LIETUVOS TEISĖS INSTITUTAS

DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

1st National Report on **Lithuania**

DETOUR –
Towards Pre-trail Detention as Ultima Ratio

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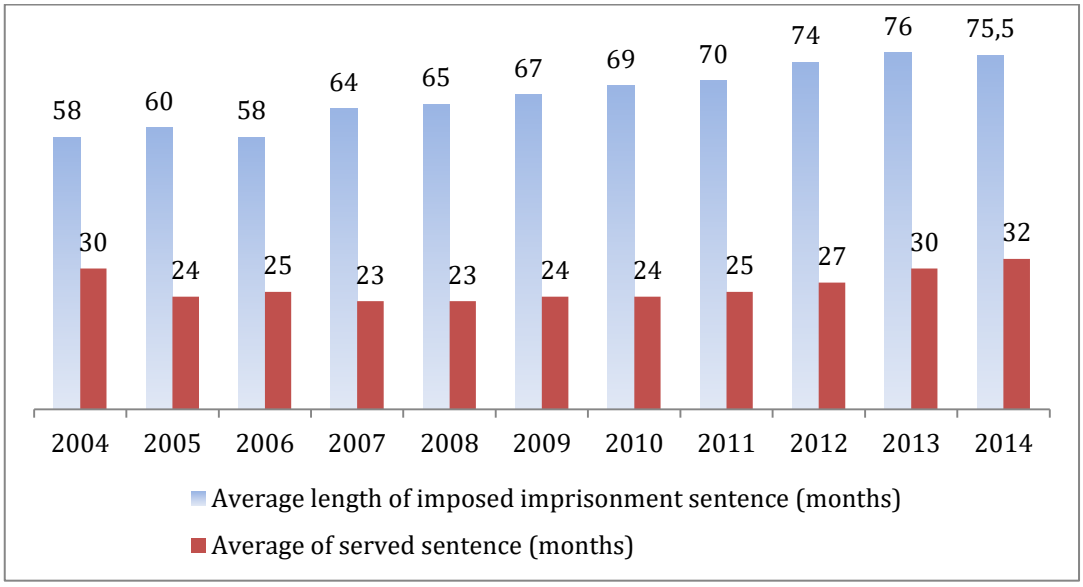
Content

1. Introduction: Pre-Trial Detention in context

The Lithuanian justice system has a long tradition of depreciation of personal liberty of convicted offenders. It may be assumed that restrictive attitudes have been inherited from the punitive approach of Soviet penal system ("lock them" approach). Also complicated criminal situation in the State in early transitional period of newly restored independent country in 1993-1997 had impact on maintaining the hard-line approach in penal policy. This approach reveals itself by high incarceration rates and long terms of imprisonment sentences.

Picture 1.1 Average length of imposed and served imprisonment sentences

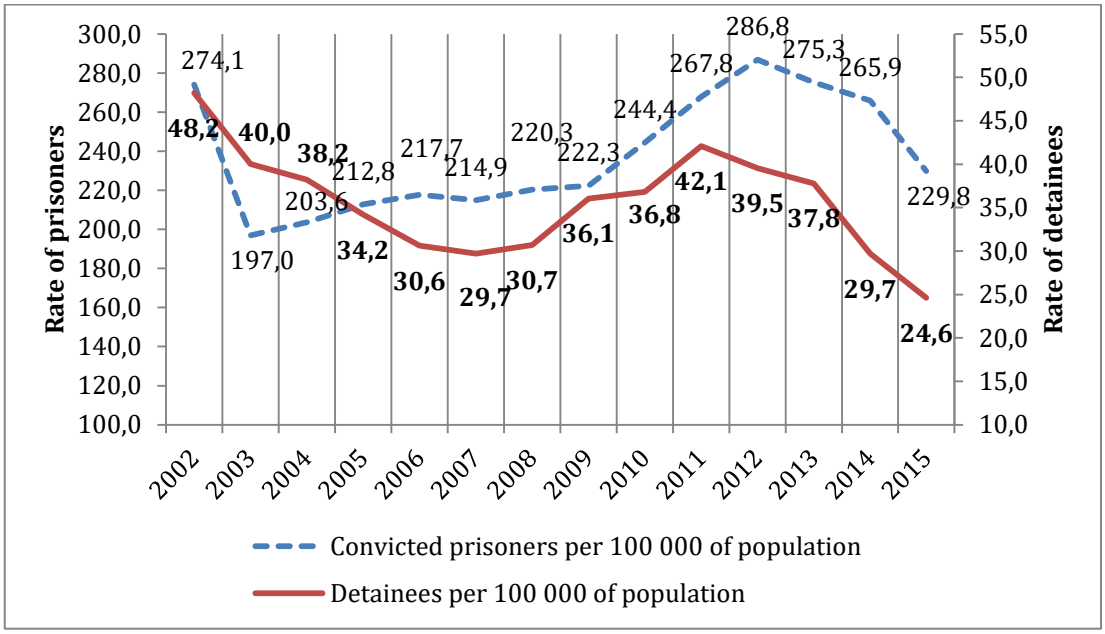


The process of the accession to the EU and related efforts to adopt Western European attitudes towards human rights, in particular liberty, and introduce moderate use of incarceration in criminal justice system, showed results immediately after the accession of Lithuania to the EU in 2004 but the effect faded during the last decade. Moreover reluctance of the courts to grant early release for eligible prisoners may be seen after the recent probation system's

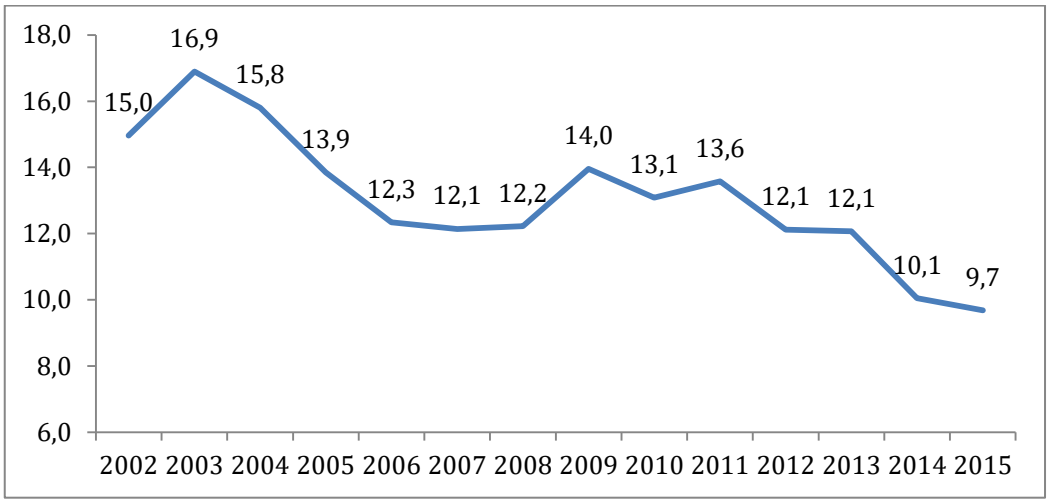
reform (2012) and it strongly contributes to the high incarceration levels in Lithuania.

Though Lithuania has some of the poorest rates of prisoners in the EU, the levels of incarceration of unconvicted persons (use of pre-trial detention) does not stand out in the common European context. High incarceration rates and average levels of use of the pre-trial detention result in rather small share of the detainees in overall population of incarcerated people. And it keeps decreasing.

Picture 1.2 Rates of detainees and convicted prisoners in Lithuania 2002-2015



Picture 1.3 Ratio of detainees with prisoners (including detainees) in Lithuania, %



However when comparing Lithuanian situation with situation in other EU member States we must keep in mind an important difference. In contrast to many Western European countries, population of immigrants in Lithuania, and also foreign population in prisons is very small (up to 8 per cent, see chapter Statistics). It rises concerns if Lithuanian justice system would be capable to keep appropriate levels of incarceration (and in particular rates of detainees) if immigration flows would turn to Lithuania.

Another contextual aspect that may influence the practices of PTD is the fact that Lithuania is rather small country. That fact allows the national media to track and scandalize most of unfortunate outcomes of rejection or release from detention and to condemn the judge who has passed the decision. As far as the number of pre-trial judges is not big, judges may feel constant and immediate risk of (repeated) appearance on front pages of national media and face fierce criticism. In combination with "tough on crime" line of the President of Republic, it may create huge pressure on pre-trial and trial judges. Strong will to take the risk to reject request of prosecutor to detain or extend the detention of the suspect may be needed if the reasoning of the request is insufficient.

2. Legal background

2.1 Human Rights and Legal Principles

The Constitution of the Republic of Lithuania (Constitution)[1] guarantees the minimum procedural and human rights in the criminal proceedings regarding the deprivation of liberty. Article 20 establishes a set of fundamental rules regarding arrest and detention: (a) prohibition of arbitrary apprehension and detention; (b) prohibition of deprivation of one's liberty otherwise than on the grounds and according to the procedures determined by law; (c) 48-hour cornerstone norm under which, a person apprehended *in flagrante delicto*, must be brought before a court for a pre-trial detention decision-making in the presence of this particular person, and (d) rule of immediate release if the court does not adopt a decision to detain the apprehended person. Article 21 protects human dignity and for that reason prohibits torture, injure or degrade of human being as well as cruel treatment and establishment of such punishments. Basic procedural rights, guaranteeing the right to appeal to a court when constitutional rights and freedoms are violated, can be found in Articles 30 and 31 of the Constitution. Article 31, *inter alia*, includes the presumption of innocence ("a person shall be presumed innocent until proved guilty according to the procedure established by law and declared guilty by an effective court judgment") and the principle of fair trial (e.g. right to a public and fair hearing of the case, right to defence of the detained person etc.).

The Code of Criminal Procedure (CCP)[2] establishes the substance and the whole procedure of PTD decision-making in detail. Under Article 1 of CCP, "the criminal procedure aims in defence of human and citizen rights and freedoms at a speedy and detailed detection of criminal acts and a proper application of the law in order to ensure that any person who has committed a

[1] Constitution of the Republic of Lithuania, 25 October 1992.

[2] Code of Criminal Procedure of the Republic of Lithuania, No. IX-785, 14 March 2002.

criminal act is given a fair punishment and that no one who is innocent is convicted". Pre-trial detention itself "may only be ordered in cases when results cannot be achieved by more lenient coercive measures" (Article 122, paragraph 7). The principle of proportionality for all provisional measures and acts, during the criminal proceedings, is regulated by Article 11 of CCP.
Moreover, the Supreme Court of Lithuania (SCL) develops and ensures uniform interpretation and application of PTD in courts (e.g. Summary of court practice "Regarding Pre-trial Detention and House Arrest Decision-making and Review"[3]).

2.2 Legal Prerequisites

Article 122 sec. 7 of CCP explicitly establishes that PTD may be applied only as a measure of the last resort when more lenient alternatives are deemed to be insufficient for ensuring uninterrupted criminal proceedings and preventing suspect from committing certain offences which are listed in the CCP. Article 125 sec. 2 p. 4 provides that if the court decides to aply PTD it has a duty to provide motives and concrete facts of the case in the decision that allow it to assume that more lenient measures would be ineffective.
Art. 122 sec 8 provides for restrictions that PTD is only allowed when a suspect is charged with an offence which is punishable with imprisonment more that one year. However this restriction has very little significance as absolute majority of sanctions for criminal offences in the Penal Code provide for maximum punishment more than one year.
Article 122 of CCP sets out a list of certain circumstances under which a person may be detained: (a) the risk that the accused will fail to appear for trial; (b) the risk that the accused would take action to prejudice the administration of justice; (c) the risk that the accused would commit certain crimes, and (d) pending extradition request or European Arrest Warrant.
The ground of absconding has to be assessed in light of the factors relating to the person's character, home (permanent residency), occupation (employ-

[3] Supreme Court of Lithuania, No. 50, 30 December 2004.

ment), health condition, previous convictions, family and social ties abroad as well as other relevant characteristics (Article 122, paragraph 2 of CCP). According to the Supreme Court of Lithuania, the risk of facing long-term imprisonment and gravity of crime alone might be an excuse for pre-trial detention[4].

Interference with establishing the truth consists of two alternative elements: (a) the risk that the accused will intimidate the victims, witnesses, experts, other suspects or convicted, and (b) the risk that the accused will destroy, conceal or tamper the objects and documents, which are significant for the investigation and trial procedure. The accused person might prejudice the administration of justice either himself or through other persons.

When a person is believed to re-offend, detention might be ordered on condition that a person is suspected or accused for having committed one or several very serious or serious crimes, or aggravated theft, robbery, extortion or aggravated damaging of property, and might, before rendering of the judgement, commit a new very serious crime or one of the crimes mentioned above (Art. 122 sec. 4 CCP)[5]. The ground of immediate recidivism might be also applied when there is evidence that the person, suspected of a threat or an attempt to commit an offence, if released, might actually commit the particular offence. Furthermore, information regarding the person's criminal record, his role in crime, suspicion of several crimes, livelihood based on criminal activities, testimonies of victims and witnesses, and other data have to be assessed in the context of such ground.

The Supreme Court repeatedly emphasized its case law that abovementioned grounds for PTD may not be declared without indication of the concrete facts of the case that prove the presence of the relevant grounds for PTD[6].

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[4] *Ibidem,* para. 8.

[5] Translation found in: Morgenstern, C. (ed.) *et al. Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU.* Tilburg/Greifswald: Wolf Legal Publishers, 2009, p. 624.

[6] *Supra note* 3.

A request to extradite or surrender (International Criminal Court or under the European Arrest Warrant) is the final ground for pre-trial detention found in Article 122, paragraph 5 of CCP.

2.3 Length Of PTD

The decision to detain a suspect and especially to extend the term of detention must be made with great caution. This requirement derives from understanding that a detained person, who has not been even convicted yet and is protected by the presumption of innocence, receives the restrictions under PTD that may even exceed the restrictions that are imposed for an individual who is sentenced with imprisonment.

Art. 127 of CCP provides that pre-trial detention may be ordered for no longer than a period of three months at once. Prior to its expiry, PTD can be extended for up to a maximum of three months but no more than six months in general. However, a regional court[7] may extend the length of detention under two circumstances: (a) due to an extraordinary complexity (e.g. white-collar crimes), or (b) a high volume of the case (e.g. a significant number of suspected and accused individuals, victims or witnesses). In cases where a grave or a serious crime may have been committed, or the suspects/accused may have committed a crime in a group of accomplices, an organized group or a criminal association[8], or the individuals are detained in a foreign country, PTD may not last longer than eighteen months. In all other cases with exceptional circumstances, the length of detention should not exceed nine months.

[7] Appeal instance for judgements, decisions, rulings and orders of district courts.

[8] A group of accomplices shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission, continuation or completion of the criminal act, where at least two of them are perpetrators. An organised group shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission of several crimes or of one serious or grave crime, and in committing the crime each member of the group performs a certain task or is given a different role. A criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act – one or several serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association. Criminal Code of the Republic of Lithuania, No. VIII-1968, 26 September 2000, Article 24.

Having adopted amendments to CCP in 2015[9], the period of PTD in the entirety of criminal proceedings may not exceed two thirds of the maximum imprisonment term that can be ordered for the crime in question.
Art. 127 sec. 7 of CCP provides that the judge must adopt an order not to extend the term of detention if he discovers that during the last two months, when detention was applied, no pre-trial investigative actions have been performed and the prosecutor fails to give any objective reasons for this[10].

2.4 An Order of Imposition of PTD and Review Procedure

Art. 123 of CCP provides that detention may be ordered for the suspect who is at large or the suspect who is arrested.
If the prosecutor is of an opinion that the suspect who is not in custody must be detained, he or she files an application with the pre-trial judge. The judge, upon making a decision to grant the prosecutor's application, makes an order to apply detention; where the judge declines to satisfy the application he makes an order to refuse detention or refuse detention and impose more leniant measure. The person detained pursuant to the aforesaid order must, within 48 hours after detention, be brought before the investigating judge. The judge questions the person brought to ascertain whether there are grounds for his detention. The defense lawyer and the prosecutor must be present during the questioning. After the questioning of the detained person, the judge may order to uphold the order to apply detention, modify or reverse the provisional measure.
If a suspect is under arrest, he or she must, within 48 hours after the moment of his arrest, be brought by the prosecutor together with an application for detention, before the investigating judge of a district court. The abovementioned procedure applies.

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[9] Amendments to the Code of Criminal Procedure, No. XII-1878, 25 June 2015.

[10] Translation found in: Morgenstern, C. (ed.) *et al. Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU.* Tilburg/Greifswald: Wolf Legal Publishers, 2009, p. 625.

The suspect placed in PTD or his/her defence lawyer have a right to appeal the decision to order or extend PTD. Art. 130 of CCP provides that an appeal against imposition of detention may be filed within twenty days from the moment of deciding upon the issue of extension of detention. The appeal shall be filed through the court that imposed or extended the detention. The court must communicate the appeal, without delay, to a higher court. *The three-judge chamber*[11] of the higher court must consider the appeal within seven days from the receipt of the appeal. A hearing shall be held to consider the appeal against the imposition of detention, and the detainee and his counsel or only the counsel shall be summoned to the hearing but their presents is not obligatory. The presence of the prosecutor during such a hearing is obligatory. The prosecutor shall provide the higher court with all necessary case materials. A further appeal with regard to the decision of *the three-judge chamber* of a higher court is not possible: the decision is definitive and not subject to appeal.

Since the decision to impose or extend detentions becomes final, the law does not provide a detainee a right to challenge detention until the established term of detention expires[12]. The only option for a detainee is making a request to the prosecutor as the Art. 139 of CCP provides that during pre-trial investigation the prosecutor has a duty to release suspect from the detention immediately if grounds for detention disappears or PTD becomes no longer necessary.

2.5 Recent Legal Developments

The Lithuanian Parliament recently adopted important amendments in the regulation of PTD aimed at the limitation of excessive use of PTD[13]. Legisla-

[11] Before the Amendments of 25 June 2015, an appeal used to be considered by one judge. *Supra note* 31.

[12] See also R. Jurka, M. Gušauskienė (2009), *Suėmimo atitikties ultimum remedium principui diskusiniai klausimai (in Lithuanian),* Teisės problemos, Nr.2 (64), online: http://www.teise.org/data/2009-2-jurka-gusauskiene.pdf

[13] *Supra note* 31.

tive changes of 25 June 2015, seeking to promote the execution of alternative coercive measures and to reduce PTD length, are the following[14]:

1) when considering a prosecutor's application for the use or extension of PTD, judges may now not only order or reject PTD, but also select a more suitable less restrictive measure at their discretion. Under former regulation the judge used to be confronted to the dilemma "everything" (PTD) or "nothing". This situation sometimes forced to impose PTD in order to avoid releasing the suspect without any restrictions.
2) when ordering PTD, judges are now under an explicit duty to indicate the factual circumstances and arguments that led them to believe that less strict restrictive measures were not appropriate in that case;
3) the longest permissible period for PTD during the pre-trial investigation for minor or semi-serious crimes was reduced from 18 to 9 months, with maximum PTD for minors being reduced from 12 to 6 months;
4) the period of PTD in the entirety of criminal proceedings may not exceed two thirds of the maximum imprisonment term that can be ordered for the crime in question; earlier there were no limits on length of PTD since the proceeding reach the trial stage;
5) appeals from a court ruling ordering or refusing to order PTD will no longer be examined by a single judge of a higher court, but instead by a panel of three judges;
6) when applying for the use of PTD, the prosecution must in all cases allow the defence lawyer to access the pre-trial investigation material that the application is based on. This requirement also applies when applying to the court for the use of other severe restrictive measures: intensive surveillance, house arrest and the imposition of an obligation to live separately from the victim.

[14] Thoroughly summarized in: Human Rights Monitoring Institute. *The practice of pre-trial detention in Lithuania*. Vilnius: Eugrimas, 2015, p. 19-20.

3. Statistics

Lithuania had very dynamic levels of detention before conviction in recent 15 years. That fact provides us with the opportunity to search for the factors (or complexes of factors) that potentially have impact on the decision making regarding implementation of detention and alternatives.

What factors or complexes of factors cause the turns of the trends in detention practices? Changes in penal regulations, regulations on detention and alternatives? Crime rates? Macro economics and related social changes? Penal climate in the judiciary? Migration related issues?

Before we start analysis of available statistics and possible factors of practices on application of detention and alternative measures, we need to make two methodological reservations. First, we must note, that available statistics cover both pre-trial detention and detention without a conviction during the trial. Space I table 4 column a) statistics provide for „untried prisoners (no court decision yet reached)". As far as data for specifically pre-trial detainees are unavailable, we will use term "detention without conviction" that covers both aforementioned groups of detainees.

Another reservation regards two different sources of available statistics – Space I reports and annual reports of Prison Department at the Ministry of Justice of the Republic of Lithuania (PDMJ). Though PDMJ provides data for Space I reports, in its own reports PDMJ presents data on detainees with some methodological differences. First, under the title „detainees awaiting for court decision" PDMJ provides data on all detainees, including those who are convicted but do not serve their sentences yet (Space I t.4 col b) and also those who have appealed or are within the statutory time limit for appeal (Space I t.4 col c). Second, PDMJ provides data for the last day of the year in their annual reports, not for 1st July, like in Space I.

Picture 3.1. Data of Space I and PDMJ on total number of detainees in Lithuania

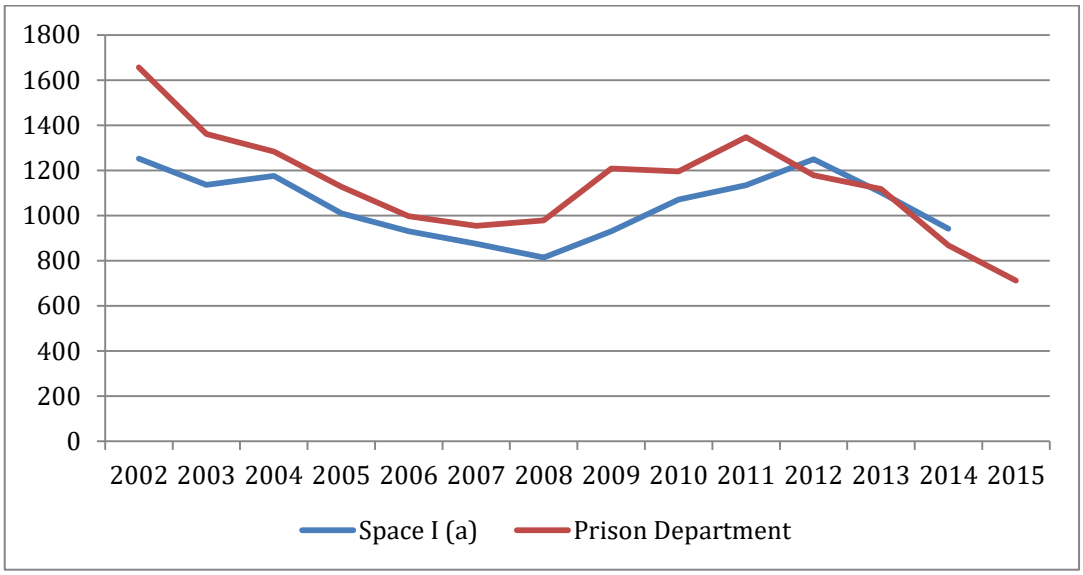


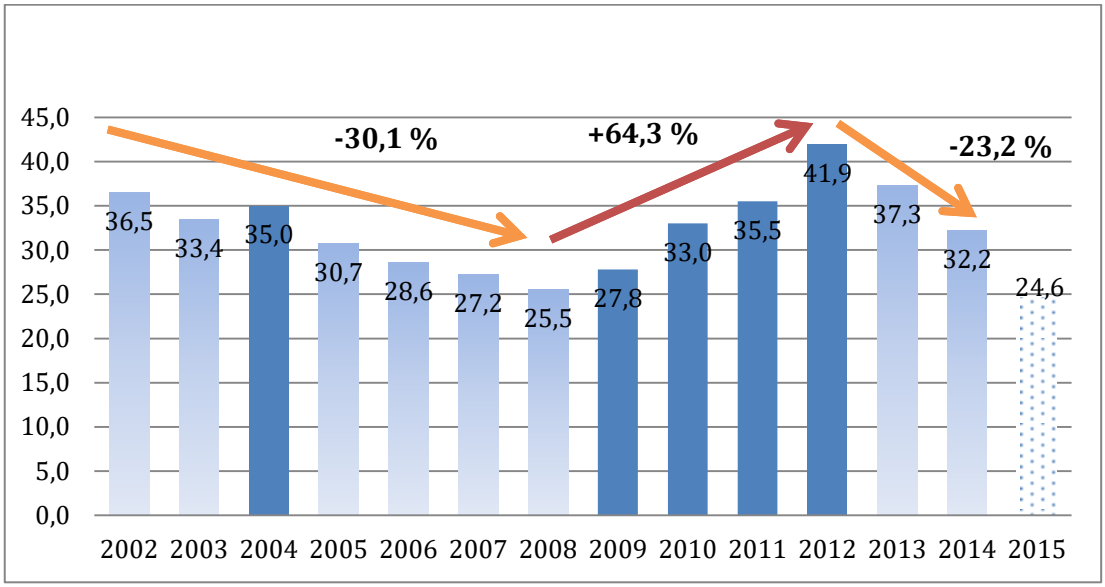
Table 3.1. Data of Space I and PDMJ on total number of detainees in Lithuania

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Space I (a)	1252	1136	1175	1010	930	875	814	931	1071	1135	1249	1102	942	-
Prison Depart-part-ment	1656	1362	1284	1127	997	955	978	1208	1196	1347	1179	1118	868	712

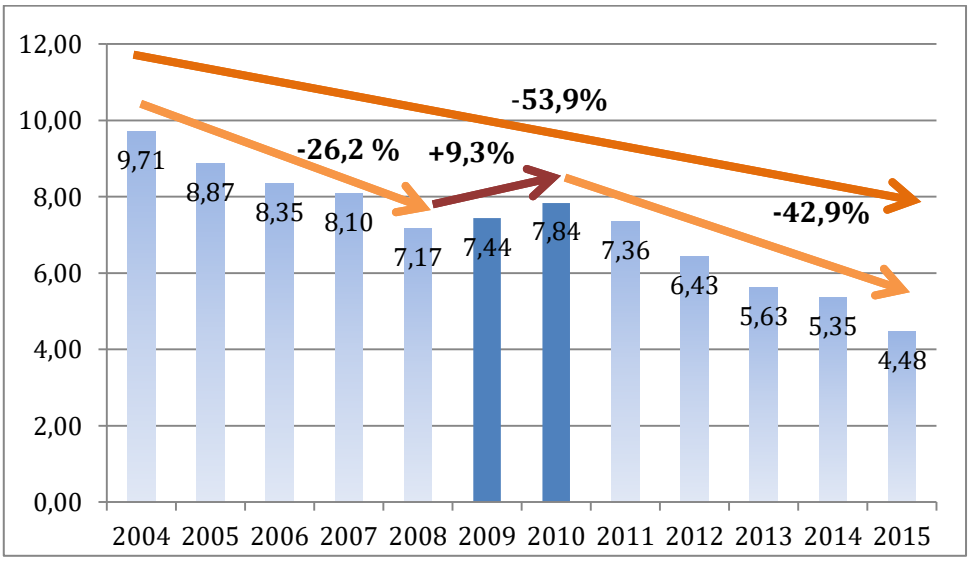
In this report we will use Space I data as it is more relevant to the subject of our research and more comparative with data of other countries. But for 2015 (at least temporary, until Space I 2015 become available) we will also use data from PDMJ reports. We will also use PDMJ data where Space I data are unavailable, e. g. for total number of suspects during every year that have been detained of received other alternative measures.

3.1 Detention rates

Picture 3.2. Dynamics of unconvicted detainees'rate per 100 000 in Lithuania on the 1 July of each year[15]



Picture 3.3. Dynamics of ratio of detention orders per 100 of suspects in Lithuania[16]



[15] Based on data from Space I reports, Table 4, point a). The last point (2015) is taken from annual report of Prison Department at the Ministry of Justice of Republic of Lithuania.

[16] Based on data from annual reports of Prison Department at the Ministry of Justice of Republic of Lithuania.

Picture 3.2 shows the rates of detainees at certain moment in a year (on the 1st July) and takes into account dynamics of total number of Lithuanian population. However it does not reflect dynamics of crime and suspects' numbers, so changes in detention rates do not necessary show changes in practices of application of detention and alternatives. Picture 3.3 takes into account total number of suspects and total number of suspects that received detention prior or after the conviction. Picture 3.3 shows (with some limitations) the likelihood that a statistical suspect would be detained in the criminal proceedings. That data allows us to get closer to the answer of the key question - which direction does the climate of detention policy take – is it getting colder (stricter) or warmer (more orientated at ultima ratio principle). Both pictures show that Lithuania had three different periods in terms of detention rates – period before 2008 with downward trend, break of the trend upwards in 2009, and decrease of detention rates since 2013 (see also picture 3.4 below). The divergence of the total number of detainees and detainees ratio in period 2011-2012 (also different points for the second break of detention trends) could be explained by the fact that in the end of 2010 the law on domestic violence control came into force. The law increased the number of suspects dramatically, also raised the total number of detainees. But in spite of that, the ratio of detainees decreased because only relatively small proportion of the suspects in domestic violence has been detained.

Another criterion of penal climate is the average length of the detention term.

Picture 3.4. Average length of detention before the conviction (months)[17]

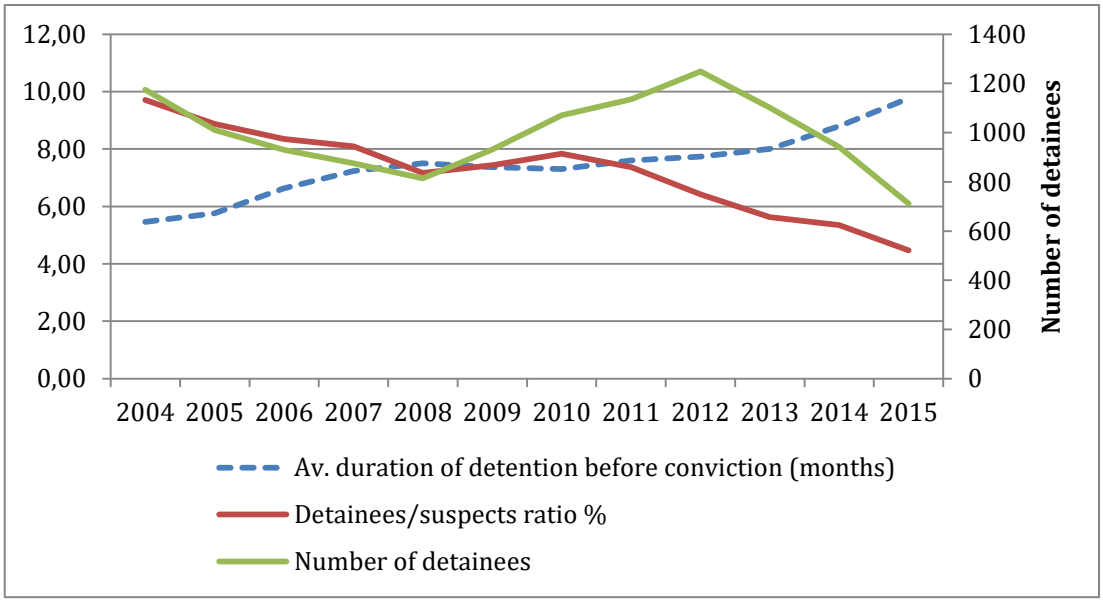


Table 3.2. Average length of detention before the conviction (months)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Av. duration of detention before conviction (months)	5,47	5,77	6,63	7,23	7,50	7,37	7,30	7,60	7,73	8,00	8,80	9,77
Detainees/suspects ratio %	9,71	8,87	8,35	8,10	7,17	7,44	7,84	7,36	6,43	5,63	5,35	4,48
Number of detainees	1175	1010	930	875	814	931	1071	1135	1249	1102	942	712

Average duration of detention (ADD) is a bit tricky criteria. On one hand it could be assumed that longer ADD shows more severe detention practices. On the other hand, it is more likely that the increase of ADD may show more selective and more accurate practices. Increase of ADD may be caused by the practices were detention is "reserved" for the serious complicated cases, where suspects are detained for longer terms and short term detentions in non-serious cases are being ordered rarely.

Picture 3.4 supports the second assumption as the ADD line appears to be a reverse reflection of the detainees/suspects ratio line, and therefore it is reverse reflection of the penal climate in making decisions on detention.

[17] Chart is based on the data, that have been provided by the PDMJ by our request.

3.2 Legal framework

As it has been already stated in the chapter on legal regulation of pre-trial detention, no significant changes were done before 2015, so in the abovementioned periods (2008-2013), except introduction of legislation on domestic violence control in the end of 2010. The same applies to the changes of Penal Code.

3.3 Alternatives

Picture 3.5. Ratio of suspects that received certain measure with total number of suspects (%)

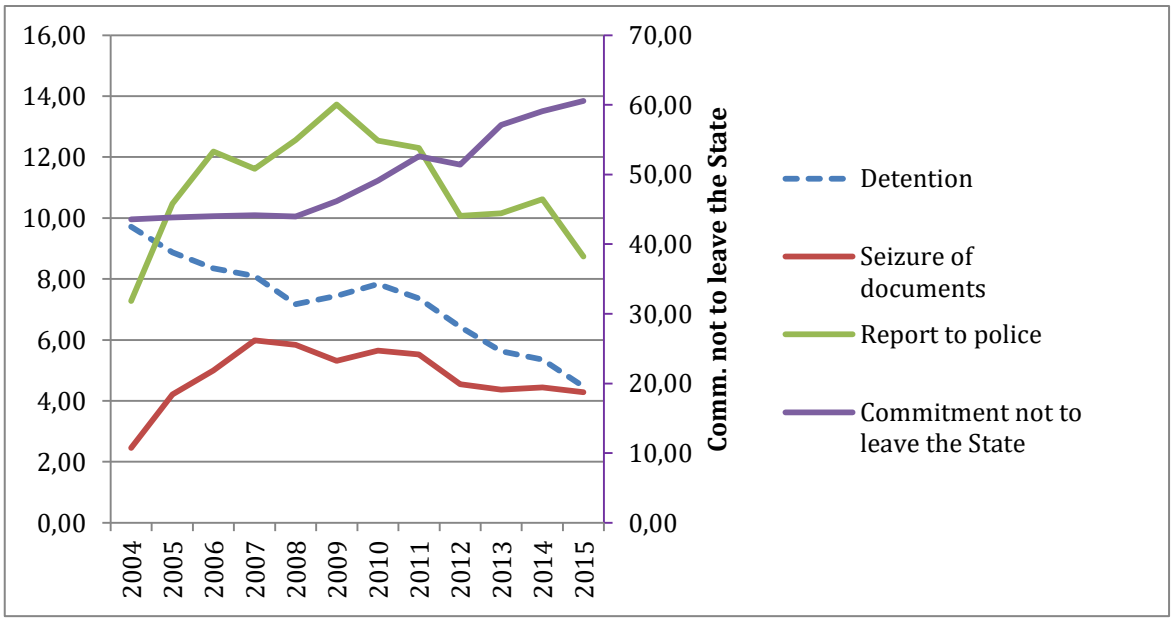


Table 3.3. Ratio of suspects that received certain measure with total number of suspects (%)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Detention	9,71	8,87	8,35	8,10	7,17	7,44	7,84	7,36	6,43	5,63	5,35	4,48
Seizure of documents	2,46	4,21	5,00	5,99	5,84	5,32	5,65	5,52	4,55	4,37	4,44	4,28
Report to police	7,28	10,47	12,18	11,62	12,56	13,73	12,54	12,30	10,07	10,16	10,61	8,74
Commitment not to leave the State	43,55	43,83	44,02	44,15	43,96	46,17	49,12	52,60	51,40	57,13	59,07	60,55

Picture 3.5 shows the ratios of the least severe and most used alternatives: seizure of documents, report to police, commitment not to leave the State[18] and compares them with the ratio of detention. However it is difficult to note any correlations. The commitment not to leave the State dominates absolutely. Up to 60% of suspects are ordered with this measure. We can only make cautious guess that recent increase of application of this measure is related to the decrease of use of other measures including detention.

Picture 3.6. Ratio of suspects that received severest measures with total number of suspects[19] (%)

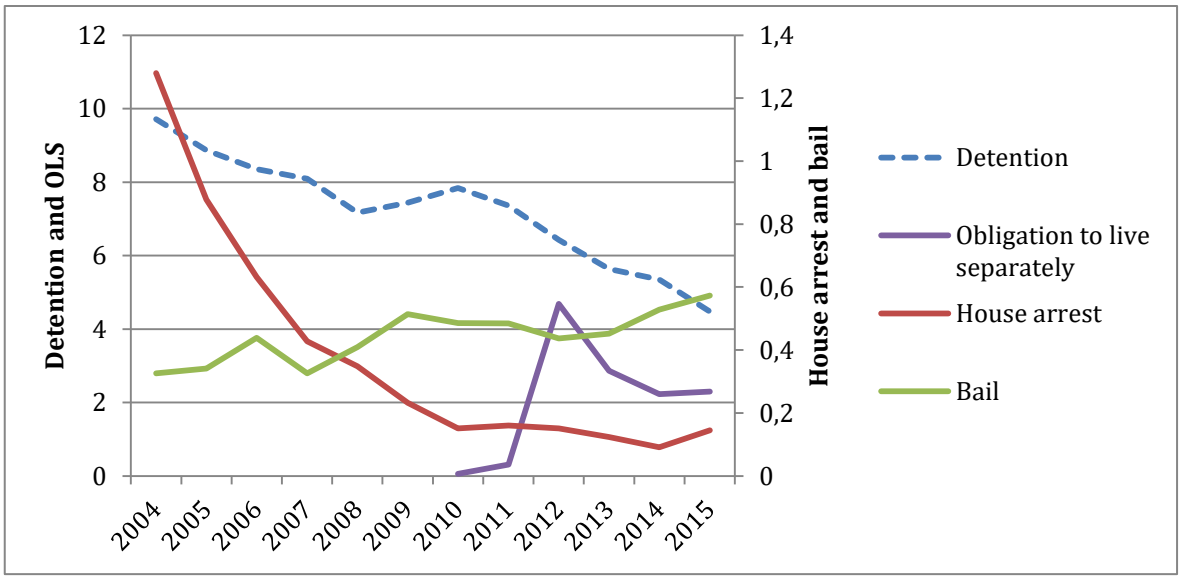


Table 3.4. Ratio of suspects that received severest measures with total number of suspects (%)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Detention	2708	2313	2074	1838	1666	1794	1920	1792	1869	1734	1642	1202
House arrest	357	229	157	97	81	56	37	39	44	38	28	39
Bail	91	89	109	74	95	124	119	118	127	139	162	154
Obligation to live separately[20]	58					n/a	13	75	1362	882	683	617

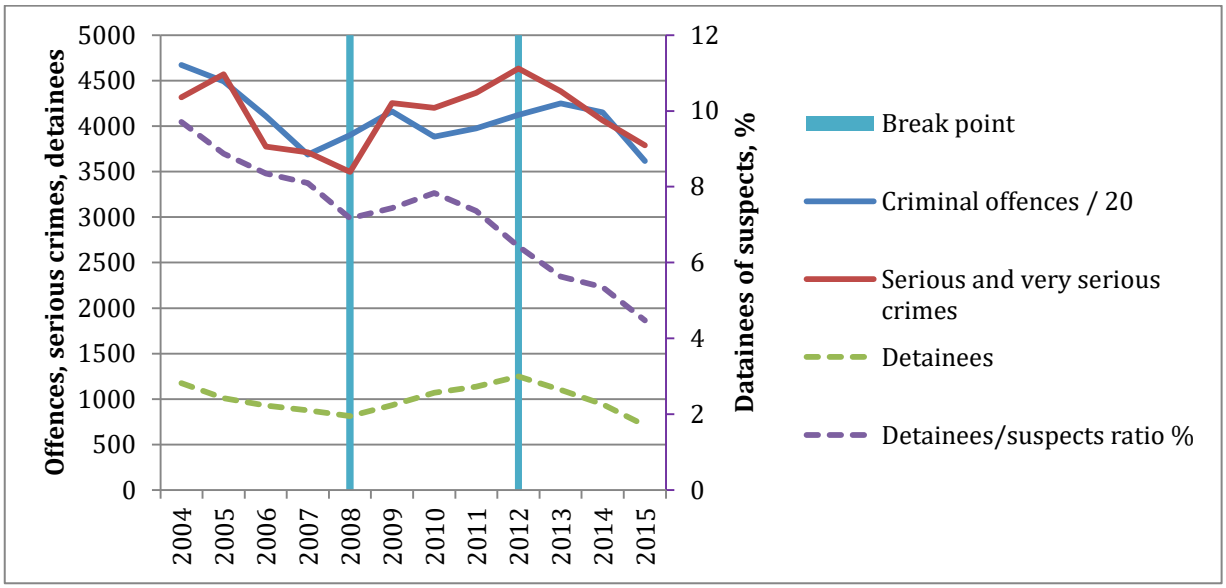
[18] These alternatives may be ordered comulatetively with other measures for the same suspect.

[19] These measures (except detention) may be ordered comulatetively with other measures.

Picture 3.6 and table 3.4 presents data on most severe measures. It appears that bail and especially house arrest and are used in practice extremely rarely. Therefore at the moment these measures could hardly be seen as factors that make a significant impact on detention statistics. Obligation to live separately or stay away from the victim is mostly applied in domestic violence cases. The spike in use of this measure in 2012 could be explained by the spike of domestic violence cases at the same time. The increase of cases of this kind was a consequence of new legislation on domestic violence control, introduced in late 2010.

3.4 Crime rates

Picture 3.7. Rates of registered crime and detainees' statistics[21]



[20] Obligation to live separately was applied for 56 suspects during 2004-2008. No data for 2009 are available. Data from the Report of Prosecutor General of the Republic of Lithuania on the Practice of application of the measure order to live separately from a victim in 2004-2008, 2009-01-08, Nr.7.7-1 (in Lithuanian).

[21] Total number of criminal offences is divided in 20 in order to make a more compact and therefore more informative graphic.

Table 3.5. Rates of registered crime and detainees' statistics

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Criminal offences / 20	4671,0	4490,8	4107,8	3687,1	3903,0	4160,2	3883,5	3976,2	4124,6	4248,5	4150,2	3617,2
Serious and very serious crimes	4317	4571	3776	3713	3498	4253	4199	4364	4634	4384	4063	3788
Detainees	1175	1010	930	875	814	931	1071	1135	1249	1102	942	712
Detainees/ suspects ratio %	9,71	8,87	8,35	8,10	7,17	7,44	7,84	7,36	6,43	5,63	5,35	4,48

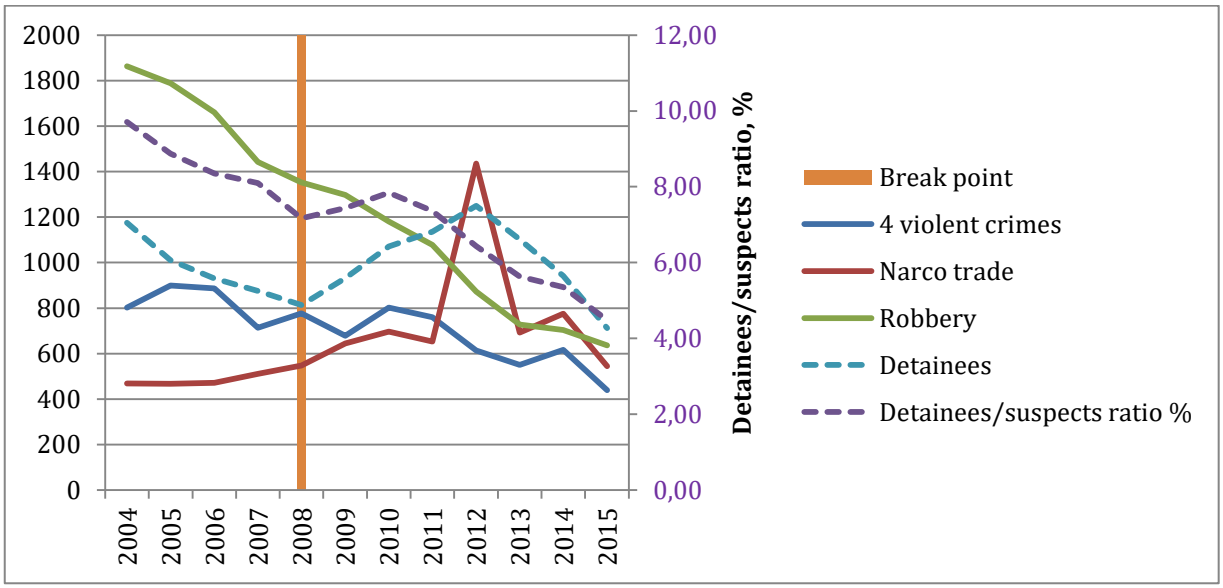
General criminogenic situation may be a strong factor that influences rates of detention. More registered crimes means more suspected offenders. More suspected offenders usually mean more cases where conditions for detention may be met. However, there are serious reservations for correlations between registered crimes and rates of detention. Significant share of offences that are reported and registered by the police become so called "dark cases" where no suspect may be detected (especially in theft and robbery cases). It goes without saying that detention is irrelevant in "dark cases" as long as the case is "dark". Secondly, total number of registered offences covers the offences where order of detention is very unlikely (negligent offences, not serious non-violent offences, committed by the offender with no criminal record, etc.). Number of registered serious and very serious crimes has more correlations with detention rates. Though seriousness of the offence may not be sole ground for detention, probability that grounds for detention may be found in cases of this type is significant.

Picture 3.7 shows that dynamics of total number of detainees (TND), number of recorded serious offences (RSO) reflect one another during the whole period of 2004-2015. Reflection between RSO and ratio between detainees and suspects (RDS) may be observed only during period 2004-2010 and 2013-2015. In 2011-2012 RSO and RDS took opposite directions. It is very likely that bifurcation of the directions of RSO and RDS was coused by the spyke of domestic violance cases that increased the total number of sus-

pects significantly thus decreasing ratio between detained suspects and all suspects.

Thou statistics of registered serious crimes and total number of detainees at 1st July of each year visually correlate, we've tried to go a bit deeper. We have tried to detect correlation between TND/RDS and the most serious and quite common offences, where use of detention is very likely because of their nature and seriousness: dynamics of four most violent crimes (manslaughter, intentional causing serious bodily harm, rape and sexual coercion), drug trade, robbery. In addition, in order to avoid influence of "dark cases" and dismissed cases, we took the numbers of cases where pre-trial investigation have been finished and the cases have been referred to the court for the trial.

Picture 3.8. Detention rates and numbers of certain serious crimes[22]



[22] Some crimes of robbery do not belong to the category of serious crime under Lithuanian Penal Code. However Data from data base of Information technology and communications department unter Ministry of interior of Republic of Lithuania – www.ird.lt, crime statistics, data on suspects and defendants, form 30-SAV.

Table 3.6. Detention rates and numbers of certain serious crimes

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
4 violent crimes	802	899	886	713	777	679	802	760	613	550	616	439
Narco trade	469	467	471	511	547	645	696	653	1436	692	775	545
Robbery	1863	1789	1661	1443	1353	1298	1180	1078	872	727	704	636
Detainees/suspects ratio %	9,71	8,87	8,35	8,10	7,17	7,44	7,84	7,36	6,43	5,63	5,35	4,48
Detainees	1175	1010	930	875	814	931	1071	1135	1249	1102	942	712

In Picture 3.8 we may not see any clear reflections between dynamics of some common crimes with high probability of imposition of detention and actual rates of detention (both TND and RDS). The raise of detention rates from 2009 may not be explained by the dynamics of cases for aforementioned crimes. It sheds a doubt on the direct correlation between serious criminality and detention rates.

3.5 Macro-economic situation and "penal climate"

In the end of 2008 global financial crisis began. The economic slowdown reached Lithuania in 2009. In the picture 9 we can see that dynamics of social - economic factors have been reflected by the dynamics of ratio of detainees and suspects.

Picture 3.9. Correlation between GDP, unemployment rate and share of the suspects that receive detention[23].

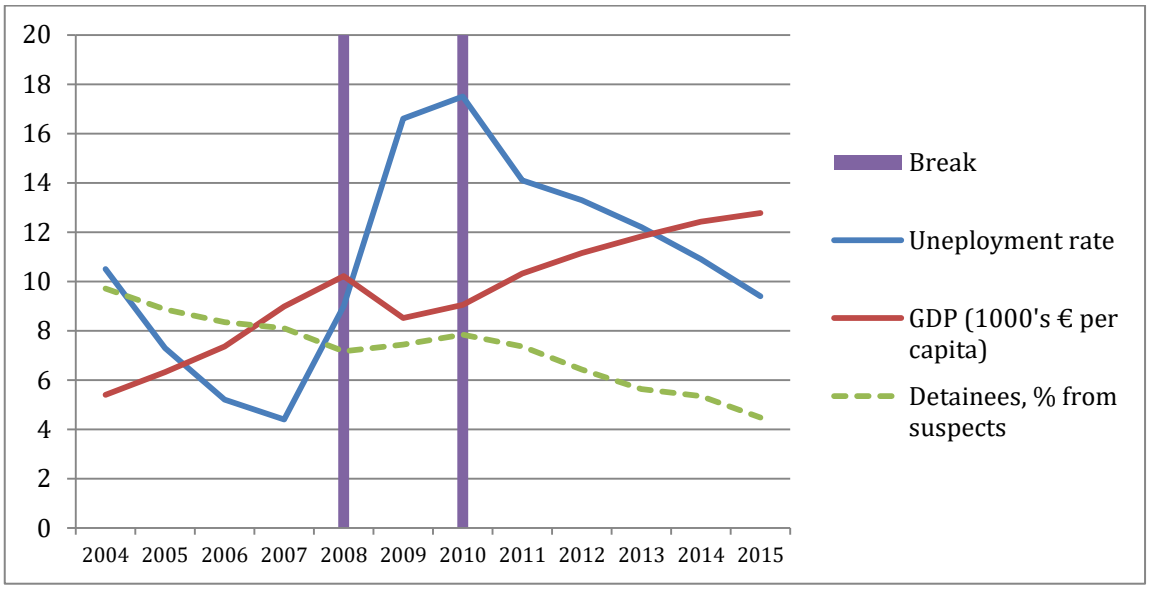


Table 3.7. Correlation between GDP, unemployment rate and share of the suspects that receive detention

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Unemployment rate	10,5	7,3	5,2	4,4	9	16,6	17,5	14,1	13,3	12,2	10,9	9,4
GDP (1000's € per capita)	5,40	6,32	7,36	8,99	10,22	8,52	9,05	10,32	11,16	11,82	12,43	12,78
Detainees, % from suspects	9,71	8,87	8,35	8,10	7,17	7,44	7,84	7,36	6,43	5,63	5,35	4,48

In 2009 the GDP fell and the direction of detention rate changed upwards. In 2011 GDP returned to the pre-crisis level and started to accelerate, unemployment fell sharply and level of detainees resumed to decrease.

G. Sakalauskas notes that difficult economic situation in the State in 2009 and later evoked the annoyance and anxiousness of society and justice system by the anticipated social disorder and raise of criminality (which did not necessary take place). In addition media took its role in escalating certain crimi-

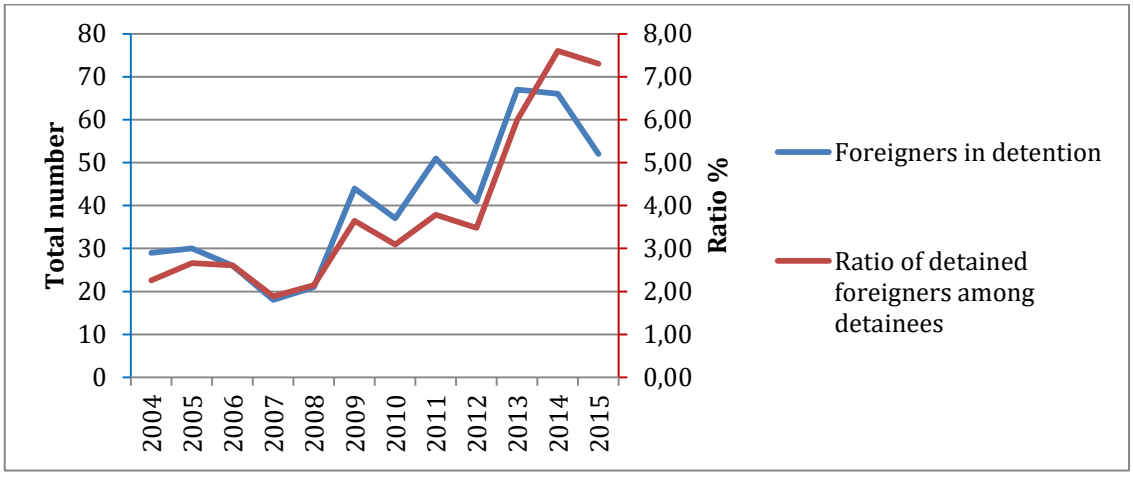
[23] Social and economic statistics from the site of Statistics Department, http://www.stat.gov.lt/

nal occasions and wooing for strong punitive response[24]. The context of abovementioned statistics allows to assume that social shake and instability and penal attitudes could have influenced penal practices at some extent and, among other things, inclined prosecutors to request for and judges to impose detention more frequently.

3.6 Foreign suspects

Criminality of foreigners is a huge factor of detention and imprisonment rates in Western European countries. On one hand, they are represented in the detainees' population unproportionally, comparing to their proportion in the population. Secondly, they make huge absolute share of detainees' population (sometimes more than a half or even more). Until now the situation in Eastern Europe is very different. In Lithuania foreigners make an increasing but still a very tiny share of detainees and they may not be regarded as a significant factor of detention practices.

Picture 3.10. Numbers and ratio of foreign detainees



[24] Sakalauskas G. „Ką liudija didėjantis baudžiamasis represyvumas Lietuvoje?" (What does increasing punitive repression witness in Lithuania?), Kriminologijos studijos, 2014/2, p. 96-137.

Table 3.8. Numbers and ratio of foreign detainees

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Foreigners in detention	29	30	26	18	21	44	37	51	41	67	66	52
Ratio of detained foreigners among detainees	2,26	2,66	2,61	1,88	2,15	3,64	3,09	3,79	3,48	5,99	7,60	7,30

4. Research review

Doctoral thesis by Gintaras Goda ”Pre-trial detention and protection of human rights (comparative – legal analysis) (1995, unpublished[25]) was the first fundamental research of the topic in Lithuania. It was completed in the time, when the Soviet Code of Criminal Procedure was still in force and the law enforcement practices (including detention practices) were strongly influenced by the Soviet mentality. The work of G. Goda introduced the standards of ECHR and comparative analysis of the legal frameworks of the Western European countries, provided criticism on Lithuanian regulations on pre-trial detention and practices of that time that were mostly inherited and retained from Soviet legal system, and made proposals for the amendments of regulations based on the standards of ECHR. Later G. Goda became one of the architects of modern Code on Criminal Procedure of Lithuania (2003).

In 2004 the Department of Judicial Practice Analysis at the Supreme Court of Lithuania completed extensive overview of court decisions on detention and house arrest under the provisions of new CCP[26]. The overview covered 1601 decision on detention of first and appeal instances and 50 decisions on application of house arrest. The period of the analyzed decisions was the first half of 2004. The overview also included relevant cases of ECHR. It is interesting to note that after the year when the overview was published, four consecutive years of decreasing detention rates fallowed.

The pre-trial detention in Lithuania became the subject of academic research only in 14 years after the work of G. Goda was completed. Pre-trial detention in Lithuania became one of the topics in the large international research, funded by the European Commission, “Pre-Trial Detention in the European Union, An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU”, A.M. van

[25] Goda, G. „Kardomasis kalinimas ir žmogaus teisių apsauga (lyginamoji teisinė analizė)“ (in Lithuanian), doctoral thesis, unpublished, Vilnius university, 1995.

[26] Supra note 3

Kalmthout, M.M. Knapen, C. Morgenstern (eds.), (2009)[27]. The chapter "Lithuania" was written by the Ch. Morgenstern in cooperation with S. Bikelis. That was a desktop research, that described legal framework provided in the new CCP, provided detailed statistics on detention (until 2007), based on the Space I data and other sources of statistics, introduced jurisprudence of the ECHR against Lithuania were the problem of the excessive length of the detention was raised and confirmed in one case[28], and also it revealed some other relevant aspects.

In 2009 a group of researchers at Law Institute of Lithuania completed comprehensive legal study "Reasonableness of implementation of detention in Lithuania" (in Lithuanian, ed. S. Bikelis, 2009)[29]. The research provides updated statistics (up to 2008) and detailed analysis of the interpretation of the grounds of detention, also it presents the regulations and statistics on alternatives and comparative analysis with some European countries. It also presents extended analysis of practice of ECHR, with emphasis on issue of grounds for extension of detention. The research also included qualitative analysis of Lithuanian court decisions on detention (112 files) and few interviews with three judges, two prosecutors and one defense lawyer. There researchers suggested amendments of the CCP that could limit application of detention in the cases where imposition of imprisonment is unlikely and also supported idea of Gintaras Goda that overall term of PTD should be limited to the 2/3 of maximum sanction of imprisonment provided for the offence. The research was completed in the end of the long term trend of decrease of detention rates just before the radical change of the trend upwards in 2009.

Also in 2009 Raimondas Jurka and Marina Gušauskienė published the article "Controversial Issues Of Detention Corresponding To Ultimum Remedium

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[27] Morgenstern, C. (ed.) *et al. Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*. Tilburg/Greifswald: Wolf Legal Publishers, 2009.

[28] Stašaitis v. Lithuania (application No. 47679/99), decision of 21 March 2002.

[29] Bikelis, S. (ed.), *Suėmimo skyrimo ir taikymo pagrįstumas Lietuvoje*. Vilnius: Lietuvos teisės institutas, 2009, unpublished.

Principle"[30]. The authors focused on the right to appeal against detention. They raised the issue that detainees have no right to appeal (e.g. periodically) after the expiration of the terms to appeal against the decision to impose or to extend detention. They also noted the lack of possibility to appeal against the decision to detain in the court of the appeal instance.

In 2013 Andrius Nevera published the article "Imposition and extension of detention: standards of the European Court of Human Rights and Lithuania's practice"[31]. The author made a thorough analysis of all the four grounds for imposition and extension of detention, based on the practice of ECHR and instances of practice of Lithuanian courts.

In 2012-2015 researchers of the Human Rights Monitoring Institute (HRMI) conducted series of researches on detention. In 2012 K. Liutkevičius prepared an overview of regulations on detention and some instances from judicial practice on application of grounds for detention[32]. In 2013 the report based on interviews with seventeen police officers, prosecutors and pre-trial judges was published[33]. The author aimed to reveal the factors why the authorities tend to prefer detention in the cases where detention may seem not necessary. The aims to seek success in investigation by making psychologic pressure on suspect, to make investigation "more comfortable" when suspect is locked and he or she is always at the disposal of the investigator, to avoid any risk (and responsibility) for absconding or repeated offending, also effort to avoid hysteric reaction of media were mentioned among the factors. The presentation of the results of the research was held in the Committee of Law

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[30] Jurka, R. and Gušauskienė, M. (2009), *Suėmimo atitikties ultimum remedium principui diskusiniai klausimai (in Lithuanian),* Teisės problemos, Nr.2 (64), online: http://www.teise.org/data/2009-2-jurka-gusauskiene.pdf

[31] Nevera, A. (2013), *Imposition And Extension Of Detention: Standards Of The European Court Of Human*

Rights And Lithuanias Practice, Admimstrativa un kriminala justicija 3(64).

[32] Liutkevičius, K. (2012), *Sulaikymo ir suėmimo reglamentavimas ir taikymas Lietuvoje (in Lithuanian),* Human Rights Monitoring Institute, online: https://www.hrmi.lt/uploaded/PDF%20dokai/ZTSI_Sulaikymas_Ir_Suemimas_2.pdf

[33] Širvinskienė, A. (2013), *Pre-Trial Detention: Police, prosecutors' and investigating judges' perspective*, Human Rights Monitoring Institute, online: http://hrmi.lt/uploaded/Documents/Pre-trial%20detention%20-%20Practitioners%20attitudes_EN_Final_1.pdf

and Legal Order of Lithuanian Parliament were representatives of the Parliament, the courts, prosecution and defense lawyers participated[34]. They discussed the problem of alleged overuse of detention. The participants emphasized the role of mentality, lack of adversarity in the proceedings, the problem that defense arguments are rarely presented in the court decisions. It has been noted, that the pre-trial judges sometimes face poorly prepared or/and presented cases on one hand and also experience the pressure from experienced prosecutors "not to ruin their case" on the other. All together with the practice to appoint unexperienced judges to the position of pre-trial judges sometimes lead to the situation that detention is not treated as a measure of the last resort.

In 2015 HRMI published the report of the research "Pre-trial detention in Lithuania" that was conducted in the "Fair Trials" project framework and funded by the European Commission[35]. This comprehensive research included both desktop and empirical parts. The researchers of HRMI conducted 20 observations of the court hearings, 4 interviews with judges, 5 with prosecutors, they also received filled questionnaires from 36 defense lawyers. Also 61 court file has been analyzed. The researchers emphasized very poor representation of defendants by the State paid defense lawyers, who are sometimes even unfamiliar with the case and speak in very general, unspecific manner, use standard phrases. This issue is even more painful during the procedure of the extension of the term of detention where participation of the defendant is not compulsory and therefore the detainee rarely attends. The insufficient employment of bail has been noted. On the other hand effectiveness and purposeness of house arrest have been questioned.

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[34] Discussion at the Seimas Law and Legal Order Committee, 2013-02-21. Protocol of the discussion (in Lithuanian) available online: file:///C:/Users/User/Downloads/diskusijos%20stenograma%2020130221%20(1).pdf

[35] Human Rights Monitoring Institute. *The practice of pre-trial detention in Lithuania*. Vilnius: Eugrimas, 2015.

5. Pre-trial detention and media

Media coverage of decisions on PTD might be summarized into three categories: a) short „technical" information about the decisions related to application of PTD in the cases that attract media's attention without any special message or critics; b) more or less fiercely critics that scandalize courts' decisions on PTD, c) objective analysis of PTD, interviews with experts etc.

The first (neutral) category of coverage has been the most common in recent years. Also some negative reactions appear on media from time to time. The experts of Human Rights Monitoring Institute writes in their report (2015) that „until relatively recently (...) media reactions were mostly limited to individual cases where PTD was refused or a person was released from PTD. Such court decisions, especially where more serious crimes are concerned, are received very negatively by the media. Several examples of headlines reacting to releases from PTD:

"Officers shocked: the judge felt sorry not for the raped minor, but for the man accused of defiling her"[36]

"Ineffable judge's kindness to a foreigner suspected of smuggling heroin to Lithuania worth millions of Litas"[37] [38]

We can point out one serious „scandal" in 2013 which was widely and fiercly covered by media where the pre-trial judge even filed for resignation from the judicial service (he withdraw his file soon and continues carrier of the judge). However the role of media for the impulsive decision of the judge to resign is not clear. The „scandal" erupted after the suspect (Russian citizen with serious criminal records) disappeared on the next day after his release from PTD. It appeared that foreign country was seeking for extradition of the suspect. Later the judge admitted to media that he made a mistake when replaced de-

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[36] http://www.delfi.lt/news/daily/crime/pareigunai-priblokste-teisejui-pagailo-ne-iszagintos-nepilnametes-ojos-isniekinimu-kaltinamo-vyro.d?id=52973521

[37] http://www.delfi.lt/news/daily/crime/neispasakyta-teisejo-malone-uzsienieciui-itariamam-atgabenus-ilietuva-heroino-uz-milijonus-litu.d?id=63931382

[38] *Supra note* 35, p. 13.

tention with house arrest in this case but he also pointed out that prosecution provided very limited information about the suspect and the circumstances of the case[39].

An interesting example of different kind of media reaction appeared on the major news portal recently, in September 2016. An article was published with a title „Unprecedented case: detention ordered to the defense lawyer who fosters a child“[40].

Not the latter example but wider analysis of media allows us to notice some positive trend in coverage of PTD on media. Relatively recently a number of media released analytical publications on the issues of (over)use of PTD. Major portal “Delfi” published an interview with the Chairman of the Court of Appeal of Lithuania A. Valantinas where he emphasized the importance of jurisprudence of the European Court of Human Rights with regards to detention decision-making[41]. The counsel G. Bartkus critically analyzed a particular case with a detained individual and questioned a wide scale of implementation regarding detention[42]. Portal “15min” published a comprehensive article in 2014[43] after a couple of cases where PTD was refused and media held negative reactions afterwards. The article included interviews with the judge of the Supreme Court of Lithuania, the researcher of Human Rights Monitoring Institute (HRMI) and the assistant to the judge, who explained damages of overuse of PTD. We may assume that recent HRMI research on “The prac-

[39] „The judge makes exuces for releasing „thief in law“ which was requested by the of Europol“ // http://www.delfi.lt/news/daily/crime/teisejas-g-viederis-teisinosi-kodel-paleido-europolo-ieskoma-iteisinta-vagi.d?id=61712565

[40] http://www.delfi.lt/news/daily/lithuania/beprecedentis-atvejis-vaika-slauganciam-advokatui-skirtas-suemimas.d?id=72238098

[41] http://www.delfi.lt/news/daily/law/a-valantinas-apie-klaidas-i-laisve-paleidziamus-mafijos-sulus-ir-teiseju-balius.d?id=71869800, 26 July 2016.

[42] http://lietuvosdiena.lrytas.lt/aktualijos/rezonansines-bylos-ar-vel-neteks-raudonuoti.htm, 16 May 2016.

[43] http://www.15min.lt/naujiena/aktualu/nusikaltimaiirnelaimes/suemimo-taikymas-lietuvoje-ar-nepersistengia-teisejai-ir-prokurorai-59-447733, 31 August 2014.

tice of pre-trial detention in Lithuania" (2015)[44] may also encourage major media to take PTD issues more seriously.

As another positive sign we hold first attempts of the judges to come out to public with comments and explanations on their decisions or on decisions that are discussed on mass media. Judge of Vilnius district court Audrius Cininas is a "pioneer judge on social media" who actively comments judicial decisions in criminal cases, including PTD, in his Facebook profile posts[45]. He has more than 1000 FB friends and more than 2000 followers. We assume that open access to the expert opinion of the judge may make positive impact on the quality of mass media coverage of the PTD issues. Another positive impact of the open comments of professional judge – his public support to the judges who are undeservedly attacked by media due to their decisions.

[44] Human Rights Monitoring Institute. *The practice of pre-trial detention in Lithuania*. Vilnius: Eugrimas, 2015.

[45] https://www.facebook.com/audrius.cininas?fref=ts

6. Alternatives

CCP of Lithuania provides for a long list of alternative measures:

- Intense supervision (electronic monitoring, introduced in 2015)
- House arrest
- Bail
- Order to live separately or stay away from the victim
- Seizure of personal documents
- Obligation to report to the police
- Written obligation not to leave (may include injunction to meet certain people, visit certain places)

The court or prosecutor has the right to impose several alternatives at once.
It is important to note, that in the sense of Lithuanian legislation the term „alternative to PTD" is not accurate. It is PTD that is alternative to other less severe measures. The law sticktly follows the concept of PTD as *ultima ratio* and requires that competent officer (judge, prosecutor, pre-trial investigation officer) would start considerations on the appropriate measures with „alternatives", and only if there were indications that alternatives would not suffice, then consider the last „alternative" – PTD. The amendments of CCP (2015) explicitly require the judge who issues the decision to apply PTD to provide the motives and indicate circumstances of the case that give the ground to believe that the application of alternative measures would be unreasonable (Sec. 2. p. 4) of Art. 125 of CCP).
Most severe measures, i.e. detention, intense supervision (electronic monitoring), house arrest and order to live separately or stay away from the victim, can be ordered exceptionally by the court or investigating judge. The rest of alternatives, i.e. bail, seizure of personal documents, obligation to report to the police and written obligation not to leave, may also be executed with the prosecutor's order.

Intense supervision is an electronic control over an offender (Article 131[1], paragraph 1 of CCP). This alternative measure is regulated under a separate chapter of the Law of Probation[46] as it also includes control of individuals on parole. Having entered into force in January 2015, intense supervision is the second severest coercive measure following PTD. With implementation of such alternative, the Lithuanian Government expected to reduce detention rates[47]. However, a correlation cannot be revealed due to statistical absence. In April 2016 the first case of implementation of this measure took place. Two suspects who are suspected of very serious crimes (trafficking of 2 kg cocaine and human trafficking) have been released from detention after they spent one year in custody. PTD was replaced with intense supervision[48].

Electronic monitoring initially may not exceed a period of 6 months with unlimited number of extensions of 3 months. Being intensely supervised, the suspected person is obliged to (a) have electronic monitoring device (an ankle bracelet) on, and (b) follow his/her regulated daily agenda (e.g. regularly attend therapy course). If the suspect fails to comply with the duties he/she is informed about or removes, damages or destroys an electronic device, the individual may face the risk of detention. The responsible institution for the control of intense supervision is police[49].

House arrest used to be the second most restrictive measure in the criminal procedure till 2013 when intense supervision was first introduced. Under house arrest regime the suspect/accused may be obliged to: (a) stay in a certain residence at fixed time, (b) not to attend public places, and (c) not to communicate with certain individuals. While the first restriction is a necessary element in house arrest, two others vary according to a particular context[50]. Hence, the content of house arrest order issued by investigating judge

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[46] Law of Probation, No. XI-1860, 22 December 2011.

[47] CPT/Inf (2014) 19, p. 14-15.

[48] http://www.15min.lt/naujiena/aktualu/nusikaltimaiirnelaimes/ant-zmonemis-ir-narkotikais-prekiavusiu-itariamuju-isbandyta-nauja-kardomoji-priemone-apykoje-59-632607

[49] Order of Minister of Interior on regulation of execution and control of intense supervision, 15 December 2014, https://www.e-tar.lt/portal/lt/legalAct/a8b4878086ba11e481c9c95e73113964

[50] G. Goda *et al. Baudžiamojo proceso teisė*. Vilnius: Teisinės informacijos centras, 2005, p. 243.

must be thoroughly examined (e.g. time provisions, certain bars or restaurants which should not be attended by the suspected/accused person, full names of individuals excluded from communication with the suspect/accused etc.). Similarly to the electronic monitoring, house arrest can be applied for 6 months and extended for 3 more months with no limitations. Police is the responsible institution for the control of house arrest: a police officer inspects individual placed under house arrest regime at least once a week if not stated otherwise in a house arrest order[51].

Order to live separately or stay away from the victim is one of the latest alternatives (after intense supervision) introduced in 2004 due to international legal regulation[52]. Aiming at protecting a victim and his/her residents particularly in domestic violence cases, this coercive measure may include additional restrictions addressed to the suspect: (a) not to communicate and not to seek for any communications with a victim and individuals residing with a victim, and (b) not to attend public places visited by them (e.g. workplace or residency). When a victim and the suspect share common residence, the suspected person is the one obliged to move out.

Bail is a monetary installment deposited to a court or the office of prosecution which may be ordered by the prosecutor or the court. Under CCP, the fixed payment may be also executed by family members or relatives of the suspect, other individuals, enterprises or organisations (Article 133, paragraph 1 of CCP). Bail value varies on specific circumstances in the case: (a) a crime, (b) potential punishment, (c) financial situation of the suspect and bail provider, and (d) their personalities. However, according to recommendations of the Prosecutor General[53], the bail sum should be minimum of the

[51] Prosecutor's General of the Republic of Lithuania Recommendations Regarding Ordering of Coersive Measures, except Detention, during Prie-trial Investigation, and Control of Compliance with Established Conditions, No. I-306, 1 December 2015, para. 35.

[52] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, No. 108-4037, 13 July 2004.

[53] *Supra note* 19, para. 56.

value of 30 MGL (1140 EUR)[54]. Before a bail order is issued, the suspected person is warned about a forfeiture of deposit with respect to infringement of his/her duties regarding procedural order: (a) to appear at the law enforcement, office of prosecution or the court when needed, (b) not to infringe with procedural rules, and (c) not to re-offend. On the other hand, having closed the criminal procedure, the bail provider recovers his/her installment.

Seizure of personal documents may be issued in order to prevent the suspected person from fleeing abroad or committing further crimes and to limit disposition of one's property (e.g. carrying out bank transactions)[55]. Documents eligible for confiscation include: (a) a passport, (b) an identity card, and (c) a driving license. It is also interesting to note that under urgent circumstances a pre-trial investigation officer has a right to issue an order of confiscation of documents.

Obligation to report to the police is another alternative measure to detention when the suspect/accused is obliged to register in the local police station at fixed time and periodicity stated in an order. It is often the only effective coercive measure (except from PTD) in the case of absence from residence[56].

Written commitment not to depart is the least restrictive measure concerning freedom of movement. The suspect/accused is not allowed to leave his/her residence or temporary location without a permission by the prosecutor or the court. 'Departure', as indicated in recommendations of Prosecutor General[57], is absence from residence or temporary location for a period of more than 7 days or leaving abroad with no authorization, or fleeing for more than 24 hours without notification of authorities. Additionally, the individual may be obliged not to: (a) attend certain places (e.g. cities, streets or institutions

[54] 1 MGL or basic social allowance is 38 EUR – http://www.sodra.lt/lt/situacijos/statistika/pagrindiniai-socialiniai-rodikliai, Sodra.

[55] *Supra note* 19, para. 67.

[56] P. Ancelis *et al. Tyrimo veiksmai baudžiamajame procese.* Vilnius: Mykolo Romerio universitetas, 2011, p. 178.

[57] *Supra note* 19, para. 82.

etc.), or (b) communicate with certain people (send emails or make phone calls etc.).

The statistics of application of alternatives are presented in the chapter 3.3 of this report, in the pictures 3.5 and 3.6 and tables 3.3 and 3.4.

7. European Element

7.1 Brief Summary of the Standards established by the European Court of Human Rights

Pre-trial detention directly affects, *inter alia*, the right to liberty and security, considered to be of the highest importance in a "democratic society"[58]. As a result, minimum PTD standards are enshrined in major human rights instruments, including International Covenant on Civil and Political Rights[59], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[60] and the European Convention on Human Rights. Other legislative initiatives, in particular, European Parliament resolutions (e.g. Resolution on detention conditions in the EU[61]), Committee of Ministers of the Council of Europe recommendations (e.g. Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse[62]) and United Nations General Assembly resolutions (e.g. United Nations Standard Minimum Rules for the Treatment of Prisoners, in other words, the Nelson Mandela Rules[63]) are non-binding and act more as a political guidance, reflecting the views of the Members States, nonetheless, their recognisance and influence in criminal procedure law is considerable. Not only international and regional legislation contribute to the process of the establishment of PTD imposition and application provisions,

[58] *Medvedyev and others v. France*, App. No. 3394/03, 29 March 2010, para. 76.

[59] United Nations General Assembly, International Covenant on Civil and Political Rights, 1976.

[60] United Nations General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

[61] European Parliament, Resolution of 15 December 2011 on detention conditions in the EU, (2011/2897(RSP)).

[62] Committee of Ministers of the Council of Europe, Recommendation Rec (2006) 13 to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

[63] United Nations General Assembly, Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175 adopted on 17 December 2015.

but also the European Court of Human Rights (ECtHR/the Court), developing the practice of pre-trial detention.

The most common legitimate ground of PTD is no doubt that a person is reasonably suspected of having committed an offence[64]. The "reasonableness" in the case law of the European Court of Human Rights is understood as facts or information which would satisfy an objective observer that the person concerned may have committed the offence although what may be regarded as "reasonable" will, however, depend upon all the circumstances[65]. For instance, in the *Labita* case[66] the accusations against the applicant, based solely on statements of *pentito* (a former mafioso who has decided to cooperate with the law enforcement) with no further information or objective evidence, were held not to be enough to found "reasonable suspicion" of the individual being involved in mafia-type activities. At the same time the suspect/accused has a right to be informed about particular evidence satisfying a "reasonable suspicion". In one of the latest cases regarding detention *Albrechtas v. Lithuania*[67] the Court found a violation of the provisions afforded by Article 5 § 4 of the Convention. ECtHR acknowledged "the applicant's argument that he all the more had a legitimate right to know what evidence linked him to that crime in order to be able to challenge its relevance when the question of the lawfulness of his detention was being decided".

The European Court of Human Rights has recognised four reasons under which a person may be ordered with a coercive measure of last resort: (a) the risk that the accused will fail to appear for trial[68]; (b) the risk that the accused would take action to prejudice the administration of justice[69]; (c) the risk that

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[64] Office of the High Commissioner for Human Rights and the International Bar Association. *Pre-trial Detenton in the Baltic Sea Region*. Oslo/Copenhagen: Norwegian Ministry of Justice and the Police/Council of the Baltic Sea States, 2003, p. 173.

[65] *Fox, Campbell and Hartley v. United Kingdom,* App. Nos. 12244/86, 12245/86, 12383/86, 30 August 1990, para. 32.

[66] *Labita v. Italy,* App. No. 26772/95, 6 April 2000.

[67] *Albrechtas v. Lithuania,* App. No. 1886/06, 19 January 2016, para. 76.

[68] *Stögmüller v. Austria,* App. No. 1602/62, 10 November 1969, para. 15.

[69] *Wemhoff v. Germany,* App. No. 2122/64, 27 June 1968, para. 14.

the accused would commit further crimes[70]; or (d) the risk that the accused would cause public disorder[71]. All of these possible grounds, except from "the risk of public disturbance" being replaced with pending extradition request or European Arrest Warrant, echo in the Code of Criminal Procedure.

The ground of absconding has to be assessed in light of the factors relating to the person's character, home, occupation, assets, family and social ties[72], but at the same time the absence of a fixed residence *per se*[73], the risk of facing long-term imprisonment and the gravity of the charges alone[74] cannot be an excuse for pre-trial detention.

When it comes to the suspects' characteristics, overreliance on factors of unemployment, lack of a family or fixed residency and possible long-term sentence may cause friction with the ECtHR standards. Under these circumstances, the position of the Supreme Court of Lithuania, expressed in the summary of national jurisprudence in 2004, stating that the severity of charges or potential imprisonment may satisfy the flight risk[75], should be reviewed substantially.

With regards to interference with establishing the truth, including the danger of spoiling evidence or intimidating witnesses, the second PTD ground loses its validity with the passing of time as the investigation progresses, i.e. "the inquiries are effected, statements taken and verifications carried out"[76].

As in the case of flight risk, the evaluation of the personality along with the past history[77] and previous convictions of the suspect[78] is what matters when a person is believed to re-offend. However, merely the lack of job or a family

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[70] *Matznetter v. Austria,* App. No. 2178/64, 10 November 1969, para. 9.

[71] *Letellier v. France,* App. No. 12369/86, 26 June 1991, para. 51.

[72] *Becciev v. Moldova,* App. No. 9190/03, 4 October 2005, para. 58.

[73] *Sulaoja v. Estonia,* App. No. 55939/00, 15 February 2005, para. 64.

[74] *Garycki v. Poland,* App. No. 14348/02, 6 February 2007, para. 47.

[75] Supreme Court of Lithuania, No. 50, 30 December 2004, para. 8.

[76] *Clooth v. Belgium,* App. No. 12718/87, 12 December 1991, para. 44.

[77] *Ibidem.*

[78] *Stögmüller v. Austria,* App. No. 1602/62, 10 November 1969, para. 15.

does not let deprive liberty of a person under the ground of repetition of offences[79].

Regardless of what is the reason for a person to be detained, the arguments for and against release must be sufficiently reasoned with concrete facts and prepared exclusively for a particular case. In this respect, the ECtHR has emphasized that a "general and abstract" form of argumentation[80], such as rewriting previous inquiries or statements of criminal procedural laws, would not satisfy the lawful PTD requirements. One illustration of this derives from the *Balčiūnas v. Lithuania* case[81], where the ECtHR ruled out that the judicial orders by the Lithuanian national courts, extending the applicant's detention, were "theoretical and nearly identical throughout the time".

In a number of cases against Lithuania[82] the Court held that for a certain period of time individuals were deprived of their liberty with no issued order. For instance, regarding the case *Vaivada v. Lithuania*[83], ECtHR observed that "from 1 March to 15 April 1998 no order was made by a judge authorising the applicants' detention under Articles 10 and 104-1 of the Code of Criminal Procedure as then in force; nor was there any other "lawful" basis for the applicants' remand in custody during that period from the point of view of Article 5 § 1". In the case *Venskutė v. Lithuania*[84] the Court has concluded that "as of 10.30 a.m. on 25 May 2005 the applicant was under the control of the Service officers. Whilst acknowledging that the record of her provisional arrest was drawn up some four hours later, the Court nonetheless observes that that document indicated the applicant's arrest time as 3 p.m. The lack of a proper record of the applicant's arrest is therefore sufficient for the Court to hold that her confinement for that time was in breach of Article 179 of the

[79] *Matznetter v. Austria,* App. No. 2178/64, 10 November 1969, para. 9.

[80] *Khudoyorov v. Russia,* App. No. 6847/02, 8 November 2005, para. 173.

[81] *Balčiūnas v. Lithuania,* App. No. 17095/02, 20 July 2010, para. 85.

[82] *Butkevičius v. Lithuania,* App. No. 48297/99, 26 March 2002; *Stašaitis v. Lithuania,* App. No. 47679/99, 21 March 2002; *Grauslys v. Lithuania,* App. No. 36743/97, 10 October 2000 etc.

[83] *Vaivada v. Lithuania,* App. Nos. 66004/01 and 36996/02, 16 November 2006, para. 44.

[84] *Venskutė v. Lithuania,* App. No. 10645/08, 11 December 2012, para. 80.

CCP, which provides that each investigative action must be documented, and contrary to the requirements implicit in Article 5 of the Convention for the proper recording of deprivations of liberty".

Deprivation of liberty shall follow a procedure, prescribed by law, which means that detention must conform not only to the substantive rules, such as preconditions under which a person may be remanded in custody but also to procedural laws[85] established both at national and European level.

According to the ECtHR, judicial control on the first appearance of an arrested individual must above all be prompt[86]. The right to be brought promptly before a judge, enshrining in Article 5(3) of ECHR, leaves little space for interpretation: any period in excess of four days[87] endangers the lawful execution of detention and could be considered to breach the right to liberty and security. What is more, shorter periods may only be valid if there are special difficulties or exceptional circumstances preventing law enforcement from bringing the arrested person before a judge sooner[88]. This is illustrated in the *Rigopoulos* case[89], where an applicant was brought before the investigating judge 16 days after initial detention due to the inspection of a ship on the open Atlantic, more than 5,500 km from the Spanish coast. Consequently, it was technically impossible for the Spanish authorities to bring the applicant overland within a shorter period of time. To that end, the individual facts of the case must be evaluated when in doubt of the compliance with a prompt PTD decision-making procedure.

Lithuanian Constitution has set an absolute rule in that regard: "a person detained *in flagrante delicto* must, within 48 hours, be brought before a court for the purpose of deciding, in the presence of the detainee, on the validity of the detention"[90]. The arrest should not take longer than is necessary

[85] *Del Río Prada v. Spain*, App. No. 42750/09, 21 October 2013, para. 125.

[86] *McKay v. United Kingdom,* App. No. 543/03, 3 October 2006, para. 33.

[87] *Ibidem*, para. 47.

[88] *Kandzhov v. Bulgaria,* App. No. 68294/01, 6 November 2008, para. 66.

[89] *Rigopoulos v. Spain*, App. No. 37388/97, 12 January 1999.

[90] Constitution of the Republic of Lithuania, 25 October 1992, Article 20.

to identify the person or to take obligatory actions in the process inasmuch as 48 hours is the longest possible period of arrest and thus should be implemented only in exceptional cases just like pre-trial detention itself[91].

Once pre-trial detention is decided to be ordered, after an arrested person has been brought quickly before a judge, the second limb of Article 5(3) of the European Convention on Human Rights becomes of higher importance, guarantying the trial of the accused person within a reasonable time or release pending trial. The purpose of the reasonable time provisions is to ensure that no one spends too long in detention before trial[92]. Under the Code of Criminal Procedure, pre-trial detention may be ordered for a period of three months at once. Prior to its expiry, PTD can be extended for up to a maximum of three months again but no more than 18 months in general.

The main criteria for determining the lawful length of detention should include the complexity of the case, gravity of the charges, a number of suspects (accused) and witnesses, case files and any other related special figures. Not surprisingly, in the *W. v. Switzerland* case[93] the Strasbourg Court did not find PTD, which had lasted four years and three days, to violate the right to liberty and security by reason of extent and complexity of the case, where the documents collected took up 120 metres of shelf space and the final judgement consisted of 1 100 pages in total.

7.2 Reports on Lithuania by the CPT and CAT

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) was ratified in 1998 and came into effect in the Republic of Lithuania a year later in 1999. Since then the CPT has examined "the treatment of persons deprived of their liberty" across the country by carrying out five visits to places of deprivation of liberty on the

[91] Human Rights Monitoring Institute. *Arrest and Pre-trial Detention in Lithuania*. Vilnius: Human Rights Monitoring Institute, 2012, p. 4.

[92] Amos, M. *Human Rights Law*. Oxford and Portland, Oregon: Hart Publishing, 2014, p. 296.

[93] *W. v. Switzerland,* App. No. 14379/88, 26 January 1993.

following years – 2000, 2004, 2008, 2010 and 2012[94]. On the global level the United Nations General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which entered into force nationwide in 1996. The CAT, a body that monitors implementation of the UNCAT, submitted its conclusions and recommendations, addressing the responsible authorities of Lithuania, in 2004, 2009 and 2014[95].

Conditions of detention

Ever since the first CPT's visit regarding prison establishments in Lithuania conditions of detention were amongst major challenges in the national penitentiary system. Repressive theory of retributive punishment, inherited from soviet times, was followed by the practice of long-term imprisonment as a priority sentence which is still widely used in the courts nowadays (Picture 1.1 Prison Population Rate per 100.000 of national population in Europe and Table 1.1 Prison Population Rate per 100.000 of national population in Europe).

[94] The CPT examined the treatment of persons deprived of their liberty in Lithuania for the sixth time in 2016.

[95] The newest concluding CAT's observations were expected to be adopted by the April, 2016, however, the procedure is still ongoing.

Picuture 7.1 Prison Population Rate per 100.000 of national population in Europe[96]

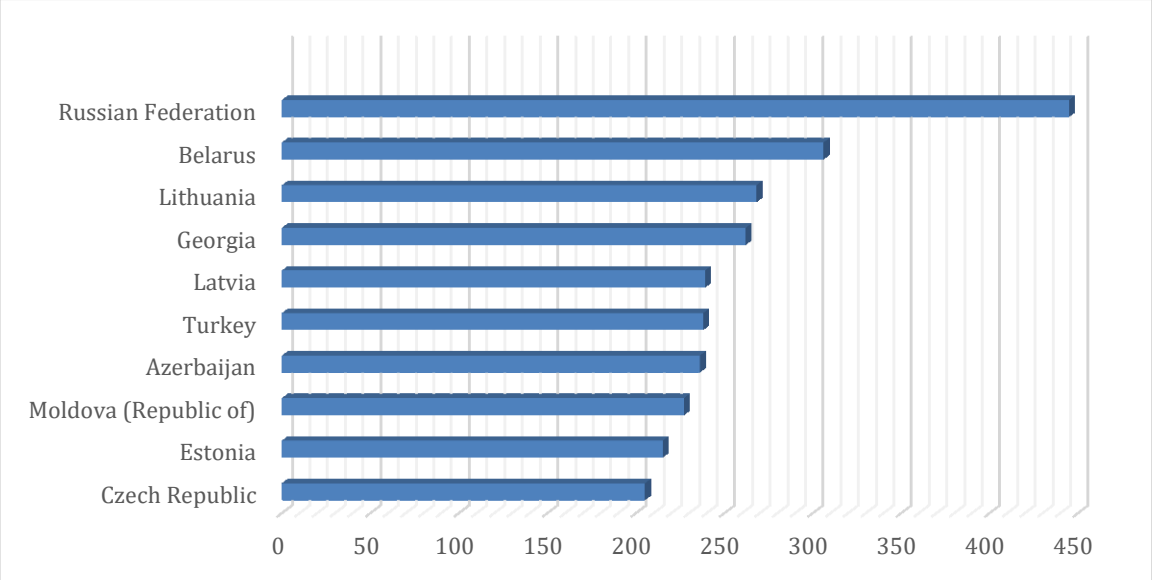

Table 7.1 Prison Population Rate per 100.000 of national population in Europe[97]

Ranking	Title	Prison Population Rate
1	Russian Federation	445
2	Belarus	306
3	Lithuania	268
4	Georgia	262
5	Latvia	239
6	Turkey	238
7	Azerbaijan	236
8	Moldova (Republic of)	227
9	Estonia	215
10	Czech Republic	205

[96] Institute for Criminal Policy Research, University of London. World Prison Brief. Highest to Lowest - Prison Population Rate,

<http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14>.

[97] *Ibidem.*

Although the total number of detainees in Lithuania has been decreasing constantly from 2011/2012, as seen from the data in the part of Statistics (Picture 3.1. Data of Space I and PDMJ on total number of detainees in Lithuania and Table 3.1. Data of Space I and PDMJ on total number of detainees in Lithuania), the incarceration rate remains one of highest throughout the whole continent. The fact that over 95% of prosecution's requests for PTD are satisfied should be also considered in the light of the approach to crime and punishment execution derived from the former totalitarian regime.

Not only the attitudes but also the physical facilities, most of them continuously functioning from soviet times, have to be evaluated. CPT and CAT expressed its concern regarding the conditions of detention in the latest reports and observations.

At the time of the visit, the official minimum standard of living space per adult sentenced prisoner was still 3.1 m² for dormitory-type accommodation and 3.6 m² for multi-occupancy cells.

As indicated in previous reports, these standards are too low. Furthermore, the delegation observed that even these standards were often not respected. For example, it found at Alytus Prison that inmates had less than 2 m² of living space per person in certain cells[98].

The Committee [CAT] is concerned that material conditions, such as hygiene, access to natural and artificial light, ventilation, the partitioning of sanitary facilities and clean mattresses and bedding, in police arrest houses, as well as the regimen offered to detained persons in terms of daily outdoor exercise in certain police facilities, are not in conformity with international standards.

[…]

It is also concerned that the infrastructure and poor material conditions in a number of prisons, especially in the Lukiskes and Siauliai prisons, includ-

[98] CPT/Inf (2014) 18, para. 36.

ing living space per prisoner, are not in conformity with international standards and that prisoners are not provided with a constructive regime[99]. Poor detention conditions shall be considered as an inhuman or degrading treatment or punishment. For this reason, the national courts should order PTD as a last resort having examined potential human rights violations while in custody under the present material conditions and the regime.

The European Court of Human Rights has also found detention conditions in Lithuania violating prohibition of torture. The Court in *Karalevičius v. Lithuania* case[100] observed that "the applicant spent more than three years and one month in the Šiauliai Remand Prison, which according to the Government was overcrowded by more than 100 percent from the point of view of the relevant domestic requirements. For most of that time the applicant was afforded less than 2 square metres of space, of which more than one year and a half was spent by the applicant being restricted to 1.51 m² of space, in a cell of 16.65 m² together with 10 other inmates".

In 2015 the Supreme Administrative Court of Lithuania (SACL) mostly received cases from persons serving imprisonment concerning compensation for inappropriate detention conditions[101]. Moreover, cases regarding actions of subjects of pre-trial criminal investigation, executions of justice and pre-trial detention consisted more than double appeals against judgements of regional administrative courts if compared to previous years, i.e. from 5 percent in 2014 to 11 percent in 2015.

In the case under investigation the applicant claimed compensation for damages allegedly suffered as a result of inappropriate detention conditions. It has been established that the applicant had been detained for 240 days, 185 days and a half-day whereof he was not provided with a minimum rate of living space, i.e. 3,6 square meters. The area of the cell was also cluttered with beds of detainees and other household requisites. Having

[99] CAT/C/LTU/CO/3, 2014, para. 19-20.

[100] *Karalevičius v. Lithuania,* App. No. 53254/99, 7 April 2005.

[101] Supreme Administrative Court of Lithuania. Annual Report 2015, <http://www.lvat.lt/en/annual-reports.html>.

considered all circumstances of the applicant's detention (his, as being a smoker, detention with nonsmokers, open lavatory and wash basin, insufficient ventilation, etc.), as well as the fact that a minimum rate of living space has been significantly violated for a long period of time, it was found that such infringement gave impetus to experience negative feelings, caused spiritual suffering and the feeling of worthlessness, the intensity of which exceeds an inevitably inherent degree of suffering of the prisoner, and is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms which prohibits torture. Having considered the circumstances and the case-law of the European Court of Human Rights and national courts, as well as the state's economic working and living conditions, the panel of judges decided to award damages for non-material harm of LTL 4 900[102].

[102] Administrative case No. A-442-795/2014.

8. Conclusions and Outlook

Desktop research of the issues related to the treating PTD as the measure of the last resort in Lithuania allows us to note positive trends in some aspects:

Recent amendments of legal regulations (2015) are clearly aimed at the reduction of use of PTD;

Positive trends in statistics show dramatic decrease of use of PTD and, what is very important, positive changes in "penal climate";

More academic discussions on PTD, more analytical publications in mass media and even the first judges, actively and openly commenting judicial decisions on social media, may be observed;

A great potential for increased use of alternatives may be observed, particularly of bail. Application of electronic monitoring has just begun in Lithuania, it was applied for the first time in April 2016.

However more research and direct opinions of the actors of proceedings are needed to find out if:

new amendments make any difference in practice;

what are the key reasons for changing penal climate and practices, what are the other, unnoticed factors that influence the PTD decisions, especially regarding procedure of decision making;

how do the media impact on PTD decisions;

what are the obstacles to apply alternatives instead of PTD, do alternatives actually replace PTD, or do they replace other alternatives or even have net-widening effect.

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