To have your cake and eat it too

A short history of the EU's failure to harmonise pre-trial detention

Joep Lindeman

1 Introduction

John Vervaele has played a pivotal role in the research conducted under the umbrella of the Utrecht School of Law. He was one of the founding fathers of the RENFORCE research program, which has consistently placed the EU at the centre of its research. John's interests, however, have always been broader, which is why he has also been a much-appreciated member of the Montaigne Centre for Rule of Law and Administration of Justice. He has written valuable and unique publications, for example on human rights developments and transitional justice in Southern America, and he has fuelled the founding and development of our research programme with important insights. However, I do not write this contribution solely from my perspective of programme leader of the Montaigne Centre. Ever since my years as a student in the 1990's, John Vervaele has been one of the standard bearers of the Willem Pompe Institute for Criminal Law and Criminology. At first as a teacher, later as an inspirer and a supervisor, and most importantly as a generous and good-humoured colleague.

The RENFORCE programme is without a doubt the main player of the Utrecht School of Law's research into the EU, but this is not to say that the EU is no research subject of the Montaigne Centre – on the contrary. Obviously, when conducting research into the rule of law and the administration of justice, one cannot ignore EU instruments, such as the EU Charter of Fundamental Rights or the directives harmonizing procedural safeguards in criminal proceedings, adopted after the conclusion of the Stockholm Program of 2009. Montaigne researchers have been involved in comparative research projects, funded by the European Commission, on pre-trial detention. Being one of those researchers, I would like to reflect on the EU's approach of pre-trial detention. Or rather, the lack of such an approach. There are many 'success stories' as to the harmonisation of criminal (procedural) law within the EU, such as the directives on procedural

safeguards, that often build upon consistent case-law of the ECtHR. Some aspects of criminal proceedings have turned out to be a bit of a headache, though, the rules on pre-trial detention being one of those. On the one hand, the European Arrest Warrant (EAW) has secured, amongst others, a practice in which pre-trial detention can provisionally start in each EU-state, not always with as much judicial scrutiny as a strictly national application of pre-trial detention would require. On the other hand, though, attempts to harmonise *national* rules on pre-trial detention – and, e.g., promote the use of alternatives for a detention order – so far have failed. This seems odd, as the ECHR and the ECtHR's case-law on pre-trial detention has been consistent as well and harmonising rules and procedure in this regard would have made sense. In the following, I will shortly point at important aspects of the ECtHR case-law that could be the object of such harmonisation (para. 2), after which I will look back in time as I go into the development of the *Corpus Juris*, which tried to introduce a provision on pre-trial detention in the EU legislation. I will then show that this part of the *Corpus Juris* has not been followed up (contrary to some important other features) (para. 4) and that up until today, those striving for minimum rules on pre-trial detention in the EU are disenchanted (para. 5).

2 The ECHR

Article 5 of the ECHR, read in conjunction with the case-law of the ECtHR, has always been clear: the presumption of innocence, proportionality and subsidiarity are key-elements in the general principles of the court.[1] The court consistently holds that persons charged with an offence must always be released pending trial; until conviction, they must be presumed innocent unless the state can show that there are 'relevant and sufficient' reasons to justify the continued detention. In that regard, a 'reasonable suspicion' is a *condicio sine qua non* for the validity of the (continued) detention, but, after a certain lapse of time, it no longer suffices. Continuing detention pending trial can be justified only if there are specific indications of a 'genuine requirement of public interest', notwithstanding the presumption of innocence, such as: (a) danger of absconding; (b) the risk of collusion; (c) risk of reoffending; or (d) risk of public disorder. These requirements also implicate that the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence: justification for any period of detention, no matter how short, must be convincingly demonstrated. Additionally, when deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial. Detention of an

1. See, among many others, *Buzadji v. Moldavia*, EHRM (GC) 5 July 2016, nr. 23755/07, § 87 *et. Seq.*; *Selahattin Demirtaş v. Turkey*, EHRM 20 November 2018, nr. 14305/07 § 239.

individual is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. Pre-trial detention is a temporary measure, and its duration must be as short as possible.

This comprehensive case-law of the ECtHR notwithstanding, comparative research projects have shown that in a lot of EU-member states pre-trial detention is used rather extensively, I will discuss this in more detail in para. 4, but will firstly go into the *Corpus Juris*.

3 The *Corpus Juris* and pre-trial detention

In 1995/1996, experts on EU law and criminal law developed the *Corpus Juris*, with the aim to introduce provisions regarding substantive criminal law and criminal procedure to protect the financial interests of the European Union. Of course, this *Corpus Juris* has been of pivotal importance for the realisation of the European Arrest Warrant (EAW) and the European Public Prosecutor's Office (EPPO). Not all proposals survived, though: the *Corpus Juris* hinted at a European 'judge of freedoms' as well, who could, for example, order pre-trial detention.

The first version of the *Corpus Juris* came to light under the supervision of the late Mireille Delmas-Marty. As was to be expected, extensive debates ensued which gave rise to the launch of a follow-up project (*Suivi du Corpus Juris*). Under the direction of Delmas-Marty and John Vervaele, this study recommended 'effective, dissuasive and proportionate protection of Community interests' and 'looked at the possible impact of the *Corpus Juris* with regard to the present situation in national law, from the points of view of the need to bring the *Corpus Juris* into force and also of the conditions necessary for the feasibility of its recommendations'.[2]

The initial version of the *Corpus Juris* included, amongst others, proposals to harmonise several criminal offences (such as money laundering) and to harmonise investigation powers. Article 20 § 3 in conjunction with Article 25 § 2 proposed to allow the EDPP[3] or EDelPP[4] to request the so-called 'judge of freedoms' to order 'remand in custody' for six months, renewable for 3 months. The order would require 'reasonable grounds to suspect that the accused has committed one of the offences (…) or good reasons for believing it necessary to stop him from committing such an offence or from fleeing after committing it'. The judge of freedoms was to check the lawfulness and regularity of this pre-trial detention as well as its necessity and proportionality.

2. J.A.E. Vervaele, 'Foreword', *in* M. Delmas-Marty & J.A.E. Vervaele (Eds.), *The implementation of the corpus juris in the member states. Volume I*, Antwerp/Groningen/Oxford, Intersentia, 2000, pp. v-viii.
3. Director of European Public Prosecutors.
4. European Delegated Public Prosecutors.

This part of the initial proposal was criticised, mainly because the threshold for application of pre-trial detention was considered to be too low. It was deemed 'unacceptable' that pre-trial detention would already be possible solely on the basis of a suspicion or – alternatively! – in order to prevent the accused from committing other offences. A reasonable suspicion should, at the least, *accumulate* with a fear of reoffending. Additionally, the lack of concretisation of the principle of proportionality and the lack of priority of alternative measures to detention were also criticised.[5] In hindsight, one wonders how it was even possible that this proposal ever came to see the light of day: these principles of proportionality and subsidiarity were already well established in ECtHR case law on pre-trial detention in the late 1990s.

Taking these comments into account, the new proposal (2000) for the *Corpus Juris* (the so-called Florence draft) provided a more nuanced provision:[6]

> **Article 25quater – Coercive measures: judicial control and pre-trial custody**
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> 1. A person arrested or prosecuted in connection with the offences defined above (Articles 1 to 8) can be subjected to coercive measures such as remand in custody or placement under judicial control.
>
> 2. These measures are ordered by the judge of freedoms, after the EPP has informed him of the charges (cf. Article 20(3t)). The judge of freedoms orders the measures when he has good reasons to suspect that the accused person has committed one of the offences defined above (Articles 1 to 8) and when he is convinced that such a measure is necessary in order: to stop the accused person from evading justice; or to stop a continuation or repetition of offences; or to preserve evidence or prevent witnesses from being pressurised.
>
> 3. The accused person shall be held in pre-trial custody only when all other means of control appear insufficient, and only for a period strictly justified by the grounds mentioned in (2). The maximum duration for pre-trial detention is six months, renewable for three months (…).

Notwithstanding the still rather concise wording, this proposal was much more in line with the basic principles of ECtHR case-law. However, as we know today, this provision for pre-trial detention never materialised. Amongst others, a supranational judge ordering pre-trial detention turned out to be a bridge too far. In the 2001 Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (Com (2001) 715), the European Commission already rejected the idea of a 'Community judge of freedoms' as a counterpart for the European Prosecutor (p. 61), preferring judges of freedom in each national system. After that, the matter was left untouched for a long time. In the meantime, the EAW entered into force quite quickly (in 2004), whereas the EPPO took much longer to become operational (2021). Judicial

5. S. Manacorda, 'Criminal procedure I: Articles 20-26', *in* M. Delmas-Marty & J.A.E. Vervaele (Eds.), 2000, pp. 327-346, pp. 331-332.
6. 'Appendix III: Corpus Juris 2000', *in* M. Delmas-Marty & J.A.E. Vervaele (Eds.), p. 206.

authorities have eagerly used the EAW since it became available and an increase in possibilities of pre-trial detention in transnational dimensions has been one of its side-effects. Meanwhile, the EPPO regulation holds a rather modest provision on pre-trial detention: Article 33 simply states[7] that '[t]he handling European Delegated Prosecutor may order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases'. This, of course, leaves all decisions on pre-trial detention to the discretion of national judges.

4 The failure to come to harmonisation of minimum norms for pre-trial detention

In the wake of the development of a Roadmap for strengthening procedural rights of suspects, the European Commission issued a Green Paper on detention in 2011, in which it addressed the issue of pre-trial detention and the need to improve mutual trust in this regard.[8] As to pre-trial detention, the Green Paper problematised the wide variety of definitions, terminology and practice as well as the differences in its duration. Although a number of member states, as well as scholars and interest groups, agreed that these perceived problems required EU legislation, other member states opposed and no initiatives were taken.[9] It was anticipated that in the follow-up of the Stockholm programme, new initiatives regarding minimum standards on pre-trial detention would take shape.[10] This did not happen, but in the meantime, the European Commission funded multiple research projects on the practice of pre-trial detention in EU countries, such as the research project run by Fair Trials.[11] This NGO pointed at problems concerning detention conditions in relation to the execution of European Arrest Warrants. Furthermore, reporting on national practice, its research showed a rather extensive use of pre-trial detention, which was attributed to practices of rushed proceedings with too little scrutiny, sometimes insufficient legal assistance, formulaic

7. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.
8. Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327.
9. J.M. Beneder, 'Detentie in de Europese Unie', *Sancties*, 2018/12, pp. 75-83. Also see H. De Suremain, N. Fischer, C. Boe *et al*., *Bringing Justice into Prison: For a Common European Approach. White Paper on Access to Justice for Pre-Trial Detainees. A Report Based on Comparative Analysis and Empirical Studies in Nine EU Countries by the Research Project EUPRETRIALRIGHTS.* Paris: European Prison Litigation Network, 2019. Retrieved from www.prisonlitigation.org/white-paper-pretrial/, p. 22.
10. De Suremain *et al*., 2019, p. 23.
11. Fair Trials, *A measure of last resort? The practice of pre-trial detention decision making in the EU*, 2016, retrieved from www.fairtrials.org/publications/ For the Dutch country rapport, see J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-trial detention in the Netherlands. Legal principles versus practical reality. Research report*, The Hague: Eleven International Publishing, 2016.

substantiation of decisions and a reluctance to use alternatives for pre-trial detention. Fair Trials urged the EU to adopt a 'legislative instrument that is binding on Member States and codifies existing ECHR standards which are currently inaccessibly buried in an ever-growing corpus of ECtHR case law.'[12]

In 2017, researchers from the Montaigne Centre participated in a comparative research project, again financed by the EU, into the use of alternatives for pre-trial detention in a number of EU member states.[13] This so-called DETOUR project resulted in a comparative report that confirmed that pre-trial detention was used extensively in the majority of the countries in the research – Ireland being a notable exception.[14] It was found that some countries used pre-trial detention predominantly for the purpose of prevention (to avoid reoffending), which could indicate a culture in which pre-trial detention is used as a tool for 'pre-sentencing'. In other countries, pre-trial detention was mainly used to secure criminal investigations (to ensure that the suspect would indeed appear at trial).[15] The research project provided abundant qualitative data on the use of alternatives, or – rather – the lack thereof. In line with the Fair Trials research, we found that alternatives for pre-trial detention were not used on a very wide scale in most countries. Time constraints in the proceedings, deficiencies in the provision of relevant information on personal circumstances as well as a wide range of organisational hurdles were found to be common denominators in this regard. Again: recommendations were made to the EU, this time not solely pertaining to legislative activity, but first and foremost to engage in activities that would raise the awareness in all EU-member states as to the instrumental and punitive culture (described as 'hidden and extra-legal motives') in relation to pre-trial detention.[16]

The DETOUR research project also focused on the use of the so-called European Supervision Order (ESO), introduced in FD 2009/829.[17] One of the aims of this FD is to allow for conditional suspension of pre-trial detention in a transnational setting (for example: the pre-trial detention of a German citizen who is prosecuted in the Netherlands can be suspended under certain conditions. While awaiting his trial in the Netherlands, the suspect may return to Germany where the conditions for his release will be monitored by German authorities). This aim might seem appealing, but in practice there are found to be too many administrative hurdles and too little incentive for prosecutors and judges to go overcome these hurdles.

12. Fair Trials 2019, p. 2.
13. Austria, Belgium, Germany, Ireland, Lithuania, The Netherlands and Romania.
14. W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes & M. Rogan, *DETOUR: Towards Pre-trial Detention as Ultima Ratio. Comparative Report*, Vienna: Institute for the Sociology of Law and Criminology 2017. Retrieved from https://dspace.library.uu.nl/handle/1874/362897.
15. Hammerschick *et al.*, p. 14.
16. DETOUR: *Recommendations*, retrieved from www.irks.at/detour/publications.html.
17. Framework Decision 2009/829/JHA 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.

The bureaucracy is seen as a deterrent.[18] Even in the Netherlands, where the public prosecutor's office invested significantly in facilitating the ESO, the number of cases has been negligible.[19] In other research, the ESO has been called 'a failure'.[20] This half-hearted use of the possibilities of provisional release seems to contrast with the abundant use of the EAW, also in relation to pre-trial detention. After all, the EAW brings a fair share of procedural hurdles as well. When it comes to provisional detention, EU Member States seemingly have been all too prone to be having the cake and eat it too.

This utilitarian view might backlash, though. Differences between member states in detention conditions for pre-trial detainees can lead to a reluctance to execute an EAW and surrender the requested person.[21] The same can be said for other potential threats to fundamental rights of suspects. Another comparative study that was co-funded by the EU (and in which researchers from the Montaigne Centre were involved) demonstrated that access to justice for pre-trial detainees can be complicated. As such, detainees are hindered in addressing poor detention conditions and it can be difficult for lawyers to come to a proper preparation of a criminal trial when their clients are detained.[22] In order to maintain the efficient system of surrender, mutual trust in the national practices of pre-trial detention is of the utmost importance.

5 How to come to meaningful harmonisation?

While it could be argued that the Stockholm programme-directives have, to some extent, led to harmonisation in national pre-trial detention proceedings (for example Directive 2012/13/EU on the right to information, that holds a provision (Art. 7(1)) on disclosure of relevant parts of the case-file during the pre-trial proceedings[23]), this did not lead to significant changes in practice. As such, it is no surprise that organisations such as Fair Trials, the Prison Litigation Project and the European Criminal Bar Association keep insisting that minimum standards for

18. Hammerschick *et al*., 2017, p. 67.
19. J.M.W. Lindeman, M.M. Boone & P. Jacobs, 'De praktijk van de Europese toezichtmaatregel: begin van een meeromvattende invloed van de EU op de voorlopige hechtenis?', *Strafblad*, 6, December 2018, pp. 30-34.
20. A.M. Neira-Pena, 'The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security', *European Papers* 5, 3, 2020, pp. 1493-1509.
21. E.g., CJEU 5 April 2016, *C-404/15 and C-659/15 PPU (Aranyosi & Căldăraru)*. Also, see De Suremain *et al*., 2019.
22. De Suremain *et al*., 2019; P. Jacobs & J.M.W. Lindeman, 'De tenuitvoerlegging van de voorlopige hechtenis. Belemmerend voor of juist in dienst van de voorbereiding van de strafzaak?', *Strafblad*, 2, 2019, pp. 6-14.
23. A. Pivaty & A. Soo, 'Article 7 of the Directive 2012/13/EU on the Right to Information in Criminal Proceedings: A Missed Opportunity to Ensure Equality of Arms in Pre-Trial Proceedings?', *ECCL*, 27, 2019, pp. 126-154.

pre-trial detention are imminent.[24] Scholars such as Baker, Harkin, Mitsilegas and Peršak concur and plead for legislative action, claiming that deficiencies in EU countries and disparities between member states threaten to undermine mutual trust.[25] They advocate for a directive based on Art. 82(2) TFEU – that would establish minimum rules – and for 'soft law' actions. Others point out, though, that it is still under debate if Article 82(2) TFEU could be a basis for such a directive.[26]

However, the question is whether legislation alone would suffice. The DETOUR research and experiences in the Netherlands have shown that legislative efforts on a national level do not necessarily have much impact in practice and I see no reason why that would be different for supranational legislation.[27] It is of vital importance that legislation goes hand in hand with activities that are geared towards changes in legal culture, such as raising awareness of problematic overuse of pre-trial detention and propagating the use of alternatives. In a very recent special issue of the *European Journal on Criminal Policy and Research*, edited by Martufi & Peristeridou, an impressive wealth of evidence-based insights has been compiled that could hopefully inspire the EU.[28]

Apparently, the European Commission indeed aims to resuscitate the process on thinking about pre-trial detention. In the Work programme 2022, it states that it will 'assess how to achieve convergence on pre-trial detention and detention conditions between Member States as part of improving cross-border cooperation in criminal matters'.[29] On 25 March 2022, the commission published a 'Call for evidence', in which it stated that national practices in pre-trial detention do not meet international standards and that this has a negative impact on mutual trust and EU judicial cooperation in the area of criminal law.[30] The aim of this call is to come to a Commission Recommendation, which unfortunately does not seem to be the most powerful instrument. With these recent developments in mind, my estimation is that, 25 years after the first draft of the *Corpus Juris*, a harmonised approach of pre-trial detention is still not within reach. My estimation is also that this will fill John Vervaele with disappointment: the utilitarian view on the

24. V. Asselineau, 'Agenda 2020: A new Roadmap of minimum standards of certain procedural safeguards', *NJECL*, 9, 2, 2018, pp. 184-190; G. Jansen, 'The need for a new roadmap of procedural safeguards: a lawyer's perspective', *ERA Forum*, 22, 2021, pp. 279-294; De Suremain *et al*., 2019.
25. E. Baker, T. Harkin, V. Mitsilegas & N. Peršak, 'The Need for and Possible Content of EU Pre-trial Detention Rules', *eucrim*, 3, 2020, pp. 221-230.
26. A. Martufi & C. Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework', *European Papers*, 5, 3, 2020, pp. 1477-1492, p. 1478.
27. M.M. Boone, P. Jacobs & J.M.W. Lindeman, 'Alternatieven voor voorlopige hechtenis in Europa en Nederland: de advocaat als onterechte sleutelhouder?', *Delikt & Delinkwent*, 3, 2019, pp. 170-187, p. 180; Hammerschick *et al*., 2017, p. 15.
28. A. Martufi & C. Peristeridou, 'Towards an evidence-based approach to pre-trial detention in Europe', *European Journal on Criminal Policy and Research*, 28, 3, 2022, pp. 357-365.
29. Making Europe stronger together, COM(2021) 645, p. 10.
30. Call for evidence, 25 March 2022, Ares(2022)2202649, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13173.

harmonisation of the restriction of freedom, mainly through the EAW, should have gone hand in hand with minimum standards that unequivocally advocate that the presumption is always in favour of release.