



PRE-TRIAL DETENTION:

ITS USE AND MISUSE IN TEN COUNTRIES

This brief sets out the main findings and recommendations on the use of pre-trial detention from research conducted in 2018-2019 by the Institute for Crime & Justice Policy Research (ICPR) and its research partners. The [full report](#) and all source references can be found at: https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf

The research forms part of a wider project, 'Understanding and reducing the use of imprisonment in ten countries' (or 'the ten country project'). The project focuses on a diverse group of jurisdictions spanning five continents:

- Kenya and South Africa in **Africa**
- Brazil and the United States in the **Americas**
- India and Thailand in **Asia**
- England and Wales, Hungary and the Netherlands in **Europe**
- Australia in **Oceania**

The ten country project aims to advance understanding of the factors driving high imprisonment levels and to devise strategies to curb the unnecessary use of custody. While the research mainly focuses on the ten countries, the issues addressed and our strategies for tackling them have global relevance. This brief and the full report draw on the following main sources of information:

- pre-trial detention statistics held on ICPR's [World Prison Brief](#) database;
- analyses of the legal framework governing pre-trial decision-making in the ten countries;
- semi-structured interviews with 60 experienced criminal defence lawyers across the ten countries.

Terminology

Pre-trial detainee: Someone who, in connection with an alleged offence, has been deprived of their liberty following a judicial or other legal process, but not yet definitively sentenced. The person could be at any of the following stages:

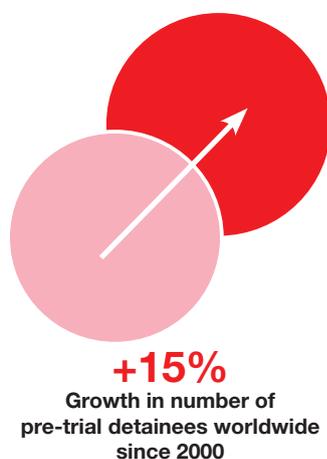
- the 'pre-court' stage: the decision has been made to proceed with the case, and further investigations are in progress or a court hearing is awaited;
- the 'court' stage: the court process (involving determination of guilt and/or sentence) is ongoing;
- the 'convicted un-sentenced' stage: the person has been convicted at court but not yet sentenced;
- the 'awaiting final sentence' stage: a provisional sentence has been passed, but the definitive sentence is subject to an appeal process.

(Not all of the above stages are applicable in every case or every legal system.)

Remand prisoner: Used interchangeably with 'pre-trial detainee'

Remanded in custody: Ordered to be held in pre-trial detention or 'on remand'

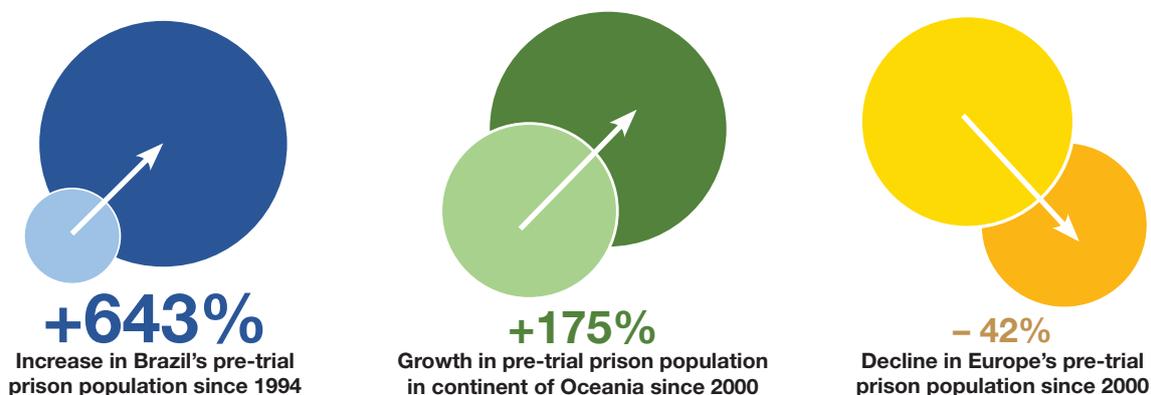
Bail: Someone who is 'released on bail' before or during any of the above stages is not held in pre-trial detention pending conclusion of the case. They can either be released without conditions, or have conditions attached (by the police or the court) to their release. A common bail condition is payment of a sum of money, which is forfeited if the person then absconds. This money is itself called 'bail', as in: 'The court set bail at US\$ 500'.



The data

There are around three million pre-trial detainees worldwide, representing around one third of all prisoners globally. Between 2000 and 2016, pre-trial detainee numbers rose by 15% overall, but some countries and regions saw much larger increases than this in their pre-trial prison populations. The biggest increases in pre-trial populations were seen in Oceania, the Americas and Asia. The only continent where the total pre-trial population decreased in size over this period was Europe.

Our World Prison Brief website holds pre-trial data on almost all countries in the world but there are currently ten countries (the largest being China) which do not publish any data on their pre-trial detainee populations.



Why should we be concerned?

Prison overcrowding: The unnecessary use of pre-trial detention is a major but largely preventable cause of prison population growth and overcrowding. Prison overcrowding damages the health and the rehabilitation prospects of prisoners; it also carries grave risks for public health. Two thirds of all countries worldwide currently have overcrowded prison systems. Among the ten countries in our project, only one – the Netherlands – is not running its prison system above official capacity.

Human rights: Pre-trial detention engages several distinct rights protected by international law:

- The right against torture and inhuman and degrading treatment: this will be infringed if conditions are unsafe, insanitary or violent.
- The right to liberty: everyone has the right not to be detained arbitrarily or for excessive periods.
- The right to private and family life: even a short period in detention disrupts family and private life and the ability to earn a living.
- The right to a fair trial and the presumption of innocence: in prison it is harder to consult a lawyer, challenge detention or prepare for trial – and easier to be pressured into confessing or accepting plea deals.

Economic and social harm: Pre-trial imprisonment carries higher costs than less restrictive measures for ensuring trial attendance. The main direct cost is that of imprisonment itself: in England & Wales, the daily cost of a prison place is seven times that of electronic monitoring in the community. Indirect costs include lost productivity and income tax revenues; and burdens placed on the state when the prisoner cannot provide for or look after family members or, after release, when s/he cannot find work or accommodation.

Time in prison also raises the risk of future offending. In prison, people are more likely to form associations that could lead to future criminal activity. They lose the benefit of protective factors known to support desistance from crime, such as family relationships and work. They may be forced into debt. Being in prison disrupts progress in tackling the root causes of offending, such as substance use or mental health problems. Pre-trial prisoners usually have no access to work, rehabilitation programmes, education or training.

The law: In recognition of the severe consequences of the misuse of pre-trial detention, its use is strictly limited (at least in theory) by international and regional laws and standards. These are mirrored in national legal frameworks, although to different degrees.

Why is pre-trial detention still being misused?

Our research sought to understand why pre-trial detainee numbers are still as high as they are in much of the world, despite laws that should ensure remand in custody is a measure of last resort. We used three hypothetical cases (or vignettes) as a framework for our research. The first vignette concerns a burglary by a man with previous convictions for similar offences; the second, a drug importation by a woman from a less developed country; and the third, an intentional homicide by a young man.

First we analysed the laws and policies that would, in theory, govern custodial decision-making in such cases in the ten countries. Then we interviewed defence lawyers to find out how, in practice, decisions about possible pre-trial detention would be made in the three cases, and to understand the factors – legal as well as extra-legal – that tend to influence outcomes in similar cases and more broadly.

Causes of pre-trial injustice

Our research has shown that a wide range of factors combine and conspire to bring about injustice at the pre-trial stage. Some relate principally to the law and policy on pre-trial decision-making and to the social context in which the law is applied, while others are more to do with the operation of the criminal justice system and the roles and practices of the main actors in the system. Many of these factors are closely intertwined, as the following summary shows.

(1) Law in context

We found that all ten countries' legal systems contain provisions to protect defendants' rights to liberty and the presumption of innocence, requiring the court to be satisfied on various grounds before ordering pre-trial detention. Often these provisions are backed up by others enabling remand decisions to be challenged and regularly reviewed.

Yet when presented with the three vignettes, the lawyers overwhelmingly said that pre-trial detention in such cases (and often more generally) is, in effect, the **norm rather than the exception**. The lawyers considered that judges' strong tendency to remand in custody usually comes about because of the very wide discretion that they have at the pre-trial stage. Less commonly, judges do not apply laws or policies designed to limit the use of remand. Some lawyers also referred to legislation reducing the scope for pre-trial release in some circumstances.

While legal provisions clearly matter in that they lay down the principled framework for pre-trial decisions and for the safeguarding of rights, there are wider political and cultural factors at work in shaping outcomes. Lawyers in several countries said the prevailing public discourse on crime and criminals influences pre-trial decision-making and the use of discretion. This was often linked to populist or conservative political rhetoric, to sensationalist crime reporting, and to media (and social media) pressure on judges to be tougher and to tackle perceived impunity.

Poverty, social status, race and nationality were all seen as factors that could influence outcomes and make pre-trial detention more likely in individual cases. Defendants are routinely denied conditional release because they cannot afford to pay bail at the level set by the police or the court, or are unable to produce evidence of a stable home life or job. Another key factor is previous convictions, which can often mean pre-trial detention for someone who would otherwise have been released.

(2) Criminal justice machinery

Structural weaknesses in criminal justice systems: Pre-trial detention can be unnecessarily used (or extended) simply because justice systems are outmoded, under-resourced and over-burdened. Lack of court infrastructure, insufficient numbers of judges and other personnel, and unmodernised case management systems can all lead to long backlogs of cases. This, in turn, can result in people spending far too long in pre-trial detention. When judges are overwhelmed with cases, they are more likely to err on the side of caution and detain defendants. If alternatives to custody are not sufficiently funded and supported, judges will be more likely to set bail at unaffordable levels and remand those who cannot post bail.

Judges: The role of judges has emerged from this research as the key factor in pre-trial outcomes across the ten countries. While they must comply with the law, judges also exercise discretion in weighing information about the alleged offence, the defendant's circumstances and any related risk factors. Judges are human and their personal attitudes are bound to affect the exercise of discretion, as is the prevailing political and cultural context. Lawyers said that some judges' lack of life experience, legal skill, seniority, courage, humanity or engagement with the real world prevented them from reaching decisions objectively and in accordance with the law. They also complained that judges often failed to give concrete reasons for their decisions to remand in custody and were too ready to accept the prosecution's case for remand.

Prosecutors and police: Although prosecutors can play a positive role in averting the risk of unnecessary pre-trial detention, the research has highlighted a strong tendency for prosecutors to apply for remand in custody almost as a matter of routine. Police and prosecutors often have little or no discretion to divert less serious cases away from prosecution. Police in some countries are incentivised to make high numbers of arrests including for relatively minor drug and other offences. This can lead to unsustainable volumes of cases passing through courts, producing delays and backlogs and leaving less time for proper investigation of risk and for reasoned decision-making by the courts.

Defence lawyers: The majority of people accused of a crime cannot afford quality legal representation, which can adversely affect their prospects of avoiding detention. Legal aid systems are often under-funded and legal aid lawyers so overwhelmed with work that they cannot give sufficient attention to pre-trial hearing preparation.

Recommendations

Our recommendations follow directly from our research on pre-trial legal and policy frameworks in the ten countries. They are not a comprehensive list of matters to be addressed to prevent pre-trial injustice: other bodies at national and international levels have produced more detailed advice and guidance, much of it echoed by our own findings. (Full references can be found in the report, along with a list of all relevant international standards.)

Laws and policies to prevent misuse of pre-trial imprisonment

- (a) Ensure that the law on pre-trial detention fully reflects international standards, is clear, and does not contain conflicting provisions.
- (b) Rule out use of pre-trial detention where there is no likelihood of a custodial sentence if the defendant is convicted.
- (c) Limit the overall time that a person can be detained pre-trial.
- (d) Require judges, when imposing or extending pre-trial detention, to provide concrete, case-specific reasons for their decision, in writing.
- (e) Mandate the consideration of alternatives to pre-trial detention.
- (f) If money bail is used, require that it is set with proper regard to the defendant's means.
- (g) Require the prosecution to disclose to the defence the case file or the principal evidence on which the charges are based, prior to the first pre-trial detention hearing.
- (h) Ensure that time spent in pre-trial detention is always deducted from any custodial sentence.
- (i) Avoid introduction of laws and policies likely to increase the misuse of pre-trial imprisonment: examples of these can be found in our main report (at page 33). Go to https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf.

Criminal justice systems

- (j) **Resourcing:** All constituent parts of the criminal justice system should be sufficiently resourced and equipped to handle the case-loads coming into the system, thus reducing risk of unnecessary delays in the progress of cases. This includes: the police and forensic services; prosecutors; the judiciary and the courts; interpretation and translation; defence lawyers; and the probation service.
- (k) **Alternatives to pre-trial detention:** The full range should be available, not only in law and policy, but in practice on the ground: regular reporting at police stations, surrendering of passports, house arrest, geographical bans, electronic monitoring, and bail hostels or other premises for use by defendants awaiting trial.
- (l) **Data on use of alternatives:** Data should be collected on numbers of pre-trial decisions resulting in custody and in the use of alternative measures. Data should be analysed regularly, to ensure availability of alternatives matches demand.

Judges and magistrates

- (m) **Training:** There must be familiarity with the national and international provisions relating to pre-trial detention as a measure of last resort, as a minimum. Judges should be trained on alternatives to pre-trial custody and the measures available in the local area.
- (n) **Diversity:** Judges should be drawn from all social groups, to ensure they reflect, as far as possible, the social make-up of the communities they serve. This will help limit the risk of biased, discriminatory, uninformed or disengaged decision-making.
- (o) **Awareness of prison conditions:** To ensure judges are aware of the human – and public health – consequences of prison overcrowding and under-resourcing, they should be required to visit prisons in their state or region at least annually, to observe the conditions in which remand prisoners are held.
- (p) **Public understanding:** Judges would benefit from better public and media awareness of the basic principles governing pre-trial decision-making, including the right to be presumed innocent and detention as a last resort. Information on government and court service websites could reduce the risk of unfair criticism of judges, including in rare cases when defendants commit offences while on bail.

Prosecutors and police

- (q) **Training and support:** Prosecutors should be trained on the national and international provisions relating to pre-trial detention as a measure of last resort, and on alternatives to pre-trial custody.
- (r) **Independence and resources:** Prosecution services should be independent of state control and be properly resourced. This will make it more likely that prosecutors will carry out proper, evidence-based assessments of risk, rather than automatically seeking remand in custody.
- (s) **Discretion:** In some legal systems it may be possible to give prosecutors and police more discretion to divert cases away from the criminal justice system altogether at the pre-trial stage. This might be appropriate when a treatment-based intervention would be more suitable or where an administrative or civil law penalty, reprimand or warning would suffice.
- (t) **Police pay:** Incentivising police with bonuses for arresting suspects is generally inadvisable. It is preferable to raise police salaries to levels at which the temptation to seek bribes will reduce, and to redouble efforts to challenge institutional impunity and eradicate corrupt practices.

Defence lawyers

- (u) **Legal aid:** There must be adequate funding to ensure that people who need legal aid receive it promptly, across all geographical areas.
- (v) **Training:** Lawyers who defend clients in criminal proceedings must be adequately trained not only on the law and procedure relating to pre-trial detention and fair trial rights, but also on practical ways of mitigating the need for remand in custody, for example, by liaising with social and health services to ensure that clients' health or other social needs are met.
- (w) **Monitoring:** The quality of lawyers' advice and representation at pre-trial hearings should be monitored to ensure it meets acceptable national standards.

Overarching points

The above recommendations should be read in the context of two overarching points:

1. It is clear that pre-trial detention is not, in reality, viewed by policy makers, judges or prosecutors as an exceptional measure, to be used only as a last resort. If it were, we would see far fewer people remanded in custody, for much shorter periods. There would be greater use of alternatives, including electronic monitoring and similar measures. In view of the enormous costs of imprisonment to the public purse and the harms associated with its over-use, this should be a matter of concern for governments, judges and other practitioners.
2. The misuse of pre-trial detention is not an isolated problem or one related largely to legal provisions and their application. It can only be addressed as part of wider cross-sector strategy aimed at reducing resort to custody overall. In many countries, the range of offences for which custody can be imposed has widened and there has been a steady increase in maximum custodial penalties available to judges and imposed by them. Tougher punishments have had no demonstrable effect on reducing crime, but they have helped bring about a global prisons crisis.

This research brief and the accompanying full report were published in November 2019. To read the full report, [Pre-trial detention and its over-use: evidence from ten countries](https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf) go to https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf or to learn more about the project, visit [ICPR project page](https://www.icpr.org.uk/theme) (<https://www.icpr.org.uk/theme>). To access the latest information on prison populations worldwide, visit ICPR's [World Prison Brief](http://prisonstudies.org/) database (<http://prisonstudies.org/>).

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