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‘Pre-trial detention and prison overcrowding in Belgium’

1 Evolution of the use of pre-trial detention in Belgium

Prison overcrowding is a problem faced by various European countries and has been receiving the attention of both politicians and academics for some time.

In Belgium, like the rest of Europe, the overcrowding of prisons is an issue that has received a central place in penal policy and academic discussions on the prison system. At the beginning of 2003, the ‘historical’ milestone of a total daily population of 9,000 prisoners was exceeded in Belgium. An important category considered responsible for prison overcrowding is the group consisting of the pre-trial detainees. In 1999, the average daily number of pre-trial detainees was 2,297, or 26.9% of the total daily population (n=8,548).

The evolution of this population between 1980 and 1999 shows a striking increase (see figure 1). Between 1980 and 1999, the average number of pre-trial detainees included in the daily penal population increased by more than half (53%). This figure shows also that especially the increase in the length of the pre-trial detention is responsible for this situation. Except for a relapse at the end of the 1980s (from an index of 144 in 1988 to 130 in 1989 where index 100=1980) and a quite stable curve during the 1990s (1992-97) the general trend between 1980 and 1999 was a continuously increasing one. During this period the length of detention increased by no less than 58%. In addition, the length of detention had never before been as long as it was in 1998-99.

2 Pre-trial detention in European perspective

Looking at the use of pre-trial detention in a number of European countries (number of pre-trial detainees per 100,000 inhabitants), it can be seen that especially a number of Eastern European countries, led by the Russian Federation (174 per 100,000 inhabitants in 1997), have a high number of pre-trial detainees.



Nationaal Instituut voor Criminalistiek en Criminologie

Macedonia, Finland, Ireland and Iceland on the other hand show a quite limited to very low level of pre-trial detention (in 1997, 10 pre-trial detainees or less per 100,000 inhabitants). In 1997, more than half of Western European countries had a level of pre-trial detention that fluctuated between 15 and 35; only five West European countries had a higher degree of pre-trial detention, notably the Netherlands (36), Italy (36), France (37), Portugal (43) and Turkey (43).

With 32 pre-trial detainees per 100,000 inhabitants (in 1994 and in 1997), Belgium finds itself in the middle European bracket.

3 Towards a reduction of the population of pre-trial detainees in Belgium?

To reduce the number of pre-trial detainees in the prisons, different paths are possible. On the one hand, work can be done to reduce the *number of prison committals*, on the other hand a solution can be sought in limiting the *length* of pre-trial detention.

- 1) A simulation study that we performed concerning an increase in the pre-trial detention threshold had already indicated that an increase in this threshold from one year to three years would have virtually no effect (only 3%) on the size of the average daily population of pre-trial detainees.
- 2) Given that it is the length of pre-trial detention that is primarily responsible for the increase in the number of pre-trial detainees, the question then arises regarding what could be expected if the length of pre-trial detention were to be limited.

The idea of limiting the length of pre-trial detention is certainly not new. In fact, a number of European countries already have legal provisions limiting this term. In Belgium, on the other hand, pre-trial detention is not subject to an absolute maximum length. However, the appropriateness of maintaining an arrest warrant is assessed monthly by a judicial body.

In our study we examined what the effects of limiting the length of pre-trial detention might be on the size of the prison population. When a limitation in the length of pre-trial detention is contemplated, possibly by subjecting it to a legal maximum, it is essential to have in view the *number of detentions that exceed a specific threshold* (the maximum length to be introduced) as well as the *average length of the time that this proposed maximum is currently being exceeded*. Such information would allow calculating the effect on the average daily population of introducing a maximum length of pre-trial detention. The proportion of the daily population to possibly be 'saved' can be calculated using the formula $Stock = Flow * Length$. If we understand 'Flow' to be the annual number of detentions of long duration (greater than a stipulated length) and 'Length' as the length of time the period was exceeded (= difference between the average length of long detentions and the maximum period to be introduced), the result obtained indicates the 'Stock' that would no longer be a part of the average daily population should the maximum length be applied in the future.



This requires a cohort study in which the length of the pre-trial detention is calculated for a well-defined group of pre-trial detainees for each separate case. In our study we simulated the effects of a limitation of the period of pre-trial detention to 3, 4 and 6 months, for non-violent offences.

4 A simulation study: methodology

4.1 Data

In realizing such a cohort study, use was made of the data stored in the database of the prison administration (SIDIS database). The prison administration was asked to extract specific data regarding the legal status (detention status), the crimes committed and a few time variables (to calculate the length of the pre-trial detention) for *all persons confined as pre-trial detainee during the period 1996-2000*.

4.2 Measurement unit

The unit of measurement in our study was the *number of prison committals* (thus not the number of prisoners), which means that for prisoners with multiple separate periods of detention during the period under consideration (1996-2000), each period of detention was studied individually.

4.3 Calculation of the length of pre-trial detention

The global term of pre-trial detention (i.e., the total period of time before there is question of a definitive conviction, thus a judgment against which appeal is no longer possible) is calculated from the date of imprisonment until the date of release, or until the date of the change to a definitive status. Concerning detentions that were not yet concluded at the moment we started our analysis, the term of pre-trial detention was calculated until this latter date (which was 15 May 2001).

4.4 Detention paths

The population under study was classified into (six) different groups that correspond to the most logical (and most common) detention paths:

- Group 1: prisoners who were confined as **pre-trial detainee** (PTD), retained this status for the duration of their detention (i.e., did not yet appear before court for trial), and were released or still in custody on 15 May 2001;
- Group 2A: prisoners that were confined as **not definitively convicted** (i.e., persons convicted in first instance but awaiting a judgement after appeal) (NDC), underwent their detention with this status, and were released or still in custody on 15 May 2001;



Nationaal Instituut voor Criminalistiek en Criminologie

- Group 2B: prisoners who were confined as pre-trial detainee (PTD), remained contiguously in detention with the status of not definitively convicted (NDC), and were again released or still in custody on 15 May 2001;
- Group 3A: prisoners who were confined as pre-trial detainee (PTD), remained contiguously in detention with the status of not definitively convicted (NDC), and ultimately underwent their detention with the status of **definitively convicted** (DC);
- Group 3B: prisoners who were confined as not definitively convicted (NDC), and contiguously underwent their detention with the status of definitively convicted (DC);
- Group 3C: prisoners who were confined as pre-trial detainee (PTD), and contiguously underwent their detention with the status of definitively convicted (DC).

4.5 Criminal offences

With respect of the criminal offences the population under study was also categorized according to the offence for which they (as pre-trial detainee or not definitively convicted) were confined. Within the framework of our analysis, a *dichotomous classification* was used to group the cases according to whether the offence concerned the physical integrity of persons (violent crimes *versus* other criminal offences). The simulations made in our study are only relevant to the introduction of a maximum length for pre-trial detention for the category ‘other’ criminal offences: the justification for this is to be found in the fact that it may be assumed that such a limitation for this category of criminal offences is more societally acceptable.

Detentions in the category “infringement of physical integrity” include detentions for which at least one of the offences committed implied such harm to physical integrity. When the offence committed *only implied* criminal offences that included *no* infringement of physical integrity, the detentions were classified in the category of ‘other’. The description “harm to physical integrity” is interpreted very broadly and includes the following: (1) offences that contained no harm to physical integrity but could have had consequences at this level (e.g. abandoning a child), (2) unintentional violent offences like unintended assault and battery, (3) a number of offences characterized as “violent” by the nature and position of the victim (e.g. prostitution – recruitment of a minor), and (4) a number of offences for which there was no question of “violence” in the strict juridical sense of the word but in which harm to physical integrity must be assumed (e.g. indecent assault without violence).

5 Some important results

5.1 Main detention path

When we examine the distribution of detentions according to detention path (period 1996-2000), it appears that a bit more than half of the detentions (53.8%) were limited to a (short) period of pre-trial detention with the status of pre-trial detainee (group 1). The other detentions mainly concern periods for which the pre-trial detention status changes to a definitive status: group 3A represents approximately one fifth of the total number of



Nationaal Instituut voor Criminalistiek en Criminologie

detentions (20.2%), groups 3B and 3C a bit more than 10% each. 'Pure' periods of pre-trial detention (i.e. without changing to a definitive status) that include a period of detention with the legal status of not definitively convicted (groups 2A and 2B), are rather uncommon.

5.2 *Length of pre-trial detention*

5.2.1 Average length

Regarding the length of pre-trial detention, it can be said that the average length of the (continuous periods of) pre-trial detention (for all groups together) fluctuates around 80 days annually, with the exception of a somewhat lower level in 1997: 79.3 days in 1996, 75.4 days in 1997, 80.1 days in 1998, and 80.6 days in 1999.

5.2.2 Distribution by category of length

Most detentions have rather short periods of pre-trial detention (< 3 months). Approximately four out of ten detentions (38.9%) have a length less than one month, almost two out of ten (18.8%) detentions have a length between one and two months. Globally, 70% of the detentions have a period of pre-trial detention less than three months.

5.2.3 Category of length by detention path

There are many detentions with relatively short periods of pre-trial detention (76.1% < one month) especially in Group 3B (not definitively convicted that change to a definitive status) with groups 1 (pre-trial detainees only) and 2A (not definitively convicted only), approximately half of detentions have a period of pre-trial detention less than one month. Groups 2A (not definitively convicted only) and 2B (initial committal as pre-trial detainee, afterwards not definitively convicted), on the other hand, (also) have many detentions with a period of pre-trial detention of extremely long duration: 14.3% of detentions in Group 2A have a period of pre-trial detention greater than one year. For Group 2B, this is no less than 20.7%.

5.3 *Effects of limitation of the length of pre-trial detention*

The simulations that we performed in this regard concern *three different scenarios* in which a maximum limit for the length of pre-trial detention would be introduced for the *category 'other' criminal offences*. The limits were set at three, four and six months.

The average daily population of pre-trial detainees (including not definitively convicted) would be reduced by around 340 units with the introduction of a maximum length of pre-trial detention of three months for the category 'other' criminal offences. In this case, the number of pre-trial detentions with a length greater than three months is an average of 1,452 units annually; these detentions last an average of 174.4 days, which comes down to an average length of time of 84.4 days (= 174.4 days less 90 days, or three months) that the period was exceeded. According to the formula $Stock = Flow * Length$, this yields a saving of 340.4 places, i.e. $Stock = (1452 * 84.4) / 360 = 340.4$. This comes down to a 14.8% reduction in the average daily population of pre-trial detainees in 1999 (N=2,297).



Nationaal Instituut voor Criminalistiek en Criminologie

Limiting the maximum length of pre-trial detention to higher thresholds logically leads to less reduction in the average daily population: approximately 240 units with the introduction of a maximum of four months and a bit more than 120 units at a maximum of six months (always limited to the category 'other' criminal offences).

5.4 *Additional analysis*

Additional analysis was done on one year from the period in question (1996-2000), namely 1999. Subject to the hypothesis of limiting the maximum length of pre-trial detention to *three months*, and exclusively for the category '*other*' criminal offences, the following was examined:

- which prisons (housing pre-trial detainees) would primarily 'profit' from such a reduction in the daily population (it concerns the penal institutions where the initial confinement took place!),
- which criminal offences (among the broad category of 'other' criminal offences) were primarily represented among the cases affected by the limitation in the maximum length, and
- - via an additional study on individual prison files on a random sample - to what extent would the exclusion of illegal foreigners from any limitation in the length of pre-trial detention affect the "saving" obtained.

5.4.1 General effects of limiting the length of pre-trial detention

When a calculation is made of the "saving" that can be achieved in the average daily population via the introduction of a maximum length of pre-trial detention (three months, for the category 'other' criminal offences), it emerges that for the year 1999, in general a total reduction of 346.2 units can be obtained, a figure comparable to that obtained for all five years (1996-2000) together (N=340.4; *supra*).

5.4.2 Prison

- 1) With respect to the distribution of the calculated 'saving' by prison, it first appears that more than half of the total number of preventative detentions (detentions for both criminal offence groups together) are 'processed' by only three prisons: Forest (24.8% of the total number of detentions), Antwerp (19.0%) and Lantin (10.4%).
- 2) Secondly, the reduction of pre-trial detainees is not evenly distributed across the various institutions. The largest reduction can be obtained at the prison in Forest. A reduction of 156.5 prisoners can be expected for this institution, or no less than 45% (!) of the total expected reduction for all institutions together.
- 3) Finally it also emerges that the scope of the 'saving' can be explained by several factors, namely the number of committals and/or the average length of pre-trial detention.



Nationaal Instituut voor Criminalistiek en Criminologie

5.4.3 Criminal offence

Limiting the length of pre-trial detention would primarily affect the detentions for drug-related offences and theft.

No less than 39.1% (or 571 detentions) of the total number of detentions with a period of pre-trial detention greater than three months (N=1,461) concerns *at least* a drug-related offence (combinations with other offences are possible, except combinations with criminal offences against physical integrity). 32.9% of these detentions concern thefts.

Other offences quite strongly represented (> 10%) among detentions with a period of pre-trial detention greater than three months are formation of a gang (16.5%), other offences (14.4%), forgery (11.5%) and handling of stolen goods (10.5%).

5.4.4 Illegal foreign prisoners

Concerning the detentions in 1999 with a period of pre-trial detention greater than three months for the offences 'drugs' and/or 'theft', possibly in combination with other offences but without there being talk of harm to physical integrity, a study on individual prison files was also made to examine the extent to which they concerned prisoners of foreign nationality with no right to residency.

The intent was to study the impact of limiting the length of pre-trial detention (to three months) but *excluding* this category of prisoners with foreign nationality without the right to residency.

Limiting the length of pre-trial detention to three months in these cases (offences involving 'drugs' and/or 'theft' without harm to physical integrity) would result in a reduction in the average daily population of 237 units. Excluding illegal foreigners from this limitation to the maximum length of pre-trial detention brings about a sizeable reduction in the possible "saving" to the average daily population (at least for offences involving drugs and/or theft without harm to physical integrity). The total saving in the average daily population would then amount to a reduction of 118.2 prisoners.

6 Questions

Although this research puts forward some striking results, the question on how to understand the obtained results and on the possible impact of a limitation of the length of the pre-trial remains. First of all the question arises whether the proposed reduction of the population of pre-trial detainees has to be obtained either by way of a legal reform or by stimulating the acceleration of the (criminal justice) procedures, i.e. a reform of practice rather than law texts.

Secondly there's the question whether the estimated reduction (for the population of pre-trial and not definitively convicted detainees) can actually be achieved. On the one hand, it is not unthinkable that in the future the detention capacity "saved" through the limitation of the length of pre-trial detention would simply be lost when replaced with the legal status of definitively convicted (= *displacement effect*). On the other hand, one could also argue that the limitation of pre-trial detention to a maximum length would not cause displacement, but



Nationaal Instituut voor Criminalistiek en Criminologie

would rather have a *moderating effect on sentencing*, and in particular on the length of the prison sentences imposed by judges. In other words, since there might be a tendency for criminal judges to ‘cover’ the period of pre-trial detention by imposing sufficiently long prison sentences, the limitation to the maximum length of pre-trial detention should result in shorter prison sentences: a reduction of the maximum length of pre-trial detention matter of factly produces shorter periods of pre-trial detention that need to be ‘covered’ by the sentence itself. It is difficult to predict whether the “saving” calculated in this study will be confirmed in practice. After all, some aspects are also influenced by the effects such a limitation will have on the sentencing practice. Shorter periods of pre-trial detention could nevertheless have a favourable effect on release policy, in the sense that this would avoid the eligibility date for early release already being exceeded at the end of pre-trial detention, or would go a long way towards minimising the possibility for the transgression of this eligibility date.

Last but not least, also the issue of illegal foreigners among pre-trial detainees deserves particular attention. As appears from our study, a massive reduction in the “saving” could be caused if illegal foreigners are excluded from the measure limiting the length of pre-trial detention which must be taken into account. Presently, *political solutions* to this appear to be sought mainly in collaboration agreements stating that foreign pre-trial detainees with no permanent ties to Belgium are to be transferred to the authorities of the country of origin in order to be tried there. Without going into any more detail regarding to this policy, and even though defensible in the attempt to reduce the (Belgian) prison population, these types of measures raise a number of questions, such as concerning the continuity of the enquiry (and the independence of the judiciary), the possibilities for victims to enforce their rights abroad, and potential additional costs for the victims and/or the countries involved (translation of parts of the judicial file, etc.). Maybe international collaboration agreements, such as the European arrest warrant, can also put pressure on the use of pre-trial detention insofar as the mutual recognition of legal judgements reduces the risk fleeing justice: greater confidence concerning the actual application of the punishments finally imposed, implies that it is less necessary to take foreign suspects into pre-trial detention for longer periods of time.

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