

Alternative measures to pre-trial detention in Europe: what else is there?

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What are alternative measures to pre-trial detention?

Alternatives to pre-trial detention (or remand prison) are measures of a procedural nature that allow the accused or investigated to live in freedom during the criminal proceedings, or in other words measures that allow suspects or accused persons to await the trial outside prison.

Which are they?

If we have a look around the world we find very different types of alternative measures to pre-trial detention. Among them, for example: bail bond, electronic monitoring, house arrest, separation from home -in cases of domestic violence-, prohibition of approaching or communicating with specific persons, prohibition of leaving a given area without authorization or of going to certain places, withdrawal of driving license, withholding of travel documents (passport and/or identity card), obligation to appear before the judge or another designated authority (also called periodic presentation), a promise to submit to the proceedings and not to obstruct the investigation, commitment to follow a specific treatment program or subjection to the care or supervision of a given person or institution, restorative justice programs etc. There is no *numerus clausus* list of alternative measures to pre-trial detention. Each State, each criminal justice system has different measures to impose as an alternative to preventive detention.

Advantages of the use of alternative measures to pre-trial detention

Several advantages can be highlighted in relation to the use of the alternative to detention measures: they optimize the social utility of the criminal justice system, maximize the use of the public and private resources available and they show lower rates of recidivism (in relation to prison),. But above all, these measures stand out for reducing the dissocializing effects and stigmatization derived from prison and are an important way of reducing overcrowding in prisons.

Overuse of imprisonment: pretrial detention and presumption of innocence

Certainly, the overuse of imprisonment and its detrimental effects on criminal justice systems, individuals and societies, has led most countries to implement alternative measures to prison at early stages of the criminal justice process. To combat the overuse of imprisonment it is necessary to consider the use of alternatives to prison before the sentencing stage.

In 2018, [Penal Reform International](#) stated that pre-trial detention is one of the main causes of overincarceration and prison overcrowding, and that it remains an enormous challenge for penitentiary systems, since around 30% of prison populations have not been convicted. Thus, leaving aside the strategy focused on the decriminalization of certain behaviors, one of the main strategies to reduce the overuse of prison measures has been to develop alternative measures to pre-trial detention.

Among other reasons, in addition to the dissocializing effects coming from the prison measures, it can be argued in favor of the use of alternatives to pre-trial detention that the accused or investigated has the right of presumption of innocence. This right is recognised at universal and European level to any arrested or detained person.

For this reason, pre-trial detention should always be a measure of last resort and be taken with adequate justification.

Culture of use of the pre-trial detention: some data

Nevertheless, a kind of culture of pre-trial detention still exists among penal systems. Despite the advantages and the right to presumption of innocence abovementioned, there are still judges and prosecutors who are reluctant to use alternatives to pre-trial detention more often: many times the main worry of the prosecutors and judges is to ensure the presence of the investigated or the accused at the trial, and to avoid any possibility of flight.

Organizations, like Fair Trail, claim that pre-trial detention is not always imposed as a last resort and is disproportionately imposed in relation to certain groups such as foreigners. On the other hand, some European projects (as, e.g., [PONT](#) or [Detour project](#)), show that there is a significant lack of alternative measures to provisional prison in penal systems.

According to the data provided recently by World Prison Brief, in 2020 there would be over three million people held in pre-trial detention and other forms of remand imprisonment throughout the world. Fortunately no EU country is among the countries with the highest proportion of the total prison population in pre-trial detention or remand prison. By continents, the average rates in each one are: America 97 per 100,000 of the national population, Asia 30, Africa 28.5, Europe 27 and Oceania 23. The world average rate is 38 per 100,000.

In the European context, according to [Space I](#)¹, 22% of the inmates held in European penal institutions are not serving a final sentence. Following the terminology of the Council of Europe, this means that 22% of the inmates are detainees placed in remand on custody (often referred to as detainees placed in pre-trial detention, or simply as pre-trial detainees).

Focusing on EU countries, according to the report of [Space I](#) and the data provided by [Prison Studies](#) at the beginning of 2019, approximately 23,26% of the prison population in the EU was in pre-trial detention (or remand prison).

It should be noted that at European level an important part of the population in pre-trial detention are foreigners. Specifically, in EU context the percentage of foreigners in remand prison² is approximately almost 60%.

This data show clearly the existence of an overuse of the pre-trial detention and highlight the important and urgent need to promote the use of alternative measures to provisional prison.

What can we do? Some recommendations...

In this context, one of the crucial strategies to be implemented by penal systems is the development of a wider range of alternative measures to pre-trial detention, not only to promote

¹ SPACE I project exists since 1983 and it was created by the Council of Europe. Its goal is to present comparable data on the populations of penal institutions within all the Member States of the Council of Europe. Visit: <https://wp.unil.ch/space/space-i/>

² this is, of the group of foreign inmates, the percentage in remand prison.

the use of this type of measures, but also to have a larger array of measures to avoid the use of prison during the pre-trial investigation. Countries like Spain do not consider electronic monitoring or house arrest among its alternatives measures to pretrial detention. .

The Tokyo Rules and the Bangkok Rules (2010) encourage criminal justice systems to provide a wide range of non-custodial measures allowing the accused to remain in the community and to promote conditions to avoid the overuse of pretrial detention.

More and newer measures should be considered. And other good practices at this respect should be explored in order to change the abovementioned culture of pre-trial detention. In Croatia, e. g., there is the option of implementing an alternative measure during the investigation phase of the criminal procedure (issued by the state attorney) instead of going to trial.

In this respect, new technologies offer today a wide range of possibilities to implement the supervision of a person, and leaving aside the risk of the overuse of this kind of control. The, use of electronic devices would always be less harmful and detrimental than prison. Anyway, it seems that new technologies are still a pending issue for many penal systems, especially in relation to the alternatives to pre-trial detention.

In the same line, restorative justice programs and measures are still far from being developed and used to its fullest extent as alternative measures to provisional prison.

In addition, promoting the use of alternative measures to pre-trial detention requires not only the enlargement of the range of measures but also to ensure its start-up and to allocate the resources to implement them: one of the main challenges in promoting the use of these measures is to guarantee that there is an adequate system in place at full capacity, in full operation, with sufficient funds and resources to allow the management, implementation and monitoring of alternative measures to preventive detention. The effective implementation of alternative measures to pre-trial detention requires a plurality of economic, logistical and technological measures. For example, supervision measures require personal resources (staff) for implementing them, and electronic monitoring requires a significant investment in new technologies.

In order to promote the use of alternative measure to pre-trial detention and ensure that this last is used as a last resort, other measures as limiting legal grounds for applying provisional detention or making a restrictive interpretation of them can be considered.

Certainly, some measures aimed at reducing the use of provisional prison may have an impact on promoting the use of alternative measures to imprisonment, such as:

- To reduce the legal deadlines for provisional detention. If the time that a defendant can be in provisional prison is further limited, this will force more speed to be carried out in cases involving prisoners and will often force the use of alternative measures to provisional prison.

- In this regard, it would be advisable to give preference to the substantiation of cases in which there is an accused or investigated in provisional detention

- To improve the system of public defenders. The lawyer can promote the application of alternative measures to provisional detention.

- To establish the need of prior hearings on the admissibility of pretrial detention and to require an in-depth analysis of the situation of the investigated or accused person to see if

provisional imprisonment is really necessary or if supervision can be executed through an alternative measure to imprisonment.

-To adopt strategies focused on the groups most vulnerable to preventive detention, like foreigners.

In this regard, it would be recommendable to lower the conditions for access to some of the alternative measures to provisional prison, such as the bail. Certainly, the bail conditions should be appropriate, reasonable and proportionate to the actual economic situation of the accused or investigated. Many awaiting trial are eligible for bail, but they cannot provide the required guarantees which, for certain groups, are really difficult to meet.

Finally, and with regard to the idea of developing strategies focused on vulnerable groups to pretrial detention, legal tools aimed at avoiding the provisional imprisonment of certain groups should be developed. Such is the case of Framework Decision 2009/829/JHA (FD 829). To avoid the over-representation of EU citizens in pre-trial detention and to provide these “foreigners” with alternatives to be implemented in their nationality or residence countries, the Council of the EU developed in 2008 the FD 829, on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This tool thus became an alternative to the indiscriminate use of the deprivation of liberty measures in the case of foreigners. Nevertheless, the FD 829 is not frequently used among EU Member States. One of the main reasons is precisely the lack of a large and flexible range of alternative measures to pretrial detention in the EU countries.

Promotion of the use of any legal or practical mechanism that aims at implementing alternatives to the pre-trial detentions is today, more than ever, necessary.

Conclusions

It is clear that there is still a long way to change the “culture of the use of pre-trial detention” and to develop to its fullest extent the use of alternative to prison in the first phases of the criminal procedure.

Nevertheless, important improvements are coming. The level of awareness about the need of the use of alternative measures to pretrial detention is increasing. Judges and prosecutors are increasingly aware of the need to use measures other than prison to control the accused in a criminal trial, non-dissocializing measures that allow the individual to remain in community, without breaking their social bonds.

On the other hand, the development of new technologies opens up a very positive outlook for us to carry out the supervision of the investigated and accused through means much less harmful than provisional detention. Other less used forms, such as restorative justice, are emerging more and more frequently as a better and more effective way of resolving conflicts, and undoubtedly better than prison, being a good tool to avoid the criminal trial itself.

We have the ideas, we have the means and we have the strength: let's promote the use of alternative measures to pre-trial detention in our beloved Europe!