are to be submitted as well as the proof regarding its justification.[30] Such hearing should be held as soon as possible within the 72 hours after bringing the arrested person before the judge, and summons to attend it must be sent to the defendant, who must be assisted either by a lawyer of his choice or from legal-aid, to the public prosecutor and to the rest of the parties of the proceedings.

The hearing should also take place in order to request and decide, as the case may be, the remand detention of the defendant who is not under arrest or his release on bail. If the public prosecutor or any prosecuting party requests that remand detention of the defendant or his release on bail be decided, those who are in attendance shall be allowed to submit pleas and propose the means of proof which may be performed on the spot or within the 72 hours mentioned in the previous paragraph. The judge or court shall decide on the appropriateness or not of the remand or the imposition of bail. If none of the parties requests it, such authority shall necessarily ordain the immediate release of the defendant that is under arrest.[31]

Controls of the decision

Against the court orders which decree, extend or refuse the remand detention or resolve the release of the defendant, an appeal for amendment may be brought before the decision-making judge or court itself, as well as an appellate review directly before the higher court, which shall be entitled to preferential procedure and must be resolved within a maximum period of 30 days.[32] That is to say, remand detention is not reviewed on a regular basis, but if requested by the parties, or, additionally, due to a judge initiative. Law provisions confine themselves to establish a maximum period of duration.

In addition to the Judiciary, the Spanish Constitution entrusts the safeguard of the right to personal freedom to three other bodies: the Public Prosecution Office (in Art. 124), the Ombudsman (in Art. 54) and the Constitutional Court (in Art. 161.1b of the Constitution).

The Attorney General Office (*Fiscalía General del Estado*) writes a report every year describing the action taken on penitentiary matters. The most recent of such reports highlights as main problems at present: the high and increasing

30 Before the reform introduced by Organic Law 5/1995, of 22 May, the remand detention could be ordered by the judge ex officio.
31 Article 505 of the LECrim.
32 Article 507 of the LECrim.

level of occupancy at the correctional centres of the country and the situation of the penitentiary psychiatric units.[33] These aspects shall be analysed hereinafter.

The Ombudsman, as commissioner of the Spanish Parliament, submits an annual report with a breakdown of the citizens' complaints regarding the public administration, which includes a section referring to the correctional administration.[34]

Statistical data on remand prisoners

We shall start with the data pertaining to the prison population in general, and later on we will focus on the data regarding remand prisoners. In Europe, the last SPACE report with statistical penal data from September 2007 shows information on prisoners and institutions in 39 different countries.[35]

The average rate of European prison population in 2007 was 109.5 inmates per 100,000 inhabitants. 56% of the participating countries (22 out of 39) had rates exceeding 100 inmates per 100,000 inhabitants. Amongst them, Spain surpassed the average with a rate of 126.3 inmates per 100,000 inhabitants, and is therefore in seventeenth place.

In 2007, the average occupancy rate in Spain was 143.2 inmates per 100 jail beds. This rate placed Spanish prisons among the most densely populated in Europe. The overcrowding situation in Spanish prisons is only surpassed by Cyprus, which has 197.4 prisoners per 100 jail beds.[36]

As regards the percentages of remand prisoners in Europe, on 1 September 2007 the average rate of remand prisoners was 27.6 prisoners per 100,000 inhabitants. Again Spain exceeded the average with a rate of 32.1 remand prisoners per 100,000 inhabitants.

More up-to-date data may be found in the statistics of the penitentiary world compendium (*World Pre-trial/Remand Imprisonment List*) with rates dated up to the end of November 2008, where the figure of worldwide remand prisoners exceeds two million and two hundred fifty thousand people.[37] In the majority of

33 See under the publications, reports section for year 2009, on the website (at: www.fiscal.es).

34 It may be consulted at the Ombudsman Documentation Centre, under Annual Reports, on the website (at: www.defensordelpueblo.es).

35 See Annual Penal Statistics from the Council of Europe: Council of Europe Annual Penal Statistics (SPACE I) 2007, which shows penitentiary information up to September of year 2008 (at: www.coe.int/t/dghl/standardsetting/prisons/space_i_EN.asp).

36 Another data offered by the Council of Europe is the average length in European prisons. The European average in 2006 was 6.2 months, while the average length in Spanish prisons is 17.2 months, which is only second to Portugal (26.5 months) and Romania (22.8 months).

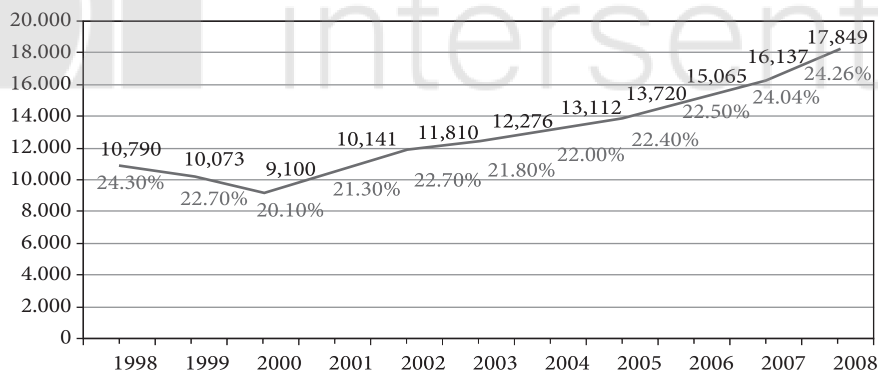
37 This figure corresponds to the countries which provided information on this subject. As for the remaining countries, a quarter million additional people should be calculated. WALMSLEY, R., International Centre for Prison Studies, *World Pre-trial/Remand Imprisonment List* p. 1–6 (at: www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf. This institution conducts many comparative analyses with the statistical data provided by the national authorities of many countries worldwide.

countries, remand detainees make up a percentage of between 10% and 40% of the total prison population. According to these data, which are substantiated by national information, in Spain the remand population amounts to 24% of the total prison population, and the rate of remand detainees is ever-increasing, reaching approximately 35 remand detainees per 100,000 inhabitants. With this rate it is clearly placed before other neighbouring countries, such as France (27), England and Portugal (25), Denmark (18), Germany (16), Norway and Sweden (15); while it is, however, surpassed by Italy (44).

These data must be contrasted with crime rates.[38] Studies show that, while criminality has an average growth or drop rate between 2% and 4% in the last few years, the prison population has increased by 20%. In other words, the highs and lows of crime rate do not affect the number of inmates, whereas the changes to the Penal Code have definitely had an influence, since they impose penalties which are increasingly harder and without possibility of reduction.

The evolution of prisoners in the last nine years shows a constant upward trend. The group of remand prisoners falls slightly up to year 2000, and since then there has been a progressive increase which continues at present. In December 2008 the remand prisoners' population in Spain reached 17,849 people. The upward trend can be clearly seen in chart nº 2. The percentage figure refers to the representativeness rate of remand prisoners within the general prison population.

Chart 2. Evolution of the Remand Prisoners Population in Spain[39]



38 On crime evolution and reactions to crime in Spain, see Díez Ripollés, "La política criminal en la encrucijada" [Criminal policy at a crossroads]. Editorial B de f, Buenos Aires, 2007.

39 Source: Authors' compilation based on data from the Ministry of the Interior (Data up to December 2008).

III.3. RESULTS FROM AN EMPIRICAL STUDY OF JUDICIAL DECISIONS ON REMAND DETENTION

Throughout years 2007 and 2008 a research was conducted on the judicial decision over remand detention, in order to know the real enforcement made of it by the judges in the last few years. For this purpose an in-depth analysis of their decisions was carried out. This empirical study analysed judicial decisions on remand detention in Malaga, including 250 cases over which a decision was taken during 2003 and 2004. All those cases were judged in years 2006 and 2007.[40] As a result, information was obtained in relation to the criminal proceedings in which the decision was set, as well as regarding the grounds for judges' decision and the configuration of the precautionary measure throughout the procedure.

A preliminary profile of remand detainees was obtained through the analysis of the legal proceedings of the remand detainees who were the object of such research. They are people who show the typical characteristics of the other registered offenders: they are mainly male and, concerning their age, they are a bit older, in general, that the registered offenders, although they are distributed in a more balanced way in all possible ages.

The large percentage of foreign remand detainees in relation to the Spanish ones is particularly noticeable. In contrast to the prison population in general, the group of foreign remand detainees is particularly well represented, surely because for the judge the fact of being a foreigner involves a lack of settlement and therefore, an increase of the risk of absconding.

The percentage of remand prisoners with a criminal record reaches 28% of the cases. We may deduce that drug addiction is a circumstance that is hidden from the judiciary, since it is only alleged in 30% of the legal proceedings, while in penitentiary circles the statistics on inmates with this characteristic show a figure of more than twice as much. Yet more serious is that the possible insane nature of the remand prisoner keeps unknown during the criminal proceedings: therefore it has only been detected in half of the cases which later on were so declared in the sentence.

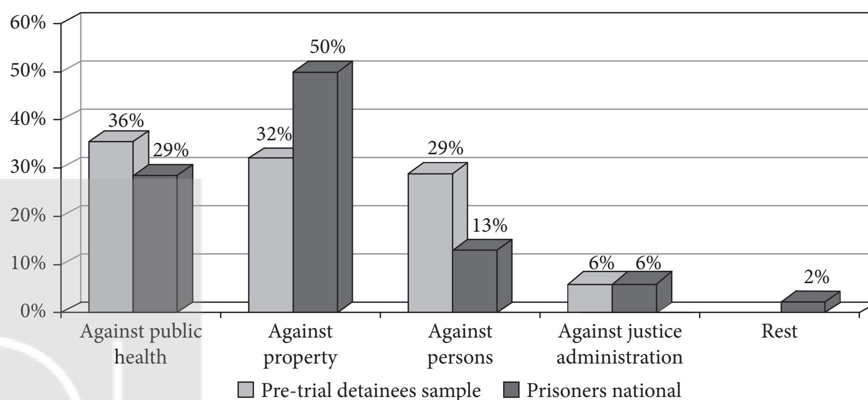
Under the legal provisions for the adoption of this measure, the decisions found on remand detention refer, almost absolutely, to offences punished with a penalty exceeding the legal minimum that is currently required: two years of imprisonment (95% of cases). Although the law accepts exceptions in the application of this measure to offences punished with a lesser penalty, the use of

[40] The research was carried out by Cristina Guerra Pérez, as researcher of the *Instituto Andaluz Interuniversitario de Criminología* (Andalusian Interuniversity Institute of Criminology), and it constitutes her doctoral dissertation submitted in June 2009 at the Law School of the University of Malaga (Spain). It may be consulted at the Criminal Law Department of the Law School and is forthcoming. For further information, please contact: afernandezc@uma.es.

these exceptions by the judges is very rare, and only in cases oriented to the protection of the victim. The provision related to previous existence of criminal records, which also allows circumventing the need for a minimum penalty, has not been applied on any occasion, in spite of the relevance given to this scenario by the legislator.

On the basis of crime types, the aforementioned research compared the remand prisoners of the sample with the convicted prisoners at national level.[41]

Chart 3. Comparison of Remand Prisoners from the Sample with Convicted Prisoners at National Level, by Crime Types



Contrary to the Spanish convicted prison population, where 50% of the inmates serve sentences for offences against the property and 29% for offences against public health, however, in the sample of remand prisoners we see that the offence against the property is only attributable to 32% of the remand prisoners, and offences against public health are the reason for remand detention in 36% of the cases.

In the sample, out of every three offences against public health, two were aggravated subcategories[42] and out of every three theft offences, two had been burglary or robbery. In offences against individuals, the most frequent crimes (27%) were injuries and assault. The remaining typologies (homicide, offences against sexual freedom, kidnapping, threats and mistreatment) showed a more balanced distribution, between 11% and 19%. In the offences against the justice administration there were more remand prisoners for infringing precautionary measures than for violating a sentence.

[41] It should be taken into account that in the case of convicted prisoners the offences included in the prison statistics refer only to the main charge. In the sample all charges are included, although 71% of the remand detainees only have one offence charged.

[42] Hard drugs trafficking, special amount of drugs, organised crime, etc.

The research specially focussed on getting to know the substantiation of the decision for remand detention: to verify if the judges correctly specified the grounds of the imprisonment warrants and if the legislative reform of 2003[43] had had any real influence on the behaviour of the judiciary.

According to the deciding subject, the sample randomly included decisions adopted by different bodies: individual and collegiate, of both examining and trying, judge and magistrate categories, assigned to the capital city and the province, male and female. It was established that the group of women showed a stronger tendency to deliver an order of incarceration than men, and that the quality level of the decisions decreased as seniority in the judiciary increased.

A model of reasoned warrant was drafted considering as necessary elements for the statement of grounds: the acts committed, the circumstances regarding the defendant and the purpose sought with such measure. More than half of the warrants in the sample were standardised resolutions, not personalised, thus infringing the requisites established by the Constitutional Court case law.

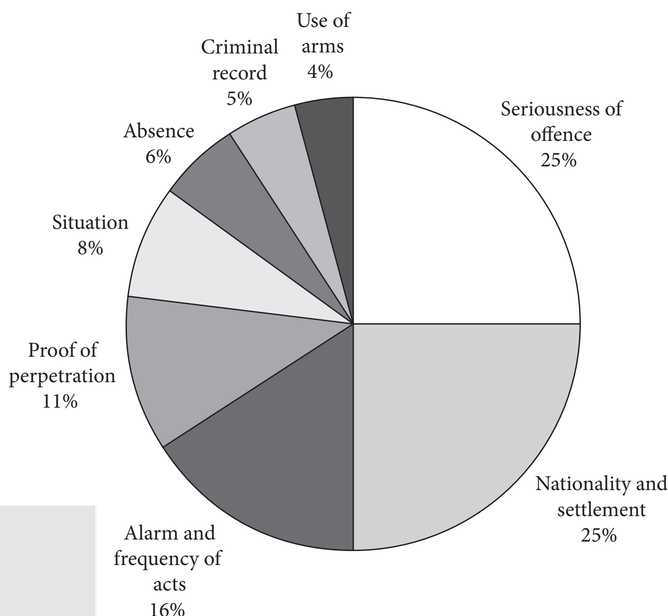
After the legislative reform of 2003, the level of the statement of reasons in the decisions improved considerably, although still 25% of the warrants did not include any reference to the acts attributed to the subject affected by this measure and, as regards the circumstances of the defendant, in 36% of the resolutions there was no mention to them at all. Both facts are certainly worrying, since the degree of personalisation in all these decisions should be considered, at the very least, deficient, and confirms the hypothesis that for many judges in the criminal proceedings there are acts, viewed abstractly, to which remand detention must be applied, rather than specific subjects who merit such a measure.

The content of the decisions was analysed in order to know the specific grounds given by the judges to justify their decisions. The reasons were classified as: pertaining to the acts committed, to the accused person, to the process and for other reasons. The first remark was that some judges alleged reasons not provided for in the law and that the two most frequently mentioned reasons were the severity of the behaviour, and the fact of being a foreigner and the lack of domicile of the defendant. It may be seen in chart nº 4.

From the set of reasons it was concluded that the judge, when adopting his decision, takes into account, in the first place, the possibilities of escape of the defendant; secondly, the fact that the subject is going to be finally convicted; thirdly, that the subject has failed to appear following judicial summons; and finally, the fact that he has a criminal record, together with some other characteristics.

[43] See *supra* note 22.

Chart 4. Distribution of the Reasons Justifying Imprisonment



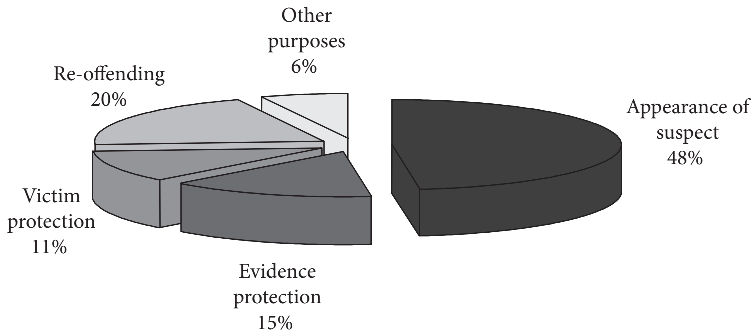
An analysis was conducted on the total number of defendants with a criminal record in order to ascertain when this circumstance had been relevant for the decision of remand detention. This showed that habitual domestic maltreaters, followed by persons accused of threats and robbery stood out. According to the nature of such offences, a special judicial concern to protect the victim was detected, rather than the avoidance of generic re-offending or any other purpose.

Additionally, the judges currently include in the majority of their warrants (83.9%), the goals which are pursued with the adoption of this precautionary measure. In this aspect, the requirements laid down by the law are clearly complied with by the majority of judges.

We analysed which was the specific end or ends that were referred to in the decisions of the positive cases. The results obtained show that to ensure the appearance of the defendant at the trial or, in other words, to avoid the risk of escape is the most important goal for examining judges, with a rate of 48%. The second purpose is to avoid re-offending with a rate of 20%, then the protection of evidence with 15%, the protection of the victim with 11% and other ends with 6%.[44]

[44] It is quite surprising how frequent the Spanish judiciary considers effective imprisonment of the defendant the only way to avoid the risk of escape. A good example is the "Ekin case", at the National Court of Spain (*Audiencia Nacional*): In this case of terrorism, once it had been deliberated and decided that the verdict would be condemnatory, the court, before drafting

Chart 5. Imprisonment Purposes, According to References in the Warrants (N=248)[45]



One of the aspirations of the empirical investigation was checking the influence in reality, and not only in name, of each of the reasons and purposes which appeared in the decisions for remand detention. To this end, statistical techniques of one variant and multivariate analysis were used to examine, in the first place, the possibilities of certain reasons appearing in the decision depending on the purposes that were pursued with it. Secondly, all the reasons were added up together with the purposes, and then the study focussed on the strength of their relation with the most frequent offences of the sample.

From the multivariate analysis, the following conclusions were obtained regarding each of the offences which operated as an independent variable.

1. In serious offences against public health, the most decisive reason used by the judges for the decisions of remand detention is the seizure of drugs in the possession of the defendant, and the most significantly remarked purpose of this precautionary measure is to protect the evidence of the inquiries. The interest of the examining judge is, therefore, specifically geared to ensuring the success of the proceedings.

2. In offences against public health which are not serious, for the decision-making persons the financial situation of the defendant is a determinant reason, which would also somehow reveal its risk of recidivism, as well as the fact of being a foreign citizen, which is mainly connected with the purpose of avoiding the risk of escape, although they also worry about preventing re-offending. It can

the ruling and notifying it to the parties, ordered that the defendants be immediately arrested and remanded in custody. In spite of it, finding the convicted defendants proved to be complex and was not totally achieved. See EFE news agency, 6 December 2007 (at: www.20minutos.es) and 5 December 2007 (at: www.Antena3noticias.com).

45 In the "Other purposes" category other ends are included, such as avoiding social unrest, purpose which has already been repealed. It also contains overall references to the legal provision which includes the legally established purposes, without specifying the one that is pursued with the measure in that case.

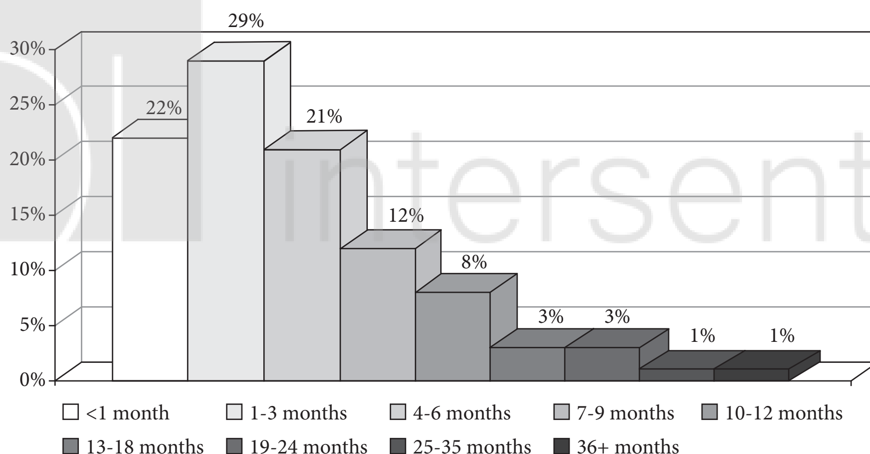
be said that here, contrary to the previous category, the reasons and purposes focus on the person of the defendant.

3. Robbery is directly associated with reasons such as admission of the facts by the defendant and the use of weapons in the commission of the offence. However it is not linked to any specific purpose. In this category, the judge's attention is clearly focussed on the committed offence.

4. In injuries and assault is where the purpose of protecting the victim appears more significantly, clearly setting aside any other purpose as to prevent the defendant from escaping. The victim takes priority and attention to him displaces any element regarding the defendant.

Finally, the evolution of this precautionary measure was examined with the information contained in the legal proceedings. The average length of remand detention in the sample is four months. This data must be considered in relation to the average duration of the full criminal procedure in cases with prisoner on remand, since the beginning of the inquiries up to the sentence before appeal, which amounts to twelve months on average: eight months' average duration for the criminal proceedings and four months for the hearing.

Chart 6. Duration of Remand Detention



Besides, the duration of this measure in the courts of the capital city was compared with those of the province, and it was noted that 61% of the remand detention decided in the capital city lasted no longer than three months, as opposed to 43% of the decisions adopted by the courts of the province. And to make matters worse, decisions for more than seven months' duration only represent a percentage of 19% in the capital city vs. 34% in the province. This negative discrimination in the province compared to capital city, which is common to other public services, is particularly dramatic when what's at stake is something as precious as personal freedom.

The precautionary measure does not always remain unmodified for the whole criminal proceeding but goes through modifications in 59% of cases. Petitions for freedom during the enforcement of remand detention were studied, as well as the appeals filed against the initial decision for remand detention, and a similar number was found in both categories. It was noted that 20% of the petitions for freedom were directly filed by the defendant in a letter addressed to the judge and sent from the correction centre. It is remarkable that the measure was reversed in 39% of the appeals filed against the remand detention decision.

It was more complex to get to know the grounds for modification of the remand detention. The conclusions on this subject were: first, that no reasons can really be specified which lead up to the modification, since the judge does not explain them in a considerable number of cases (28%); second, the special importance assumed by prosecutor's requests in this respect (22%); and finally, the special significance of the mere lapse of time, since this latter circumstance is enough to produce a modification in the personal situation of the defendant (15.8%).

Amongst the imprisonment modifications, the most frequently used by the judges is to release the prisoner with the obligation to appear periodically before the court (81%). Release on bail is not considered to be a useful instrument, since it is only used in one out of four cases. According to its nature, bail is mainly cash and the data show that in forensic practice two amounts are predominantly imposed as bail: one of € 3,000 (24%) and the other one of € 6,000 (22%).

On the other hand, the time elapsing before the remand situation is modified is extremely short, of less than a month in 31% of cases and of three months in 64% of cases. This data must necessarily be considered in relation with the duration of the remand detention. The results obtained from the research show that remand detention is a measure imposed for a short term. The most frequent length of imprisonment is between one and three months. 22% of the remand prisoners only remain in prison for days or weeks, in a period of less than a month, and 72% of this group is released before 6 months have elapsed. The study offers very relevant information: half of the remand detentions run over less than three months.[46]

Finally, it is interesting to analyse what was the final result of the indictment whose conclusion was guaranteed by the measure. Only a minimum percentage of the cases ended in the staying of proceedings (4%). The reasons for dismissal may be summarized in three groups of causes: escape of the defendant, negative results of the incriminating evidence and others which prevent the progress of the criminal procedure, such as limitation of the offence or demise of the defendant.

[46] This data justifies the jurisprudence demands for other alternative instruments to become more widespread in order to reduce considerably a measure as severe as imprisonment.

In the procedures that reached the trial stage, 86% of the rulings were condemnatory and in 95% of them an imprisonment penalty was imposed to the sentenced. The number of appealed sentences which are upheld is also extremely high. However, the research shows that 16.7% of those who were remand prisoners obtained afterwards a suspended sentence. This percentage is very high and necessarily leads us to consider that some procedural agent (the defendant counsel, the examining judge, the public prosecutor) has not applied enough care in previous stages of the procedure so as to notice that this could be the outcome of the indictment, and to argue accordingly in order to avoid the adoption of the precautionary measure.

The same reproach must be addressed to the handling of the subjects that were acquitted due to an insanity defence, that amount to 5% of the remand prisoners in the study. If these subjects seemed to be declared irresponsible at the end of the procedure, they should not have been on remand at the beginning of it, but should have had a differentiated treatment, also in relation to the precautionary measure.

III.4. RIGHTS OF ARRESTED PERSONS

An arrest must comply with the principles of proportionality and rationality, and must be carried out in a manner that will cause the least damage to the pre-trial detainee's personal, reputation or property rights, respecting his honour and personal dignity. Transportation and custody of detainees must be performed separately, taking into account the sex, age, type of offence and involvement therein.[47]

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Detainees must be informed in a comprehensible manner of the charges against them, of the reasons for their arrest, and of their rights, in particular the following:

- The right to remain silent and not testify, if they do not wish, not answer any or some of the questions they are asked, and the right to state that they will only testify before a judge.
- The right against self-incrimination and to not plead guilty.
- The right to freely appoint a counsel and to request that the latter be present during testification, and to intervene at any examination of identity to which they may be subject.
- If detainees or prisoners do not appoint a lawyer, one will be appointed by operation of law by the court or police officer guarding them, and said lawyer must appear at the place of custody as soon as possible.

[47] Article 5.3 of Organic Law 2/1986, of 13 March, on Security Forces and Corps (*Ley de Fuerzas y Cuerpos de Seguridad*), and Article 520.1 of the LECrim.

- The right to notify the family member or person of their choice of the arrest and the place of custody in which they are detained at all times.

Foreigners shall have the right to have the aforementioned circumstances notified to their country's consular offices.

In case of a person under age or legally incompetent, the authority guarding the detainee shall notify the persons exercising parental authority, guardianship or de facto custody of the minor, and if they can not be located, shall immediately inform the public prosecutor's office.[48]

- The right to be assisted by an interpreter, free of charge, if the foreigner does not understand or speak Spanish.
- The right to be examined by a forensic physician or the legal substitute, and in the absence thereof, by the forensic physician of the institution in which the detainee is held, or by any other physician dependent on the State or on other Public Administration.

Under special conditions, detention in solitary confinement ("incomunicada") can be ordained, at the request of the police, by the examining magistrate for a total of five days in all cases, and up to thirteen days if detainee is suspected of terrorism-related offences. The fundamental rights of these persons are restricted. Specifically, they do not have the right to notify their family or consulate of their detention, to be assisted by a counsel or by a physician of their choice.[49]

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[48] In case of a minor (under the age of 18) the legal representative and public prosecutor's office will be informed immediately of the arrest and the place of custody, and the public prosecutor will be personally in charge of the investigation. Security measures will be kept to a minimum (shackles, exhibition of arms, tough language, police vans etc.) and the minor will be placed in custody in appropriate premises, separate from adults. In any case, within a maximum of twenty-four hours, the arrested minor must be released or sent before the public prosecutor. If the minor is under the age of 14 he will not be held criminal responsible and the rules regarding the protection of minors will be applied. In this case the public prosecutor will also be immediately informed for the purpose of assessing the minor's situation; see Article 17 of Organic Law 5/2000 regulating the criminal liability of minors.

[49] Amnesty International has denounced on many occasions that because of these regulations Spain has one of the strictest detention systems of the European Union, which favours the practice of torture and ill-treatment by the police, without real subsequent judicial review. Recommendations have been made to have the current regulations on incommunication repealed and to install recording and audio equipment in the areas of police stations where persons under arrest may be held.
See the report "Spain: Out of the Shadows – time to end incommunicado detention" (at: www.es.amnesty.org/uploads/media/Salir_de_las_sombras.pdf).

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

This section deals separately with the rights and conditions of custody either of arrested persons or remand prisoners. With some relevant exceptions, remand prisoners and convicted prisoners are subjected to the same correctional regime.

IV.1. FACILITIES, CATEGORIES AND ACCOMMODATION

Pre-trial detainees are transferred to existing police facilities, called municipal detention centres (*depósitos municipales*) in case of local police, or police cells (*calabozos policiales*) in case of other police forces. Four different administrations intervene in the custody of detainees: the three territorial administrations, in other words: the central, regional and municipal administrations[50], and the administration of justice through the judicial district judges, who control all stages of the detention process of the persons under arrest. Both the Spanish Ombudsman and Regional Ombudsmen regularly submit to Parliament special reports on the places where pre-trial detainees are held in custody.[51]

In the first place, it should be highlighted that in recent years the number of detention centres (both municipal and provincial[52]) has decreased, but their staff and material resources have improved. Funds for the service are insufficient, and in the case of municipal detention places, a shortage of local police forces has led to inter-police cooperation for the custody of detainees.

Although the number of detainees is very large in relation to the facilities, the amount of time detainees spend in detention centres has decreased considerably due to more rapid transfers of persons on remand to prisons, and because short-term prison penalties that used to be served in said facilities no longer exist. Managing these detention centres has become quite complex due to

50 The authority for custody corresponds to the central administration, which is delegated by law to certain municipalities, and which it finances, although with deficiencies, that are offset through the financial support of regional administrations.

51 Reports of the Spanish Ombudsman: "Situación penitenciaria y depósitos municipales de detenidos de 1988–1996" (at: www.defensordelpueblo.es) and the Special Report of the Andalusian Ombudsman: "Lugares de custodia de personas detenidas: depósitos municipales y otros calabozos policiales" [Detention facilities for pre-trial detainees: municipal detention centres and other police cells], December 2008 (at: www.defensor-and.es/). In this report we refer to the information provided in the second one, which makes a comparative analysis between the situation in 1993–1995 and in 2005–2007.

52 The National Police is in charge of the latter. There are also detention centres in National Police stations, at the level below the provincial one, which coexist with municipal police or local Civil Guard forces and also perform such custody functions.

the characteristics of many of the persons in custody, particularly for local police forces, who lack proper training for this task: note should be made of the increasing number of men arrested for cases of violence against women and the increasing number of detainees of foreign origin.[53]

Lastly, the Minors' Criminal Liability Law (*Ley de responsabilidad penal de menores*) establishes that, "*during the time of detention, minors must be held in custody in appropriate premises that are separate from the ones used for adults, and shall receive the care, protection and social, psychological, medical and physical attention they require, taking into account their age, sex and individual characteristics*". On the date of the report mentioned above[54], there were no specific premises for minors in the territory analysed, in other words, in Andalusia.

Some penitentiaries are for remand prisoners and others for convicted prisoners. However, in most cases penitentiaries have both types of inmates, and they are not always separated. There are separate prisons for women, or separate modules in mixed prisons[55], and the law establishes that women may have children up to the age of 3 with them.

Minors between the ages of 14 and 18 serve the imposed custodial measures in special closed centres that are separate from those for adults. The main difference between these closed centres and the ones for adults is that in them minors spend most of their time in training, working, educational and leisure activities geared to fostering their personal and social abilities, and that the disciplinary regime is strict.[56]

The living conditions of penitentiaries in Spain are reasonable. However, overcrowding is the major problem. Since the number of inmates is greater than prisons' capacity, cells are usually shared. The general rule is that two prisoners share a cell, but in some penitentiaries three or more inmates live in the same cell.

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[53] Following the date on which Organic Law 1/2004 of 28 December on Measures for the Comprehensive Protection against Gender Violence (*Medidas de protección integral contra la violencia de género)* became effective, which considerably aggravated the classification of crimes in that respect, not only were there more arrests, but also more remand prisoners awaiting trial, and both circumstances are reflected in an increase in the number of pre-trial detainees that go through detention centres.

[54] See *supra* note 51.

[55] Pursuant to Instruction 7/2006, the penitentiary administration has established a procedure for imprisonment of transsexual inmates which includes compulsory medical and psychological evaluation reports and examination of their psycho-social gender identity, for penitentiary purposes. This enables to place transsexual persons without any official sex identity according to that examination, in modules and in conditions of custody that are appropriate for their situation.

[56] Royal Decree 1774/2004 of 30 July, approving the Regulations of Organic Law 5/2000 regulating the criminal liability of minors.

IV.2. RIGHTS OF DETAINEES – GENERAL

Persons sent to prison on remand have, amongst other rights, those provided in the General Penitentiary Law (*Ley general penitenciaria*) and in the Regulations that implement said law.[57] The most important rights are the following:

– The safeguard of their life, integrity and health by the prison administration, and the preservation of their privacy and dignity.
– The right to be called by their own name, that their situation be kept confidential with third parties, and to receive appropriate penitentiary treatment.
– The right to receive personal and updated information regarding their procedural and penitentiary situation.
– To exercise their civil, political, social, economic and cultural rights, if they are not incompatible with the cause that has given rise to their imprisonment.

IV.3. RIGHTS TO HUMANE TREATMENT

Private clothes or prison uniform?

Uniforms are forbidden by penitentiary law, so inmates are allowed to wear their own clothes and use their own linen during their imprisonment. Clothes and linen are washed free of charge in the prison's facilities.[58]

Meals

Inmates do not use their money directly, since the use of legal currency is forbidden. However, each prisoner has a bank account into which limited deposits can be made from the outside, to which he is given a card that can be used to purchase additional food and other goods at the commissary. The prison administration is in charge of inmates' meals, providing different types of menus that are adapted to medical indications or to religious or ethical needs.[59]

[57] Article 4 of the Penitentiary Regulations approved by Royal Decree no. 190/1996 of 9 February.

[58] Family members are allowed to leave clothes for remand prisoners at the reception desk. In case inmates do not have clothes, or if their clothes are in bad conditions, they will be given clothes free of charge by the prison administration.

[59] In the case an inmate is destitute, the prison administration gives him an allowance for minor expenses. The consular authorities of some countries may provide money for remand prisoners to buy essential products, at the request of detainees themselves, and grant extraordinary aid for special cases.

Force feeding

In connection with possible hunger strikes that may occur in order to exercise pressure within the scope of a penitentiary, the forced feeding of inmates has been dealt with by the Constitutional Court, which has stated that "*it cannot under any circumstance be considered "torture" or "inhuman or degrading treatment"*, since "*the purpose of such a measure is not to provoke suffering but rather to prolong life*". Authorisation is thus given for "*minimum required medical intervention…, which is permitted only at the time in which, pursuant to medical science, the prisoner's life is in serious danger, and in the manner determined by the penitentiary supervision judge, it being forbidden to mouth feed prisoners against their conscious will*".[60]

IV.4. CONTACT WITH THE OUTSIDE WORLD

Visitors

Another particularly important right within the penitentiary context is the right to have relations with the exterior as provided for in the regulations: The visits' regime which an inmate is entitled to have in prison is regulated in the General Penitentiary Organic Law and in the Regulations that implement that law, and the times, day and manner in which said visits may take place are specified by each centre, which establishes different conditions. During the time of remand detention, a prisoner may receive visits of family members or friends, with the approval of the penitentiary's authority, who can ask for prior identification of the visitors. Penitentiary legislation states that inmates can have a minimum of two ordinary 20-minute oral communications per week, although in most centres a prisoner can exchange them for one 40-minute visit, which normally takes place on weekends.[61]

Additionally to ordinary visits, the law allows other more personal communications ("*vis-à-vis* visits") which may be of an intimate nature (with one's partner) or of a family nature (with one's partner, children etc.), as well as longer "cohabitation visits" for couples that satisfy certain requirements. These communications usually take place monthly.

[60] SSTC (Constitutional Court Judgments) 120/1990 and 137/1990. These rulings have been strongly criticised by a relevant jurisprudence sector.

[61] Family or friends visits can be denied on security reasons or for ensuring a correct evolution in penitentiary treatment. They can be forbidden by a judge in order to guarantee victim protection as well.

Telephone calls, letters and parcels

During their prison term, inmates can send and receive an unlimited number of letters and can also make telephone calls, specifically five per week, at the inmate's own expense. Prisoners are only entitled to receive incoming phone calls in cases of emergency, subject to prior authorisation by the director of the penitentiary center. If deemed necessary by the authorities, correspondence may be withheld for security reasons.

All the rights and living conditions described above are directly applicable to remand prisoners, as there are no differences between them and convicted prisoners in this respect. There are, however, negative differences for prisoners awaiting trial in respect to the right to have temporary leaves and the application of penitentiary benefits[62], which are considered to be part of the correctional treatment and are generally reserved for inmates serving prison terms.

IV.5. DAY PROGRAM OF PRE-TRIAL DETAINEES

Detainees have rights to participate in the prison's activities and to benefit from public subsidies to which prisoners may be entitled. Correctional authorities can offer inmates official education, free of charge. Scholarships and educational loans are available for prisoners who want to take some type of open learning courses. Training is provided in educational, cultural and sport activities; however, permanent or regular occupational training activities are not very numerous.

In principle, remand prisoners are not excluded from these training activities, although the penitentiary administration prefers that such activities involve prisoners who are "susceptible to intervention", or in other words, prisoners who are expected, due to the characteristics of the crime committed[63] and their personal circumstances[64], to stay in prison long enough to carry out the activity.

62 Penitentiary benefits are measures established for the purpose of achieving social reintegration of the sentenced and entail reducing the sentence or real time of imprisonment (Article 202 of the Prison Regulations and the following). These include, amongst others, temporary leaves, good time credits or an earlier parole.

63 For example: if the remand prisoner has committed a serious offence against public health, the precautionary measure can be expected to last a minimum of 6 months to one year, which is sufficient time to carry out some continuous activities in optimum conditions.

64 Severity of the offence, whether or not the inmate has a prior criminal record, proximity of the place of residence of family members and of the examining judge to the penitentiary where he is confined etc. All these circumstances can affect the duration of the measure as well as the time of confinement in one penitentiary centre or another, and are taken into consideration before authorising participation in an activity or programme.

Most prisons have a library with books on legal matters and literature, generally in Spanish. Family members are allowed to send books, magazines and newspapers. In their cell prisoners can have a television set, radio and an authorised personal computer to be used for educational or training purposes, without connection to the Internet.

There are very few paid jobs. After doing away with good time credits by working, the penitentiary administration had to start remunerating jobs that had not been paid in the past, including: work in kitchens or laundry rooms, cleaning common areas, helping in the dining hall and visiting rooms, and working as porters. New penitentiary centres have some industrial-type workshops (for joinery, woodwork or forging), or handling workshops, still in their initial stages, but the number of vacancies is very limited in relation to the inmate population.[65] At this point note should be made that in allocating these vacancies, priority is given to convicted prisoners over remand prisoners, and to inmates who have had a job for more than one year.[66] In consequence, the real possibilities for remand prisoners are greatly reduced.[67]

Educational programmes for maltreaters or rapists, psychological treatments, group therapy for drug addicts[68] or alcoholics to get over their addiction, and in particular existing therapeutic modules, have limited places, with waiting lists for inmates interested in participating in such programmes.

In conclusion, one can say that the overall participation rate of remand prisoners is lower, since they are not included in the penitentiary regime classification and, in consequence, do not have access to personalised prison treatment for convicts. In addition, as mentioned earlier, no one knows how long remand prisoners will have to spend in prison or in a specific penitentiary, which adds to the real difficulty of including them in a programme.[69] Furthermore, the infrastructures and resources available for these activities in penitentiaries

65 In the conclusions and recommendations of the 2006 Report on "Women Deprived of Liberty in Penitentiaries in Andalusia", the Andalusian Ombudsman denounced that women did not benefit from the same opportunities as men, or from the same sport activities, or paid activities, or group therapies or therapeutic modules, due to lack of resources and specialised personnel. See pages 301–304 at: www.defensor-and.es.

66 The so-called special penitentiary employment relationship is regulated by Royal Decree 782/2001.

67 No statistical figures are available from correctional authorities.

68 Currently, there are specific voluntary dishabituation programmes for inmates who are addicted to drugs, the most common being treatments with methadone, as well as specific syringe distribution and exchange programmes for inmates who consume drugs, in order to avoid disease transmission. In order to carry out intervention programmes in the field of drug dependency, prison administrations are supported by different territorial institutions and NGOs.

69 The major decisions regarding the situation of remand prisoners correspond to the judge in charge of examining their criminal case; for example, granting extraordinary temporary leaves, since prisoners must be available at all times, and if possible at the penitentiary closest to the court, to collaborate with programmed proceedings.

intended for remand prisoners are fewer, precisely because of their special characteristics: investments to this effect in penitentiaries are primarily geared to convicted prisoners.

IV.6. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Violence and suicides

The Spanish prison administration uses a system called FIES (specially monitored internal files), which establishes a series of measures for greater control and surveillance of specific groups of inmates in order to reduce their possibilities of disrupting the order in the prison. These measures involve inmates who are considered to be particularly problematic and dangerous due to their behaviour in prison, or who belong to armed bands or organised crime, members of the security forces or the penitentiary system[70], inmates who have committed very serious offences or who belong to racist, xenophobic or fanatical groups etc.[71] Some restrictive measures are solitary confinement (only two hours a day a walk in open air prison yard), restrictions of communications (no visits from outside, censored or tampered letters, phone calls monitored), strip-searching and frequent transfers of the inmate to other penitentiaries.

If a pre-trial prisoner feels threatened, he can ask to be isolated from the other prisoners as a way of protection. There is also a protocol to prevent the suicide of inmates.[72] However, in his last 2008 report, the Spanish Ombudsman expressed concern regarding the frequency of deaths in prison.[73]

Health care

The law states that the prison administration shall safeguard the life, integrity and health of inmates, and in this sense it must ensure that they all have access to the same medical care that is given to the whole population, and must provide services equivalent to primary health care in prisons.[74] There are no differences

70 In this case, to protect them from the other inmates and to avoid fights or aggressions.

71 Instruction 21/1996 of the DGIP (General Directorate of Penitentiary Institutions) regulates the application of the FIES.

72 Newsletter 1472005 of the DGIP established the Framework Programme for the Prevention of Suicide: Correctional staff is trained and made familiar with risk factors of suicide to screening those inmates needed for further intervention. Mental health and psychology staff proceeds to evaluation and treatment of suicide. Prevention measures must involve ongoing observation and routine security checks, prisoners at risk not being left alone and being constantly observed by trained inmate or staff, use of family visits as mean to foster social support.

73 The report can be consulted at: www.defensordelpueblo.es/.

74 Articles 207–220 of Prison Regulations.

in the medical, social and spiritual care given to convicted prisoners and remand prisoners.

However, the quality of medical care differs from one correctional centre to another. They all have infirmaries with rooms for consultation, dressing room, a pharmacy and beds, which vary in number, for sick inmates that require greater surveillance. Residential modules also have medical exam rooms. On entering prison, inmates undergo a medical examination and can personally ask to see the doctor.

Health personnel consists mainly of physicians, nurses and nurses' aides, radiodiagnosis technicians and pharmacists. Infirmaries are equipped with necessary technical resources and have proper material and instruments. The major deficiency has to do with the lack of specialised medical care, which has to be provided by external services. This situation is aggravated, at certain times, when inmates cannot attend their external hospital appointments because of lack of available police officers to drive them to the hospital at certain times.[75] In addition, note should be made that at present prison psychiatric hospitals are insufficient[76] to treat psychiatric pathologies.[77] Furthermore, ordinary prisons have been denounced for not providing rehabilitation, occupational or social insertion therapies for persons suffering from mental illnesses.[78]

All prisons have social workers devoted to inmates' social problems. However, prison staffs, in particular personnel qualified to provide treatments, are not increasing as rapidly as the number of inmates. This has a negative effect on the work of these professionals, who have to deal with an excess workload. In respect to spiritual assistance, each prison centre has a Catholic chaplain in charge of organising religious services.

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75 In this sense, Instruction 2/2007 was a step forward, as it implemented a videoconference system in prisons to make it easier to consult physicians at other penitentiaries or at the closest public or private hospital, in order to avoid having to take inmates there.

76 The Correctional Administration also has two psychiatric hospitals, located in Alicante and Seville, which are used for compliance of preventive measures adopted in criminal procedures.

77 40% of the prison population suffers from mental and personality disorders, and 8% from serious mental illness. See: Spanish Society for Penitentiary Health (*Sociedad Española de Sanidad Penitenciaria*) at the IV National Congress for Penitentiary Health, in 2006 (see at: www.derechopenitenciario.com/noticias/noticia.asp?id=545).

78 The Andalusian Human Rights Association (*Asociación pro derechos humanos de Andalucía*) has denounced how the lack of medical resources and of coordination between the medical services of prisons and external social and health services affect these inmates. See "Ciudadanos invisibles: enfermos mentales en prisiones ordinarias" [Invisible citizens: mental patients in ordinary prisons], 17/03/2009 (at: www.apdha.org).

IV.7. COMPLAINTS BY PRE-TRIAL DETAINEES

Prisoners can address their complaints about their penitentiary regime and conditions orally or in writing either to the director of the prison, or to the inspectorate of prisons (administrative review), or to the penitentiary supervision judge (judicial review). Any time they can address the Spanish Ombudsman, who presents an annual report to the Parliament. They can also send their complaints and requests to their country's consulate.

Remand prisoners can address petitions regarding their procedural situation to the judge who is examining their criminal case until a ruling is issued and they become, or not, convicted prisoners. All other complaints and requests regarding prison administration should be addressed in the same way as convicted prisoners, as described in the previous paragraph.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

Although this issue is not properly regulated in Spain, it has been subject, nonetheless, to extensive doctrinal analysis.[79] The convenience of replacing remand detention with other alternative measures is a widely accepted criminal policy option.[80] The current wording of Article 502.2 of the Code of Criminal Procedure requires that remand detention be strictly applied as an exceptional measure, since it establishes that it must be only adopted when it is objectively necessary and when there are no other less burdensome measures that would allow to reach the same objectives as with remand detention. Doctrine on this issue has complained that our legal procedural system does not have a number of

79 Several authors have analysed this matter in highly interesting studies, including the following: Barona Vilar, "Prisión provisional y medidas alternativas" [Remand detention and alternative measures]. Librería Bosch, Barcelona, 1988, p. 251; Cid Moliné. "El sistema de penas desde una perspectiva reduccionista: alternativas a la pena de prisión" [The punishment system from a reductionist perspective: alternatives to custodial sentences] in 'Curso sobre política criminal del CGPJ, Cuadernos de Derecho judicial', CGPJ, Madrid, 1999, p. 119–145; Giménez-Salinas Colomer. "Penas privativas de libertad y alternativas" [Prison penalties and its alternatives] in "La individualización y ejecución de las penas", in Cuadernos de Derecho Judicial, CGPJ, Madrid, 1993, p. 119 and foll.; Ramos Rubio. "Medidas alternativas a la prisión provisional en el proceso penal español: la libertad provisional" [Alternative measures to remand detention in the Spanish criminal procedure: provisional release] in "Prisión Provisional, Estudios Jurídicos: Ministerio Fiscal", Ministerio de Justicia, IV- 2003, Madrid, p. 745–784; Pastor Motta. "Las medidas alternativas a la prisión provisional" [Alternative measures to remand detention] en "Régimen jurídico de la prisión provisional". Editorial jurídica Sepin, Madrid, 2004, p. 305.

80 By means of Resolution no. 65, of 11 April 1965, the Council of Europe recommended a series of principles for governments to follow to restrict the use of remand detention, excessive duration thereof and its replacement by alternative measures. Resolution no. 11, of 27 June 1980, established the alternative measures to police custody, which in fact and in spite of the terminology, also refers to remand detention.

measures as alternatives to remand detention, articulated on the basis of obligations incidental to freedom, that would allow considering and applying imprisonment as an exceptional and subsidiary measure.[81]

The Spanish legal system uses the generic term *provisional release* for the intermediate situation between remand detention and the ordinary state of personal liberty to which all citizens are entitled in normal conditions; provisional release is susceptible of being accompanied by certain incidental obligations.

The Code of Criminal Procedure expressly considers two incidental obligations: the periodic appearance before the court[82], and, if appropriate, the payment of a bail to guarantee the presence and availability of the defendant regarding the judicial authorities. To guarantee compliance with the obligation to appear before the court, the court may order that the defendant's passport be retained as a measure to ensure that he cannot leave national territory.[83]

In order to comply with the constitutional requirement of exceptionality, the enactment of Organic Law 13/2003 should have been harnessed to introduce a series of measures alternative to remand detention which, without fully depriving, but restraining, liberty, would have achieved the same objectives as this precautionary measure.[84]

For this purpose, together with provisional release with or without bail, it would be advisable to generalise restraining orders which currently are solely used for offences of Article 57 of the Penal Code, and to allow them to be used for all types of crimes.[85] Restraining orders are referred to in Article 544 bis of the Code of Criminal Procedure, and can only be adopted for the purpose of protecting a victim. They consist in forbidding defendants to live in a certain place, or to go, approach or communicate with certain people. Breach of restraining orders can result in remand detention for the defendant.

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81 See Barona Vilar. "Derecho Jurisdiccional…", op. cit., p. 471 and ff.

82 The general rule in the provisional release regime establishes that the defendant is limited to assuming the obligation of appearing in court or before the appointed authority the days specified in the writ, and at all times required by the examining judge or court hearing the case (Article 530 of the CCP). The law does not specify the frequency of the appearances, which is up to the examining judge or the court hearing the case.

83 Organic Law 13/2003 of 24 October amended Articles 529, 530, 539 and 544 bis of the LECrim; and Organic Law 15/2003 of 25 November again amended Article 544 bis of the LECrim.

84 It should be noted that in ruling 169/2001 of 16 July, the Constitutional Court rejected that the adoption of possible alternative measures be based on the principle *a maiore ad minus*, and required that they be expressly and specifically authorised by the law.

85 That is, for crimes of homicide, abortion, injuries, detention and kidnapping, coercion, threats, torture, against moral integrity, sexual crimes, against privacy or against one's own image, housebreaking, insults and libel, property or socio-economic crimes.

In addition, the court should be empowered to order defendant´s house arrest with inclusion of the surveillance measures that are deemed necessary, not only when remand detention could entail risks for the defendant given his state of health, but also due to any other legitimate circumstance from which it can be inferred that the defendant will not escape from the action of justice.

More generally, and on a regular basis, it would be advisable to empower the judge to impose, along with provisional release with or without bail, any of the obligations or duties referred to in Article 83 of the Penal Code concerning the regulation of suspended sentence:

1. Prohibition to reside in or go to a specific place (neighbourhood, town, province et cetera).
2. Obligation to notify any change of residence or any other personal circumstance.
3. Prohibition to leave a location without prior judicial authorisation.
4. Establishing specific limitations on the right to leave national territory, which may be accompanied by the instrumental measure of retaining the passport.
5. Prohibition to go near certain persons (the victim, wronged party or family members), wherever they may be, or to approach the homes of such persons, their workplaces or any other place that these persons may frequent, which may or may not be determined.
6. Prohibition to communicate with the victim of the criminal action or with the persons determined by the court, establishing with them, by any means of communication, including computing or telematic means, written, verbal or visual contact.
7. Obligatory attendance at specific educational, work or rehabilitation or dishabituation centres.

Similarly, it should be made possible to apply some preventive measures for dangerous persons set forth in Articles 96 and 105.1 of the Penal Code:

8. Obligation to live in a specific place.
9. Temporary prohibition or restriction to exercise certain activities, functions or rights (such as professional practice, activities of a specific company or corporate entity, the right to drive motor vehicles, or possessing and carrying arms).
10. House arrest: obligation to stay at home or place of residence, under surveillance, due to personal circumstances of the defendant (illness, care of other persons, and in general, personal and family requirements).

Doctrine uses to propose all these personal precautionary measures as alternatives to remand detention.[86] Recently the use of electronic means worn by the defendant to locate him (such as electromagnetic bracelets)[87] has been added. All of these measures also satisfy the principle of subsidiarity, since they can achieve the same objectives as remand detention, with much less restriction of the rights of persons who have not yet been declared guilty of any crime.

In consequence, a detailed, consistent and complete system of precautionary measures must be established as alternative to total deprivation of freedom.[88] The introduction in the new 1995 Penal Code of a series of penalties as alternatives to imprisonment shows the way to do it. The ultimate objective is that remand detention be applied as a last resort, after consideration is given to a series of personal precautionary measures that should constitute the rule, and not the exception, as is currently the case.[89]

VI. CONCLUSION

Two precautionary measures which entail deprivation of liberty for the suspect are established in Spanish legal system: arrest and remand detention.

The duration of arrest is short-term: Within a maximum period of seventy-two hours the arrested person must be released or brought before the judicial authority. There is a special provision for terrorists or persons belonging to armed bands in order to ensure the extension of their detention up to a maximum of five days.

Remand detention takes place in a penitentiary. This can only be decided by a judge or a court. Its term may not exceed one year if the offence entails a prison penalty equal to or smaller than three years, or two years if the imprisonment penalty such offence entails is greater than three years. A single extension

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86 See Gutiérrez de Cabiedes. "La prisión…". op. cit., p. 79.
As mentioned before, measures number 1, 5 and 6 have already been introduced in Criminal procedure law (Articles 13 and 544 bis of the LECrim) by means of Law 14/1999, for certain crimes.

87 Spain is currently extending use of remote control systems and of bracelets with radio or GPS systems, which enable to control the comings and goings out of their homes of prisoners under open-prison regime. The application of these instruments would be also very useful through the implementation of the criminal procedure. They could help avoid not only the most severe measure of deprivation of freedom, but also all the negative effects that remand detention in a prison implies, such as desocialisation, social stigmatisation, criminal contagion or worsening of the inmate's criminal behaviour pattern.

88 See also Barona Vilar. "La prisión provisional en la Ley Orgánica del Tribunal del Jurado" [Remand detention in the Jury Organic Law], *RGD,* March 1996, p. 1828.

89 See Asencio Mellado. "Reforma de la prisión provisional. El respeto a la excepcionalidad como garantía del derecho a la libertad" [Reform of remand detention. Respect for exceptionality as guarantee of the right to freedom], Diario La Ley, nº 6211/2005, year XXVI, p. 1–7.

adopted by the judge or court, either of up to six months if the offence implies a prison penalty equal to or smaller than three years, or of up to two years if the offence entailed a prison penalty greater than three years. The term never can be extended for longer than the term of the penalty which punishes the type of offence charged to the remand prisoner.

Arrests for offences and misdemeanours show a slightly increasing trend in the last few years. Spanish remand population amounts to 24% of the total prison population, and the rate of remand prisoners is ever-increasing, reaching at the end of 2008 approximately 35 remand detainees per 100,000 inhabitants.

The results of an empirical research on the criminal proceedings in which the judicial decision on remand detention was set have been presented. The report also regards the grounds for judges' decision and the configuration of the precautionary measure throughout the procedure.

Arrests must be carried out in a manner that will cause the least damage to the pre-trial detainee's personal, reputation or property rights, respecting his honour and personal dignity. Detainees must be informed in a comprehensible manner of the charges against them, of the reasons for their arrest, and of their rights. Under special conditions, detention in solitary confinement can be ordained, at the request of the police, by the examining magistrate for a limited period of time.

Persons sent to prison on remand have those rights provided in the General Penitentiary Law and in the Regulations that implement said law. In most cases penitentiaries have both types of inmates, and they are not always separated. All the rights and living conditions of convicted prisoners are directly applicable to remand prisoners. There are, however, some negative differences in respect to the right to have temporary leaves and the application of penitentiary benefits, which are generally reserved for inmates serving prison terms.

The Spanish legal procedural system does not have a sufficient number of alternative measures to remand detention, articulated on the basis of obligations incidental to freedom, that would allow considering and applying imprisonment as an exceptional and subsidiary measure.

PRE-TRIAL DETENTION IN TAIWAN: AN EVOLUTION WITHOUT INTERNATIONAL CONVENTIONS

Jaw-perng WANG*

I. INTRODUCTION

Taiwan's legal culture was historically biased against criminal suspects and detainees and provided them with very few legal protections before and during formal trial proceedings. The legal system was designed to find out the truth without much regard for human rights or proper criminal procedures.

For example, up until the mid 1980s, it was not uncommon that the police tortured suspects to obtain confessions. The phrase "presumption of innocence until proven guilty" was not added into the CCP until the 2003 amendments. Although suspects were not directly presumed to be guilty, they had to cooperate, often to their detriment, with authorities in order to avoid pre-trial detention. The vague language regarding the grounds for pre-trial detention in the Code of Criminal Procedures (henceforth referred to as the CCP) allowed prosecutors to exercise a lot of discretion in issuing detention orders and detain uncooperative suspects for up to two months in detention facilities. Courts rarely overruled prosecutor's detention orders and society as a whole considered detention as a legitimate method to handle criminals.

The terrible living conditions in detention houses (also referred to as remand houses) were widely known and feared by the society. Rape was not uncommon in these facilities and authorities usually ignored events that took place behind

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the bars. The notorious living conditions in these facilities allowed authorities to use pre-trial detention as a powerful threat against suspects and extract quick confessions in exchange for release.

For example, when I practiced law during a period between 1987 and 1990, I represented a client who was charged with rape. I visited him in the police cell, and inquired whether he would be interested to settle the case with the victim. At that time, according to law, he could be released immediately and the charges would be dropped if he chose to settled the case with the victim. The defendant, however, maintained his innocence and refused to settle the case privately. As a result of his refusal to settle the case, he was sent to a detention house.

I visited him the following day to discuss the case. Contrary to the previous time we met, the defendant firmly requested me to settle the case by all means necessary. After his release, following the settlement, the defendant explained to me in great detail the abuses he had to endure from his inmates who "used the toothbrush to brush [his] penis." What my client described was representative of the general living conditions in typical detention houses. Authorities ignored the 'underground order' in these facilities and did little to protect detainees from abuses by their inmates.

Since Taiwanese society as a whole did not sympathize with detainees, there were no channels that allowed suspects to voice their concerns about their living conditions or file complaints for mistreatments in detention houses. Under the Detention Act, although detainees could complain to the Minister of Justice if they were mistreated or abused in detention houses, they could not file a formal lawsuit with courts. Without any judicial review of events that took place in detention houses, the government was able to successfully keep away the public attention from the terrible living conditions in these detention houses.

Although subsequent reforms helped to address some problems in pre-trial detention laws, it was not until 2008 when the Constitutional Court declared the existing Detention Act to be unconstitutional and forced the government to make significant changes to the pre-trial detention regulations.

In the last fifteen years, Taiwan made significant steps in improving its human rights record and reform pre-trial procedures. There are three major reasons for these developments:

First, the Constitutional Court struck down a number of statutory provisions and forced the government to reform existing laws. For example, the Court found the CCP provision authorizing prosecutors to issue pre-trial detention orders to be unconstitutional. It also invalidated the existing Detention Act provision that denied detainees a right to file formal complaints in courts. The Constitutional Court also struck down a provision in the Detention Act that allowed authorities to record conversations between detainees and their lawyers and use these conversation records as evidence during trials. These decisions

created a need to reform some of the existing laws and helped to promote further legal reforms.

Second, legislators also recognized problems in the existing detention laws and took actions to reform them. For example, to strengthen presumption of innocence, the CCP was amended in 2003 requiring prosecutors to bear the burden in establishing guilt of defendants. In addition, to protect suspects from police illegal searches and seizures and to protect the right of confrontation, the exclusionary rule and hearsay rule were added to the CCP in 2003.

Third, detention of celebrities and powerful government officials brought to light terrible living conditions in detention houses and helped to foster a debate in the society about the future of pre-trial detention laws. For example, arrest of the former Secretary General of President Chen Shuei-bian became a media sensation when the famously long hair of Secretary General was cut off by the detention authorities. Following nation-wide media coverage of President Chen Shuei-bian's detention ordeal, Taiwanese society learned about some of the draconian policies practiced in detention houses that even the president could not avoid. Due to the nation-wide media coverage of these events, the society started to question some of regulations in detention houses such as the policies that did not allow detainees to take shower every day, or the rules that limited hot water usage during very cold days.

This paper will highlight the evolution of Taiwan's pre-trial detention practices by examining living conditions in detention houses, rights of detainees and facilities available to them. This paper concluded that pre-trial detention practices in Taiwan will continue to improve and will likely be comparable to the high human rights standards in other developed nations within the next decade.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Taiwan is not a member state of the United Nations (henceforth referred to as the UN), nor recognized as an independent nation by most countries in the world. As a result, Taiwan is unable to participate in most of international organizations. Taiwan was, however, able to gain membership in some international organizations that dealt with economic matters or international trade, such as the Asia-Pacific Economic Cooperation or the World Trade Organization.

The *International Covenant on Civil and Political Rights* and *Universal Declaration of Human Rights* were signed by Taiwan in 1967, during the time

when UN saw Chiang Kai-shek's government as the legitimate government of China. At the time of signing, Taiwan did not make any reservations with regard to pre-trial laws. Unfortunately, shortly after, in 1971 Taiwan lost its seat in the UN, which went to the PRC government of mainland China. Thus, although Taiwan signed both of the documents, they had no international force and Taiwanese citizens did not have rights to make complaints to international judicial bodies.

Taiwan's Legislative Body recently ratified the *International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights* on 31 March 2009. On 22 April 2009, "*Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*" was promulgated by President Ma Ying-jeou, who was elected in 2008 on an election platform that emphasized greater human rights and the improvement of living standards in Taiwan. Its Article 2 states that the "human rights protection provisions in the two Covenants have domestic legal status." Its Article 9 provides that "the date of coming into force of the Act shall be decided by the Executive Yuan." The Executive Yuan set this date as December 10, 2009.

Following the ratification of these documents, fundamental international human rights are now directly enforced through the domestic courts. To further comply with the rights outlines in the two Covenants, in May 2010 Taiwan's Legislature passed the *Act of Speedy Trial*, which provides defendants with the right to a speedy trial.

II.2. NATIONAL HUMAN RIGHTS FRAMEWORK

The *Act to Implement the International Covenants* and the *Act of Speedy Trial* are extremely significant to further Taiwan's human rights developments because Taiwan's Constitution does not provide any significant or detailed provisions regarding individual rights. For example, Article 10 of the Constitution states that "the people shall have freedom of residence and of change of residence" and Article 11 further states that "the people shall have freedom of speech, teaching, writing, and publication."

Comparatively, Taiwanese constitution has a very long and detailed provision in regards to arrests and pre-trial detention. Article 8 states that "Physical freedom shall be guaranteed to the people. In no case, except that of *flagrante delicto*, which shall be separately prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in accordance with procedures prescribed by law may be resisted. When a person is arrested or detained on suspicion of

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having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. Said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of said person for trial. The court shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for surrender of the said person for trial. When a person is unlawfully arrested or detained by any organ, he or any other person may petition the court for an investigation. The court shall not reject such a petition, and shall, within 24 hours, investigate the action or the organ concerned and deal with the matter in accordance with law."

Accordingly, four major rights can be noted from the provision quoted above. First, in principle, no person can be arrested or detained by any authority except that of judiciary or the police. Second, authority executing the arrest or detention shall in writing inform the arrestee or detainee, as well as his designated relative or friend, grounds for arrest or detention. Third, authority making arrest or detention shall, within 24 hours, surrender a suspect to a competent court for a trial. Alternatively, an arrestee, detainee, or any other person, may petition to a competent court requesting for a writ to be served within 24 hours on the organ making the arrest for the surrender of said person for a trial. Fourth, when a person is unlawfully arrested or detained by any organ, he or any other person may petition the court for an investigation. The court must accept such a petition and within 24 hours investigate the action and deal with the matter in accordance with law.

The Constitution does not contain an article concerning human rights and does not explicitly prohibit the use of torture. Nonetheless, based on the decisions and interpretations of the Constitution Court, the phrase "in accordance with the law" mentioned in the Article 8 of the Constitution, means that the contents of the law must be proper in substance. Therefore, a confession must be a product of free will and cannot be obtained through torture. Other rights mentioned in the Constitutional Court's decisions include: the right to confront the witness testifying against the accused, the right against double jeopardy and presumption of innocence until proven guilty. The Court went further and stated that the phrase "in accordance with the law" includes all rights and protections universally endowed to the people in modern civilized country with rule of law".[1]

1 Judicial Yuan Interpretation No. 384 (1995).

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III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

Like many other countries, Taiwan's police may arrest a suspect only with a valid a warrant or without a warrant when certain requirements are met. After an arrest, the police may keep the person in custody at the police station for booking and interrogation for no more than 24 hours. Under Article 8 of the Constitution, the police must, within 24 hours after the arrest, turn the arrestee over to a competent court for arraignment.[2] The CCP also provides that, within 24 hours after the arrest, an arrestee must be turned over to a competent court for arraignment, unless there are other circumstances specified by law. In practice, the police usually brings an arrestee to a prosecutor within 16 hours after an arrest. The prosecutor then examines the circumstances of the case and decides whether the arrestee should be released or placed under detention.

If a prosecutor intends to detain an arrestee for investigation, he must apply for a detention order. If court approves the application of a detention order, an arrestee may be detained for up to two months. Following the formal detention order, an arrestee is sent to a detention house. A prosecutor may apply to the court for one extension of detention for a period of two months.[3] Detention at this stage is normally called investigation detention.

After a person is indicted, it is up to the court to decide whether to release or detain the defendant. Courts may order unconditional release, conditional release, or detention pending a trial. If a defendant is ordered to be detained, he/she will be sent to remand house. Detention at this stage is normally called trial detention. If an arrestee is not indicted within two to four month period, according to the CCP, he/she must be released from custody.

In Taiwan trials in appeal courts are considered *trial de novo*. When a case is appealed to the court of appeals, the court has to conduct a completely new trial. The court of appeals has the same detention authority as the trial court has at the district level.[4]

Taiwan's Supreme Court is a reviewing court and pays great deference to factual decisions made in lower courts. Detainees who await decision at this stage are often said to be "awaiting confirmation of sentence".

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[2] Article 8, Section II of the Taiwan Constitution states "when a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall… within 24 hours, turn him over to a competent court for arraignment."

[3] Section 2, Article 108 of the CCP states that "each extension of the period of detention may not exceed two months. Only one extension is allowed during investigation."

[4] [4] Section 7, Article 108 of the CCP: "If no prosecution has been initiated or no judgment has been rendered at the expiration of the detention period, the detention shall be deemed canceled, and the public prosecutor or the court shall release the accused; if the accused is released by the public prosecutor, the public prosecutor shall immediately notify the court of the same."

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In July of 2009, Taiwan had 3,783 people held in pre-trial detention facilities. Prison population at the same time was at 55,486. The total prison population including pre-trial detainees was 59,269.[5]

In 2008, the average length of investigation detention was 1.5 months; the average length of trial detention at district courts was 2.5 months; the average wait time at courts of appeals was 3.5 months; and the average at the Supreme Court (awaiting confirmation) was 1.9 months.[6]

III.1. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

The CCP is very vague in regards to the appropriate time duration between arrest and custody. However the Code is very detailed about the interval period between an arrest and remand. The latter might offer a justified reason for the absence of the former.

As stated above, according to the constitution, an arrestee *must* be released or turned over to a competent court within *24 hours* after his *arrest*. Usually police will deliver the suspect to a prosecutor within 16 hours following the arrest. In other words, the time between arrest and release from police custody is usually no more than 16 hours. Normally, the police will take the arrestee immediately back to the police station in order to comply with the 16-hour restriction.

Except in certain minor offenses, the CCP does not grant the police right to decide whether they should detain or release an arrestee. The Code states that a suspect arrested by the police *must* be turned over to the prosecutor *immediately*. Only when the offense is minor, or when the offense committed is one that prosecution may be instituted only upon complaint or a request, can the police, with the public prosecutor's approval, release the arrestee.[7]

Although a suspect must be turned over to a court within 24 hours after an arrest, it is possible that a suspect may be kept longer than 24 hours under the CCP. Article 93–1 of the CCP states that time spent in one of the following

[5] Statistics from Statistics Department of Ministry of Justice.

[6] Statistics from Statistics Department of Ministry of Justice.

[7] Article 91 of the CCP: "If an accused is arrested with a warrant or because of a circular order to arrest without a warrant, he shall be brought immediately to the place designated" Section 2, Article 93 of the CCP states that "a judicial police officer or judicial policeman who arrests without a warrant or receives a person in *flagrante delicto* shall immediately send the arrestee to a public prosecutor. If the offense committed is punishable with maximum punishment of imprisonment for no more than one year, or detention, or sole fine, or if the offense committed is one that prosecution may be instituted only upon complaint or request and that the time period to initiate such compliant or request has lapsed, then with the public prosecutor's approval, the arrestee needs not be sent to a public prosecutor."

circumstances shall not be counted against the 24-hour limitation, provided that there is:

(1) Unavoidable delay caused by traffic obstruction or force majeure
(2) Transfer of arrestee
(3) Interrogation cannot be made according to the first section of Article 100–3[8]
(4) Examination cannot be made due to medical emergency of the accused or suspect
(5) Examination is not made because authorities await arrival of the attorney when the accused or suspect has made the presentation that a defence attorney has been retained. The said waiting time shall not exceed four hours. The same rule applies to in cases where police waits for the arrival of the person named in the third section of Article 35 in the event the accused or the suspect is unable to make a clear and complete statement due to unsound mind
(6) Examination is not made because of waiting for the presence of the interpreter if there is a need for having an interpreter for the accused or suspect, provided that the waiting time shall not exceed six hours
(7) If the public prosecutor orders the release of the arrestee on bail or to the custody of another, while waiting for bonds to be presented or for the acceptance of custody, provided that the waiting time allowed shall not exceed four hours
(8) The time when the suspect was examined by the court, according to the Habeas Corpus Act

Therefore, it is possible for a suspect to be kept in police custody for more than 24, or even more than 48 hours, if the police concurrently encounter several circumstances outlined above.

In principle, under Article 100–3 of the CCP, the police cannot interrogate a suspect during the night.[9] The "night" is vaguely defined by the CCP as the time between sunset and sunrise. In the winter time, the night may be as long as 13 hours, lasting from 5:30 pm until 6:30 am. If the police cannot conduct an interrogation due to the night time restriction, the time in custody during "night time" shall not be counted against the twenty-four hour limitation. In other words, the police may receive an 'extra' 13 hours by obeying the interrogation rule. In addition, according to Section I, the Subsection 5, Article 93–1 the police may earn

[8] Section 1, Article 100–3 of the CCP states that "the interrogation of criminal suspects by judicial police officer or judicial policeman shall not proceed at night, except for the following circumstances: (1) Express consent by the person being interrogated; (2) Identity check of the person arrested with or without a warrant at night; (3) Permission by a public prosecutor or judge; (4) In case of emergency.

[9] There are four exceptions: (1) express consent by the person being interrogated; (2) identity check of the person arrested with or without a warrant at night; (3) permission by a public prosecutor or judge; (4) in case of emergency.

extra four hours if there was no interrogation due to the wait for a defence attorney. The police may gain additional hours if an interrogation cannot be conducted due to a health emergency, according to the Subsection 4 of the same article.

In the past, pre-trial detention orders were often issued by prosecutors. According to the article 8 of the constitution, the police must, within 24 hours after the arrest, turn the arrestee over to a competent court for arraignment. Although the constitution requires the police to turn an arrestee over to a court, the previous CCP provision required the police deliver an arrestee to the prosecutor's office.

Until the mid-1990s, prosecutors had a broadly defined authority to detain suspects.[10] Whenever a prosecutor found it necessary and one of the listed reasons specified by the law was fulfilled[11], the prosecutor could detain the accused for up to two months without obtaining any court authorization.[12]

In 1995, Taiwan's Constitutional Court struck down provisions of the CCP granting prosecutors the authority to detain suspects. Due to the great complexity of the issue, the Constitutional Court gave the Legislative Yuan two years to amend the CCP. On December 19th 1997, the prosecutor's authority to detain the accused formally came to an end. Today, a prosecutor must apply to a court in order to obtain a detention order.

III.2. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS

There are two types of pre-trial detention in Taiwan: ordinary detention and preventive detention. Ordinary detention is issued in order to ensure that the suspect will be present during the investigation, trial, and the final verdict. Preventative detention is issued to prevent a suspect from re-committing same offense. The requirements for issuance of these detention orders differ and are outlined below.

Ordinary Detention

Ordinary detention requires the existence of three positive elements and absence of any enumerated negative elements. The three positive elements are as follows:

1. Strong Suspicion – The CCP provides that "an accused may be detained after he is *strongly suspected* of having committed an offense."

[10] The old Section 3, Article 102 of the CCP provided that "a writ of detention shall be signed by a prosecutor during investigation."

[11] The old Article 101 of the CCP: "An accused may be detained if necessary after examination, and if one of the conditions specified in Article 76 exists."

[12] Section 1, Article 108 of the CCP: "Detention of an accused may not exceed two months during investigation…"

2. Specific Grounds – A detention order may be issued only when one of the following circumstances are present:
   (A) The accused has absconded, or there are facts sufficient to justify an apprehension that he may abscond
   (B) There are facts that sufficiently demonstrate that the suspect may destroy, forge, or alter evidence, or conspire with a co-offender or witness
   (C) Accused committed an offense punishable by death, life imprisonment, or a minimum punishment of imprisonment for no less than five years.[13]
3. Necessity – Even if the above two elements are met, a detention order can be issued only when other measures (such as a conditional release) are insufficient to ensure the prosecution, trial, or execution of sentence.[14]

Even if the above elements are met, the Code states that a court *must* grant bail in the following circumstances:

1. Non-serious Offenses: The maximum punishment for such an offense is imprisonment for less than three years, detention, or a fine. If an accused is a recidivist, or a person who makes the commission of crime a habit or occupation, a person who commits a crime during the period of parole, or a person detained under Section I of Article 101, the said rule shall not apply
2. Pregnancy or birth: The accused has been pregnant for five months or more or has given birth during the preceding two months
3. Illness: The accused is ill, and it appears that he cannot be treated unless medical attention is provided[15]

In the above circumstances, detention shall not be permitted unless there is no possibility to release the accused on bail, or to the custody of another person, or with a limitation on the residence of accused.[16] In other words, the court may not issue a detention order in the above circumstances if suspect applies for bail. It is almost certain that any suspect will apply for bail. As a result, it has become common practice for courts not issue a detention order due to the above mentioned circumstances.

[13] Article 101 of the CCP.

[14] Article 101 of the CCP; First Sentence, Article 101–2 of the CCP: "After examining the accused, despite the existence of the circumstances specified in section I of Article 101 and section I of Article 101–1, the judge may nevertheless order that the accused be released on bail, or to the custody of another, or with a limitation on his residence if the detention is deemed unnecessary."

[15] Article 114 of the CCP.

[16] Second Sentence, Article 101–2: "If the circumstances specified in Article 114 exist, detention shall not be permitted unless it is unable to release the accused on bail, or to the custody of another, or with a limitation on his residence is not workable."

Preventive Detention

Preventive detention was added into the CCP in 1997. Like ordinary detentions, preventive detention requires the existence of three positive elements and absence of any enumerated negative elements. The three positive elements are as follows:

1. Strong Suspicion of Specific Offenses – An accused may be detained only after he is *strongly suspected* of having committed one of the offenses specified by the CCP[17]
2. Suspicion of Re-committing the Same Offense – A preventive detention order can be issued only when there are facts sufficient to establish that an accused may re-commit the same offense again
3. Necessity – According to the CCP, even if the above two elements are met, a preventive detention order shall be issued only when the detention is necessary[18]

In order to issue a preventative detention, the Code requires court to establish absence of negative elements, which are same as elements in cases of ordinary detention. According to the law, court *must* grant a bail request to individuals charged with non-serious offenses, pregnant women, women giving birth, or individuals with a serious illness.

Therefore, a person cannot receive any form of detention, either ordinary or preventive detention, when he or she is suspect in an offence not punishable by imprisonment, unless suspect cannot be released on bail, placed in the custody of another individual, or have a limitation imposed on his\her residence.[19]

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[17] Article 101–1 of the CCP lists the following offenses: "(1) The offense of Arson as provided in sections I, II, and IV of Article 174, and sections I and II of Article 175, and the offense of constructive arson as provided in Article 176 of Criminal Code; (2) The offense of Forced Sexual Intercourse as provided in Article 221, the offense of Forced Obscene Act as provided in Article 224, the offense of Aggravated Forced Obscene as provided in Article 214–1, the offense of Sexual Intercourse or Obscene Act against an insane person as provided in Article 225, the offense of Sexual Intercourse or Obscene Act against under aged child as provided in Article 227, the offense of Battery as provided in Article 277–1 of the Criminal Code. For the case chargeable only upon a complaint, if a complaint is not filed or has been withdrawn, or if the period of time for filing the compliant has lapsed, then this section shall not apply; (3) The offense of False Imprisonment as provided in Article 302 of Criminal Code; (4) The offense of Forcing as provided in Article 304, and offense of Threaten to Personal Security as provided in Article 305 of Criminal Code; (5) The offense of Larceny as provided in Articles 312 and 322 of Criminal Code; (6)The offense of Abrupt Taking as provided in Articles 325 through 327 of Criminal Code; (7) The offense of commission of Fraudulent as an Occupation as provided in Article 340 of Criminal Code; (8) The offense of Extortion as provided in Article 346 of Criminal Code."

[18] Article 101–1 of the CCP.

[19] Second Sentence, Article 101–2 of the CCP states that "if the circumstances specified in Article 114 exist, detention shall not be permitted unless that the accused is released on bail, or to the custody of another, or with a limitation on his residence is not workable."

The CCP states that a court cannot issue a detention order without first examining the accused. In other words, the accused has a right to be heard before the court. The court *must* hear opinions and arguments of a suspect before issuing any detention orders.

III.3. PROTECTION AGAINST UNLAWFUL OR UNREASONABLY LONG DEPRIVATION OF LIBERTY

Following a detention order, a defendant or his defence lawyer may apply to the court for cancellation of the detention or for suspension of detention and require the court to release the suspect on bail.[20] Cancellation of the detention means that the suspect receives an unconditional release. Suspension of detention is a conditional release such as release on bail, release to the custody of another individual, or a release with limitations places on the residence of accused. A defendant may submit the applications at any time and as many times as he wishes. After the receipt of request, courts decide whether to grant or reject these requests.

Usually in order to receive cancellation of the detention, it must be established that the reason for detention ceases to exist, meaning that the positive elements of the detention, as mentioned above, are no longer present.[21] Other grounds for cancellation of the detention include:

1. Late serving of the order to extend detention – Before the expiration of the detention period, the court may, on its motion or due to a prosecutor's application, extend the detention period according to the CCP. However, if the order to extend detention has not been legally served by the expiration of the detention period, the detention shall be deemed as cancelled[22]
2. No prosecution or judgment before expiration of detention – If no prosecution has been initiated or no judgment has been rendered at the expiration of the detention period, the detention shall be deemed cancelled[23]
3. Decision not to prosecute – If an accused who is detained receives a judgment cancelling prosecution or a ruling of deferred prosecution, the detention will be considered as cancelled[24]
4. Acquittal or other reason – If an accused is under detention, such detention is considered to be cancelled as soon as any of the following judgments are issued: not guilty, exempt from prosecution, punishment remitted,

20 Articles 107 & 110 of the CCP.
21 Article 107 of the CCP.
22 Sections 1 & 2, Article 108 of the CCP.
23 Section 8, Article 108 of the CCP.
24 Section 1, Article 259 of the CCP.

suspension of sentence, fine, sentence commuted to a warning, or case not entertained.[25]

In meeting the above grounds, a detainee *must*, in principle, be released and the court has no discretion to rule otherwise.

Courts have the authority to evaluate all evidence to decide whether the reason for detention has ceased to exist and make the ultimate decision. For suspension of detention, courts possess great discretion. The relevant determination is whether other conditions of release – such as bail bonds, limitation on residence or other means are sufficient to achieve the same goal achieved by detention.[26] Unlike in the cases where cancellation of the detention is issued, courts has almost unlimited discretion in deciding whether conditions for release can achieve the same goal as detention.

As further explained below, the CCP places limits on the length of time permitted for pre-trial detention:

A. Investigation Detention – As stated above, an accused may be detained for up to two months during the investigation stage with former approval from a court. If it is necessary to continue the detention, a prosecutor may apply for an extension of the detention. The application must state the reasons for the extension and must submitted to appropriate court no later than five days prior to the expiration of existing detention order. During the investigation stage, an extension of detention order may not exceed two months. Only one extension is allowed and in total, 4 months is the maximum allowed time for detention during the investigation stage.[27]

B. Trial Detention – The CCP places limits on detention period for most offenses, but does not explicitly place limitations on serious offenses. However, the newly passed *Speedy Trial Act* adds limitation on the detention period even for cases involving serious offenses.

1. The most serious offenses: Under the CCP, individuals suspected in offenses that carry punishments of more than ten years' imprisonment, may be detained until the end of trial regardless of how long all procedures may take. In other words, there is no legal limitation on the length of the detention under the CCP. In response to the criticism voiced by human right groups, Section 2, Article 5 of the *Speedy Trial Act* now limits detention period for

25 Article 316 of the CCP. But, there is a proviso in the Article "provided that during the period allowed for appeal or while an appeal is pending the accused may be released on bail, to the custody of another, or with a limitation on his residence; if he is unable to provide bail or if it is impossible for him to be released to the custody of another or with a limitation on his residence, an order may be issued requiring him to remain under detention if necessary."

26 Article 110 of the CCP.

27 Sections 1 & 5, Article 108 of the CCP.

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these offenses to no more than 15 months at the district court or the court of appeals, and 5 months at the Supreme Court level.

2. Other offenses – Other than the most serious offenses, a court, at each instance, may detain the accused for three months pending the trial. If it is necessary to continue the detention, courts may, prior to the expiration of the period, extend such period by a ruling after examining the accused in accordance with law. Extension may not exceed two months. Extension may be allowed three times during first and second instances, and one time only during the third instance. In other words, the district court and the Court of Appeals may detain the suspect for up to 9 months, and the Supreme Court may detain the accused for up to 5 months.[28]

When a case is appealed to the Court of Appeals, the latter has to make its own decision whether to keep the suspect in detention facility or release pending for the appellate procedure. When a case is further appealed to the Supreme Court, the Court of Appeals remains responsible for detention of the suspect and must once again make the decision of whether to keep or release the accused, since the Supreme Court in Taiwan is a reviewing court and does not hold hearings with respect to factual finding.[29]

III.4. INFORMATION, LEGAL REPRESENTATION, INTERPRETER, INFORMING OTHERS

Section 2, Article 8 of the Constitution explicitly states that "when a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative or friend, of the grounds for his arrest or detention."

The CCP is constituent with the Constitution and provides an arrest warrant with information that contains offense(s) charged, reason(s) for the arrest, and place to which an accused will be taken. According to the CCP an arrest warrant shall consist of two copies. In making an arrest, one copy of the warrant shall be handed to the accused or members of his family. In making a warrantless arrest, the law enforcement officer shall notify the arrestee and his family members immediately that a defence attorney may be retained to be present during questioning by the police.[30]

As stated above, before issuing a detention order, the court *must* examine the arrestee, who has a right to appear in court and make statements. In examining an arrestee, court must inform him of the offense(s) for which he was charged,

[28] Sections 1 & 5, Article 108 of the CCP.
[29] The Conclusion of the Conference of the Supreme Court's Criminal Panels in 2006.
[30] Articles 77, 79, 88–1 of the CCP.

the right to remain silent, the right to retain a lawyer, and the right to request the investigation of evidence favourable to his case. Failure to do so will constitutes a reversible error. A detention order without the prerequisite administration of the warnings will be reversed by the higher court.

According to the CCP, when a person is detained, he or his family are all entitled to certain information. Therefore, a writ of detention is required to detain an accused. A writ of detention shall contain the following information: offense(s) and article(s) of the Penal Code violated, reason(s) for detention and the facts based upon, place of detention, time period of detention and its starting date and remedies available for challenging the order of detention. In the execution of a writ of detention, the writ shall be sent to the defence attorney, the accused, and the relatives or friends as appointed by the accused.[31]

An accused does not necessarily have to be legally represented even though he was detained. Every accused has the right to retain his own lawyer at any stage of criminal proceedings, including the investigation stage or detention hearings.[32] If a defendant retains his\her lawyer, the latter will be notified and has the right to appear at all detention hearings including investigation. However, indigent defendants have a right to a government-paid lawyer only after the formal indictment, not before. In other words, if a prosecutor applies for detention during the investigation stage, an indigent accused does not have the right to a government-paid lawyer at the detention hearing, even if such a right is available during the trial stage. Nonetheless, for the accused unable to make complete and sound statement due to mental problems, the CCP requires a lawyer to be appointed regardless of the investigation stage. As a result, suspects with unsound mind are to be legally represented at all detention hearings, including the investigation and trial stages.[33]

Under the CCP, if an accused is deaf, mentally ill, or cannot communicate in the language used by authorities, an interpreter may be used when examining the accused. In practice, interpreters are regularly used during interrogation or detention hearings of individuals with disabilities, mental problems, or foreigners who cannot converse in official language. Unfortunately, the CCP does not provide any rights to grant foreigners translations of all documents presented and used.

III.5. INTERNATIONAL INSTRUMENTS AND DECISIONS

Taiwan is not a member state in the United Nations, nor is recognized as an independent country by most of the countries in the world. Almost like an infant

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31 Articles 102 & 103 of the CCP.

32 Article 27 of the CCP.

33 Articles 27 & 31 of the CCP.

in international society, Taiwan and its citizens are unable to complain to any international judicial bodies. There are no indications that laws relevant to the issue discussed have been influenced by international laws.

III.6. MOST IMPORTANT DEVELOPMENTS

Three important developments that took place in the last 15 years are directly relevant to further evolution of pre-trial detention practices in Taiwan.

Detention authority

Previously prosecutors had the right to detain suspects at their discretion without any approval from courts. According to Article 8 of the Constitution, the police must, within 24 hours after the arrest, turn the arrestee over to a competent court for further arraignments.[34] Although the Constitution required the police to surrender an arrestee over to a "court", the CCP contained a contradicting provision that required the police to turn an arrestee over to a prosecutor's office. As a result, prosecutors had very broad authority in detaining suspect.[35] Whenever a prosecutor found it necessary and one of the listed reasons specified by the law applied[36], he could detain an accused for up to two months without obtaining court approval.[37]

In 1995, Taiwan's Constitutional Court stated that the CCP provision granting prosecutors the authority to detain suspects to be unconstitutional. Due to the great complexity of the issue, the Constitutional Court gave the Legislative Yuan two years to amend the CCP in this regard and reform pre-trial detention practices. On December 19th 1997, prosecutorial authority to detain suspects came to an end.

The abridgement of the prosecutorial authority in detaining suspects proved to be extremely significant to future developments in detention laws. For example, in 1997 the number of detainees in Taiwan was 21,457. In 1998 when prosecutors lost the right to detain suspects, the number of detainees dropped to 7508.

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[34] Section 2, Article 8 of the Constitution provides that "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall… within 24 hours, turn him over to a competent court for arraignment."

[35] The old Section 3, Article 102 of the CCP.

[36] The old Article 101 of the CCP: "An accused may be detained if necessary after examination, and if one of the conditions specified in Article 76 exists."

[37] Section 1, Article 108 of the CCP: "Detention of an accused may not exceed two months during investigation…"

Detainee's right to communicate with his defence lawyer

Before 2009, communications between a detainee and his defence lawyer were monitored and recorded, and the recorded information could be used as evidence against a detainee at trial. The now dissolved Article 23, Paragraph 3 of the Detention Act stated that when a counsel visited a suspect in a detention facility, the visitation was to be under surveillance. The Detention Act authorized not only on-site monitoring by the detention facility personnel, but also eavesdropping, recordation, and audio-recording. Not surprisingly, counsel visitation were routinely monitored and recorded pursuant to the above statutory provisions. Article 28 of the Detention Act also stated that "any statement, demeanour, or contents of correspondence sent or received by the defendant suitable for references during investigation or on trial, shall be submitted to the prosecutor or the district court." This provision allowed authorities to use communications between suspect and his lawyer to be admitted as evidence during investigation or at a trial.

On January 23rd 2009, the Constitutional Court declared the above-mentioned provisions to be unconstitutional. The Court reasoned that these provisions allowing authorities to conduct surveillance and audio-recording without considering whether these actions achieves the purpose of detention or are necessary in maintaining the order of the detention facility, hindered the exercise of the "right to defend oneself" and exceeded the scope of necessity, thus violating the principle of proportionality under the Constitution. The Court further noted that the provisions were inconsistent with the meaning and purpose of the Constitutional protection of the right to litigate. However, the Court held constitutional the "mere visual monitoring" without probing into the contents because there could be established a clear need for such action in order to maintain order and security in the facility. The Court emphasized that a detainee has the right to exercise free and unrestricted communications with defence counsel. The Court declared these CCP provisions to be void as of May 1st 2009.[38]

Following the ruling, the Detention Act was amended as follows: "When a detainee is visited by his defence lawyer, officials of the detention house may visually monitor the visit, but cannot hear communications except otherwise provided by law. To maintain order and security of the detention house, mails or materials sent to or from detainee's defence lawyer may be scanned for contraband." As a result of these revisions, a detainee enjoys the right to exercise free and unrestricted communications with his defence lawyer.

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[38] Interpretation No. 654 (2009).

Serious offenses as ground for detention

As stated above, ordinary detention requires the presence of three elements: strong suspicion, specific grounds, and necessity. To clarify, specific ground means that the accused was charged with committing an offense punishable by death, life imprisonment, or a minimum punishment carrying a sentence of no less than five years imprisonment. In other words, under the CCP, the charge of serious offense alone could constitute sufficient ground for detention since it can include other elements mentioned. Therefore, generally a detention order is issued if the accused is charged with a serious offense rather than a minor one.

In October 2010, Taiwan's Constitutional Court declared that it is unconstitutional for the charge of serious offense to constitute detention without the presence of other elements. The Court reasoned that the existing practice contradicts with the presumption of innocence and excessively restricts ability of the accused to defend himself if the charge of serious offense alone serves as ground for detention, without consideration of whether defendant may be absconded, capable to destroy, forge, or alter evidence, or conspire with a co-offender or a witness.

The Court declared that a person charged with serious offense may be detained only if *all* of the following circumstances are established:

- The suspect is strongly suspected of having committed the offense.
- There is probable cause to believe that the accused may be absconded, destroy, forge, or alter evidence, or conspire with a co-offender or witness.
- Other measures, such as conditional release, are insufficient to ensure the prosecution, trial, or execution of a sentence.

IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

IV.1. FACILITIES

An arrestee *must* be turned over to a court within 24 hours after his arrest, as stated above. Usually the police keeps an arrestees for 16 hours. Prosecutors may keep the suspect for additional eight hours. During this 24 hour period, an arrestee is usually kept either in the police station or in a cell of a prosecutorial building. If a court decides to detain an arrestee, the suspect shall be sent to the detention house, which is monitored by the Ministry of Justice (MOJ).

IV.2. CATEGORIES AND ACCOMMODATION

A criminal defendant shall be detained in a detention house under the Detention Act; whereas a convict shall be kept in a prison in accordance with the Prison Act.[39] In practice, however, pre-trial detainees and short-term-imprisonment prisoners are kept in same compound due to insufficient facilities and funds available. In fact, all detention houses keep some short-term prisoners in Taiwan. However, their sleeping facilities and living areas are separate from temporary detainees who await trials.

The Detention Act provides that "a defendant under the age of eighteen shall be detained separately from others."[40] In addition, the Juvenile Delinquency Act provides that a juvenile shall be detained in a juvenile probation house, and must transferred to a detention house after he\she reached the age of adult (20 years of age). Currently, Taiwan has 18 juvenile probation houses, of which 16 are in the same compounds as detention houses. However, minors in these facilities are kept strictly separated from other detainees. On 15 September 2009, there were 415 people under the age of 18 kept in the juvenile probation houses.

The law does not have any provisions that protect vulnerable individuals in detention houses. Instead local regulations in detention houses attempt to offer some protections to individuals who are likely to be abused when in custody. There are very few regulations that protect homosexuals, transsexuals, those accused of sex offenses, or those accused of offenses against children. Nonetheless, those who are vulnerable to harassment or sexually assault are supposed to be protected by officials who must monitor daily physical and psychological state of detainees. If an attack or sexual assault occurs, the officials shall take immediate and appropriate actions and provide the victims appropriate medical care, counselling, or other therapy.

HIV positive detainees are strictly monitored due to the fear that they will transmit the disease to others. Such individuals are supposed to be separated from others, and be provided with medical care, expert counselling, social work services, and/or psychological therapy if required. If it is necessary, they will be escorted to hospitals for better treatments.

Former policemen or other former law enforcement officials are not protected by regulations; however they obtain certain protection exercised by individual establishments. When such individuals are admitted to a detention house, usually their cells are carefully selected to protect former law enforcement officials from attacks and harassment. These individuals do not share cells with criminals, such as robbers, thieves, or murderers. Officials are also supposed to monitor events that take place in detention facilities and quickly identify attacks

[39] Article 1 of the Detention Act; Article 2 of the Prison Act.
[40] Article 3 of the Detention Act.

and terminate conflicts. Other than the practices mentioned, no special measures are provided by law, allowing detainees to have guaranteed protections.

In the past, suspects identified as significant offenders such as leaders of terrorist organizations and heads of gangs were sent, by MOJ, and managed in facilities built on remote islands. They were not subject to special procedures different from ordinary suspects. They were, however, treated comparatively harsher than regular suspects in detention houses. In 1997, the CCP was amended and now forbids prosecutors to move detainees from one detention house to another without prior court permission.[41] To date, no special groups are held in specially designated facilities throughout Taiwan.

The MOJ's regulations require each detainee to have an accommodation of 2.314 square meters, excluding the toilet and facial washing stand. In practice, because detention houses admit 15.51% over their capacity, each detainee actually has a space less than the prescribed amount.

Article 14 of the Detention Act states that "a defendant shall be confined individually, but he may receive an accommodation in group cell appropriate to his status, occupation, age, character, physical and mental condition. Defendants cannot be placed in the same cell with co-defendants or other defendants whose cases are related. Defendants, who are senile or maimed and cannot be accommodated in a group cell with other defendants, may be taken to a ward." In practice more than 95% of pre-trial detainees are not held in single cells (about 3593 people in group cells as of 31 July 2009). Some estimate that the proportion might be as high as 99%.[42] The reasons offered by the MOJ are the over capacity of facilities, lack of funds, and security concerns.

When pre-trial detainees are admitted to detention houses, they are asked a number of questions about their character, personal relationships, and other necessary information.[43] Detention house is supposed to assign cells to suspects according to their status, occupation, age, character and condition of their body and mind. These are the only measures taken by detention houses to ensure that detainees are paired with suitable sell mates.

IV.3. INFORMATION

In accordance to the Detention Act, pre-trial detainees must always be provided with at least some information relevant to their detention. Article 10 of the Detention Act states that "a detention house shall tell the defendant rules that he must obey once admitted" and "the issuing affairs mentioned in the preceding paragraph should be posted in each cell." In practice, every detention house has

41 Article 103–1 of the CCP.
42 The government does not keep the statistics regarding this issue.
43 Article 10 of the Detention Act.

its own code of conduct, that includes information regarding visitation, mail, groceries, medical care, rights and obligations of detainees. When a detainee is admitted to a detention house, the detention house will give the manual to each detainee for a review.

Procedures for requesting information and lodging complaints are also explicitly provided by the law. Article 6 of the Detention Act states that "a criminal defendant can appeal to a judge, public prosecutor or inspector if he received inappropriate treatment in a detention house. When a judge, public prosecutor or inspector receives an aforesaid appeal, he shall report to the principal of the court or the chief public prosecutor." The Implementing Rules for the Detention Act provides additional information regarding procedures for lodging a complaint. All of the above information is included in detention manuals.

IV.4. RIGHT TO HUMANE TREATMENT

The international obligation to respect dignity of suspects and detainees is not expressly codified in Taiwan, but has been added into a new draft of the Detention Act.[44]

According to the Detention Act, a criminal defendant who has been ordered to be detained shall be detained in a detention house.[45] The CCP requires that a public prosecutor shall diligently inspect the detention house. He shall also report the result of his inspection to the competent superior officer and notify the court once every ten days.[46] Moreover, the Detention Act authorizes the prosecutors to inspect the detention house *at any time*. In addition, the Chief Prosecutor of the High Court and its branches are required to inspect all detention houses at least once every year.[47]

Because of the above provisions, in practice, all prosecutorial offices schedule their prosecutors to visit and inspect detention houses every ten days and keep records of these visits. Some prosecutors prefer to inspect detention houses irregularly.

Every cell has its own sanitary facilities which detainees have to share. Prior to 2009, a detainee was allowed to take one cold water shower every day in summer and every other day in fall and spring. Hot showers were provided every three days in winter. Following Former President Chen Shui-bian's detention experience and mass media coverage of his sub-human living conditions, the

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44 Article 1 of the Draft Detention Act: "The purpose of the Act is to protect a detainee's rights and facilitate litigation procedures." Article 2 provides, "Officials shall respect and protect a detainee's dignity and rights in performing their duties."

45 Article 1 of the Detention Act.

46 Article 106 of the CCP.

47 Article 4 of the Detention Act.

MOJ issued a 'new shower policy' on January 5th, 2009. Detainees are now allowed to take daily showers. Hot water showers are provided Monday through Friday between December 1 and end of February. For all other days, hot water showers will be provided Monday through Friday, if the temperature falls below 20 degree Celsius.

Detainees are allowed to bring their own clothes to detention facilities. Some detention houses allow suspects to wear their own clothing items, but some do not and have uniform policy. Nonetheless, defendants in all detention houses are allowed to wear their own clothes when they make court appearances. According to the law, detainees may have their own food and personal daily items, have a right send and receive mail, in addition to sending and receiving other items including books. However, detention house may search through the incoming articles to maintain security and safety.[48]

The CCP explicitly provides that a pre-trial detainee has the right to receive visitors. If there is an apprehension that the accused may escape, destroy, forge, or alter evidence or conspire with a co-offender or witness, the court may prohibit detainee from meeting with visitors. In cases of emergency, public prosecutor or the detention house may also prohibit meetings, provided that the request is immediately referred to the court for approval. The object, scope, and time period subject to the prohibition is decided by public prosecutor at the investigation stage, and by the presiding judge or commissioned judge at trial stage.[49]

Unfortunately, the government does not keep complete statistical data on the number of pre-trial detainees who are denied regular visits. The only records available is the information on the number of detainees who have been banned from receiving visitors and communicating with the outside world during the investigation stage. In 2008, 10,119 accused were detained at the investigation stage. Out of this number, 3,499 (34.58%) were held incommunicado. In the last five years, the percentage of the detainees who were held incommunicado ranged between 32–35%.[50]

Pre-trial detainees are allowed to leave their cells for 30 to 60 minutes daily. If they volunteer to work, they are allowed to leave their cells and work up to 6 hours everyday. In theory, all detainees are given the opportunity to work. Out of all detainees and prisoners, 74.6% worked in 2009. Unfortunately, the MOJ does not have statistics regarding the remand houses in this regard.

48 Section 2, Article 105 of the CCP.

49 Sections 2–4, Article 105 of the CCP.

50 Resource from MOJ's website, www.judicial.gov.tw/juds/year97/09/111.pdf (last visited, 1 October 2009).

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IV.5. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Regulations require officials monitor on daily bases the physical and psychological state of detainees. If an assault occurs, the officials must take immediate and appropriate actions and provide victims with appropriate medical attention, counsels, or other therapy deemed necessary.

The regulations require officials to take special measures to prevent pre-trial detainees from committing suicide. If a detainee has a mental disease (such as depression), receives a severe sentence, or experiences a grave family matter, officials are required to appoint counsellors to assist him. If his mental state or behaviour is too unstable, the officials will refer him to expert counsellors.

If pre-trial detainees are detained on the ground that they are addicted to drugs, treatment is provided by medical doctors and experts. For those who are detained on other grounds, treatment is not provided even if suspects are addicted to drugs.

All prisons are required to have a department that provides prisoners with welfare advice, counselling, and other support. In regards to detention houses, only those facilities with a population of over 500 detainees have such departments, consisting of only one or two social workers. Unfortunately, only five of 19 detention houses in Taiwan have such a department. Prior to placing a detainee in solitary confinement, he\she should be evaluated by paramedics, but not necessarily by a doctor. Only when a detainee is strongly suspected of being mentally or physically ill, he will be examined by a doctor before being placed in solitary confinement.

The detention house does not have its own in-house doctor. Doctors are hired to enter the house to see detainees during certain days. If a detainee is too ill, according to the Detention Act, then he or she shall be escorted to a hospital.[51] Other than the doctors offered by the detention house, a detainee or his family has the right, based on the MOJ's regulations, to retain a doctor who may enter detention house and provide medical care. Each detention house has a consultant who helps detainees with various aspects of living in the house, but the houses do not have social workers.

All detention houses in Taiwan have a medical department with two to ten paramedics, depending on detainee population. Unfortunately, as stated above, none of detention houses have a resident doctor. Outside doctors visit detention houses only during daytime and on weekdays. Detainees have no flexibility in

[51] Article 7–1 of the Detention Act: "A defendant shall undergo a health examination when he/she enters a detention house; a defendant who meets any of the follow conditions shall be taken in the sick room, separated, or escorted to a hospital, and the detention house shall report to the competent court or public prosecutor. 1. The person is insane or falls ill and may cause harm to his/her own life if detained. 2. The female defendant is at least five-months pregnant or has giving birth within the past two months. 3. The person has an acute epidemic disease."

scheduling doctor appointments and must accept prescribed schedules. Generally, detainees are escorted to an outside hospital based on doctor's advice or, alternatively, when there is a medical emergency during the night-time or on weekends.

In Taiwan, all citizens enjoy the benefits of the Nation Health Insurance – a countrywide health insurance program sponsored by the government. This program, unfortunately is not extended to convicted prisoners, however it does apply to detainees. Detainees enjoy benefits of the National Health Insurance under of the presumption of innocence; however the healthcare they receive is not comparable to health care benefits enjoyed by free individuals who have an access to a wide range of medical facilities.

Prisons and detention facilities are operated by the MOJ's Correction Department. Prison and detention house staff are rotated between different prisons and detention houses. All employees in these facilities receive training to have all necessary skills and knowledge needed to work in prison environment. However, no special readjustment training is given to prison staff transferred to detention houses. Therefore, although detention house may have different regulations from a prison facility, the staff of a detention house may perceive the facility as another jail and act accordingly.

IV.6. COMPLAINTS BY PRE-TRIAL DETAINEES

Under the Detention Act, a detainee has a right to file a complaint with the judge or public prosecutor if he has received inappropriate treatment in a detention house. When a judge or public prosecutor receives a complaint, he shall report to the principal of the court or the chief public prosecutor.[52] Unfortunately, the Act is not clear in regards to what the principal of the court or the chief public prosecutor must do when handling the complaint. Similarly, breaches of pre-trial detention rights might be raised during trial, but the actual legal effect of raising these complaints remains unknown.

The MOJ's regulations provide detailed guidelines regarding how the authorities should deal with a complaint. The regulations require a detainee to submit his complaint to a detention house which shall then refer the complaint to the supervisory authority – the MOJ. The same regulation states that the MOJ has the final say regarding the complaint and is the last resort for a detainee's complaint. As a result, a detainee has no right to bring his case to the court under any circumstances.

On 2 December 2008, the Constitutional Court declared the above provision to be unconstitutional. The Court reasoned that, if the adverse decision made by the detaining authority has unlawfully jeopardizing a detainee's constitutional

52 Article 6 of the Detention Act.

rights, he shall be permitted to bring an action in court. The Court demanded that the government establish appropriate rules to provide detainees with a timely and effective remedy no later than two years from the date of publication of its decision.[53]

IV.7. INTERNATIONAL INSTRUMENTS AND DECISIONS

Unfortunately, Taiwan is not a member of the United Nations, nor recognized as an independent country by most of the countries in the world. The relevant law and practice with regard to Facilities and Rights of Pre-Trial Detainees, as discussed above, has not been directly influenced by international law.

IV.8. MOST IMPORTANT DEVELOPMENTS

One could argue that the most significant development in pre-trial detention is the Constitutional Court decision giving detainees a right to access courts. A detainee may file a complaint with a judge or public prosecutor if s/he is treated inappropriately in a detention house. Unfortunately, the existing Detention Act does not explain the effects of such complaints.

Section 1, Article 14, of the Implementing Rules for the Detention Act states that "a complaint brought by a defendant who disagrees with the disciplinary action taken by the detention house shall be dealt with in accordance with the provisions set forth below…The supervisory authority [of the detention house] shall have the final say in the case of a complaint." The supervisory authority of detention house is the MOJ since it manages detention houses. Therefore, the MOJ is the last resort for a detainee's complaint, and according to the passage quoted above, detainee did not have a right to bring complaints to court and had to file complaints directly with the MOJ.

Many legal observers argued that the existing complaint system was inadequate because detainees did not actually have a right to institute legal proceedings in court for judicial remedies. If a detainee disagreed with the treatment or disciplinary action taken by the detention house, filing a complaint with the MOJ was his/her sole remedy.

On December 2nd 2008, the Constitutional Court declared the above provision to be unconstitutional. The Court reasoned that Article 16 of the Constitution guarantees people the right to institute legal proceedings, meaning that a person has the right to litigation in court when his/her personal rights are violated. After a criminal defendant is taken into detention, the detainee's personal freedom as well as any constitutional rights based on his personal

[53] Interpretation No. 653 (2008).

freedom may be restricted to the extent necessary for achieving the purposes of detention and maintaining order at the place of detention. However, beyond the scope of this restriction, the constitutional protections of detainees are no different from other people. If detainee believes that the decision and actions made by detaining authorities exceeded the scope necessary for achieving the purpose of detention or for maintaining order, thereby unlawfully jeopardizing his constitutionally protected rights, he shall be permitted to bring an action in court for remedies.

The Court did not explain the nature of such legal proceedings and simply stated that the judicial remedy should be a criminal procedure, an administrative procedure, or a special procedure, depending on factors including: (1) the nature of the matter in dispute and its relation with the criminal action in which the detainee is involved, (2) the length of detention, (3) timely and effective protection of detainee's rights, and (4) the organization and personnel assignment of the court.

Due to the far reaching implications of the judgment, it will take certain amount of time to modify the existing laws and institute proper procedures that reflect the Constitutional Court ruling, it was decided that the government establish appropriate rules no later than two years from the date of publication of the decision.[54]

As a result, the MOJ announced a decision to re-write the entire Detention Act, and a committee was set up to accomplish this goal. As of writing this paper, the committee has not submitted the final draft to the Legislative Yuan.[55]

V. ALTERNATIVES TO PRE-TRIAL DETENTION

The CCP explicitly provides several alternatives to pre-trial detention. These alternatives include: bail, release to the custody of another person, limitation on residence, periodic reporting to authorities, conditional release requiring suspect not threaten or cause personal injury or property damage to or take action against the victim, witness, expert witness, the public official in charge of investigation or trial of the case, or the spouse, lineal blood relatives, collateral blood relatives within the third degree of kinship, relative by marriage within the second degree of relationship, family head or family member of the said public official. Additional conditions may also be placed by the court if they are

54 Interpretation No. 653 (2008).

55 The author of this report is a member of this committee. The committee convenes approximately every month to debate the policies and contents of the draft of the Detention Act.

deemed to be necessary to a particular case, such as reporting to the police station every day.[56]

In 2008, prosecutors applied to have 11,663 defendants detained in pre-trial detention, and courts ordered 9,980 of them (85.6%) to be detained. Out of those individuals who were detained, 581 were released unconditionally, 766 were released on bail, 21 were ordered limitation on residence, and 21 were released into custody of other individuals.[57]

V.1. CASES, GROUNDS, LEVEL OF SUSPICION AND OTHER CONSIDERATIONS

When grounds for detention do not exist, an accused must be released without any conditions. When grounds for detention exist, the court may choose to order detention or conditional release. The CCP explicitly provides that, even if grounds for detention exist, the judge may order they accused be released on bail, be placed in the custody of another individual, or released with limitations on his residence, if a detention is deemed to be *unnecessary*.[58]

In other words, *all cases*, including serious offenses such as murder qualify for alternative arraignments over pre-trial detention. The only decisive element is establishing such arrangements are the "necessity." The CCP does not require any grounds, minimum level of suspicion, or other considerations when deciding whether to use alternative arrangements instead of detention. Therefore, courts are granted broad discretion in deciding whether to use detention or other alternatives. In fact, there have been several cases where a person was charged with murder but ordered to be released on bail.

According to the CCP, when the maximum punishment for an offense is imprisonment for less than three years, detention, or a fine, the accused shall be given an alternative to detention unless the alternatives are unworkable because the accused is a recidivist, a habitual criminal, or a parolee; or the grounds for his detention are preventive detention.[59] In other words, a person could be detained when s/he is charged with an offense for which imprisonment is not provided as a penalty.

In deciding whether a suspect should be granted alternative arraignments, the court normally considers the seriousness of charges, chances of suspect feeling authorities and personal circumstances of accused. Murder charges, drug offenses of first or second degree, counterfeiting, and weapon offenses are considered to be very serious criminal violations. Defendants charged with these

56 Articles 102–1 & 116–2 of the CCP.
57 Resource from MOJ.
58 Article 102–1 of the CCP.
59 Article 114 of the CCP.

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offenses are very likely to be detained and cannot qualify for alternative pre-trial arrangements. Offenses such as manslaughter, negligent homicide, assault and battery, theft and embezzlement, fraud, forgery, money laundering, public order offences, traffic offences, escort and prostitution related offenses are not considered to be serious and defendants involved in these crimes may receive alternative arrangements, unless there is strong indication that suspect may flee.

V.2. MONITORING OF ALTERNATIVE MEASURES?

Alternative arrangements to pre-trial detention are not subject to regular review, unless a suspect reports to the court or public prosecutor periodically due special circumstances surrounding his/her case. Generally, when a court orders an alternative arrangement to pre-trial detention, a prosecutor has the right to appeal the decision.[60] Additionally, if a suspect violates conditions of his/her release, the court may order detention.[61]

The only statutory limit on alternative arrangements exists in matters that involve money bonds. If an offence carries a monetary punishment, the amount of bail may not exceed the maximum amount of the fine.[62]

Unfortunately, there have been no significant developments in the area of alternative detention and none of the abovementioned alternative have been directly influenced by international law. Overall, Taiwan did not have any important developments with regard to alternatives to pre-trial detention in the last 10 to 15 years.

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VI. CONCLUSION

One could argue that without positive influence from the international community, a conservative state will struggle over extended periods of time in attempting to establish functioning human rights program. Taiwan is not recognized as an independent sovereign state and is not a member of the United Nations and cannot be directly involved in an international human rights organization. Taiwanese citizens have no international forum to challenge the state's human right policies or other policies they consider to be unjust. Without the stimulation from outside world, Taiwanese people have to develop a new social conscience that will promote modern values and human rights.

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60 Article 416 of the CCP.
61 Article 117 of the CCP.
62 Article 112 of the CCP.

From 1945 to 1988, Taiwan was governed by an authoritarian government, first ruled by Chiang, Kai-Shek, and later by his son Chiang Ching-kuo. Until 1996 Taiwanese could not elect their leaders and could not be involved in the matters of governance. For over 50 years, from 1945 to 2000, Taiwan was ruled by a single political party – Kuomindang. During the dictatorship and constant fear of invasion from mainland China, Taiwan's government saw the legal system as a tool in maintaining the social order. The goal of criminal justice was to serve the government, not to protect human rights and individual liberties.

Until recently, suspects in criminal acts were easily detained during pre-trial proceedings, either under statutory provisions or based on discretion of authorities. Detention houses were popularly perceived as torture chambers and this image allowed law enforcement officers, policemen and prosecutors to threaten suspects and extract quick confessions from suspects.

Unfortunately, until recently, the press, judiciary, and legislature largely supported the government and did not challenge policies of the state. The government was controlled by a dictatorial regime for more than 50 years. As a result, there was no significant progress in remand detention policy.

In 2000, for the first time in modern Taiwanese history an opposition party – Democracy Progress Party won presidential elections and presided over a long period of legal reforms.

The first steps to reform remand detention came from the judiciary. In the last decade, Taiwan's Constitutional Court gradually struck down several statutes regarding pre-trial detention. The most important Court decision established that detainees had constitutional right to have access to courts and file legal complaints due to the unjust conditions or abuses they faced in detention houses. The Detention Act explicitly denied detainees such right for more than 50 years. The decision had two significant impacts on the future of the remand detention:

First, the Government completely re-wrote its fifty year old Detention Act to make it more modern and acceptable to the society that valued human rights and individual liberties. Second, detention houses became subjected to judicial review after December 2010. The Government can no longer close the door of detention houses and do whatever it wants inside as was done before.

Second, the government implemented the "*International Covenant on Civil and Political Rights*." As of December 10th 2009, international human rights provisions of the Act have domestic legal status and are enforced. In other words, fundamental international human rights are now directly enforced in domestic courts. It is likely that legal decisions of international courts will have great influences on Taiwan's domestic courts and will further improve human rights. Additionally, international conventions and standards that require decent and dignified treatment of suspects in detention facilities will have impact on the

future shape of remand detention. These future developments will, without a doubt, help to further reform pre-trial detention laws in Taiwan.

Until recently, Taiwan's remand detention policies remained almost unchanged and reflected government interests to maintain rigid social order rather than to protect individual human liberties. Traditional Confucian culture also contributed to the perception of detention facilities as a method to deter future criminals, rather than to protect presumption of innocence. In the last decade, Taiwan underwent major reforms in remand detention. The reform process has not been fully completed because it is a major project that has widespread societal impact. Regardless, remand detention is very different from what it used to be. Based on the current progress made, one can be optimistic that Taiwan will be able to meet the human rights standards set by the international community in the next decade.

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LA DÉTENTION AVANT JUGEMENT EN DROIT TURC

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I. INTRODUCTION

La présente étude se propose de dégager les principaux points de la détention avant jugement en droit turc. Nous bornerons notre étude à la législation et à la jurisprudence turque.

Une transformation très nette s'est dessinée ces dernières années, dans le champ de procédure pénale, grâce notamment à l'impact croissant des droits de l'Homme. La jurisprudence de la Cour européenne des droits de l'Homme, abondante en la matière constitue un élément majeur. Nous nous pencherons sur cette jurisprudence.

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II. CADRE LÉGAL : NORMES INTERNATIONALES ET DE DROITS DE L'HOMME

II.1. INSTRUMENTS INTERNATIONAUX DE DROITS DE L'HOMME

La Turquie a adhéré au Conseil de L'Europe le 9 août 1949. Elle est membre des Nations Unies depuis le 24 octobre 1945. Le Pacte international relatif aux droits civils et politiques du 16 décembre 1966 (Pacte ONU I) est entré en vigueur pour la Turquie, par la publication de la loi n° 4868 sur la confirmation de la ratification du Pacte international relatif aux droits civils et politiques dans le Journal officiel n° 25412, du 18 juin 2003.

La Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants de l'ONU est entrée en vigueur pour la Turquie par la

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publication de la loi n° 3441 sur la confirmation de la ratification de ladite dans le journal officiel du 10 août 1988.

La Convention relative aux droits de l'enfant (ONU) est entrée en vigueur pour la Turquie, par sa publication dans le journal officiel n° 22184, du 27 janvier 1995.

La Turquie a ratifié la Convention européenne des droits de l'homme (CEDH) en 1949 qui est entrée en vigueur par la suite par la publication de la loi nº 6366 sur la confirmation de la ratification de la Convention européenne des droits de l'Homme dans le journal officiel nº 19895, du 18 mai 1954. La Turquie a reconnu la juridiction obligatoire de la Cour européenne des droits de l'homme (Cour EDH) le 22 janvier 1987.[1]

La Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CEDH) a été signée par la Turquie le 11 janvier 1988. Elle est entrée en vigueur par la publication de la loi nº 3411 dans le journal officiel nº 19737 (bis) sur la confirmation de sa ratification.

Les textes sur les droits de l'Homme et les textes relatifs à la détention se réfèrent à deux niveaux distincts de règles. La première catégorie réunit en son sein des règles de portée juridique contraignante, la deuxième catégorie, celles sans portée contraignante.

En Turquie, la détention avant jugement s'interprète à la lumière des ces deux types de textes. En ce qui concerne l'intégration du droit international dans l'ordre juridique interne, la Turquie se réclame du système moniste. Ce système admet en général la primauté du droit international sur le droit interne. Les dispositions d'un instrument sur les droits de l'Homme, entrées en vigueur conformément aux dispositions de la Constitution, deviennent du droit interne.

Selon l'article 90 de la Constitution turque, «*les instruments internationaux sur les droits de l'Homme ont la primauté sur la législation nationale. En cas de conflit entre des dispositions d'un tel instrument avec la législation, les dispositions du traité prévalent*».

La Turquie a toujours fait l'objet d'un contentieux important devant la CEDH depuis qu'elle accepté le droit de recours devant la Cour EDH pour les particuliers, en 1987. Pendant de nombreuses années, la Turquie a occupé la première place des Etats les plus concernés par le contentieux devant la Cour EDH. Elle demeure l'un des Etats contre lequel le plus de requêtes sont introduites, elle se place en second rang en 2010 derrière la Russie.

En droit turc, les citoyens peuvent dénoncer en outre la violation des droits énoncés dans le Pacte ONU I, par l'intermédiaire du système de protection dans la mesure où joue la déclaration de réserve faite par la Turquie à l'article 5 §2 (a) du Protocole facultatif au moment de la ratification. Selon cette réserve, la compétence du Comité des droits de l'Homme des Nations Unies ne porterait

[1] Par la décision du Conseil des ministres n° 87/11439 du 22 janvier 1987, publiée dans le Journal officiel n° 19438 du 21 avril 1987.

pas sur la faculté de recevoir et d'examiner des requêtes individuelles relatives à des affaires qui sont en train d'être, ou ont déjà été examinées dans une autre procédure. Elle sera limitée en outre, à des violations alléguées qui résultent des actes, des omissions, des développements ou des événements qui peuvent se produire dans les frontières nationales du territoire de la République turque après la date d'entrée en vigueur du Protocole facultatif ou d'une décision concernant les actes, les omissions, les développements ou les événements qui peuvent se produire pour la République turque, après la date d'entrée en vigueur. Le Protocole ne s'appliquera pas non plus aux communications à des droits autres que ceux qui sont garantis par le Pacte. Ces réserves sont conformes à la Résolution (70) 17 du Comité des Ministres du Conseil de l'Europe qui envisage de résoudre des problèmes liés à la coexistence ou à la concurrence des procédures prévues par le Pacte et la CEDH.

Cependant, la possibilité offerte aux citoyens d'invoquer les instruments internationaux est limitée à ceux qui leur confèrent directement des droits. Dès lors, il est peu probable qu'un recours soit déclaré recevable si, d'aventure, le recourant se borne à invoquer uniquement des règles de la seconde catégorie. Par contre, rien n'interdit de les utiliser pour interpréter d'autres notions à portée contraignante, ce que les tribunaux turcs ne se sont pas privés de faire.[2]

II.2. DROITS DE L'HOMME AU NIVEAU NATIONAL / DROITS CIVILS

La Constitution turque de 1982 édicte un catalogue de droits fondamentaux. Les droits fondamentaux sont énumérés dans la deuxième partie de la Constitution turque.[3] La Constitution distingue les droits fondamentaux en trois chapitres : droits et obligations de l'individu (art. 14-34) ; droits et obligations sociaux et économiques (art. 35-53) ; droits et obligations politiques (art. 54-62).

Le droit à la vie, l'inviolabilité du corps humain et l'interdiction de la torture et des peines ou traitements inhumains ou dégradants fait l'objet de l'article 17 de la Constitution turque.

A l'instar des articles 5 §1 CEDH et 9 du Pacte ONU I, l'article 19 de la Constitution turque proclament que nul ne peut être privé de sa liberté si ce n'est dans les cas prévus par la loi et selon les formes que celle-ci prescrit. Contrairement à l'article 9 du Pacte ONU I qui se borne à préciser que les détentions et les arrestations ne doivent pas être arbitraires les art. 5 CEDH et 19 de la Constitution turque énumèrent une liste exhaustive des conditions qui permettent de placer une personne en détention. L'article 19 de la Constitution

2 Par exemple arrêt du Conseil d'Etat sur les grèves de la faim dans les prions du 22 novembre 2002 rendu, E. 2000/936, K. 2002/4487.

3 Articles 17 à 74 la Constitution turque de 1982.

turque dresse la liste de cinq cas autorisés de privation de liberté : l'exécution des peines privatives de liberté et des mesures de sûreté prononcées par les tribunaux ; l'arrestation ou la mise en détention de l'intéressé en vertu d'une décision judiciaire ou en raison d'une obligation prévue par la loi ; l'exécution d'une décision prise en vue de l'éducation surveillée d'un mineur ou de sa comparution devant l'autorité compétente ; l'exécution d'une mesure prise conformément aux règles définies par la loi en vue du traitement, de l'éducation ou du redressement dans un établissement spécialisé d'un aliéné, d'un toxicomane, d'un alcoolique, d'un vagabond ou d'une personne atteinte d'une maladie contagieuse, qui constituent un danger pour la société ; l'arrestation ou la mise en détention d'une personne ayant pénétré ou tenté de pénétrer irrégulièrement dans le pays ou ayant fait l'objet d'une décision d'expulsion ou d'extradition.

III. CADRE LÉGAL : RÈGLES NATIONALES RELEVANT DE LA PROCÉDURE PÉNALE

Les modalités de privation de liberté avant jugement consistent en l'appréhension, la garde à vue et la détention provisoire. Ni la Constitution ni le Code de procédure pénale (CPP) ne définit l'appréhension. Aux termes de l'article 4 du règlement relatif à l'appréhension, à la garde à vue et à l'interrogation[4], l'appréhension sert à priver un individu de sa liberté – pendant un cours laps de temps- à l'égard duquel existe des indices sérieux et concordants qu'il soit auteur d'une infraction. L'appréhension peut être appliquée envers un individu présentant un danger pour la sécurité publique, l'ordre public, la vie ou l'intégrité corporelle d'autrui.

La garde à vue est définie dans l'article 4 du règlement relatif à l'appréhension, à la garde à vue et à l'interrogation comme la détention d'une personne appréhendée, dans le délai prévu par la loi, avant qu'il soit traduit devant le juge ou qu'il soit libéré. La garde à vue ne doit pas porter atteinte à la santé du détenu.

La détention provisoire est l'incarcération ordonnée par un juge à l'endroit d'une personne gravement suspectée d'avoir commis une infraction, afin qu'elle soit tenue à disposition de la justice pour les besoins de l'enquête ou pour des impératifs de sécurité..[5]

[4] Publié dans le journal officiel n°25832 du 1er juin 2005.

[5] Feyzioglu, M., *Tutuklama (Détention provisoire)*, (mémoire de DEA non publié de l'Université d'Ankara, 1992, p. 7.; Öztürk, B., Tutuklama Sebepleri I, (*Conditions de mise en détention provisoire*) in : *MBD*, janvier 1988, n° 24, p. 3 ; Kunter, N. / Yenisey, F. / Nuhoglu, A., *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*,(*Traité de procédure pénale*) 14e édition, İstanbul, 2006, p. 773.

La population carcérale turque se compose de 119.394 personnes dont 36.425 détenus avant jugement et 19.419 avant décision passée de chose jugée selon les statistiques de 2009 (30.5.2010) de l'Institution turque de statistique.

III.1. INTERVALLE ENTRE L'ARRESTATION ET LA GARDE À VUE OU LA DÉTENTION PROVISOIRE

En droit turc, au terme de l'article 90 al. 5 du Code de procédure pénale, la police judiciaire quand elle appréhende une personne, doit prévenir le Procureur de la République (procureur ci-après) au sujet de cette appréhension. Le procureur peut décider soit de relâcher cette personne soit de la placer en garde à vue (art. 91 al. 1). Néanmoins, le Code de procédure pénale ne fixe aucune durée maximale entre l'appréhension de la personne et la décision du procureur, il se contente de préciser que la police judiciaire doit informer immédiatement le procureur.

La durée de la garde à vue est limitée à 24 heures, mais elle peut être prolongée de 24 heures sur autorisation de ce dernier.

La personne placée en garde à vue doit être traduite devant un juge au plus tard dans les 24 heures sous réserve de la période nécessaire pour la conduire devant le tribunal le plus proche de son lieu de détention. La période nécessaire pour la conduire devant le tribunal le plus proche de son lieu de détention ne peut pas excéder 12 heures. Il convient de préciser que, dans la doctrine certains auteurs estiment que ces deux durées doivent être additionnées et la durée totale de la garde à vue peut être portée à 36 heures.[6] D'aucuns précisent que ces deux délais ne peuvent pas être cumulés et par voie de conséquence le délai de garde est limité à 24 heures.[7] Nous sommes également de ce dernier avis. Le juge peut soit décider de maintenir la personne en détention provisoire soit de la relâcher.

En ce qui concerne la criminalité organisée, ce délai peut être prolongé trois fois un jour et ne peut pas être prolongé en tout cas au delà de trois jours. (Dans ce cas, le délai total de la garde à vue sera quatre jours).

Dans certains cas, en particulier pour les affaires de trafic de stupéfiants et les infractions contre la sûreté de l'Etat, l'espionnage, et contre la défense nationale, la durée de garde à vue est de 48 heures.

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[6] Öztürk B. / Tezcan D. /, Erdem M. R. / Sirma Ö,/ Saygilar Y. F. / Alan E, *Nazari ve Uygulamalı Ceza Usul Hukuku Ders Kitabı,(Manuel de procédure pénale)*, Adalet Yayınevi, Ankara 2010, p.397.

[7] Kunter, N. / Yenisey, F. / Nuhoglu, A., *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*,(*Traité de procédure pénale*) 14e édition, İstanbul, 2006, p. 794; dans le même sens Ünver Y. / Hakeri H., *Ceza Muhakemesi Hukuku, (Droit de procédure pénale)* 3e édition, Istanbul, 2010 p. 337.

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Dans le cas de l'état d'urgence déclaré conformément à l'article 120 de la Constitution, la durée de la garde à vue peut même atteindre sept jours.

III.2. CAS, MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

D'après l'article 90 al. 1 CPP, toute personne peut procéder à des appréhensions qu'en cas de flagrant délit, si l'auteur présumé de l'infraction risque de prendre la fuite ou si son identification ne peut être faite immédiatement. La garde à vue est donc applicable indépendamment de la gravité de l'infraction.

Par ailleurs, le code de procédure pénale permet aux policiers et gendarmes de procéder à des appréhensions dans les cas susmentionnés. Lorsqu'il y a l'impossibilité de saisir immédiatement leur supérieur hiérarchique ou le procureur de la République, ils peuvent en outre, arrêter des personnes lorsque les conditions de placement en détention provisoire sont réunies ou dans les cas où un retard serait préjudiciable.

La décision de placement en garde à vue ne peut être prise par le Procureur à l'égard des personnes, lorsqu'il existe des indices de culpabilité relative à une infraction ou lorsqu'il y a nécessité pour faciliter le bon déroulement de l'enquête pénale (art. 91 al. 2 CPP).

La détention provisoire ne peut pas être ordonnée par le juge dans les cas où l'infraction est passible d'une amende ou d'une peine d'emprisonnement qui ne dépasse pas une année au plus.[8]

Seul le juge peut décider de maintenir une personne en détention provisoire. Pour qu'une personne soit placée en détention provisoire, il faut à la fois l'existence d'un «*lourd*» soupçon à son encontre, autrement dit, une forte présomption de culpabilité, un motif de placement en détention provisoire.

Le CPP énumère de façon limitative la liste de ces motifs: risque de fuite, risque d'obscurcissement de la procédure et risque de pression sur les témoins ou autre personne. Par ailleurs, le principe de proportionnalité, exclut le recours à la détention provisoire – et donc à la garde à vue – lorsque l'infraction n'est pas grave. C'est en règle générale le cas lorsque la peine d'emprisonnement prévue ne dépasse pas six mois.

Néanmoins, lorsqu'il existe une forte présomption de culpabilité relative à certaines infractions, le CPP admet que le juge peut ordonner la détention provisoires en vertu de l'art 100 al. 3.[9] Ainsi, le CPP prévoit une présomption légale des motifs de détention.

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[8] Art.100 al.4 CPP.

[9] Ces infractions sont: génocide et crime contre l'humanité (art. 76, 77, 78 CP); homicide (les art. 81, 82, 83 CP);torture (art. 94, 95 CP); agression sexuelle (sauf le 1er alinéa de l' art.102 CP); abus sexuel des mineurs (art. 103); trafic de stupéfiants (art.188); association de malfaiteurs (sauf les al. 2,7 et 8 de l'art. 220 CP); crimes contre la sûreté de l'Etat (les art. 302,

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Le juge peut ordonner la mise en détention provisoire par défaut aux termes de l'article 248 al. 5 CPP. Toutefois, lorsque le suspect est arrêté il doit être traduit devant le juge, qui décidera de le relâcher ou de le placer en détention provisoire.

III.3. PROTECTION CONTRE LES PRIVATIONS DE LIBERTÉ ILLÉGALES OU EXCESSIVEMENT LONGUES

L'article 19 al. 8 de la Constitution turque accorde à la personne privée de sa liberté pour une raison quelconque le droit d'introduire une requête devant une autorité judiciaire compétente afin d'obtenir une décision à bref délai sur son état et sa libération immédiate dans le cas où cette privation est illégale.

La personne placée en garde à vue, son avocat, son épouse, son représentant légal, et ses enfants et ses parents peuvent recourir devant le juge de paix contre la décision de garde à vue et contre sa prolongation selon l'article 91 al. 4 CPP. Le juge de paix examine immédiatement le recours, sur dossier, et rend sa décision dans un délai de 24 heures. Si le juge de paix estime que le maintien en garde à vue est approprié ; il peut refuser de relâcher le détenu. Le juge peut aussi décider que la personne appréhendée soit traduite devant le procureur avec le dossier d'enquête.

Pendant l'enquête préliminaire, aussi longtemps que dure la détention provisoire de l'accusé et à un intervalle de trente jours au maximum, le juge de paix examine, à la requête du procureur, s'il est nécessaire de maintenir l'intéressé en détention. Le procureur peut demander au juge de paix la libération du détenu et sa mise sous contrôle judiciaire.

L'accusé peut aussi demander, dans le délai prévu au paragraphe précédent, que le tribunal se penche sur la question de sa détention provisoire. Les articles 267 et suivants du même CPP déterminent les modalités d'exercice de la voie de l'opposition.[10] L'article 271 CPP offre au représentant ou défenseur d'un détenu une possibilité d'être entendu par l'autorité judiciaire lors de l'examen de la

303, 304, 307, 308 CP) ; crimes contre l'ordre constitutionnel (les art. 309, 310, 311, 312, 313, 314, 315 CP) ; les infractions de contrebande d'armes selon l'art 12 de la loi n°6136 du 10 juillet 1953 sur les armes à feu, couteaux et autres outils ; le détournement de fond en vertu de l'art. 22 al. 3 et 4 de la loi n° 4389 du 18 juin 1999 sur les banques ; les infractions passibles d'emprisonnement définies dans la loi n° 4926 du 10 juillet 2003 sur la lutte contre la contrebande ; les infractions prévues aux art. 68 et 74 de la loi n°286 sur la protection de patrimoine culturel et naturel ; incendie criminel prévu 3 à l'art. 110 al. 4 et 5 de la loi n° 286 du 1er août 1956 sur les forêts.

10 La Cour EDH avait jugé à maintes reprises que le recours prévu dans l'ancien CPP était inefficace compte tenu du fait, d'une part, qu'il n'offrait pas de garantie raisonnable de chance de succès dans la pratique (voir, parmi d'autres, Cour EDH, *Koşti et autres c. Turquie*, no 74321/01, § 22, arrêt du 3 mai 2007) et, d'autre part, que les garanties inhérentes à une instance de caractère judiciaire, en particulier le respect des principes du contradictoire et de l'égalité des armes entre les parties, n'étaient pas respectées (voir, par ex, Cour EDH, *Bağrıyanık c. Turquie*, no 43256/04, § 51, arrêt du 5 juin 2007).

demande d'opposition. Ledit article 271 du CPP prévoit que «*à l'exception des cas prévus par la loi, la procédure d'opposition se déroule sans audience. Toutefois, si cela est nécessaire, le procureur et puis le représentant ou le défenseur de l'intéressé sont entendus*». Cependant, dans un arrêt récent la Cour EDH a observé, «*la tenue éventuelle d'une audience (est) laissée à la discrétion de l'autorité judiciaire, même en présence d'une demande expresse en ce sens formulée par les détenus ou leurs représentants*».[11]

Pendant le procès d'un accusé en détention provisoire, le tribunal décide d'office, lors de chaque audience ou si les circonstances l'exigent entre les audiences, s'il est nécessaire de proroger la détention provisoire de l'intéressé.

L'article 141 §1 (d) de ce code prévoit un recours pour toute personne jugée en détention provisoire et qui se plaint de la durée excessive de la procédure pénale diligentée à son encontre. Selon cette disposition, toute personne légalement détenue mais qui n'a pas été traduite dans un délai raisonnable devant une autorité de jugement ou qui n'a pas été jugée dans ce délai, peut réclamer à l'État réparation de tous ses préjudices, tant sur le plan moral que matériel.

L'article 142 CPP précise les modalités de ce recours. D'après l'article 142 §§1 et 2 dudit code, la personne qui se plaint du défaut de célérité de la procédure pénale engagée à son encontre peut saisir le tribunal pénal supérieur compétent de sa demande d'indemnisation dans les trois mois à partir de la notification de la décision définitive ou, en tout état de cause, dans un délai d'un an à compter de la date à laquelle la décision de justice concernée devient définitive.

En vertu de l'article 102 CPP, la détention provisoire ne peut excéder une durée d'une année concernant les affaires pour lesquelles le tribunal pénal supérieur n'est pas compétent. Ce délai peut être prolongé six mois. L'article 102 §2 CPP, prévoit que la durée de la détention provisoire ne peut excéder deux années, au maximum, dans les affaires relevant de la compétence du tribunal pénal supérieur.[12] Lorsque des circonstances exceptionnelles le justifient, cette période peut faire l'objet d'une prorogation qui ne peut excéder une durée supplémentaire de trois années.

III.4. INFORMATION, REPRÉSENTATION LÉGALE, INTERPRÈTE, INFORMATIONS AUX TIERS

L'article 19 de la Constitution turque prévoit que toute personne doit être informée «*des motifs de son arrestation ou de sa mise en détention et des accusations qui sont formulées contre elle, en règle générale par écrit, et dans les cas où cela ne serait pas immédiatement possible oralement et ce séance tenante*

[11] Cour EDH, *Yigitdogan c. Turquie*, no 20827/08, arrêt du 16 mars 2010.

[12] Ces affaires concernent le trafic de stupéfiant dans le cadre de la criminalité organisée ; les infractions commis par violence en vue d'enrichissement dans le cadre d'une association de malfaiteurs ; les infractions définies dans la quatrième partie..

ou, en ce qui concerne les délits collectifs, au plus tard au moment de sa comparution devant le juge».

Le Code de procédure pénale énonce également ces principes en des termes peu différents. L'article 90 al. 4 CPP indiquent que la police doit informer immédiatement le suspect du motif de sa garde à vue, puis de ses droits.[13] L'information doit donc être donnée avant qu'ils ne soient transférés dans un commissariat de police.

Le Code de procédure pénale, dispose dans ses articles 149 et 150 que toute personne détenue a droit à l'assistance d'un avocat dès son placement en garde à vue, et que la désignation d'un avocat est obligatoire si la personne concernée est mineure ou si elle est accusée d'une infraction punissable d'une peine maximale d'au moins cinq ans d'emprisonnement.

Aux termes de l'article 10 al. 1 litt. c de la loi n° 3713 sur la lutte contre le terrorisme[14], le droit d'accès à un avocat peut être différé de 24 heures sur l'ordre d'un procureur, pour les infractions liées au terrorisme. En revanche, l'accusé ne peut être interrogé pendant cette période.

Dès le début de sa garde à vue, le suspect a le droit de faire prévenir une personne de son choix.[15] Il a aussi le droit de bénéficier des services d'un interprète.

III.5. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

La Cour européenne des Droits de l'Homme a rendu plusieurs arrêts (381 arrêts) constatant la violation de l'article 5 de la Convention notamment en raison des problèmes liés à la durée de la garde à vue[16], aux conditions de la garde à vue[17], à la durée de la détention provisoire[18] et au contrôle juridictionnel de la détention provisoire.[19]

[13] L'art. 5 du règlement relatif à l'arrestation, à la garde à vue et à l'interrogatoire, précise les droits des personnes placées en garde à vue; droit au silence; prendre contact avec un avocat; droit de s'opposer à la garde à vue.

[14] Loi n°3713 publiée dans le journal officiel n° 20843 bis du 12 avril 1991.

[15] Art. 91 al. 5 CPP.

[16] Voir par exemple Cour EDH, *Karatay et autres c. Turquie* no. 11468/02, § 35, arrêt du 15 février 2007; Cour EDH *Bayam c. Turquie*, no. 26896/02, arrêt du 31 juillet 2007, § 16,. Cour EDH, *Böke et Kandemir c. Turquie*, nos. 71912/01, 26968/02 et 36397/03, arrêt du 10 mars 2009, § 64.

[17] Voir parmi beaucoup d'autres, Cour EDH, *Alkes c. Turquie*, no 3044/04, arrêt du 16 février 2010,.

[18] La Cour EDH a examiné les requêtes relatives à la durée de la détention provisoire et conclu à maintes reprises à la violation de l'article 5 § 3 de la Convention. Voir parmi beaucoup d'autres, Cour EDH, *Dereci c. Turquie*, nº 77845/01, §§ 34-41, arrêt du 24 mai 2005, et Cour EDH, *Taciroğlu c. Turquie*, nº 25324/02, §§ 18-24, arrêt du 2 février 2006.

[19] Les articles 135, 136 et 138 de l'ancien Code de procédure pénale prévoyaient que toute personne soupçonnée ou accusée d'une infraction pénale avait normalement droit à l'assistance d'un avocat, dès son placement en garde à vue. Pour les mineurs, l'assistance d'un

La plupart des événements sur lesquels les jugements sont fondés remontent aux années 1990 ou avant l'entrée en vigueur du nouveau Code pénal turc ou code de procédure pénale (…) ont été promulguées. Il est clair que la dynamique de la sauvegarde des droits de l'Homme a été renforcée par la pression croissante, notamment des règles de portée contraignante et non contraignante, qui place la Turquie sous le regard de mécanismes de contrôle, et les gouvernements sous la menace de jugements sanctionnant certaines de ses pratiques.

III.6. DÉVELOPPEMENTS LES PLUS IMPORTANTS

En matière de garde à vue, les exceptions prévues par la loi relative aux Cours de sûreté de l'Etat ont été supprimés après l'abrogation de ladite loi en 2004. Néanmoins, les durées différentes de garde à vue et les exceptions persistent dans le nouveau CPP en matière de criminalité organisée.

La Cour Constitutionnelle turque est très susceptible sur la durée de garde à vue à l'issue (de laquelle) le juge interviendra. Elle a déclaré inconstitutionnelle l'article15 al. 3 de la Loi relative à l'état de siège qui prévoyait 30 jours de garde à vue sans que le prévenu soit traduit devant le juge.[20]

La Constitutionnelle turque présentait certaine souplesse concernant les infractions graves. Elle admettait la prolongation de garde à vue jusqu'à 15 jours pour certaines infractions énumérées dans la loi.[21] Les amendements de 2001 de la Constitution de 1982 ont opté pour une durée de 4 jours au lieu de 15.

Un problème majeur rencontré dans le domaine de détention provisoire est l'application automatique lorsque l'infraction est l'une des infractions énumérées dans l'article 100 al. 3 CPP dans la pratique. Ainsi, la détention provisoire est ordonnée par le juge sans tenir compte des conditions de fond et de forme. Le CPP considère la détention provisoire en tant qu'*ultima ratio* ce que les juges semblent parfois oublier. Cette situation génère des problèmes difficiles à résoudre.

Malgré le fait que la loi indique clairement que les décisions de placement en détention provisoire ou la prolongation de la détention provisoire doivent être motivées, cette obligation est rarement respectée par les juges.

avocat était obligatoire. Conformément à l'art. 31 de la loi no. 3842 du 18 novembre 1992, qui a modifié la législation sur la procédure pénale, les dispositions ci-dessus ne s'appliquaient pas aux personnes accusées d'infractions relevant de la compétence de la Cour de sûreté d'Etat. Cela a fait l'objet d'une violation devant la Cour EDH. Voir, Cour EDH, Grande Chambre, *Salduz c. Turquie*, no 36391/02, arrêt du 27 novembre 2008.En vertu de l'art. 10 de la loi sur la lutte contre le terrorisme, modifié le 29 Juin 2006, le droit d'accès à un avocat peut être différé de 24 heures sur l'ordre d'un procureur, pour les infractions liées au terrorisme. En revanche, l'accusé ne peut être interrogé pendant cette période.

[20] Cour Constitutionnel, E. 1973/31, K 1972/5 du 16 février 1972.

[21] Cour Constitutionnel, E. 1973/19, K. 1975/87 du 15 avril1976.

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IV. ELÉMENTS FACTUELS SUR LA DÉTENTION (ÉTABLISSEMENTS) ET DROITS DES PERSONNES DÉTENUES AVANT JUGEMENT

IV.1. ETABLISSEMENTS

Dans la mesure du possible, le suspect doit être placé dans une cellule de police. Le nombre de suspects placés dans la même cellule ne peut dépasser le nombre de cinq personnes, sauf cas majeur.[22] L'article 11 du règlement relatif à l'appréhension, à la garde à vue et à l'interrogation précise qu'il sied de séparer les femmes et les hommes, les jeunes des personnes plus âgées, et les récidivistes des autres. Le suspect doit avoir accès à des sanitaires.

IV.2. CATÉGORIES ET HÉBERGEMENT

La LEPM prévoit aussi que les personnes en détention provisoire doivent être placées en principe dans les maisons d'arrêt et dans des cellules individuelles. A défaut d'infrastructure adéquate, ils peuvent aussi être hébergés dans les établissements pénitentiaires.

Aucune disposition ne prévoit des règles en matière d'accès aux sanitaires.

Les conditions matérielles de la garde à vue sont précisées par le Règlement relatif à l'appréhension, à la garde à vue et à l'interrogation. La cellule doit être propre, chauffée, aérée et éclairée, avec des sanitaires. Le lit doit présenter un minimum de confort et être propre.

La loi sur l'exécution des peines et des mesures précise que les personnes placées en détention provisoire doivent dans la mesure du possible, être séparées les unes des autres. Les femmes doivent être séparées des hommes, les mineurs des majeurs[23] en vertu de l'article 111 al. 3 LEPM. L'administration pénitentiaire est tenue de prendre les mesures nécessaires, afin de placer les personnes qui sont en conflits, les prévenus complices dans des cellules différentes et d'éviter tout contact entre lesdites personnes conformément à l'article 113.

Les prévenus dangereux sont séparés des prévenus ordinaires.[24] Ils sont placés dans des maisons d'arrêt de haute sécurité. Faute d'infrastructure, les quartiers pour détenus sont aménagés dans des prisons de haute sécurité

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22 Il convient de noter que « le cas majeur » n'est défini ni dans le CPP, ni dans le règlement.

23 Nonobstant les dispositions de LEPM, les mineurs sont placés dans des sections des établissements construits pour condamnés majeurs. Un contact entre ces deux catégories de détenus devient inévitable et pose des problèmes. Sur ce sujet voir Centel N., *Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama* (La détention provisoire et l'appréhension), Beta Yayınları, İstanbul, 1992, p. 103.

24 La LEPM ne prévoit pas qui va apprécier la dangerosité de la personne placée en détention provisoire. Nous estimons que faute de disposition cette tâche appartient.

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conformément à l'article 111 al. 2 de la LEPM. Il appartient au Conseil d'administration et d'observation d'évaluer la dangerosité d'une personne placée en détention provisoire en vertu de l'article 40 du Décret en Conseil d'Etat.

IV.3. INFORMATION

Aucune disposition ne prévoit que des informations sur les règles internes à l'institution, des voies d'obtention d'informations et de recours et des possibilités d'aide, notamment médico-sociale doivent être fournies aux prévenus. Elle a réaffirmé cette prise de position ultérieurement sous l'empire de la Constitution de 1982.[25]

IV.4. DROITS À UN TRAITEMENT HUMAIN

Le souci du respect de la dignité humaine ainsi que la manière dont on peut restreindre les droits fondamentaux des détenus semblent occuper le législateur turc. La Constitution turque mentionne les attributs essentiels de la dignité humaine dans son article 17, sans toutefois y faire référence d'une manière explicite.

L'article 24 du Règlement sur l'arrestation, la garde à vue et la détention soulignent que les personnes en garde à vue ne doivent faire l'objet d'un mauvais traitement. A cela s'ajoute les dispositions dudit Règlement qui prévoit qu'il ne doit pas être porté atteinte au libre arbitre du suspect (en exerçant des mauvais traitements ou des contraintes psychologiques, en provoquant un état de fatigue, en administrant des médicaments, etc.). Il interdit également à la police d'user de mesures préjudiciables à la mémoire ou aux capacités de compréhension de l'intéressé.

En droit turc, les détenus portent toujours leurs vêtements personnels. L'article 7 du Règlement sur les objets et les effets autorisés dans les établissements pénitentiaires[26] prévoit cependant une liste exhaustive des habits que les détenus peuvent emporter dans leurs cellules.

Le Règlement turc sur les visites aux détenus[27] indique de manière très précise les modalités et la fréquence des visites. Nous nous bornerons à préciser qu'aux termes de l'article 5 dudit règlement les détenus ont droit à une visite une fois par semaine et d'une durée d'au moins une demi-heure. La durée de la visite peut être au maximum une heure.

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[25] Cour Constitutionnel, E. 1985/8, K. 1986/27 du 26 novembre 1986.

[26] Publié dans le journal officiel n° 25848 du 17 juin 2005.

[27] Règlement sur les visites des détenus publié dans le Journal Officiel n° 25848 du 17 juin 2005.

En droit turc, par contre, l'article 83 LEPM ne confère le droit de visite qu'aux personnes ayant des liens de filiation et d'alliance jusqu'au troisième degré avec le détenu. Le détenu, peut toutefois donner, lors de son admission à l'établissement pénitentiaire, le nom et l'adresse de trois personnes dont il souhaite recevoir de visite. Cela lui permettra de conserver d'éventuelles relations affectives nouées avant l'emprisonnement, mais l'empêchera d'en établir de nouvelles. Le détenu ne peut en effet guère changer le nom de ces trois personnes, sauf s'il établit des circonstances exceptionnelles, en vertu de l'article 5 du Règlement sur la visite des détenus[28], telles qu'un décès, une maladie grave, un désastre naturel, le transfèrement du détenu ou le changement de domicile du visiteur.

Aux termes de l'alinéa 2 de l'article 83 LEPM, le Procureur général peut de surcroît autoriser sous forme écrite la visite d'autres personnes s'il existe un « motif raisonnable ». Il serait donc concevable de recourir à cette possibilité pour permettre au détenu de rencontrer une personne avec qui il a récemment noué des liens affectifs. Malheureusement, la loi ne dit pas si le permis de visite ainsi octroyé est à « usage unique », ou s'il peut être accordé pour une certaine durée, et surtout si le déroulement des visites ainsi autorisées s'effectue dans les mêmes conditions que celles mentionnées précédemment. Ce n'est qu'en cas d'équivalence totale entre l'une et l'autre condition d'octroi de l'autorisation que la solution présentée pourra être utilisée.

Faute de statistique pertinent en la matière, nous ne serons pas en mesure de fournir la moyenne des détenus qui se voient privés de visites régulières des membres de leur famille au motif que de telles visites sont susceptibles d'interférer avec l'administration de la justice

Le droit turc opte pour l'abolition de l'astreinte au travail à l'article 114 LEPM. La LEPM propose deux régimes de travail aux détenus, ils peuvent exercer une activité dans leur cellule et si cela n'est pas possible, ils peuvent exercer une activité pour le compte d'une entreprise privée. Dans ce dernier cas, les dispositions relatives au travail des condamnés seront appliquées. Néanmoins, il convient de noter que les détenus ne travaillent pas en général.

IV.5. PROTECTION ET SOIN DES DÉTENUS EN DÉTENTION PROVISOIRE

La personne placée en garde à vue, a droit à des soins médicaux. Si la personne placée en garde à vue le souhaite, la police doit la laisser entrer en contact avec le médecin de son choix, à moins que les nécessités de l'enquête ne l'empêchent. L'examen a lieu en l'absence de la police, mais le médecin doit toutefois informer celle-ci l'état de santé de la personne.

[28] Publié dans le journal officiel n° 25848 du 17 juin 2005.

L'administration pénitentiaire turque n'aborde la question du suicide en prison que sous l'angle de la sanction disciplinaire qui y est attachée. Cela revient à considérer la tentative de suicide comme un caprice du détenu aux fins de faire plier l'administration pénitentiaire, caprice qui doit être sanctionné. En fait, une telle approche, outre son côté ouvertement choquant, revient à nier purement et simplement le droit des détenus à la vie, vu que le suicide est davantage considéré comme un acte de défiance que comme l'anéantissement d'une vie.

Le droit turc ainsi dans la droite ligne de la jurisprudence de la Cour EDH en ce qui concerne l'obligation de l'administration en cas de suicide. La responsabilité de l'administration pénitentiaire du fait du suicide d'un détenu peut être engagée dans la mesure où il s'agit d'un dysfonctionnement objectif du service pénitentiaire. Pour engager la responsabilité de l'administration pénitentiaire, il est nécessaire de prouver le lien de causalité entre le dommage et la faute de l'administration.

Toute forme de violence commise à l'encontre d'un codétenu mérite l'isolement cellulaire du détenu aux termes de l'article 44 de la LEPM.

L'article 71 de la LEPM turque prévoit également la prise en charge médicale du détenu par le médecin pénitentiaire et le cas échéant par des structures hospitalières. Les prévenus souffrant d'une addiction peuvent bénéficier des programmes et traitements en vertu de l'article 9 du Décret en Conseil d'Etat. Ils peuvent en outre recourir à l'aide d'un professionnel afin de combattre les effets nocifs de l'incarcération.

Il n'existe aucune disposition sur la capacité à subir la détention d'une personne placée en détention provisoire. Néanmoins, l'article 16 de la LEPM turque, fait une distinction entre les détenu-condamnés souffrant d'une maladie mentale et ceux qui souffrent d'autres maladies. L'exécution de la peine d'un détenu souffrant d'une maladie mentale sera interrompue et le détenu sera placé dans un établissement hospitalier aux termes de l'article 57 du Code pénal jusqu'à la guérison. La durée du placement en l'établissement sera déduite de la durée de la peine encore à exécuter en établissement pénitentiaire. En cas de maladie du détenu, la peine privative de liberté s'exécute en principe dans les quartiers cellulaires des établissements publics hospitaliers en vertu de l'article 16 al. 2 LEPM turque. Si le détenu est placé dans un tel établissement, mais que cette mesure constitue elle aussi un danger certain pour sa vie, l'exécution de la peine privative de liberté est suspendue jusqu'à la guérison.

Il appartient au procureur de la République du lieu d'exécution de la peine de se prononcer sur la décision de suspension de l'exécution de la peine. Le procureur doit prendre en considération le rapport d'expertise sur la capacité du détenu à subir la détention, délivré par l'Institut médico-légal ou celui d'un comité de santé d'un hôpital public désigné par le Ministère de la justice et approuvé ultérieurement par l'Institut médico-légal.

Nous estimons que ces dispositions peuvent être appliquées également à l'égard des prévenus.

IV.6. VOIES DE RECOURS

Les conditions de détention du détenu peuvent être évoquées devant deux instances différentes : les juridictions chargées de l'application de la peine ou les juridictions administratives ordinaires.

La Loi n° 4675 sur le juge d'exécution des peines en droit turc[29] détermine ses compétences, qui peuvent se résumer comme suit : examen des requêtes sur l'admission à la maison d'arrêt, la santé, les relations avec l'extérieur, l'hébergement, le travail.

Le droit administratif turc prévoit la responsabilité de l'administration pour ses fautes de service. Selon l'article 125 al. 6 de la Constitution : *« L'administration est tenue d'indemniser tout dommage résultant de ses activités, actes et décisions ».* Dans ce cadre, elle est responsable des fautes de service qui peuvent résulter soit de l'absence d'exécution, soit de l'exécution retardée, soit de la mauvaise exécution du service. Ainsi, les usagers des services publics dont les intérêts sont lésés par une telle faute peuvent bénéficier des mécanismes de protection juridique prévus. Les usagers de services publics qui veulent formuler un recours devant le juge administratif pour cause de faute de service résultant d'une action de l'administration sont tenus de formuler un recours administratif préalable. Comme nous l'avons souligné, ceux dont les droits sont lésés par des actes administratifs doivent, avant d'introduire un recours administratif, s'adresser à l'administration intéressée et demander d'être rétablis dans leurs droits selon l'article 13 al. 1 de la Loi n° 2577 sur la procédure administrative contentieuse. En cas de rejet, les intéressés peuvent introduire un recours.

Le juge administratif exige une « faute lourde » lorsqu'il s'agit de la surveillance des détenus. Ce critère de la « faute lourde » est propre au juge administratif ; le juge civil ne l'utilise pas. Il signifie que le juge est particulièrement exigeant pour mettre en jeu la responsabilité publique : toute erreur, et même toute faute, ne peut entraîner la responsabilité. Il faut qu'il s'agisse d'une faute que l'on peut qualifier de grave. Ce critère répond au souci du juge de reconnaître la difficulté de l'action de l'administration, et de lui laisser une marge de manœuvre.

[29] Publié dans le journal officiel n° 24410 du 23 mai 2001. Le juge joue à la fois le rôle de juge d'application des peines et de juge d'exécution des peines. Le législateur a cependant opté pour le terme de « juge d'exécution des peines ».

IV.7. DÉVELOPPEMENTS LES PLUS IMPORTANTS

Il convient de noter que les conditions de détention ont suscité des craintes de la part du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT). Le système de dortoir s'est avéré problématique et fut l'objet de plusieurs rapports du CPT.[30] Le CPT indiqua en outre que les unités d'hébergement des établissements dans leur ensemble sont en très mauvais état et souvent sales.[31]

Comme nous l'avons déjà relevé, la Turquie s'est engagée à améliorer les conditions de détention dans les prisons. Un nouveau parc pénitentiaire se met en place, conforme aux critères du CPT. Dans l'attente de la fermeture des établissements pénitentiaires insalubres, des efforts devraient être faits pour atténuer les difficultés découlant de l'insuffisance des conditions de détention.

V. ALTERNATIVES À LA DÉTENTION AVANT JUGEMENT

V.1. GÉNÉRALITÉS, CAS MOTIFS, NIVEAU DE SUSPICION ET AUTRES CONSIDÉRATIONS

Le système juridique de la Turquie prévoit comme des alternatives à la détention avant jugement le contrôle judiciaire dans l'article 109 CPP. Le contrôle judiciaire ne peut être ordonné par le juge que s'il existe un motif de détention au sens de l'article 100 CPP[32] et lorsque l'infraction est passible d'une peine d'emprisonnement maximale de trois ans.

Le prévenu peut être mis sous contrôle judiciaire dans les cas où l'infraction est passible d'une amende ou d'une peine d'emprisonnement qui ne dépasse pas une année au plus.[33]

Pour les détenus qui ont été libérés parce que les délais prévus dans la loi pour la détention provisoire ont été dépassés, les dispositions sur le contrôle judiciaire peut être appliqué sans tenir compte de l'exigence de durée de peine d'emprisonnement maximale.[34]

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[30] Visite du CPT en 1996 organisée suite à une invitation du gouvernement turc. Voir le rapport du CPT/Inf (2001).

[31] CPT/Inf (2005) 18.

[32] Voir *supra* la partie sur la détention provisoire.

[33] Art. 109 al. 2 CPP.

[34] Art. 109 al. 7 CPP.

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Le contrôle astreint la personne concernée à se soumettre, selon la décision du juge d'instruction ou du juge des libertés et de la détention, à une ou plusieurs des obligations.[35]

Aucune statistique n'existe sur le pourcentage des mesures alternatives à la détention.

V.2. SUIVI DES MESURES ALTERNATIVES

Le juge peut, à tout moment, imposer à la personne placée sous contrôle judiciaire une ou plusieurs obligations nouvelles, supprimer tout ou partie des obligations comprises dans le contrôle, modifier une ou plusieurs de ces obligations ou accorder une dispense occasionnelle ou temporaire d'observer certaines d'entre elles en vertu de l'article 110 al. 2.

La mainlevée du contrôle judiciaire peut être ordonnée à tout moment par le juge, soit sur la demande de la personne après avis du procureur de la République. Le juge statue sur la demande de la personne dans un délai de cinq jours, par ordonnance motivée qui peut faire objet d'un recours selon l'article 111 CPP.

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[35]
- Ne pas sortir des limites territoriales du pays.
- Se présenter périodiquement aux services, associations habilitées ou autorités désignés par le juge qui sont tenus d'observer la plus stricte discrétion sur les faits reprochés à la personne mise en examen ;
- Répondre aux convocations de toute autorité, de toute association ou de toute personne qualifiée désignée par le juge et se soumettre, le cas échéant, aux mesures de contrôle portant sur ses activités professionnelles ou sur son assiduité à un enseignement ainsi qu'aux mesures socio-éducatives destinées à favoriser son insertion sociale et à prévenir le renouvellement de l'infraction ;
- S'abstenir de conduire tous les véhicules ou certains véhicules et, le cas échéant, remettre au greffe son permis de conduire contre récépissé ; toutefois, le juge peut décider que la personne mise en examen pourra faire usage de son permis de conduire pour l'exercice de son activité professionnelle ;
- Se soumettre à des mesures d'examen, de traitement ou de soins, même sous le régime de l'hospitalisation, notamment aux fins de désintoxication ;
- Fournir un cautionnement dont le montant et les délais de versement, en une ou plusieurs fois, sont fixés par le juge compte tenu notamment des ressources et des charges de la personne mise en examen ;
- Ne pas détenir ou porter une arme et, le cas échéant, remettre au greffe contre récépissé les armes dont elle est détentrice ;
- Constituer, dans un délai, pour une période et un montant déterminés des sûretés personnelles ou réelles ;
- Justifier qu'elle contribue aux charges familiales ou acquitte régulièrement les aliments qu'elle a été condamnée à payer conformément aux décisions judiciaires.

V.3. INSTRUMENTS ET DÉCISIONS INTERNATIONAUX

Le droit turc, s'est inspiré du des dispositions pertinentes en matière des mesures alternatives avant jugement du droit allemand, italien et notamment du droit français. Les articles. 109 et suivants CPP sont calqués sur le modèle français.[36]

V.4. DÉVELOPPEMENTS LES PLUS IMPORTANTS

Selon le législateur turc, les alternatives à la détention avant jugement permet de garder sous contrôle les personnes soupçonnées d'avoir commis un crime sans porter atteinte à leur liberté.[37] Pourtant, dans la pratique, le recours général à la détention provisoire continue à augmenter.

VI. CONCLUSION

Des progrès ont été réalisés sur le plan législatif en ce qui concerne la détention avant jugement notamment grâce à l'entrée en vigueur du nouveau code de procédure pénale en 2005. Si les violations des droits de l'homme sont en baisse, dans ce domaine elles se poursuivent quand même et il est urgent de mettre en œuvre la législation déjà en vigueur. La forte proportion de personnes en détention provisoire reste à régler.

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36 Voir le motif de l'art. 109 CPP disponible sur www.ceza-bb.adalet.gov.tr/mevzuat/cmkmaddegerekce.doc.

37 Ibid.

PRE-TRIAL DETENTION IN THE UNITED STATES OF AMERICA: A MULTIPLE PROBLEM CRISIS

Emilio C. Viano*

I. INTRODUCTION

In the United States, the issue of pre-trial detention has attracted much attention in recent years since terrorist suspects have been detained at Guantanamo Naval Base and elsewhere. Some suspects have been held for years without trial. Extreme methods of interrogation were sometimes used, and there have been charges of other abuse. Guantanamo detentions aroused robust debate in the United States and incited considerable criticism of the U.S. government from around the world precisely because they are so unusual.

However, they are also much less valuable as a reference than typical U.S. detention practices and rationales. Typical practices offer better examples for exploring and seeking solutions for detention-related problems. And at the heart of any solution should be efforts to reduce the use of pre-trial detention as much as possible, not simply to improve the management of detention centers.

The pre-trial detention system is often criticized in the United States. The criticism stems from a combination of the negative effect of detention with the inability of the pre-trial detention system to consistently detain only those defendants who pose a risk to society if released. The ineffectiveness of the pre-trial detention system is traceable to several factors: the failure of pre-trial services, the unavailability of alternatives, coercive actions by prosecutors, and the difficulty in predicting dangerousness.

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In the United States in chronological order pre-trial detainees fall into one of four categories, according to the flow of the criminal justice process:

1. detainees who have been formally charged and are awaiting the commencement of their trial;
2. detainees whose trial has begun but has yet to reach a finding of guilt or innocence;
3. detainees who have been convicted but not sentenced; and
4. detainees who have been sentenced by a court of first instance but who have appealed against their conviction and/or sentence or are within the statutory time limit for doing so.

The vast majority of detainees fall within the first two categories.

Generally not included in the definition of pre-trial detention is the status of arrested persons or suspects who have not yet appeared in front of a judicial officer for a determination whether they should be released or detained awaiting trial (*i.e.*, remanded in custody). Also excluded from the count of the pre-trial detention population are asylum seekers, undocumented migrants, and others held administratively. While these categories of people are usually not considered to be pre-trial detainees, the problems they face as a result of their detention and the impact on the wider society is very similar to that of pre-trial detainees generally. This chapter is an examination of pre-trial detention in the United States, addressing the Federal and the States' approaches to it.

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II. INTERNATIONAL AND HUMAN RIGHTS FRAMEWORK

II.1. INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

The United States is a member of the following organizations: the United Nations (1945) and the Organization of American States (OAS) (1948), and has observer status with the Council of Europe (COE).

As to International Human Rights Treaties and Conventions, the United States is a party to[1] the International Covenant on Civil and Political Rights (UN) (Signed October 5, 1977; Ratified June 8, 1992), and to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN) (Signed April 18, 1988, Ratified October 21, 1994). The United

[1] See the U.N. treaty collection database: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

States signed, but did not ratify the Convention on Rights of the Child (UN) (Signed February 16, 1995) and the American Convention on Human Rights (OAS)[2] (Signed June 1, 1977). The United States has not signed nor ratified the Inter-American Convention to Prevent and Punish Torture.[3]

These treaties are incorporated in the United States domestic legal order under Article II, Section 2 of the U.S. Constitution. The President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Under Article I, Section VI of the U.S. Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Generally, treaties are considered not self-executing. Implementing legislation is required for the treaties to take effect as domestic law.

The United States of America has made reservations, understandings, and declarations, to the *International Covenant on Civil and Political Rights.*

> Reservations:
> "(1) That the United States considers itself bound by article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."
> "(2) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults."
>
> Understandings:
> "(2) That the United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law."
>
> "(3) That the United States understands the reference to `exceptional circumstances' in paragraph 2 (a) of article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons."

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2 See Department of International Law database: www.oas.org/juridico/English/sigs/b-32.html.

3 See UN database: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en and also www.oas.org/juridico/English/sigs/b-32.html.

Declarations:
"(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing."[4]

The United States has also made the following reservations, declarations and understandings to the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*:

Reservations:
"I. The Senate's advice and consent is subject to the following reservations:
(1) That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

Declarations:
"III. The Senate's advice and consent is subject to the following declarations:
(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing."[5]

As to the enforceability of human rights through domestic courts, U.S. policy on Human Rights Conventions appears to be guided by several "principles":

"1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. Every human rights treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states.
3. Every international human rights agreement should be "non-self-executing".[6]

By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards.[7] In ratifying the Torture Convention, the United States, in effect, reserved the right to inflict inhuman or degrading treatment (when it is not punishment for crime), and

4 See the U.N. treaty collection database: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.
5 See *ibidem*.
6 See Louis Henkin, U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker, 89 *THE AMER. Journal of INT'L LAW* 341–350 (1995) (citing Reid v. Covert, 354 U.S. 1, 16–18 (1957)).
7 *Ibidem*.

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criminal punishment when it is inhuman and degrading (but not "cruel and unusual").[8]

II.2. NATIONAL HUMAN RIGHTS/CIVIL RIGHTS

The United States has a Constitution with a Bill of Rights. The rights relevant to pre-trial detention are in the following Constitutional Amendments.

Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Thus, in the United States, pre-trial detainees retain constitutional rights while detained. They are protected under the Due Process Clauses of the Fifth and Fourteenth Amendments.[9] The protections provided under the Due Process Clause "are at least as great as the Eighth Amendment protections available to a

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8 *Ibidem*.

9 See *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979).

convicted prisoner."[10] The rights of pre-trial detainees must be analyzed under the Due Process Clause rather than the Eighth Amendment because the detainee's guilt has not yet been adjudicated.[11]

III. NATIONAL CRIMINAL PROCEDURAL LAW FRAMEWORK

In general, the United States distinguishes the following phases of pre-trial deprivation of liberty:

- investigative detention (stop),
- arrest,
- police custody,
- remand in custody,
- remand in detention, and
- detention pending trial.

In order to stop a person for questioning, the police officer must have reasonable suspicion.[12] In order to arrest a person, the police must have probable cause. Probable cause to arrest exists when the facts known to the officer and the inferences that can fairly be drawn there from would cause a reasonable and prudent person to believe that the suspect committed a crime.[13] After an arrest, police may remand the person into custody.

A person who has been arrested without a warrant may be detained for no more than 48 hours before receiving a probable cause hearing.[14] A person that has been arrested, whether warrantless or with a warrant, must have an initial appearance before a magistrate where the defendant is informed of the charges and bail is set.[15]

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10 See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

11 See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

12 See *Terry v. Ohio*, 392 U.S. 1 (1968).

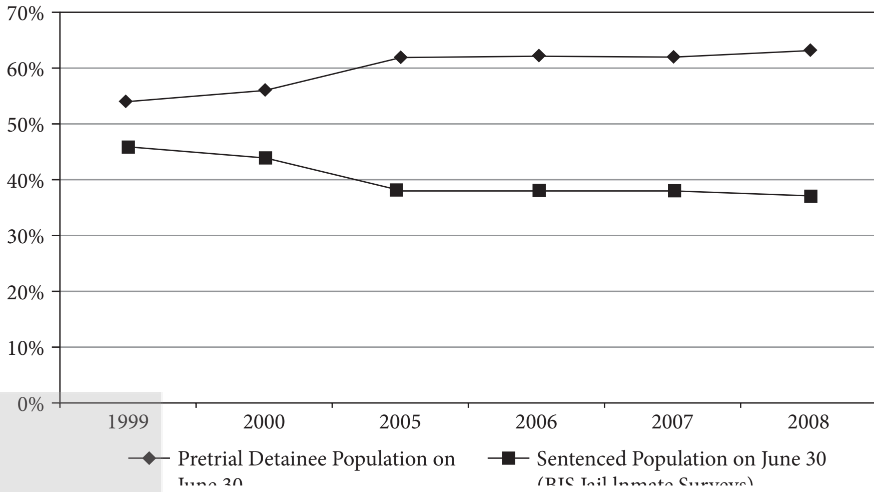
13 See *Beck v. Ohio*, 379 U.S. 89 (1964).

14 See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

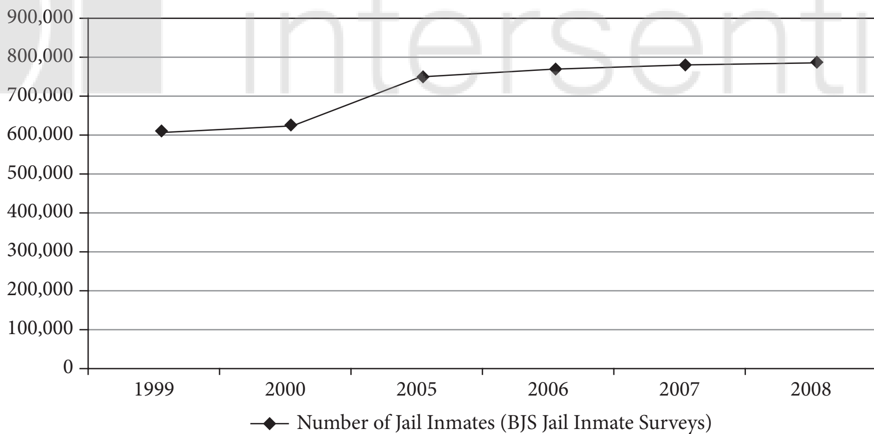
15 See U.S. Const. Amend. 4; *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S. Ct. 1536 (2001). See also Fed. R. Crim. P. 9(c)(1); Fed. R. Crim. P. 5(a) (1) (A). On bail in the USA, see *infra* section V.

III.1. PRE-TRIAL VS. SENTENCED POPULATION[16]

On June 30th, 2008, approximately 64% of the estimated 795,000 jail inmates in the United States were in pre-trial detention, that is 508,800.[17]



III.2. JAILS POPULATIONS ON THE RISE[18]



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16 See *ibidem*.

17 See Pre-trial Justice Institute, 'The role of pre-trial justice', 2009, p. 5 (at: www.pretrial.org/Docs/Documents/PJI%20July09%20NACo%20on%20Pretrial%20Justice.pdf).

18 See *ibidem*.

The total prison population (including pre-trial detainees) on June 30, 2008 was as follows:

- 2,310,984 prisoners were held in federal or state prisons or in local jails – an increase of 0.8% from year-end 2007, less than the average annual growth of 2.4% from 2000–2007.
- 1,540,805 sentenced prisoners were under state or federal jurisdiction.
- there were an estimated 509 sentenced prisoners per 100,000 U.S. residents – up from 506 at year-end 2007.[19]

III.3. AVERAGE LENGTH OF PRE-TRIAL DETENTION

Under the Sixth Amendment of the United States Constitution, an accused has the right to a speedy trial in Federal court. The right also applies to the states as a basic part of due process through the Fourteenth Amendment. The Federal Speedy Trial Act (18 U.S.C.A. §3161(c)(1)) provides that in any case where a guilty plea is not entered, the trial of a defendant must commence within 70 days of the filing date of the information or indictment.[20] Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. According to the Speedy Trial Act, the trial of persons held in detention solely to await trial, or though released, designated by the attorney for government as being of high risk must begin within 90 days following the beginning of such continuous detention or designation of high risk. Although three months seems like a long time to spend in jail before trial, "[t]he Bail Reform Act itself contains no time limits on the period of detention."[21] In fact, at least one circuit has ruled that a sixteen month pre-trial detainment period was not excessive.[22] If the person is detained, failure to commence his trial within the period, through no fault of the accused or his counsel, requires automatic review by the court of the conditions of release.[23]

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19 See Bureau of Justice Statistics database (at: www.ojp.usdoj.gov/bjs/).

20 Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

21 See *United States v. Melendez-Carnon*, 790 F.2d 984, 996 (2d Cir. 1986).

22 See Bruce D. Pringle, Bail and Detention in Federal Criminal Proceedings, 22 *COLO. LAW*, 913, 914 (1993) (citing *United States v. Zannino*, 798).

23 See 18 U.S.C.A. §3164(a)(1). The 90 day period is subject to numerous exclusions, provided in 18 U.S.C.A. §3161(h).

III.4. INTERVAL BETWEEN ARREST AND POLICE CUSTODY OR REMAND

An officer may stop and detain a person whenever the officer has reasonable suspicion to believe that the person has committed a crime, is committing a crime, or is about to commit a crime.[24] The detention may last only as long as it takes to determine whether a crime has been committed, is being committed, or is about to be committed, but no longer. The scope of the detention, therefore, must reasonably be related to the original reason for the stop.[25] The detention may be extended if the officer develops additional reasonable suspicion of criminal activity. Many courts have found 20 minutes to be a reasonable amount of time for an investigative detention; however the U.S. Supreme Court has refused to set any hard-and-fast time limit on the length of an investigative stop, ruling that whether the stop is too long depends on the circumstances of each case.[26] After a reasonable time has passed, the investigative detention either ends in allowing the suspect to leave or arresting the suspect if the police officer has probable cause.

It should be noted that the United States Supreme Court has accepted a 48-hour time period following the defendant's arrest, inclusive of weekends, as a constitutionally permissible period within which to make a probable cause determination, which is often (though not always) made by a judicial officer before or in conjunction with the defendant's first court appearance.

While the 24-hour period may be ambitious, it is in fact already being met in some jurisdictions. For example, Maryland requires by court rule that the first appearance [presentment] take place "without unnecessary delay and in no event later than 24 hours after arrest" (MD Rule 4–212). In New York, the State's highest court has held that the provision in the Code of Criminal Procedure that an arrested person is to be arraigned "without unnecessary delay" should be interpreted as meaning that a delay of arraignment of more than 24 hours is presumptively unnecessary.[27] The American Law Institute's Model Code of Pre-Arraignment Procedure (1975) provides in Section 310.1 that the first appearance of an accused person should take place within a maximum period of 24 hours after the arrest. However the system can at times break down like for example it did in New Orleans, Louisiana in the aftermath of hurricane Katrina.

The decision to take a person in police custody after any initial apprehension by a law enforcement officer is made by a magistrate. If the police arrest a person without an arrest warrant, the Fourth Amendment requires the police to bring the defendant to an impartial fact finder, usually a judge-magistrate, who will

24 See *Illinois v. Wardlow*, 528 U.S. 119 (2000).
25 See *Florida v. Royer*, 460 U.S. 491 (1983).
26 See *United States v. Sharpe*, 470 U.S. 675 (1985).
27 See *People ex rel Maxian v. Brown*, 77 N.Y.2d 422 (1991).

ascertain, based almost entirely on the evidence of the police, whether they had probable cause to seize the person and to hold him for the alleged crime.[28]

As to how long a period may elapse between a suspect first being taken into police custody and a decision having to be taken about remanding that person, in *Gerstein v. Pugh*, the Supreme Court held that a probable cause hearing must be held within a reasonable time.[29] In *County of Riverside v. McLaughlin*, the Court set a presumptive guideline, that a hearing should occur no more than 48 hours after the arrest.[30]

So, a police officer makes the initial decision that they have probable cause to arrest. Then, an impartial fact finder, usually a judge-magistrate makes the decision as to whether the police had probable cause to arrest the person.[31]

According to the Bail Reform Act of 1984,[32] after a motion for pre-trial detention has been filed, the court immediately conducts a detention hearing.[33] At the detention hearing, the defendant is afforded an opportunity to testify, present witnesses on his own behalf, and introduce evidence by proffer.[34] To sustain a motion for pre-trial detention, the prosecution must show, by clear and convincing evidence, that the defendant presents either a risk of flight from the jurisdiction or a risk to the safety of any other person or the community.

III.5. POLICE DETENTION

Police may detain a person for custody if they have reasonable suspicion.[35] The United States Supreme Court held that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and searches him without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. For their own protection, police may perform a quick surface search of the person's outer clothing for weapons if they have reasonable suspicion that the person stopped is armed. This reasonable suspicion must be based on "specific and articulable facts" and not merely upon an officer's hunch. This permitted police action has subsequently been referred to in short as a "stop and frisk," or simply a "*Terry* stop." The *Terry* standard was later extended to temporary detentions of persons in vehicles, or traffic stops.

[28] See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975).
[29] 420 U.S. 103 (1975).
[30] 500 U.S. 44 (1991).
[31] See *ibidem*, at page 103.
[32] See 18 U.S.C. §3146 (1966), repealed by Pub. L. No. 98–473, §203(a), 98 Stat. 1976 (1984).
[33] See 18 U.S.C. §3142(f). Section 3142(f)].
[34] See *ibidem*.
[35] See *Terry v. Ohio*, 392 U.S. 1 (1968).

The rationale behind the Supreme Court decision revolves around the understanding that the exclusionary rule protects persons from unreasonable searches and seizures aimed at *gathering evidence*, not searches and seizures for *other purposes* (like prevention of crime or personal protection of police officers).

However, the police may only detain the suspect for a reasonable time.[36] In order to hold the suspect longer, the police would need probable cause to arrest the suspect.[37] The United States Supreme Court defines probable cause justifying an arrest as "facts and circumstances within the officer's knowledge that are sufficient to warrant a reasonable person in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.[38] A person lawfully detained in pre-trial confinement because there is probable cause to believe that he has committed a crime is subject to certain restrictions on his liberty.[39] The judicial officer should determine whether, on the basis of the allegations made in the charging instrument and any supporting documents or other materials, there is probable cause to believe that the defendant committed the crime charged. If the judicial officer determines that there is probable cause, the judicial officer should decide pre-trial release or detention in accordance with these Standards.[40]

III.6. PROBABLE CAUSE HEARING

The person in respect of whom remand is being sought must appear in person before the judge or court that is responsible for making this decision. When police seize a person without an arrest warrant, the Fourth Amendment requires that the police bring the person to an impartial fact finder, usually a judge-magistrate, who will ascertain, based almost entirely on the evidence of the police, whether they had probable cause to seize defendant and to hold him for the alleged crime. *Gerstein v. Pugh* 420 U.S. 103 (1975) held that such probable cause hearing must be held within a reasonable time. The U.S. Supreme Court stated: "There is no single preferred pre-trial procedure and the nature of the probable cause determination usually will be shaped to accord with a State's pre-trial procedure viewed as a whole."[41] The probable cause hearing often is combined with the "Initial Appearance" where a magistrate informs the

[36] See Bruce D. Pringle, Bail and Detention in Federal Criminal Proceedings, *22 COLO. LAW*, 913, 914 (1993) (citing *United States v. Zannino*, 798).

[37] See *Beck v. Ohio*, 379 U.S. 89 (1964).

[38] See *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

[39] See *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979).

[40] See National Association of Pretrial Services Agencies, NAPSA Standards on Pretrial Release, at 27 (at: www.vccja.org/2004_NAPSA_Stndrds_3rd.pdf).

[41] See *McNabb v. United States*, 318 U.S., at 342–344.

defendant of the charges in the complaint, sets bail,[42] and determines whether the defendant is entitled to appointed counsel.

Any information or indictment charging an individual with the commission of an offense shall be filed with a court within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. The review takes place automatically and must be performed by an independent judicial officer.[43]

III.7. HABEAS CORPUS

Any person, not just an interested party, can file a habeas corpus petition. The official who is the respondent has the burden to prove his authority to do or not do something. Failing this, the court must decide for the petitioner. The writ of *habeas corpus ad subjiciendum* is a civil, not criminal, ex parte proceeding in which a court inquires as to the legitimacy of a prisoner's custody. Habeas corpus is also used as a legal avenue to challenge pre-trial detention or detention by the United States Bureau of Immigration and Customs Enforcement pursuant to a deportation proceeding. The review must be performed by an independent judicial officer.[44] A prisoner can continue to bring petitions as many times as he discovers a new claim, or if new case law develops, using a possible new argument that had not been available before. The petition must state the grounds on which the detention is considered to be unlawful which can be, for example, that the Executive branch of government detaining a person does not have the legal authority, or that the prisoner's constitutional rights were violated or that he was subjected to mistreatment, torture, et cetera.

III.8. LIMITS ON THE LENGTH OF TIME PERMITTED FOR PRE-TRIAL DETENTION

The U.S. Supreme Court held that if the review is done in less than 48 hours, it is presumed prompt and the burden is on the defendant to show that it is unreasonable. If detention without review lasts longer than 48 hours, it is presumed unreasonable and the government has to show reasons for the delay.[45] That being said, there is no hard and fast rule for time. Standard 2.9 (b) of the National Association of Pretrial Services Agencies (NAPSA)[46] addresses the

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42 On bail in the USA, see *infra* section V.

43 See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

44 See *ibidem*.

45 See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

46 See NAPSA mission statement (at: www.napsa.org/mission.htm) (last visited: July 2, 2011). The Standards are intended to provide guidance to pre-trial services program directors and

timing of the detention hearing: If the judicial officer finds that there has been a showing of probable cause to believe that the defendant committed the charged offense, then the detention hearing should be held immediately – as part of the first appearance proceeding – unless either the prosecutor or the defense counsel requests a continuance. If a continuance is requested, it should not exceed [five working days] unless good cause is shown for a longer period.[47]

There is no federal constitutional right to be free pending an appeal. A judicial officer must order that, pending an appeal of a conviction or sentence, a person be released or detained under the Bail Reform Act.[48] The critical issue to remain free after a criminal conviction is whether or not one has already been sentenced. The courts are much more conservative about granting bail after someone has been sentenced, because conventional wisdom is that once one knows what kind of sentence s/he faces, s/he is more likely to flee the jurisdiction and evade punishment altogether.[49]

III.9. INFORMATION, INTERPRETER, INFORMING OTHERS

All jurisdictions, either as a matter of statute or court rule, require that a person be brought before a judicial officer to be apprised of the charges against him and of his constitutional rights, such as right to counsel. The defendant does not need to speak or enter a plea at this event. The charges are usually conveyed by means of a complaint, an informal paper that summarizes the facts (as then known and alleged) sworn before a magistrate. During an "Initial Appearance," which is usually combined with a probable cause hearing, the magistrate informs the defendant of the charges in the complaint.[50]

An accused is generally entitled to counsel at a bail or detention hearing, but failure to provide counsel is not a ground for reversal, absent a showing of prejudice.[51]

The Sixth Amendment right to counsel applies to preliminary hearings, post indictment lineup, plea bargaining discussions, sentencing, motions for new trial immediately after conviction, probation revocation that also includes sentencing, presentence discussions with prosecutor over cooperation, and post-

staff and to others involved in the formulation and implementation of laws, policies, and practices concerning the pre-trial release/detention decision-making process and the monitoring and supervision of persons released from custody while awaiting disposition of criminal charges.

47 NAPSA Standards, *supra* note 40, at 47.

48 See 18 U.S.C.A. §3141.

49 On bail in the USA, see *infra* section V.

50 See *McNabb v. United States*, 318 U.S., at 342–344.

51 See AMER. JURIS., Bail §58.

indictment psychiatric interview to determine competency to stand trial.[52] Usually, the official initiation of proceedings, deemed to occur when there is an indictment, preliminary hearing or information, activates the Sixth Amendment.

The Sixth Amendment Right to (appointed) counsel only applies to the critical stages of the criminal case. There is no Sixth Amendment right to counsel for probable cause hearings, pre-indictment lineup, grand jury, forfeiture, and probation or parole revocation or post conviction proceedings. The U.S. Supreme Court has held: "Because of its limited function and its non-adversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel."[53]

As to a right to an interpreter and translation of documents when in pre-trial detention, federal law[54] provides that:

> "(1) The presiding judicial officer… shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings –
> (A) Speaks only or primarily a language other than the English language; or
> (B) Suffers from a hearing impairment".

Criminal Defendants have the right to a court appointed interpreter only if she requests one or the state is put on notice of a significant language barrier.[55] Pre-trial detainees, if necessary, have the right to an interpreter to be present at proceedings.

NAPSA Standard 2.2 (c) calls for the proceedings to be conducted in "clear and understandable language calculated to advise defendants effectively of their rights and the action to be taken against them". This may be especially difficult if the defendant does not speak or understand English. In these circumstances, the courts should seek to have a qualified interpreter available.[56]

Normally, there is a right to inform family, friends, et cetera, when people have been arrested or taken in pre-trial detention. Under the Sixth Amendment, a defendant has the right to call an attorney at all critical stages of criminal

52 See Richard G. Singer; *Examples and Explanations: Criminal Procedure II: From Bail to Jail*, Aspen Publishers 2008, p. 244.
53 See *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975).
54 28 U.S.C. §1827(d).
55 See *Luna v. Black*, 772 F.2d 448 (8th Cir. 1985), and *United States v. Carrion,* 459 F.2d 1033 (1st Cir. 1973).
56 NAPSA Standards, *supra* note 40, at 29.

proceedings. Additionally, within a reasonable time after an arrest, or booking, a defendant has the right to make a local phone call to a lawyer, bail bondsman, a relative or any other person.[57] NAPSA Standard 2.2 (b) specifies that the defendant should be afforded an opportunity to contact family and friends during the period between arrest and first appearance. Access to a telephone should be available to the defendant for the purpose of such communications, though the arrangements must provide for appropriate security.[58]

III.10. INFLUENCE OF INTERNATIONAL INSTRUMENTS AND DECISIONS

The Criminal Procedural Law framework has been somewhat directly influenced by international law as shown by some Supreme Court's decisions.

In *Medellin v. Texas*, 128 S.Ct. 1346 (2008) held that even though an international treaty may constitute an international commitment, United States courts are not bound unless Congress passes a statute implementing it or the treaty is self executing. In this case, the Court held that U.S. states were not bound by an International Court of Justice staying the execution of a Mexican national. President Bush ordered the states to comply with the ruling, but the Supreme Court held that the President did not have the authority to do this on his own.

Lawrence v. Texas, 539 U.S. 558 (2003) was a United States Supreme Court case striking down a sodomy law in Texas. Justice Kennedy wrote the majority opinion and cited international law as part of the basis for his decision. For example, Kennedy cited a 1981 European Court of Human Rights case, *Dudgeon v. United Kingdom*, 5 Eur. Ct. H. R. (1981) 52, which led to homosexuality being decriminalized in Northern Ireland. Justice Scalia wrote a dissenting opinion criticizing the use of international law, stating that discussion of foreign views was "dangerous dicta" since "this Court … should not impose foreign moods, fads, or fashions on Americans."[59]

III.11. MOST IMPORTANT DEVELOPMENTS

Among the most important developments in the U.S. in the national criminal procedural law framework for pre-trial detention in the last 10–15 years are the following.

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[57] See ACLU website, *Know your rights: What to do if you are stopped by the police* (at: www.aclu.org/police/gen/14528res20040730.html) (last visited: July 2, 2011).

[58] NAPSA Standards, *supra* note 40, at 29.

[59] *Lawrence v. Texas*, 539 U.S. 558 (2003).

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Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act") (Pub.L. 107–56)

The Act enables law enforcement and the intelligence community to aggressively apprehend and interrogate individuals suspected of terrorist activity, emphasizes need for greater cooperation between different intelligence and law enforcement agencies, clarifies the legal parameters surrounding new technology that assists law enforcement survey apprehend possible suspects, and creates harsher penalties for those committing terrorist acts.[60]

Rasul v. Bush, 542 U.S. 466 (2004)
The U.S. Supreme Court held that the U.S. Court system has the authority to decide whether foreign nationals held in Guantanamo bay were wrongly imprisoned.

Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)
The United States Supreme Court held that the United States government had the power to detain unlawful combatants, but ruled that detainees that are U.S. citizens must have the ability to challenge their detention before an impartial judge.

Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
The United States Supreme Court held that military commissions set up by the Bush administration to try detainees in Guantanamo Bay lack "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949." Following this decision, Congress passed the Military Commission Act of 2006, which "authorize[d] trial by military commission for violations of the law of war…" However, in *Boumediene v. Bush*,[61] the majority of the United States Supreme Court struck down Section 7 of the Military Commission Act, but left intact the Detainee Treatment Act which states "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." In *Boumediene v. Bush*, the Court held that this Act unconstitutionally limited detainee's access to judicial review and that detainees have the right to challenge their detention in conventional civilian courts.

60 See Colleen E. Hardy, *The Detention of Unlawful Enemy Combatants During the War on Terror*, LFB Scholarly Publishing, 2008.
61 See *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

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IV. STANDARDS FOR CONDITIONS OF DETENTION, DETENTION FACILITIES AND RIGHTS OF PRE-TRIAL DETAINEES

Most police stations have holding cells where arrestee can be temporarily held until they are either produced in front of a magistrate or transported to a central holding facility for further processing. One term to describe these holding cells in police stations is lockup.

Pre-trial detainees are normally separated from the convicted persons serving sentences.[62] They are usually held in jails, while sentenced prisoners are held in prison. However, jails may also hold convicts serving shorter sentences, such as less than a year. Several states have set a standard to house pre-trial inmates separately from sentenced prisoners.[63]

IV.1. JUVENILES IN DETENTION

Normally, detainees under 18 are housed in juvenile institutions, separate from adults. Approximately 107,000 youth are incarcerated on any given day. Of these, approximately 14,500 are housed in adult facilities. The largest proportion, 9,100 youth, are housed in local jails, and some 5,400 youth are housed in adult prisons.[64] According to a report released in July 2009 by the LBJ School of Public Affairs at the University of Texas at Austin on a single day in 2008, more than 7,700 children under age 18 were being held in adult jails and 3,650 were being held in adult state prisons.

In many jurisdictions, juveniles can at times be charged as adults and then they are often held in adult jails. Ostensibly to protect them from adult detainees, they are often put in isolation. For example, juvenile suspects awaiting trial as adults in Colorado jails languish without education, sometimes held in solitary confinement while they wait for their day in court. The harsh conditions come partly as a fact of the state's more generally overcrowded prison facilities, where the young people are held in adult prisons, shunted into solitary confinement in

62 See Richard L. Phillips & John W. Roberts, *Quick Reference to Correctional Administration*, Aspen Publishers 2000, p. 20.

63 See, *e.g.*, Nebraska Jail Bulletin (1992) (available at: www.ncc.state.ne.us/pdf/jail_standards/jail_bulletins/92.PDF). See also State of Alaska Department of Corrections, Policies and Procedures (at: www.correct.state.ak.us/corrections/pnp/pdf/808.09.pdf).

64 See James Austin, Kelly Dedel Johnson & Maria Gregoriou, *Juveniles in Adult Prisons and Jails: A National Assessment. Washington*, DC: Office of Juvenile Justice and Delinquency Prevention, 2000 (available at: www.ncjrs.org/pdffiles1/bja/182503.pdf).

order to keep them segregated from the adult population. While state law affirms their right to an education, no education is actually provided.[65]

> "In 1996, in the face of pressures toward punishment and away from treatment for violent juvenile offenders, the Juvenile Justice Delinquency Prevention Act (JJDP) proposed new rules for jailing juveniles. The new rules allow an adjudicated delinquent to be detained for up to 12 hours in an adult jail before a court appearance and make it easier for states to house juveniles in separate wings of adult jails."[66]

Especially vulnerable groups of pre-trial detainees, such as:

- homosexuals, transsexuals
- those accused of sex offences
- those accused of offences against children
- those who are HIV positive
- former policemen or other former law enforcement officials.

All are generally placed in segregation or protective custody for their safety. This can be determined by jail officials or upon request by the inmate or as a consequence of an incident of violence directed at a particular detainee. However, HIV positive are not necessarily segregated on the basis of their health status.

Segregation of male homosexual inmates has been justified by legitimate interests in prison safety and security. Preventing homosexual and heterosexual inmates from sharing cells was considered a rational means of preventing violence between groups. Preventing homosexual inmates from sharing cells has been considered a rational means of preventing sexual activity and the spread of sexually transmitted diseases. An Appeals court also upheld disparate treatment between male homosexual and female homosexual prisoners.[67]

An example of legislation addressing the issue of segregation of vulnerable groups is the California Penal code, Sec. 4002 (a)(b):

> "(a) Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, shall not be kept or put in the same room, nor shall male and female prisoners, except husband and wife, sleep, dress or undress, bathe, or perform eliminatory functions in the same room. However, persons committed on criminal process and detained for trial may be kept

[65] See Colorado Independent website: 'Untried youth languish in Colorado's adult prisons' (2010) (at: http://coloradoindependent.com/47365/untried-youth-languish-in-colorados-adult-prisons).

[66] See Frank Schmalleger, *Criminal Justice: A Brief Introduction*, Prentice Hall, 2008, p. 469.

[67] See *Veney v. Wyche*, No. 01–6603, 293 F.3d 726 (4th Cir. 2002). [2002 JB Nov]. See: www.aele.org/law/Digests/jail57.html.

or put in the same room with persons convicted and under sentence for the purpose of participating in supervised activities and for the purpose of housing, provided, that the housing occurs as a result of a classification procedure that is based upon objective criteria, including consideration of criminal sophistication, seriousness of crime charged, presence or absence of assaultive behavior, age, and other criteria that will provide for the safety of the prisoners and staff.
(b) Inmates who are held pending civil process under the sexually violent predator laws shall be held in administrative segregation."

Special groups (terrorists, 'dangerous' criminals et cetera) are held in special facilities and are subject to special conditions and procedures. Enemy combatants are a special group so designated as the most dangerous of captured combatants. They are not afforded certain protections under the Geneva Conventions, including rights and benefits associated with the status of prisoners of war. These individuals are detained at the United States Naval Base in Guantanamo Bay, Cuba and elsewhere.[68]

IV.2. AMOUNT OF JAIL LIVING SPACE REQUIRED BY LAW OR REGULATIONS

There is no country-wide uniform rule on this. A former Illinois state statute provided that prisoners should have at least 4.65 m^2 (50 ft^2) of cell space each. However, the 7th Circuit Court of Appeals ruled that this did not give an inmate a constitutionally protected right to such living space. Prison officials, therefore, did not violate prisoner's due process rights by assigning him to a cell with another inmate, resulting in each of them having less than 50 square feet each. Court also rejected the argument that the amendment of the statute, 730 ILCS 5/3–7–3, to delete any express reference to a specific per person space requirement increased the prisoner's punishment retroactively.[69] As a result of considerable litigation on the constitutionality of housing detainees in the Charles Street Suffolk County, Massachusetts jail,[70] a new jail was designed to include a total of 309 "[s]ingle occupancy rooms" of 6.5 m^2 (70 ft^2) arranged in modular units that included a kitchenette and recreation area, inmate laundry room, education units, and indoor and outdoor exercise areas.[71]

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68 See Colleen E. Hardy, *The Detention of Unlawful Enemy Combatants During the War on Terror*, LFB Scholarly Publishing, 2008.

69 See *Hurst v. Snyder*, No. 02–2891, 63 Fed. Appx. 240 (7th Cir. 2003). [N/R]. See www.aele.org/law/Digests/jail88.html#Sleeping%20Accommodations.

70 See *Inmates of Suffolk County Jail* v. *Kearney,* Civ. Action No. 71–162-G (Mass., Oct. 2, 1978), App. 51, 55.

71 The size of the jail was based on a projected decline in inmate population, from 245 male prisoners in 1979 to 226 at present; see Rufo, Sheriff of Suffolk County, *et al.* v. Inmates of

Accommodating pre-trial detainees in individual cells (except when they prefer to share or someone has been identified as a suicide risk) is generally not the practice in the United States. While the courts have intervened in the most egregious cases of overcrowding and lack of facilities, normally the courts do not find constitutional violations when pre-trial detainees are held in overcrowded prisons.

In *Inmates of Suffolk County Jail v. Eisenstadt*,[72] the court held that conditions at the jail were constitutionally deficient. The court stated that "as a facility for the pre-trial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is 'punishment' … and therefore it violates the due process clause of the Fourteenth Amendment."[73]

However, courts ruled differently in other cases. Detainees brought suit to enjoin alleged overcrowding of pre-trial detainees at a county jail and to require that they be allowed contact visitation with family members. The Seventh Circuit Court of Appeals held that: (1) pre-trial detainees were not denied their due process rights on basis of overcrowding, since such confinement did not amount to "punishment" in a constitutional sense, and (2) denial of contact visitation did not constitute "punishment" either.[74] In a case where pre-trial detainees were housed in a 75 square foot room and had to sleep in double bunk beds, the defendants argued that "double-bunking" violated their due process rights. On appeal to the United States Supreme Court, the court held that "double-bunking" did not constitute punishment and did not violate defendants' rights under the Due Process Clause of the Fifth Amendment.[75]

As to what proportion of pre-trial detainees are held in single cells, this information is not available with precision. It is thought that this number is small. Generally, detainees are placed in single cells as punishment (isolation), for their protection (segregation), and to avoid the spread of disease.[76]

In *Bell v. Wolfish*,[77] due to a lack of adequate facilities, a New York custodial facility placed two pre-trial detainees in rooms planned for single occupancy. Because convicted inmates were sharing common areas, pre-trial detainees were expected to abide by the same restrictions as those of the prisoners. Louis

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Suffolk County Jail *et al* (1992), No. 90–954, 368–409, 375. (at: http://supreme.justia.com/us/502/367/case.html).

72 360 F.Supp. 676, 679–684 (Mass. 1973).

73 See *ibidem*.

74 See *Alvin Jordan, et al v. Michael Wolke*, 615 F.2d 749 (7th Cir. 1980).

75 See Bell v. Wolfish, 441 U.S. 520, 541–543 (1979).

76 See *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286, 293–94 (1st Cir. 1993 held that double celling is not automatically unconstitutional for pre-trial detainees but could be under specific circumstances such as double-celling in small quarters with lack of security against assaults and other possible threats.).

77 441 U.S. 520 (1979).

Wolfish, a detainee in the New York Metropolitan Correctional Center (MCC), on behalf of other detainees, demanded abrogation of rules they felt were inappropriately restrictive. The detainees, believing that their privacy and personal autonomy were jeopardized, filed a suit in the district court challenging prison conditions and complaining about MCC procedures. Among the objectionable conditions and procedures cited was "double bunking" (the replacement of single bunks in individual dormitories with double bunks). The U.S. District Court and the Court of Appeals sided with the pre-trial detainees. But the U.S. Supreme Court reversed and ruled that pre-trial detainees, regardless of where they were housed, were not entitled to receive less restrictive treatment if the institution of confinement had justifiable reasons that mandated sharing common areas with convicted inmates. Double-celling could be unconstitutional only under specific circumstances such as in small quarters with lack of security against assaults and other possible threats.

IV.3. ASSESSMENT OF PRE-TRIAL DETAINEES WHO SHARE ACCOMMODATIONS TO ENSURE THAT THEY ARE SUITABLE TO ASSOCIATE WITH EACH OTHER

"The Constitution does not mandate comfortable prisons … but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'"[78] A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.[79] The Eighth Amendment to the Constitution protects convicted inmates from the imposition of "cruel and unusual punishments." An inmate may sue a correctional facility under the Eighth Amendment for failure to afford adequate protection to inmates from attack by other inmates.[80] This constitutional protection is available to pre-trial detainees through the Due Process Clause of the Fourteenth Amendment and is "at least as great as the Eighth Amendment protections available to a convicted prisoner".[81]

78 See *Farmer v. Brennan* 511 U.S. 825, 825 (1994) (quoting Helling v. McKinney, 509 U.S. 25 (1993).

79 See *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir.1995) (holding that inmate's allegation that prison guards had shown deliberate or reckless disregard for her safety by placing her in a cell with a dangerous inmate was sufficient to state a claim under the Due Process Clause). *And* See *Wolfish*, 441 U.S. at 543; see, *e.g.*, Inmates of Suffolk County Jail v. Rufo, 12 F.3d 286, 293–94 (1st Cir. 1993) (double celling not automatically unconstitutional for pre-trial detainees but could be under specific circumstances such as double-celling in small quarters with lack of security against assaults and other possible threats).

80 See *Farmer,* 511 U.S. at 832–33; *Ayala Serrano v. Lebron Gonzalez*, 909 F.2d 8, 14 (1st Cir. 1990).

81 See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

IV.4. INFORMATION, MAKING COMPLAINTS, SEEKING HEALTH AND SOCIAL ISSUES ASSISTANCE

Per se, the NAPSA standard is: "The pre-trial inmate should be given copies of the institutions admission and orientation and an inmate rights and responsibilities forms, notified of instruction guidelines concerning telephone calls, and asked to sign a Notice of Separation Form indicating that the inmate has been advised that he or she may or may not have contact with convicted inmates. If the inmate refuses to sign the Notice of Separation Form, then the staff should document this refusal on the form. Staff should also document on the orientation form that the inmate has received the appropriate pamphlets and instructions."[82]

> "The grievance review process should be open to any inmate in any institution operated by the correctional agency or in any halfway house or privately managed prison under contract to the agency or otherwise managed under the agency's responsibility."[83]

Assumedly, detainees should also receive guidance on how to ask for assistance on health and social issues. At intake, full information on the health conditions, medical needs, medications, psychiatric history and drug abuse of each detainee should be collected and properly entered into the record.

IV.5. THE RIGHT TO HUMANE TREATMENT

The United States has ratified the International Covenant on Civil and Political Rights.[84] Additionally, the Eighth Amendment forbids cruel or unusual punishment and requires inmates to be furnished with the basic human needs. In *Farmer v. Brennan*,[85] the Supreme Court held that:

> "A prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[86]

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[82] Richard L. Phillips & John W. Roberts, *Quick Reference to Correctional Administration*, Aspen Publishers 2000, p. 21.

[83] *Ibidem*, at 156.

[84] United Nations General Assembly Resolution 2200, December 16, 1966.

[85] See *Farmer v. Brennan*, 511 U.S. 825, 825 (1994), a case in which the Supreme Court of the United States ruled that a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth Amendment.

[86] See 511 U.S. 825.

Bell v. Wolfish established that a particular measure amounts to punishment when there is a showing of express intent to punish on the part of detention facility officials, when the restriction or condition is not rationally related to a legitimate non-punitive government purpose, or when the restriction is excessive in light of that purpose.[87] Additionally, a restriction or condition may "amount to punishment" if prison officials are "deliberately indifferent" to a substantial risk to the detainee's safety.[88]

Barnes v. Rhodes holding that inmate's allegation that prison guards had shown deliberate or reckless disregard for her safety by placing her in a cell with a dangerous inmate was sufficient to state a claim under the Due Process Clause. In this context, the U.S. Court of Appeals, Seventh Circuit has defined "deliberate indifference" to mean intentional or criminally reckless conduct.[89] Thus, to violate a pre-trial detainee's due process rights, prison officials would have to intend for him to die or to suffer grievously, or they would have to act indifferently to a known risk that he would die or suffer grievously.[90]

In general U.S. courts show considerable deference to jail administrators when taking disciplinary and punitive measures towards the detainees. The U.S. Court of Appeals for the Seventh District summarized[91] the courts' position this way:

> "In deciding whether a particular measure is reasonably related to the function of pre-trial confinement, we must be careful, the Supreme Court has admonished, to remember that the implementation of such measures is "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[92]

In addition to the regulatory measures that prison officials may take to ensure the effectiveness of pre-trial confinement, a pre-trial detainee can be punished for misconduct that occurs while he is awaiting trial in a pre-trial confinement

87 See *Bell*, 441 U.S. at 538, 99 S.Ct. 1861.

88 See *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir.1995) (holding that inmate's allegation that prison guards had shown deliberate or reckless disregard for her safety by placing her in a cell with a dangerous inmate was sufficient to state a claim under the Due Process Clause).

89 See *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir.1991).

90 See *Ibidem* at 238–39 (noting that any act with a state of mind less than intent or criminal recklessness, such as negligence or gross negligence, does not amount to punishment); see also *Tesch v. County of Green Lake,* 157 F.3d 465, 474 (7th Cir.1998) (citing cases establishing that a pre-trial detainee must show prison officials' deliberate indifference toward the detainee's need for medical care, risk of suicide, risk of harm from other inmates, or need for food and shelter); *Brownell v. Figel*, 950 F.2d 1285, 1290–91 (7th Cir.1991) (noting that deliberate indifference to--intentional or reckless disregard for--the serious medical needs of a pre-trial detainee amounts to constitutionally impermissible punishment).

91 See *Rapier v. Harris* 172 F.3d 999 1999.

92 See *Bell*, 441 U.S. at 540 n. 23, 99 S.Ct. 1861 (quoting Pell v. Procunier, 417 U.S. 817, 827, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974)) (internal quotation marks omitted).

status. Notably, the basis for this punishment is not the underlying crime of which he stands accused; rather, this punishment is based upon the detainee's actions while in pre-trial confinement.[93]

The First and Ninth Circuits have recognized specifically that pre-trial detainees may constitutionally be punished for infractions committed while awaiting trial, but also have recognized the need for procedural protections prior to the imposition of any punishment.

In *Mitchell v. Dupnik*,[94] the Ninth Circuit held that "pre-trial detainees may be subjected to disciplinary segregation only with a due process hearing to determine whether they have in fact violated any rule." The court explained that, in contrast to convicted prisoners, pre-trial detainees have no sentence that could be deemed to encompass such disciplinary confinement.[95] Moreover, the court noted, "a due process hearing helps to ensure that disciplinary punishment is what it purports to be, rather than punishment in advance of conviction for the crime that led to detention--the evil condemned by Bell." More specifically, *Mitchell* held that the prison's blanket policy of forbidding inmates from calling witnesses on their behalf during disciplinary proceedings violated due process.

Similarly, in *Collazo-Leon v. United States Bureau of Prisons*,[96] a pre-trial detainee was brought before a disciplinary hearing officer on charges of attempted escape and attempted bribery of a prison guard. He was found guilty of the misconduct and was placed in disciplinary segregation. He brought a petition for a writ of habeas corpus alleging violations of his substantive and procedural due process rights. The First Circuit held that punitive restrictions or conditions may constitutionally be placed on pre-trial detainees, provided that the restrictions further some legitimate governmental objective (such as addressing a specific institutional violation, ensuring a detainee's presence at trial, or maintaining safety, internal order, and security within the institution) and are not excessive in light of the seriousness of the violation.[97] The court noted that "[t]he administrators of the prison must be free, within appropriate limits, to sanction the prison's pre-trial detainees for infractions of reasonable prison regulations that address concerns of safety and security within the detention environment."[98] Drawing on Bell's admonition that courts should respect the professional expertise of corrections officials in maintaining security and order in penal institutions, the First Circuit stated in *Collazo-Leon*[99] that

93 See *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir.1996); *Collazo-Leon v. United States Bureau of Prisons*, 51 F.3d 315, 318 (1st Cir.1995).
94 See *ibidem*.
95 See *ibidem*, at 524–525.
96 51 F.3d 315, 318 (1st Cir.1995).
97 See *ibidem*, at 318 (citing Bell, 441 U.S. at 540, 99 S.Ct. 1861).
98 See *ibidem*.
99 51 F.3d 315, 318 (1st Cir.1995),.

Bell provided "clear approval of a broad exercise of discretion by prison authorities to take reasonable and necessary action, including punishment, to enforce the prison disciplinary regime and to deter even pre-trial detainees from violation of its requirements."[100] The court thus held that the Constitution does not prohibit the punishment of pre-trial detainees for legitimate institutional purposes, but prohibits only the exercise of disciplinary authority for the purpose of, or with the unintended effect of, punishing the pre-trial detainee for the acts for which he is being detained.

Access to sanitary installations and to a bath or shower

It appears that a common standard in the better managed jails is that showering is allowed at least every other day. However, a recent federal investigation of the nation's largest single-site county jail, Chicago's Cook County Jail, has uncovered serious sanitation and medical care problems, as well as violence against prisoners who clashed with guards or failed to follow commands. Overcrowding has resulted in "hot bunking," in which prisoners use beds in eight-hour shifts. The report said that while each inmate uses his or her own bedding, the practice could still cause "sanitation and infection control problems."[101]

Also the Dallas, Texas County five county jails which house 7,600 detainees, a larger population than many Texas towns, have come under scrutiny. In May, 2008 a U.S. Justice Department report noted dirty mattresses in the Dallas County jails, improper use and labeling of cleaning agents, and a lack of sanitation officers. The report also pointed to inadequate sanitation policies and said sanitation officers' duties were not clearly defined. Among Texas five largest counties, Tarrant County's jail is the only one that has passed the Texas state inspection every year since 2003. No other large jail has passed more than two years in a row since then.[102]

Private clothes or prison uniform?

Jails set their own policies about clothing. Many jails do not allow inmates to take their own clothes into the facility. Other jails allow certain types of personal clothing to be worn by inmates. For inmates who do not have adequate clothing, or do not choose to wear their own clothes, jail uniforms are provided. There are good arguments on both sides of this question.

[100] See *ibidem*.

[101] See USA today webpage: 'Horrendous conditions found at nation's biggest jail' (2008) (at: www.usatoday.com/news/nation/2008–07–18-jail_N.htm).

[102] See The Dallas Morning News: 'Dallas Jail-DMN & DOJ Report' (2008) (at: www.dallascriminallawyer.com/blog/uncategorized/dallas-jail-dmn-doj-report/), and: 'New report finds Dallas County jails improved but still falling short on health care' (2008) (at: www.litigationfairness.com/component/ilr_news/30/article/I1353694439.html).

The National Sheriffs' Association recommends that jail uniforms be provided for all inmates. This helps prevent the introduction of contraband into the facility, aids in the control of lice, eliminates the possibility of bartering, stealing, or gambling with clothing, decreases escape risks, and makes it easier to do institutional laundry.[103]

IV.6. CONTACT WITH THE OUTSIDE WORLD

The standard is: "Pre-trial inmates may receive visits in accordance with the correctional agency's policies and local institutional guidelines on visiting privileges. At a minimum, pre-trial inmates should be approved for visits from immediate family members. These persons would include an inmates' mother, father, stepparents, foster parents, siblings, spouse, grandparents, grandchildren, children, and stepchildren."[104]

This question was considered in many cases during the mid-1980 when correctional facilities began to prohibit contact visits in response to a growing contraband problem. Many lawsuits arose wherein prisoners asserted that they had a right to contact visitation and even to conjugal visits.

The U.S. Supreme Court considered these issues in the case of *Block v. Rutherford*.[105] Dennis Rutherford was a pre-trial detainee in the Los Angeles County Jail. The Sheriff of Los Angeles County had established a blanket prohibition on contact visits. Rutherford sued. The Supreme Court held that the prohibition was a reasonable and non-punitive response to legitimate security concerns, consistent with the Fourteenth Amendment. The court ruled that the constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined in their sound discretion, that such visits will jeopardize the security of the facility.

The court found it important that the denial of contact visitation was not a punishment, which would have required "Due Process", but was incident to some other legitimate governmental purpose (security). The Court reaffirmed its prior holding that "Prison Administrators (are to be) accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Accordingly, the Supreme Court upheld the denial of

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103 See National Sheriffs Standards (at: www.ncc.ne.gov/pdf/jail_standards/jail_bulletins/84.PDF).

104 Richard L. Phillips & John W. Roberts, *Quick Reference to Correctional Administration*, Aspen Publishers 2000, p. 29.

105 See *Block v. Rutherford*, 468 US 576, 82 L Ed 2d 438, 104 S Ct. 3227, July 3, 1984.

contact visitation. The court did not address the issue as to whether an inmate in a correctional facility has the right to visitation at all.[106]

Information on what percentage of pre-trial detainees are denied regular visits from family members on the grounds that such visits would interfere with the administration of justice (or be undesirable on other legal grounds) is not available with precision. Such denials depend on local situations and on the status and conduct of specific detainees.

It must be kept in mind that *visitors* too may be denied entry or their visit terminated. For example, the Multnomah County, Oregon visiting rules stipulate that "Visits may be denied or terminated to maintain the safety, security, health and good order of the facility and/or the safety and security of the inmates, staff, visitors, contractors or the community."[107]

IV.7. ALLOWED OUT OF THEIR CELL/ROOM AND OPPORTUNITIES TO WORK

Inmates generally are locked into their rooms from 10 p.m. to 6:30 a.m. and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas. Detainees in segregation or isolation are allowed very limited time outside their cell for exercise, maybe one hour a day, often placed in large cages outdoors

Normally, the presumed relatively short stay in jail awaiting trial precludes participation in work activities, *e.g.* prison industries, except housekeeping tasks. "Unless a pre-trial inmate signs a waiver of his or her right not to work, the warden cannot require that inmate to perform any job assignment other than housekeeping tasks in his or her own cell or community living area."[108]

IV.8. PROTECTION AND CARE OF PRE-TRIAL DETAINEES

Under the Eighth Amendment, convicted inmates are entitled to "humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832–833 (1994).

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106 See *White v. Keller*, 438 F. Supp 110, 1977; *Van Poyck v. Dugger*, 779 F. Supp. 571 (M.D. Fla. 1991). See an example of visitation rules at: http://pinalcountyaz.gov/Departments/Sheriff/AdultDetentionCenter/Pages/Visitation.aspx).

107 See the Multnomah County, Oregon visiting rules (at: www.mcso.us/public/Inmate_visitors_guide.htmh) (last visited: July 2, 2011).

108 Richard L. Phillips & John W. Roberts, *Quick Reference to Correctional Administration*, Aspen Publishers 2000, p. 28.

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However, for example, a recent U.S. Department of Justice investigation of the nation's largest single county jail, Chicago's Cook County Jail,[109] documents that inmate-on-inmate violence has been a persistent problem, including prisoners stabbed, one fatally, with knifelike shanks, and another strangled by a cellmate. Scores of cells, shower areas and various dayroom features are in dilapidated conditions, thus giving inmates ample material for fabricating weapons, the report said.

Assaults by the staff are not uncommon. Among the problems cited in the report are old or mentally ill inmates struck by guards for dressing too slowly. One prisoner who had trouble complying with orders from guards complained that they used his head as "a bongo drum." Three Cook County Jail inmates committed suicide in the first four months of 2008 alone, and others have died because of inadequate medical care, according to a 98-page report prepared by the Civil Rights division of the Justice Department and the U.S. attorney's office. U.S. Attorney Fitzgerald stated that "a culture of abuse" exists, with groups of guards conducting organized beatings of inmates in retaliation for verbal insults. Prisoners were also not protected against violence from other inmates. Violence against prisoners sometimes begins as soon as they arrive at the sprawling complex on Chicago's west side, where nearly 10,000 inmates are housed while awaiting trials.

Suicide prevention

The National Sheriffs Association standards state:

> "The basic health screening should be done on all newly-admitted inmates. […] If the basic health screening indicates that an inmate has a possible mental health problem, seems to be a suicide risk, or has a potentially-serious alcohol or drug problem, then a follow-up screening should be done on that inmate in order to obtain and document more detailed information about the inmate."[110]

The follow-up screening is designed to obtain and document the following information about the subject of the screening:

- whether the inmate presents any verbal or behavioral indicators of suicide risk, or
- there is anything about his current status that indicates potential suicide risk;
- inmate's history of mental health problems and any professional mental health
- treatment or intervention;

109 Report available at: http://graphics8.nytimes.com/packages/pdf/national/Cook_County_Jail_Findings_Letter.pdf. See the Department of Justice findings letter at: www.justice.gov/usao/iln/pr/chicago/2008/pr0717_01.pdf.

110 See at: www.ncc.ne.gov/pdf/jail_standards/jail_bulletins/84.PDF.

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- whether or not the inmate is currently under treatment, including medication; and
- whether the inmate presents any behavioral or verbal indicators of possible mental illness or serious emotional distress for which he ought to be evaluated by a mental health professional.

If the screening indicated that an inmate seemed to be a fairly high suicide risk, then the screening officer's disposition might be to immediately place the inmate on "suicide watch" status and call the jail mental health worker for advice. These actions should be specifically documented.[111]

Equivalency of jail health care to medical care outside?

Detainees have a constitutional right to health care via the Eighth Amendment concerning cruel and unusual punishment; yet such services are often sorely lacking, according to a report published in the *American Journal of Public Health,*[112] the first such study to look at the health of all inmates nationwide at once. The report states that the 2.3 million Americans currently being held in prisons and jails across the country suffer a much higher rate of serious and chronic illness than the general population does. In federal, state and local jails, 38.5 percent, 42.8 percent and 38.7 percent of inmates, respectively, had a chronic medical condition. Fourteen percent of those in federal prisons, 20 percent of state prison inmates and 68.4 percent of those in local jails had not yet seen a health-care provider since their incarceration, despite persistent health problems, the report found.[113]

In *City of Revere v. Massachusetts General Hospital*,[114] the Supreme Court held that pre-trial detainees must receive at least the standard of medical care to which prisoners are entitled. Furthermore, in *City of Canton v. Harris*,[115] the Court held that the "deliberate indifference" standard governs failures to provide adequate medical attention as a result of inadequately trained officials. Deliberate indifference in denying treatment to a pre-trial detainee may support a civil rights violation claim, particularly where officers deliberately ignore a medical warning by a physician or a relative. But "deliberate indifference" must be proven to support a finding that the detainee's constitutional rights were violated. A mere difference of opinion between a prison's medical staff and the inmate, as to

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111 See *ibidem*.

112 See Andrew P. Wilper *et al*, The Health and Health Care of US Prisoners: Results of a Nationwide Survey, *Am J Public Health* 99: 666–672 (2009) (also at: http://ajph.aphapublications.org/cgi/reprint/AJPH.2008.144279v1).

113 *Ibidem*. See *also* US News website: 'Many in U.S. Prisons Lack Good Health Care' (2009) (at: www.usnews.com/health/managing-your-healthcare/articles/2009/01/16/many-in-us-prisons-lack-good-health-care.html).

114 463 U.S. 239. 103 S.Ct. 2979. 77 L.Ed.2d 605.

115 See *City of Canton, Ohio v. Harris*, 489 U. S. 378 (1989).

a diagnosis or treatment, does not support a claim of cruel and unusual punishment.[116]

The actual provision of medical care in jails is most often well below the equivalent medical care outside. Often it is contracted out to private for profit companies with little accountability and supervision. There are of course jurisdictions that strive to offer professional and adequate medical and health services to the pre-trial detainees. The National Commission on Correctional Health Care endeavors to improve the quality of health care in jails, prisons and juvenile confinement facilities and to set standards for health services in correctional facilities. It accredits jails that meet the standards and certifies correctional health personnel and others that have undergone training.[117] Many jails require detainees to co-pay in order to see a doctor. Consequently, some will delay seeing a doctor and get worse. Those who cannot pay are denied medical care. Some counties address the problem by releasing nonviolent suspects who could cost the county, or waiting to arrest those who injure themselves at the time of their crime. For example, in Richland County, Pennsylvania, 95 percent of detainees needing surgery are released, along with most pregnant detainees. If a suspect is injured when it is time to take him into custody, authorities will wait until s/he is released from the hospital to avoid medical costs.

In the United States jails have become "default holding systems" for people with mental health issues due to lack of services. Often people with serious mental illness are jailed and do not belong there, particularly those arrested for minor crimes. Jail resources are typically inefficient, inappropriate and, sometimes, inhumane. Excessive use of force, spraying the detainees with chemicals (*e.g.* pepper, tear gas), using high voltage Tasers on them, immobilizing detainees for hours or days in a restraining chair and other abuses are often used by correctional officers who are untrained in mental health and crisis intervention. At times these actions result in severe injury and even death.

A glaring example of jail medical care definitely not equivalent to "outside" care is that "provided" to the about 6,600 pre-trial detainees in the Maricopa County jail in Phoenix, Arizona under Sheriff Joe Arpaio. A federal judge ruled in 2008 that the grossly inadequate conditions in that jail system were unconstitutional and jeopardized the health and safety of inmates. The court ruled that Sheriff Joe Arpaio of Maricopa County, Arizona, who has built a national notoriety with his get-tough tactics, building a sweltering "tent city" for convicts and cladding them in black-and-white striped uniforms and pink underwear, and county health officials have violated the Constitution by depriving jail inmates of adequate medical screening and care, feeding them

[116] See AMER. JURIS., Penal §128.
[117] For more details, see: www.ncchc.org.

unhealthy and even spoiled food and housing them in unsanitary conditions.[118] Judge Wake also said that disciplinary practices against mentally ill inmates had caused "needless suffering and deterioration" and that the jails must ensure they receive prescription medication. The ruling comes on the heels of a decision in September 2009 by the National Commission on Correctional Health Care to terminate the accreditation of all of the Maricopa County Sheriff's jails. One of Sheriff Arpaio's practices was to require women detainees seeking an abortion to obtain a court order as a condition for being transported to a hospital. When sued, Sheriff Arpaio agreed to permit access to abortion without a court order but then required that inmates seeking abortion care prepay up to $600 for transportation and security costs in order to be taken offsite to see a doctor.

Drugs

Although it is generally agreed that the criminal justice system throughout the United States is overwhelmed with drug users, drug addiction programs for pre-trial detainees are not offered that widely. One justification is the short expected stay of the detainee in jail before the case is adjudicated, diverted or placed under the supervision of the Drug Court. Moreover, in this time of economic crisis, many such programs are not adequately funded and may cease operations.[119]

Pre-trial detainees may obtain welfare advice, counseling or support on personal problems from a social worker/educator/pedagogue/case manager or, if the problem is psychological, from a psychologist in the more advanced, better funded and better managed jails. It is not possible to provide accurate detailed information on this, given the large number of jails in the United States mostly under local county control. In the Washington DC metropolitan area, Offender Aid & Restoration (OAR) is the leading provider of offender services in Arlington County, Alexandria and Falls Church, Virginia and Washington DC. OAR offers:

- Jail-based educational, therapeutic and career development programs,
- Supervised community service,
- Professional re-entry services,
- Employment counseling,
- A talented corps of community volunteers.

Generally, there is not much distinction between jail and prison guards in the United States. Both are considered "correctional officers." Moreover, many jails also house state and even federal convicts serving short sentences. While

118 The name of the class-action suit has changed several times. It was originally *Hart v. Hill*, then *Hart v. Arpaio*. and now *Graves v. Arpaio*. See Second Amended Judgment No. CV-77–0479-PHX-NVW, October 22. 2008.

119 See Peter M. Carlson & Judith Simon Garrett, *Prison & Jail Administration: Practice & Theory*, Aspen Publishers, 2008, p. 410.

constitutionally the status of a pre-trial detainee is clearly different and with more rights than that of a convict, in reality this fine line is often blurred and ignored. Thus, the different status and the different needs of pre-trial detainees from sentenced prisoners are often ignored.

IV.9. COMPLAINTS BY PRE-TRIAL DETAINEES

When pre-trial detention is prolonged for such an extended period of time as to become punitive in effect, due process may require a release from pre-trial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by 18 U.S.C.A. §3142.

A pre-trial detention hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that the information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the defendant as required and the safety of any other person and the community. A district court may conduct a de novo hearing on a motion for reconsideration of the order based on changed circumstances or new information. *See* 18 U.S.C.A. §3142(f). The detention decision may also be reopened to examine the due process implications of the defendant's continued detention.[120]

A detainee can file a civil lawsuit in state or federal court. Examples of causes of action for these complaints include common law claims of abuse of process; Eighth Amendment violation claim; use of excessive force when making an arrest (under the 4th Amendment); unlawful arrest or detention under 42 U.S.C.A. §1983; and intentional infliction of emotional distress, among others. Breaches of pre-trial detention rights can be raised during trial as a violation of due process.

IV.10. MOST IMPORTANT DEVELOPMENTS AS REGARDS DETENTION FACILITIES AND THE RIGHTS OF PRE-TRIAL DETAINEES IN THE LAST 10–15 YEARS

Urgent problems plainly exist in the nation's prisons. But to date, the Supreme Court has avoided considering when prison conditions are properly judged cruel as a constitutional matter.[121] An important development is the Prison Rape Elimination Act of 2003 (PREA), the first United States federal law passed

[120] See *United States v. Archambault*, 240 F. Supp. 2d 1082 (D.S.D. 2002).
[121] See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, N.Y. L. REV. 881, 889 (2009).

dealing with the sexual assault of prisoners. The act sets a zero tolerance for rape and sexual assault in prisons and calls for developing and instituting national standards to prevent, detect and reduce sexual violence in prisons; making data and information on sexual violence more available to correctional administrators; and making prisons more accountable for inmate safety.[122]

Additionally, in 1996, Congress enacted the Prison Litigation Reform Act ("PLRA")[123] which significantly constrains available relief and imposes procedural barriers for prisoners bringing suits challenging prison conditions. The Act is meant to restrict and discourage litigation by prisoners. Its provisions fall into two broad categories: the prospective relief provisions, directed mainly at injunctive litigation for institutional reform, and the prisoner litigation provisions, directed generally at civil actions brought by prisoners. Injunctive relief must be narrowly tailored and both preliminary and final injunctions automatically expire after fixed amounts of time. In order to recover for mental or emotional injury suffered while in custody, a plaintiff must first establish physical injury. The PLRA also imposes constraints on the amount of fees recoverable. Another way Congress tried to curb prison litigation was by setting up an "exhaustion" requirement. Before prisoners may challenge a condition of their confinement in federal court, they must first exhaust available administrative remedies by pursuing to completion whatever inmate grievance and/or appeal procedures their prison custodians provide.

V. ALTERNATIVES TO PRE-TRIAL DETENTION

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Defendants charged with very serious crimes, or those thought likely to escape or to injure others, are usually held in jail until trial. The majority of defendants, however, are afforded the opportunity for release.[124] This is made possible by bail and other alternatives to secured detention.

V.1. BAIL IN THE USA

The Federal Bail Reform Act of 1966[125] established a presumption that all (federal) defendants should be released without any money bail at all, that is released on their own recognizance. "[T]he judicial officer may not impose a financial condition that results in the pre-trial detention of the person."

122 See National Institute of Justice Staff, *NIJ'S Response to the Prison Rape Elimination Act*, February 2006 (at: www.ncjrs.gov/pdffiles1/nij/213137.pdf).
123 Title VIII of Pub.L. 104–134, 110 Stat. 1321.
124 See Frank Schmalleger, *Criminal Justice: A Brief Introduction*, Prentice Hall, 2008, p. 259.
125 18 USC §§3341 et seq.

When a court is doubtful about pre-trial release, judges are instructed to set strict conditions for release, including some sort of monetary bail if necessary. States have followed this as well, and have either abolished money bail or provided a service by which defendants can obtain a bail bond provided with a small administrative fee. In making a decision, judicial officers are concerned about two types of risk: (1) the risk of flight or non-appearance for scheduled court appearances and (2) the risk to public safety. The following factors are weighed to determine the amount of bail or conditions attached to pre-trial release:

1. The seriousness of the crime charged. The more serious the crime, the higher the penalty, and the less likely, all other things being equal, that the defendant will return voluntarily.
2. The evidence against the defendant. If the evidence is overwhelming, and the defendant knows that, voluntary return becomes less likely.
3. Defendant's ties to the community. A defendant who has lived in, or has other ties to, the community is assumed less likely to leave than one who is a transient passing through.
4. The character of the defendant. The defendant's past criminal record may be considered.

Many jurisdictions have established a bail schedule under which a specific charge generates a specific presumed bail unless there is overwhelming reason to vary from that presumption. The Eighth Amendment states: "excessive bail shall not be required." Some scholars argue that this means that all defendants are constitutionally entitled to some level of bail. However, the Supreme Court has never held that bail is constitutionally guaranteed and has strongly intimated that it is not.

Forty states preclude bail in "capital offenses, where the proof is evident or the presumption great."[126] Some states extend the capital exception to situations such as life imprisonment without parole on the ground that the punishment threatened is the equivalent of death and therefore just as likely to result in the defendant's absconding. A majority of states allow the preventive detention of non-capital felons in some situations, either explicitly, or by interpretation of clauses not unlike those of the Eighth Amendment. Some states have not allowed bail or made getting bail very difficult for crimes such as stalking or domestic violence, although some statutes precluding bail for non-capital charges have been held unconstitutional.[127]

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126 See, *e.g.*, Vt. Const. chapter II, sec. 40.

127 See *e.g., Hunt v. Roth*, 455 U.S. 478 (1981) (holding that a Nebraska statute, which denied bail for sexual offenses involving force, violated the excessiveness clause of the Eight Amendment).

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The denial of bail and the negative effects of pre-trial detention spurred lawsuits. Opponents of pre-trial detention claimed the Bail Reform Act of 1984 (BRA) violated an individual's right to be free from cruel and unusual punishment. Critics of the BRA especially maintain that section 3142 allows judges and prosecutors too much discretion at detention hearings. In *United States v. Salerno*,[128] however, the Supreme Court rejected the Eighth Amendment argument and upheld the constitutionality of the BRA. The Court held that in limited circumstances, denial of bail, based upon an assessment that the defendant would commit more crimes if released, was allowed.

Nearly 20 states and the Federal system follow *Salerno* and allow for preventive detention (and denial of bail) when the community's safety is at risk. Additionally, some states have enacted dangerousness laws, which limit the right to bail to certain kinds of offenders. Other states, including Arizona, California, Colorado, Florida, and Illinois, have approved constitutional amendments restricting the use of bail. Both the defendant and the government may appeal an adverse bail decision. The scope of review is limited, however. The only question for an appellate court is whether the trial court abused its discretion. Normally, for cases where imprisonment is not a contemplated penalty, the person is not taken into custody. For example, when a person receives a traffic citation, they receive and sign the ticket but are not taken into custody.

V.2. OTHER ALTERNATIVES TO SECURED DETENTION

Since the implementation of the Bail Reform Act of 1984, increased emphasis has been placed on developing and implementing alternatives to secured detention that would mitigate the risk of flight and danger to the community and provide some relief for pre-trial detention.

Various forms of *home confinement* have increasingly gained acceptance – at both the State and Federal levels – as credible alternatives to pre-trial detention.

Electronic monitoring has also gained acceptance as a tool for monitoring the defendant's compliance with the home confinement alternative.

Other alternatives currently approved by the Federal and some State Judiciary include:

- *Third-party custody*, whereby the defendant is designated to the custody of a person who agrees to assume responsibility for supervision and report violations to the court.
- *Halfway house placement*, whereby the defendant is designated to a community-based residential facility and may leave the facility for approved

[128] See *United States v. Salerno*, 481 U.S. 739 (1987).

purposes (such as employment, education, medical treatment, and religious practices).
- *Intermittent custody*, whereby the defendant is released from detention for limited time periods (such as employment and education).
- *Substance abuse treatment*, whereby the defendant is required to participate in a drug or alcohol dependency program and/or to submit to a period of drug testing.
- *Mental health treatment*, whereby the defendant is required to undergo psychological or psychiatric treatment to reduce the risk of nonappearance and/or danger to the community associated with his emotional or mental health.

The American Bar Association has approved and adopted standards regarding pre-trial release supportive of release under the least restrictive conditions and the use of diversion and other alternative release options like those listed above. It should be only when no conditions of release are sufficient to accomplish the aims of pre-trial release, that defendants may be detained through specific procedures (ABA Standard 10–1.2).[129]

There are a variety of bond types ordered in the Federal Courts. They include:

- *Personal recognizance bond*: Defendant is released on his/her written promise to appear at all Court proceedings.
- *Unsecured bond*: Defendant is released on his/her written promise to appear at all Court proceedings AND to pay the Court the full bond amount in the event he/she fails to appear.
- *Secured bond*: Defendant's release requires cash or collateral (property) be posted with the Court prior to the Defendant's release from custody.
- *Surety bond*: Defendant's release requires a bondsman, attorney, or similar party, to post surety prior to the defendant's release from custody. All sureties used must be on the Department of the Treasury's Listing of Approved Sureties.
- *Release with Conditions*: In addition to the above-mentioned bonds, the Court typically orders pre-trial supervision and reporting as a condition of release for all defendants. Other special conditions may include: travel restrictions, electronic monitoring, substance abuse counseling and testing, and employment. Additionally, all defendants are ordered to not possess any firearm or dangerous device while on pre-trial release.

129 See ABA standards database (at: www.americanbar.org/groups/criminal_justice.html) (last visited: July 2, 2011).

Other conditions may include any or all of the following:[130]

- Avoid contact with any persons who are or may become a victim or potential witness
- Report all contact with law enforcement
- Surrender passport and obtain no passport
- Electronic Monitoring
- House Arrest
- Curfew
- Substance abuse testing and/or treatment
- Mental health evaluation and/or counseling
- Residence at a Community Corrections Center
- Maintain employment or attend school
- Other conditions may be ordered by the U.S. Magistrate Judge

V.3. NUMBER AND PERCENTAGES OF CASES IN WHICH ALTERNATIVE MEASURES ARE APPLIED TO SUSPECTED OFFENDERS

Of the defendants who had state felony charges filed against them in the nation's 75 most populous counties during May 2004:[131]

- An estimated 57% were released by the court prior to the disposition of their case. Forty-three percent were detained until case disposition, including 6% who were denied bail.
- Released defendants were most likely to be released on commercial surety bond (25%) or their own recognizance (14%).
- Murder defendants (12%) were the least likely to be released prior to case disposition, followed by defendants charged with motor vehicle theft (39%), robbery (42%), burglary (45%), or rape (52%).
- Less than half of defendants with an active criminal justice status, such as parole (17%) or probation (37%), were released, compared to 67% of those with no active status.
- About a third of released defendants were either rearrested for a new offense, failed to appear in court as scheduled, or committed some other violation that resulted in the revocation of their pre-trial release.

[130] See U.S. Pre-trial Services, *Frequently Asked Questions* (at: www.moept.uscourts.gov/Bond_and_Release_Info.html) (last visited: July 2, 2011).

[131] See Bureau of Justice Statistics database (at: www.ojp.usdoj.gov/bjs/).

- Of the 21% of released defendants who had a bench warrant issued for their arrest because they did not appear in court as scheduled, about a fourth, representing 5% of all released defendants, were still fugitives after 1 year.
- An estimated 21% of all released defendants were rearrested while awaiting disposition of their case. About two-thirds of these new arrests were for a felony.
- Thirty-four percent of the 56,982 defendants charged with a Federal offense were ordered detained by the court pending adjudication of the charges.
- Defendants charged with violent (49.7%), immigration (47.9%), or drug trafficking (45.7%) offenses were detained by the court for the entire pre-trial period at a greater rate than other offenders.
- 38.4% of defendants with at least one prior arrest were ordered detained compared to 26.7% of first-time arrestees.[132]

Type of pretrial release or detention for State court felony defendants in the 75 largest counties, 1990–2004[133]

Detention-release outcome	State court felony defendants in the 75 largest counties	
	number	percent
Total	424,252	100%
Release before case disposition	264,604	62%
Financial conditions	125,650	30%
Security bond	86,107	20
Disposit bond	23,168	6
Full cash bond	12,348	3
Property bond	4,027	1
Non-financial conditions	136,153	32%
Personal recognizance	85,330	20
Conditional release	32,882	8
Unsecured bond	17,941	4
Emergency release	2,801	1%
Detained until case disposition	159,647	38%
Held on bail	132,572	32
Denied bail	27,075	6

Note: Counts based on weighted data representing 8 months (the month of May from each even-numbered year). Detail may not add to total because of rounding.

132 See Bureau of Justice Statistics database (at: www.ojp.usdoj.gov/bjs/).
133 See Bureau of Justice Statistics database (at: www.ojp.usdoj.gov/bjs/).

V.4. CASES IN WHICH ALTERNATIVES FOR PRE-TRIAL DETENTION MAY BE ORDERED

Prosecutors who did not wish to prosecute, but are loathe to simply release the defendant, have used informal ways of assuring that the defendant provides restitution to the victim, seeks rehabilitative help, performs community service, et cetera. Defendants who meet criteria defined by statute or court rule may avoid trial for a test period in the community, but on a number of conditions. Typically, pre-trial alternatives and/or avoiding pre-trial detention are usually limited to first offenders and exclude at least some kinds of serious felonies. If a defendant successfully completes the test period, the charge might be sealed or totally erased from the defendant's record. Prosecutors have discretion to seek or allow placement in such programs, reviewable by the court.[134]

Alternatives are available for almost any type of offense, but in order to avoid detention, certain factors such as flight risk and danger to society are considered. The prosecutor has ample discretion. The prosecutor is not bound by the charge contained in the original police complaint.[135] Normally, alternative are certainly available for an offense for which imprisonment is not a penalty. Examples are diversion, treatment, community service, fine, home arrest et cetera. The accused must be released on bail where the government fails to establish that there is a flight risk and there is no clear and convincing evidence that the defendant will pose a danger to any other person or the community.[136] 18 U.S.C. §3142(a) states that, if, after a hearing, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In some jurisdiction, the victim or her survivors, witnesses and the police can object to releasing a defendant prior to trial because of the threat s/he may pose.

Pre-trial release is conditioned, among others, on pre-trial supervision. Failing any of the conditions of the release; threats to the victim, survivors, witnesses; commission of other crimes; potential of flight can trigger a review of the release and possibly lead to revocation and detention. The court can impose any condition that is reasonable in light of the totality of circumstances.

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134 See for example *State v. Caliguiri*, 726 A.2d 912 (N.J. 1999).

135 Richard G. Singer; *Examples and Explanations: Criminal Procedure II: From Bail to Jail*, Aspen Publishers 2008, p. 38.

136 See CORPUS JURIS SECUNDUM, Bail §14.

V.5. MOST IMPORTANT DEVELOPMENTS AS REGARDS ALTERNATIVES FOR PRE-TRIAL DETENTION IN THE LAST 10–15 YEARS

In a recent Luminosity study it is concluded that since the implementation of the Bail Reform Act of 1984, "increased emphasis has been placed in developing and implementing alternatives to detention. For example, various forms of home confinement have increasingly gained acceptance within the criminal justice community – at both the State and Federal levels – as credible alternatives to pre-trial detention."[137] American judicial systems are now starting to be more accepting of the *restorative justice model* that views crime as an act against people in the community and not just against the state, so that justice focuses on the suspect making amends with the community. This model includes plans for restitution and mediation programs that involve the victim, the community, and the offender. Detention and incarceration are not considered a proper response to at least non violent crimes. There is also support for shaming as a crime-reduction strategy.[138]

VI. CONCLUSION

The shortcomings of the pre-trial detention system negatively affect pre-trial detainees, the prison system, defense attorneys, and the courts. They also adversely impact the detainees' families and communities. They violate constitutional protection and the presumption of innocence. Therefore, in order to be successful, a solution must take into account each of these aspects of the criminal justice system.

The shortcomings and abuses of the pre-trial detention system are deeply rooted in the criminal justice system. Proposals which take a narrow approach to the problems raised by pre-trial detention are inadequate. A successful solution requires change at the various levels of the criminal justice system which impact a pre-trial detention determination. Only with comprehensive change, led by the judiciary, will the pre-trial detention "crisis" be solved.

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137 See Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, Luminosity study, 2009 (at: http://luminosity-solutions.com/publications/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report.pdf).

138 See Frank Schmalleger, *Criminal Justice: A Brief Introduction*, Prentice Hall, 2008, p. 324.

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The International Penal and Penitentiary Foundation: history and purpose

International efforts to harmonize criminal justice policy date back to the nineteenth century, when representatives of various European nations met periodically to exchange information and to consider common standards in the treatment of offenders. In 1872, cooperation took a step forward when an International Prison Commission (IPC) was set up to collect national prison statistics and make recommendations for prison reform in Europe. When the League of Nations was formed in 1919, it saw as part of its mandate the promotion of the rule of law in the international community. The IPC became affiliated with the League and continued to hold conferences, meeting in 1925, 1930 and 1935. In the latter year, the IPC became the International Penal and Penitentiary Commission (IPPC).[1]

When the new United Nations was created in 1954, it incorporated crime prevention and standards of criminal justice into its policy-setting role. In December 1950, the IPPC was dissolved, to be replaced by the International Penal and Penitentiary Foundation. The IPPF is a foundation governed by Sects. 80 ff of the Swiss Civil Code and created on the 5th of July 1951. The Foundation shall have as its aim to promote studies in the field of the prevention of crime and the treatment of offenders, especially by scientific research, publications and teaching.

See for further information:
http://fondationinternationalepenaleetpenitentiaire.org/

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[1] See: United Nations, The United Nations and Crime Prevention, New York: United Nations, 1991, p. 3–4.

La Fondation internationale pénale et pénitentiaire : histoire et objectif

Les efforts internationaux entrepris pour harmoniser la politique pénale et pénitentiaire remontent au 19e siècle, quand des représentants de plusieurs Etats européens ont commencé à se réunir périodiquement pour échanger de l'information et élaborer des standards communs dans le domaine du traitement des délinquants. En 1872, la coopération s'intensifia avec l'instauration de la Commission Pénitentiaire Internationale (CPI), chargée de réunir des statistiques nationales sur la prison et de formuler des recommandations pour la réforme des institutions carcérales en Europe. Instituée en 1919, la Société des Nations s'est vue confier le mandat de promouvoir des règles de droit en la matière auprès de la communauté internationale. La CPI devint affiliée à la Société des Nations et continua d'organiser des conférences et rencontres, en 1925, 1930 et 1935, avant de devenir la Commission Internationale Pénale et Pénitentiaire (CIPP).[1]

Quand en 1954, à la suite de la Société des Nations, fut créée l'Organisation des Nations Unies, cette dernière maintint parmi ses objectifs principaux la promotion de la prévention du crime et de standards en matière de justice criminelle. En décembre 1950, la CIPP fut dissoute et remplacée par la Fondation internationale pénale et pénitentiaire. Instituée le 5 juillet 1951, la FIPP est une fondation, au sens des articles 80ss du Code civil suisse. La Fondation a pour but d'encourager les études dans le domaine de la prévention du crime et du traitement des délinquants, notamment par la recherche scientifique, les publications et l'enseignement.

Voir pour plus d'informations :
http ://fondationinternationalepenaleetpenitentiaire.org/

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1 Traduction libre tirée de : United Nations, The United Nations and Crime Prevention, New York : United Nations, 1991, p. 3-4.

The IPPF Series

The International Penal and Penitentiary Foundation (IPPF) has a long history and can trace its roots back to 1872. It aims to promote studies in the field of the prevention of crime and the treatment of offenders, especially by scientific research, publications, teaching and international colloquiums. The IPPF's members are from around the world, are recognized experts in penal and penitentiary matters, and are either high judges, high officials of the prison system, or university professors. Recent publications of the IPPF regard, e.g., Prison policy and prisoners' rights, Minorities and cultural diversity in prison, and the Implementation of prison sentences and aspects of security.

Les activités de la FIPP

La Fondation internationale pénale et pénitentiaire (FIPP) est une institution vénérable dont les origines remontent à 1872. Elle vise à promouvoir les études dans le domaine de la prévention de la criminalité et le traitement des délinquants, plus particulièrement en menant des recherches scientifiques, en éditant des publications, des cours et par l'organisation de colloques internationaux. La FIPP compte des membres dans le monde entier, tous experts reconnus dans les matières pénale et pénitentiaire : hauts magistrats, hauts fonctionnaires du système pénitentiaire ou professeurs d'université. La FIPP a entre autres récemment publié Politiques pénitentiaires et droits des détenus, Minorités et diversité culturelle en prison, et L'exécution des sanctions privatives de liberté et les impératifs de la sécurité.

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