Examining the Role of Legal Culture as a Protective Factor Against High Rates of Pre-trial Detention: the Case of Ireland

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Abstract
Ireland has a comparatively low pre-trial detention rate by European standards, at around 14 pre-trial detainees per 100,000 population. This article seeks to explore one factor which may explain a lower use of pre-trial detention in Ireland: its legal culture. Drawing on semi-structured interviews with judges, prosecution lawyers, defence lawyers and probation staff, the article finds that the constitutional protection of the right to bail (the key alternative to pre-trial detention in Ireland), an enduring legal tradition which historically prohibited the use of a risk of offending ground, and shared views and assumptions about the objectives of pre-trial detention hearings amongst judges, prosecution and defence lawyers, have influenced how such actors engage in the decision-making process about the use of pre-trial detention. The article argues that more attention needs to be given to the role of legal culture to examine why detention rates differ across Europe.

Keywords Pre-trial detention · Alternatives to pre-trial detention · Bail · Legal culture · Ireland

Introduction and Objectives
Concerns about the high use of pre-trial detention (PTD), and the presence in many countries of a high remand prison population rate, have, rightly, led to examinations of why there is a high use of PTD in particular countries (Myers, 2017). This article contends that we should also be seeking to understand what factors might be at play in places with comparatively low levels of PTD, such as Ireland. Ireland has a rate of PTD which is relatively low in the European context, standing at 14 pre-trial detainees per 100,000 population (Council of Europe, 2019). This article reports on findings from a broader study of the use of PTD in Ireland, focusing here on a factor which emerged as being consequential in the Irish context: a legal culture which has inhibited high levels of PTD. This culture, shared
amongst prosecution and defence lawyers and judges, has tended, historically, to favour liberty over detention. This legal culture has been shaped directly by the legal framework for the use of bail and PTD in Ireland, but was also created by some unique features of the Irish criminal justice system, including an active role for defence lawyers and a shared set of understandings between prosecution and defence practitioners. The implications of these findings are broad, indicating that the legal framework plays an important role in shaping the attitudes of the players in the process towards PTD, and those attitudes are influential in decision-making about PTD. The findings provide a further indication that the use of risk of offending while on bail as a ground for PTD is a factor behind high use of PTD.

The article begins by examining the potential role of legal culture amongst the factors behind the use of PTD, and the grounds on which it can be imposed. It then describes the legal framework for the use of PTD in Ireland, before going on to present the methodology and findings of a study on the use of PTD in Ireland. It finds that the legal culture in Ireland, at least until recently, tended to favour liberty over detention, with the legal framework itself shaping this position in important ways. The article suggests that more attention needs to be given to the role of legal culture in efforts both to understand and tackle high rates of PTD.

PTD and the Role of Legal Culture

Most countries tend to permit PTD on similar grounds: securing the proceedings; risk of offending; and risk of flight. As Hucklesby (2009) notes, the risk of offending ground has, however, tended to become more prevalent in the legal frameworks of different countries, and indeed a preoccupation in recent years (Ashworth & Zedner, 2014; Myers, 2009). The reasons behind high usage of PTD have been put forward as including a more risk-averse judicial culture which favours the use of detention over liberty (Hucklesby, 2009), and a decreasing emphasis on the human rights of suspects, particularly the presumption of innocence (Booth & Townsley, 2009; Myers, 2017). The disproportionate and indiscriminate use of conditions on liberty at the pre-trial stage has also been viewed as responsible for driving large numbers into PTD through breach (Brown, 2013; Myers, 2017; Sprott & Myers, 2011).

While there are clear pointers in the literature to suggest that the introduction of or reliance upon a risk of reoffending ground has been responsible for increases in the use of PTD, there has been little examination of how legal frameworks and the training, perceptions and outlook of legal practitioners have shaped PTD practice. Other authors have also taken this approach in the area of pre-trial decision making.

Ireland: a Low PTD Case

Though it has also seen increases in the PTD population in the recent past, Ireland has managed to maintain a relatively low PTD rate even without the use of electronic monitoring, which is provided for in the statute book, but is not used at present in practice at the pre-trial stage.

The overall prison population rate is 80 prisoners per 100,000 population (Council of Europe, 2019). PTD prisoners make up around 20% of the total prison population on any given day in Ireland. As can be seen from Fig. 1, the number of people in PTD on average in Ireland has increased over the last decade.
The Legal Framework for PTD in Ireland

It is important to clarify the use of the term ‘bail’ in this context. While the term bail in other countries often refers to the actual financial guarantee provided to secure attendance at trial, the term bail in the Irish context is used to describe the alternative to custody in its entirety. Conditions, including those of a financial nature, may be attached to the accused’s bail.

Ireland is a common law jurisdiction, with its law on PTD deriving from statute, case law and the Constitution. The legal framework, especially those aspects of the law on PTD which have been interpreted or shaped by decisions of the superior courts, has tended to favour liberty. For example, a person who has been charged with a criminal offence in Ireland has a prima facie (on the face of it) entitlement to be released on bail pending the resolution of those charges before the courts (Vickers v. DPP, 2009). While bail, as the case of DPP v. Mulvey held is ‘not the automatic right’ of a person awaiting trial, it is nonetheless ‘an important aspect of the individual’s constitutional right to liberty, a right which can only be restricted on limited grounds supported by cogent evidence’ (2014: para. 40). The reasoning for this entitlement was set out by Walsh J. in the foundational judgment of the Supreme Court in People (Attorney General) v. O’Callaghan (1966). There, the court recognised that detaining a person in custody simply because he or she has been charged with a criminal offence is inconsistent with the presumption of innocence underlying the criminal law.

Under Irish law, there are three objections which justify the refusal of bail. First, where it appears likely that the accused will, if admitted to bail, abscond or otherwise evade justice by failing to appear for court to answer the charges against him or her: For bail to be refused on this ground, the prosecution must satisfy a court that there is a likelihood of the defendant absconding; however, it need not go further by proving matters beyond a reasonable doubt. Secondly, an accused person may be remanded in PTD where it appears ‘reasonably probable’ to the court that he or she will pervert the course of justice by interfering with prospective

Fig. 1 Rate of pre-trial detention (Council of Europe, n.d.; Irish Prison Service, 2017). Important note: Data for 2018 and 2019 is from the 31st of January not the 1st of September. No Council of Europe SPACE I report was available for 2017 so that data is from the Irish Prison Service Monthly Information Note for the population on August 31st of that year
witnesses and jurors, tampering with evidence or disposing of illegally acquired property. Thirdly, bail may be refused where the prosecution satisfies a court that there is a real risk that the accused will commit serious offences if granted bail. The creation of this ground required a partial overturning of the People (Attorney General) v. O’Callaghan decision. In Ireland, a referendum held in 1996 inserted a new Article 40.4.6 into the Irish Constitution, which effectively reversed the Supreme Court’s ruling and allowed for refusal of bail on the grounds that it is necessary to prevent the commission of criminal offences. The amendment was passed on a low turnout, but following a period of heightened concern about crime in Ireland, during which a journalist reporting on organized crime was killed, and increasing anxiety about murders in rural parts of the country (O’Donnell & O’Sullivan, 2003). This constitutional amendment led to the enactment of the Bail Act, 1997, s. 2 of which provides that:

Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

This has become colloquially known as a ‘Sect. 2 bail objection’. A Sect. 2 objection may only be raised where the accused is charged with a serious offence and it is also apprehended that a serious offence may be committed. The Schedule to the 1997 Act lists a finite but extensive number of offences which are considered to be ‘serious offences’ in this context. These offences include murder, manslaughter, serious assaults, kidnapping, false imprisonment, rape, robbery, dangerous driving causing death or serious bodily harm, drug trafficking, firearms offences, theft, and sexual offences including rape and sexual assault.

Irish law has been amended in more recent times to make it more difficult for people charged with the offence of burglary of a dwelling where that person has prior convictions and/or charges for that offence to obtain bail (Criminal Justice (Burglary of Dwellings) Act, 2015). A 2017 Act sought to amend the law concerning the risk of offending ground, requiring courts to examine the extent to which the number and frequency of any previous convictions for serious offences indicates persistent serious offending by the accused (Criminal Justice Act, 2017).

A key feature of the Irish approach to pretrial detention is the extensive use of a wide and flexible range of conditions attached to a person’s liberty when released on bail. Common conditions, which are expressly authorised by s. 6 (1)(b) of the Bail Act, 1997, include: a residence condition, i.e. that the accused resides or remains in a particular district or place within the State; a condition that the accused reports to and signs on at a specified Garda Síochána (police) station at specified intervals and during particular times; a condition that the accused person refrains from having any contact with such person or persons as the court may specify.

Understanding PTD in Practice in Ireland: Methodology and Data

The research study presented here was carried out using interviews with judges, lawyers (from both prosecution and defence) and probation officers, as well as analysis of the legal framework for the use of bail and PTD in Ireland. This research was carried out as part of a study of seven European Union countries called [not named to preserve anonymity]. 26 semi-structured interviews with judges as well as prosecution and defence lawyers experienced in PTD hearings, and probation staff were also conducted. The participants comprised six judges, eight lawyers working either in the Office of the Director of Public Prosecutions (the public prosecutor) or barristers working mainly as prosecutors, ten lawyers
who work mainly as defence lawyers, but including some with experience of working as prosecutors, and two senior staff members from the Probation Service.

These interviews were transcribed and coded using thematic analysis. Analysis was conducted using Nvivo software. Ethical approval for the procedures used in the study was granted by the Research Ethics Committee of the School of Law at Trinity College Dublin.

The Role of the Constitutional Position of Bail

The constitutional position of bail and the importance of the presumption of innocence was considered to be a very influential factor in decision-making by participants, who considered this to be the basis for the lower rates of PTD in Ireland. The presumption of innocence and the presumption in favour of bail set down in the O’Callaghan case were strongly and spontaneously expressed as reasons for how PTD decision-making is conducted in Ireland. This was repeated across all interview participants, regardless of their professional background. Judges were clear about the importance of these constitutional presumptions:

The main consideration that you have to have obviously is the presumption of innocence and, you know, that obviously is the main consideration. (Judge 2)

It’s a serious application by the State to deprive somebody of their liberty and I have to keep in mind number one the presumption of innocence and number two constitutional right to bail and that is the whole system and that’s how it works. (Judge 6)

Prosecution lawyers shared this feeling, with some describing getting bail as the ‘default’ position (PP3), with the prosecution required to make the case otherwise. Avoiding PTD was seen by participants as being ‘the norm’. As one judge put it: ‘admission to bail is what’s to be expected, that’s the norm’ (Judge 2), while a prosecutor said: ‘so the default position is that a person will be entitled to bail … it’s the default position is the difference, isn’t it.’ (Prosecution Practitioner 3). Defence practitioners stated that they referred to the presumption of innocence in their applications for bail as a matter of course.

A strong theme to emerge from the interviews, across participants from all backgrounds, was that the legal framework for PTD in Ireland and, in particular, the constitutional position of bail did guide decision-making on bail, and that the grounds were taken seriously. It was also clear that, amongst these grounds, the most important one was the likelihood of turning up for trial. The impact of the introduction of a ground which allows PTD to be ordered in circumstances where a risk of offending while on bail is established was not considered to be highly significant. It was evident that the O’Callaghan decision and grounds continues to dominate practice in the area of bail in Ireland. One judge put this feeling very simply:

the be all and end all of bail in Ireland is the O’Callaghan case. (Judge 3)

The O’Callaghan principles for the denial of bail were very much to the forefront in participants’ responses to being asked what the grounds for PTD in Ireland were. As one prosecution participant stated: ‘It’s really you know… Someone who won’t show up’ (Prosecution Practitioner 7). While section 2 of the Bail Act, 1997 was viewed as having some impact on increasing rates of PTD, its overall effect was viewed as being more muted than might have been expected at the time of its introduction. It was considered to remain relatively unusual to see a decision by a judge being exclusively made on the grounds of a risk of offending on bail. As one participant said: ‘I think that O’Callaghan is still the main
game in town’ (Prosecution Practitioner 4). Amongst participants, the legal framework was influential in their reported decision-making process:

… obviously there’s certain things that you are and you aren’t allowed to bring in, the 1997 Bail Act tells us what we’re allowed and the O’Callaghan case. So, it’s not random, they’re very specific, the factors that we have to rely on or not rely on. (Prosecution Practitioner 3)

it’s not that they’re just written, they’re very much enforced. (Prosecution Practitioner 4)

While at the time of the interviews, the introduction of the risk of offending ground was already twenty years previously, it seems the older decision of the Supreme Court in People (Attorney General) v. O’Callaghan (1966), with more than fifty years’ history and being highly dominant in PTD discourse, has been enduring and influential. This suggests that the legal culture created by the interaction of a Supreme Court decision and the actions of judges and practitioners has been resilient in the face of the desire of the executive and legislative branches of government to increase reliance on a risk of offending ground.

A Shared Understanding of How PTD Is to be Used

By and large, there were limited differences evident between judges, prosecution lawyers and defence lawyers in their understanding of what the important factors were in deciding on PTD. For all of them, the most influential factor was the person’s record of turning up for trial or other court appearances on previous occasions; this was more important than, for example, the seriousness of the charge or the person’s criminal record generally. While a minority of defence participants felt that the prosecution had a strong influence on the process, it was notable from most interviews that there was no consensus on whether there was a dominant party: prosecution, judge or defence. In fact, some participants considered it was the defence who had a dominant role.

... I think there’s generally a good balance between the parties. Both sides are heard... and there seems to be enough safeguards in relation to it to make it reasonably fair. (Defence Practitioner 1)

A striking feature of PTD practice, and indeed criminal justice in Ireland generally, is that barristers (a type of lawyer which historically has tended to do more advocacy in court) may act for both the prosecution and the defence in different proceedings. There is no specific or specialised steam by which lawyers become prosecution practitioners. This feature of Irish legal culture would appear to be important, as it seems to create a shared understanding of the purpose of PTD and how the legal framework should be used. It was considered to be one factor behind the way PTD practice operates in Ireland.

I think it provides a useful perspective. … I think it also counts against the possibility that people will perhaps make decisions for the wrong reasons. … my view on bail would be different from a defence practitioner’s but ultimately, you know, we’re in the same boat (Prosecution Practitioner 2)

This sense of a certain need for cooperation was a subtle but important feature of PTD practice as described by participants. Legal practitioners felt judges appreciated it
when practitioners made an effort to establish the facts and issues between each other before a hearing, as this made the matter run more smoothly. Defence and prosecution practitioners were also quite comfortable in talking to each other in an effort to negotiate conditions in a suitable case, or to at least exchange information which might make the hearing more efficient.

Perhaps more deeply, this shared training background also, in part, creates a culture of ease between prosecution and defence lawyers. This is manifested in two important ways: through a kind of self-restraint experienced and valued by prosecution lawyers, and the use of ‘consent to bail’ i.e. where the prosecution and defence would agree that a person should be released on bail subject to certain conditions. It was notable across interviews that practitioners were comfortable with this concept. The prosecution acts almost as a filter, diverting cases which might otherwise be subject to a contested application for bail. This self-restraint is manifested in advice given to the police that bail should not be opposed, at least vigorously, when bail objections are viewed by the prosecution to be weak. The prosecution authorities play an important role in applying the principles on bail themselves, before the matter comes before a judge.

It is difficult to ascertain the precise extent of the practice whereby bail can be agreed between the parties; however, from the interviews, it appears to be widely used.

There’s almost always discussion going on outside the courtroom. (Defence Practitioner 3) Gosh I would think that generally, I would say at least a 70-80% of the time there won’t be an objection to bail. (Prosecution Practitioner 3)

Prosecutors did not have a major difficulty with this system, considering it to be an efficient use of time and resources, and a way of ensuring that PTD was not unnecessarily used:

If there’s a chance of getting bail and it’s not a very, very serious offence and you don’t have the Guards (police) absolutely gung ho to say there’s no way this can happen you’ll work around it. (Prosecution Practitioner 4)

This was reflected in the views of a judge also: ‘I think the State are excellent. They consent where they can consent’ (Judge 5).

The work of defence lawyers was crucial in this process, with evidence from the interviews that defence lawyers were very active in their pursuit of a possible bail agreement. Defence lawyers reported placing a lot of emphasis and putting a lot of time into having discussions with Gardaí (police) or with the representatives of the prosecution before a case is called on.

Most participants stated that it would be unlikely for a judge to probe a consent application for bail. Some judges confirmed this practice:

If I’m satisfied, the DPP is satisfied, and the investigating garda is satisfied, I’m quite happy to rule it on consent. (Judge 4).

I have no prosecution role here whatsoever and if there is a consent to bail then that’s none of my business. The State are consenting and I will note the State are not objecting to bail and grant bail. (Judge 6).

It was felt by some participants, however, that in the recent past consent was becoming more difficult to obtain on the part of the prosecution, especially in the High Court.
Conclusion

Much of the scholarship on PTD has given strong indications that a risk of offending ground has led to increasingly risk-averse decision making as well as more use of PTD (Hucklesby et al., 2021), and be felt to be very intrusive (Hucklesby, 2001; Hucklesby & Wincup, 2014), as well as likely to result in failure (Sprott & Myers, 2011; Sprott & Sutherland, 2015). The experience of Ireland indicates that an historic and constitutionally grounded resistance to risk of offending as a basis for PTD has long-lasting effects on legal culture. In Ireland, risk of offending is a legally permitted ground for PTD, but it does not have the same salience or use as the longer-standing basis for denial of bail—the risk of failing to turn up for trial. This, in turn, seems to be part of the insulation against higher levels of PTD in Ireland.

However, it is noteworthy that in the very recent past, rates of PTD have increased in Ireland. At the time of data collection, some participants described a change they had noticed in practice, whereby consent to avoid PTD had become more difficult to obtain, and that, in particular, the police had become more risk averse in this context, and more likely to object to bail. While the risk of offending ground was still considered not to be especially dominant or a driver behind these changes, there was an overall feeling that the police were keener on PTD than they had been in in the past. This perception needs further analysis, but PTD rates are increasing in Ireland.

A core feature of Irish PTD practice which emerged from this research is a shared sense of the objectives and rules of how such hearings should operate. Both prosecution and defence lawyers, by and large, accept that liberty is to be prioritised in PTD hearings, and find ways, where possible and on a fairly widespread basis until the recent past to agree bail and avoid PTD. This experience indicates the need for a close and granular assessment of legal culture and the effects of law in practice on the actions, assumptions and beliefs of legal practitioners in order to fully understand the reasons behind the varying usage of PTD across Europe and beyond. Legal and judicial culture cannot be transplanted into other contexts and the experience of Ireland cannot be easily replicated in other places. However, this study suggests that efforts to reduce the use of PTD must be targeted not only at legislation and legal norms, but also judicial and legal training and the more intangible elements of how legal practitioners view their role and the objectives of PTD decision-making.

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Declarations

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