Pre-trial Detention in Spain

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1. Introduction

Pre-trial detention is generally admitted the most serious precautionary measure a jurisdiction can adopt to ensure an effective prosecution of crimes, as far as it entails deprivation of liberty for the suspect. Accordingly, circumstances and conditions which must be present to make it possible that judicial decision making, as well as the regime and rights applicable to arrested persons and remand prisoners, become very good indicators of the rigorousness of the corresponding criminal justice system. More than that, it is one of the best guidelines to assess how determined national criminal law is committed to observe the rule of law principles, specifically legal safeguards for suspected offenders.

The following pages have three goals: First, it is intended to give an overview of the Spanish regulation of both legally considered pre-trial detention measures, arrest and remand detention. Second, relevant data on the number of arrests and remand detentions and its evolution in recent times are reported, together with an illustrative empirical analysis on the factual procedure and contents of the judicial decision making in ordering these precautionary measures. Finally, a discussion on current and would-be alternatives to pre-trial detention in Spanish criminal justice system is presented.

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2. Spanish Law on Pre-trial Detention

2.1. Protection of Personal Freedom

The Spanish Constitution contains a catalogue of civil rights and public liberties, and 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”.

The Spanish Constitution additionally establishes that civil rights and public liberties are binding on all public authorities. Accordingly, 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. Besides, the Spanish Constitutional Court has jurisdiction over individual appeals for legal protection (recurso de amparo) on grounds of violation of fundamental rights

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. Spain has ratified the following international treaties on human rights: 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).

Due to Spain’s membership in the Council of Europe and the European Union, we should add the case law drawn up by the European Court of Human Rights and the Court of Justice in Luxembourg concerning the interpretation of fundamental rights’ content and scope.

Provisions punishing illegal detention either by private persons or public officials are included in Spanish Criminal Code. Whereas illegal detention entails prison

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1) Article 53.1 of Spanish Constitution (Constitución española) (hereinafter CE).