BRINGING JUSTICE INTO PRISON: FOR A COMMON EUROPEAN APPROACH

WHITE PAPER

ON ACCESS TO JUSTICE FOR PRE-TRIAL DETAINEES

A REPORT BASED ON COMPARATIVE ANALYSIS AND EMPIRICAL STUDIES IN NINE EU COUNTRIES BY THE RESEARCH PROJECT EUPRETRIALRIGHTS.

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GENERAL INTRODUCTION

This document is the main result of a wide scale enquiry conducted within the programme “Improving protection of fundamental rights and access to legal aid for remand prisoners in the European Union” (EURPRETRIALRIGHTS)[1]. This programme enabled teams of experienced scholars in Law and Social sciences to draw a precise picture of both legal provisions regarding access of remand prisoners to justice and legal aid, and of the actual enforcement of those provisions on the ground, in the nine EU members states being part of the study—namely France, Germany, Netherlands, Belgium, Italy, Spain, Poland, Czech Republic and Bulgaria[2]. The purpose of this White Paper is thus (1) to provide its readers with a comprehensive vision of the mechanisms, proceedings and strategies that may facilitate or hinder effective access to justice for remand prisoners (2) to propose their critical analysis, and (3) to come up with relevant, evidence-based proposals for legal improvement of effective access of remand prisoners to legal aid at the European level. In this perspective, it has been conceived as a usable tool bringing the results of our research to national and European institutional stakeholders, and promoting legal harmonization as well as an adaptation of practical logics of access to legal aid within the EU.

1. BACKGROUND OF THE EUPRETRIALRIGHTS PROGRAMME

1.1 The European Situation: A Brief Assessment

In 2018 the penitentiary institutions across the European Union were holding more than 569 000 accused and convicted prisoners, 90 000 of which were in pre-trial detention[3]. According to the Institute for Criminal Policy Research, among the 20 European States that have the higher occupancy rates, 14are EU Member States[4]. In documents issued by both the Council of Europe[5] and the European Parliament[6], the detention conditions of these detainees—and particularly of the last category, that of remand prisoners—are still considered problematic in a majority of Member states. Prisoners placed in pre-trial detention are indeed likely to find themselves in specialized remand centres or in prisons dedicated to short-term sentences, which are also the ones suffering from severe overcrowding, and of the situations overcrowding frequently creates: a cramped accommodation characterized by infestation with vermin, poor hygiene and heating or insufficient ventilation, and a general reduction of services to be provided in a prison facility in terms of medical treatment, education or rehabilitation programmes.

This situation persists despite the numerous standards developed by the Council of Europe, not only in the context of soft law instruments[7] but also and above all in the case law of the European Court of Human Rights (ECtHR), mainly on the basis of the non-derogable requirements of Article 3 of the European Convention on Human Rights. To guarantee the effectiveness of these rights, the Strasbourg Court has imposed positive obligations on States, mainly in the form of an obligation to provide an effective remedy, capable of preventing or stopping a violation of the Convention and providing redress. Despite this increased pressure on domestic courts, the Strasbourg Court remains overwhelmed by repetitive prison-related applications, reflecting the inability of its judgments to transform national prison systems. Several European Union Member States contribute to this congestion of the Court and have been the subject of pilot and quasi-pilot judgments, i.e. judgments finding structural violations of the Convention[8].

From the European Union’s point of view, even when prison conditions are mainly considered to fall under the responsibility of Member States, it is clear that substandard detention conditions not only undermine fundamental rights, as laid down in the Charter of the EU, but have also a strong negative impact on a proper functioning of the Union in the area of criminal law[9]. In order to promote mutual trust, judicial cooperation and the proper functioning of mutual recognition tools in the criminal law area (Art. 82 TFEU), it is essential to ensure

1 *A three-year action funded by the European Union’s Justice Programme (2014-2020).*

2 *See national reports of the EUPRETRIALRIGHTS research programme. Link >*

3 *Based on the latest Eurostat data (number of prisoners for 2016). Eurostat does not show the number of prisoners in Belgium and Scotland for 2016 (yet). See Eurostat, Prison capacity and number of persons held (crim_pris_cap), last updated on 10 January 2019. Link >*

4 *See World Prison Brief, Institute for Criminal Policy Research (ICPR), Birkbeck, University of London. Link>*

5 *European Committee on Crime Problems (CDPC), White Paper on Prison Overcrowding, Strasbourg, 30 June 2016. For an academic assessment, also see W. Hammerschick e.a., DETOUR - Towards Pre-trial Detention as Ultima Ratio : Comparative Report, Vienna: Institute for the Sociology of Law and Criminology 2018.*

6 *See in particular the European Parliament resolutions on the Stockholm programme (25 November 2009); on detention conditions in the EU (15 December 2011); on the situation of fundamental rights in the European Union in 2015 (13 December 2016) and on prison systems and conditions (5 October 2017).*

7 *Recommendation No. R (99) 22 “Concerning prison overcrowding and prison population inflation” in 1999, to finally propose in the 2016 White Paper on Prison Overcrowding a long list of measures to bring prison conditions in line with human rights standards.*

8 *See European Parliament resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI)); European Committee on Crime Problems (CDPC), White Paper on Prison Overcrowding, Strasbourg, 30 June 2016.*

9 *See in particular the European Parliament resolutions on the Stockholm programme (25 November 2009); on detention conditions in the EU (15 December 2011); on the situation of fundamental rights in the European Union in 2015 (13 December 2016) and on prison systems and conditions (5 October 2017).*

that satisfactory conditions of detention exist in all Member States[10].

When prison conditions in a Member State are considered to be degrading, the execution of arrest warrants and transfers of prisoners to that Member State might amount to a violation of the EU Charter, as ruled by the EU Court of Justice in the **Aranyosi and Căldăraru** case[11]. Therefore, the execution of an EAW may be postponed and ultimately refused due to the detention conditions to which he or she would be subjected if surrendered to the issuing Member State. This development poses a major challenge in regard with the use of EAW. The detention situation has degraded very much in numerous EU member States and national control mechanisms (jurisdictional and non jurisdictional) of prisons are so disparate that it is very difficult to get a precise and updated picture of local situations, as required under the new CJEU case law. Thus, the development in the CJEU case law, and more broadly the institutional transformations resulting from the Lisbon Treaty have profoundly renewed the parameters of the prison issue from the European Union perspective. Against this background, the question of the effectiveness of remedies available to detainees is therefore decisive from the point of view of the Strasbourg Court or that of the European Union.

This problematic landscape called for critical research and notably lead to the EURPRETRIALRIGHTS programme.

1.2 The EUPRETRIALRIGHTS programme: a brief genealogy

This project indeed originated in previous research initiated by the European Prison Litigation Network (EPLN)[12], notably an inquiry centered on legal mechanisms of access to legal remedies for detained persons in European prisons[13]. Great disparities were observed with regards to access to a judge and the effectiveness of rights. Access to legal resources in detention and the external intermediaries for prisoners' complaints were found to be critical factors in the judicial protection in detention. This fact could be explained by a "marked underrepresentation in prison of the populations that have the least financial resources and are least educated", who are often disarmed before legal procedures. The structure and volume of the remedies were equally found to be determined by the actors—lawyers, NGOs—who are active in the field of justice.

These findings called for a more systematic study of the effective access to legal resources, legal practitioners and finally to the judge while in detention. To this end, a new research project was built, aiming at a broader and deeper study. Project stakeholders first wished to focus on key populations and the moments where access to justice and legal aid are critical issues: this meant notably to focus not only on access to legal aid for persons detained in prison facilities, but also on access to legal aid for persons placed in police custody. When it came to penal detention, the pre-trial phase and the situation of remand prisoners became in the same way a matter of particular concern (see below, §2). On this particular situation, an early analysis of available sources showed a lack of precise legal or empirical knowledge, making the present research all the more necessary. A survey of European and national law on this topic in each country thus became the first goal of the research. However, the empirical obstacles to effective access to legal remedies observed in the former inquiry urged researchers to complement the description of existing formal mechanisms with an empirical survey of the actual conditions of access to legal information and assistance in each country. Methods of legal analysis thus had to be combined with the methodology classically used in social sciences, notably observation and semi-directive interviews with key actors.

2. SCOPE OF THE RESEARCH AND DEFINITION OF KEY CONCEPTS

Focusing the programme on the pre-trial phase enabled its investigators to go beyond the mere situation of detained prisoners and adopt a broader vision of the "legal chain", ranging from the initial police

10 *See Rosa Raffaelli, Prison conditions in the Member States: selected European standards and best practices, Brussels 17/01/2017. G. Vermeulen et al., Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, Maklu 2011; FRA, Criminal detention and alternatives, 2016.*

11 *CJEU, 5 April 2016, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:140; see also CJEU, 25 July case C 220/18 PPU.*

12 *Also funded by the European Union's Justice Programme*

13 *See Gaëtan Cliquennois and Hugues de Suremain (Eds.), Monitoring Penal Policy in Europe, Routledge 2017.*

arrest and custody to pre-trial detention. This option however required a precise definition of the scope and limits of the study at an early stage of the programme. The following precisions reflect those choices and clarify the aims and main interests of this research.

As previously stated, this study is first focused on remand prisoners[14], also referred to as prisoners placed in pre-trial detention, as opposed to convicted prisoners. This document will use a broad definition of pre-trial detainees (including detainees who have received a first sentence, but are still waiting for a final one). Adopting this definition also lead investigators to select the types of institutions included in the survey. As a result, this research focuses on remand institutions, prisons and police custody, understood here as a form of detention managed by a police force, and ranging in time from the initial arrest of a suspect to his/her presentation to a court after a series of police interrogations. On the other hand, this study notably leaves out institutions devoted to the detention of minors and immigration detention centres. In the same way, psychiatric institutions were not primarily included in the research but had to be taken in consideration in certain specific national contexts where this proved to be relevant (as in the German case), in so far as the period spend in these institutions is to be deducted legally from the sentence and therefore included in the pre-trial phase.

Within this legal and institutional scope, the conducted survey first focuses on systems of legal support in the nine investigated countries: the analysis is first limited to legal support for those pre-trial prisoners who complain about human rights violation in prison, as opposed to legal support regarding criminal proceedings. In many cases however, this research showed how disputes related to conditions of detention could be brought up by lawyers in the course of criminal proceedings, enabling both types of litigation to benefit from the same aid.

Finally, the deliberate focus on the effectiveness of access to legal support adopted within this research brought investigators to first analyse mechanisms of legal assistance[15] in the nine surveyed countries. Legal assistance should be here understood as encompassing access to legal information (information on rights and duties) and to a lawyer, from the first moment of deprivation of liberty. For police custody, this notion notably includes the information given on the right to legal aid, access to a doctor, and access to a trained interpreter. In penal detention, it refers to information on prisoners' rights, access to legal information and to the practical means to file a motion before a court and, again, the effective possibility to meet a lawyer. More broadly, this document will analyse material measures taken to facilitate prisoner's access to court, within Penitentiary institutions, or on the initiative or other state or non-state actors. These measures include for example organizational measures taken by non-state actors (mainly Bars, NGOs, or legal clinics) in order to structure their activity in the field of prison litigation. They also take into account technical tools provided by those same actors to facilitate prison litigation, with special attention to digital tools.

As a first part of this effort, this white paper will give a precise and evidence-based vision of legal and practical obstacles to effective access to their rights by pre-trial detainees. Its authors wish it to be a powerful and useful contribution to their protection in the European Union.

The first part of the White Paper addresses the issue of prisoners' access to the law and the courts from a European perspective. First, the requirements of the ECHR in this area and their limits will be analysed (chapter 1). The following chapter will elaborate on possible future developments from the point of view of the legislation of the European Union (chapter 2).

The second part reviews these issues from a national perspective. The situation of police custody is first considered as a point of reference for the study of the prison situation (chapter 3). It is followed by an analysis of issues regarding access to legal information in prisons (chapter 4), legal aid systems (chapter 5), the role of Bars and lawyers in this area (chapter 6), and the role of NGOs (chapter 7).

14 *The term prisoners is used here in its generic sense of a person under the control of the penitentiary administration, regardless of the status of the persons concerned as accused or convicted persons.*

15 *Given the diversity of legal regimes, our terminology has to be clarified at this point. For the purposes of this study, the term "legal advice" refers to personalized information about rights within the prison; 'legal aid' refers to funding of the assistance of a lawyer by a Member State, enabling the exercise of the right of access to defense. The term lawyer refers to a legal professional who is authorized to pursue his or her professional activities under one of the professional titles listed in the "Establishment Directive"(Directive 98/5/EC).*

CHAPTER 1
THE EUROPEAN COURT OF HUMAN RIGHTS IN THE FACE OF DIFFICULTIES OF ACCESS TO THE JUDGE IN PRISON

1. INTRODUCTION

The European Court of Human Rights (ECtHR) has moved from «the stage of ignorance of the general conditions of detention to that of recognising the right of any detainee to conditions that respect human dignity»[16]. Building on this development, the decade from 2000-2010 has seen a genuine increase in case law related to prison life. The right to protect one's health and the right to decent conditions find their «common matrix» in the judgment on Kudła v. Poland of 26 October 2000[17], delivered on the basis of Article 3 (prohibition of inhuman or degrading treatment). A few months later, the Court handed down its judgment that physical conditions should be taken into account in and of themselves, thus abandoning the intentional infliction of a pain as a decisive criterion for inhuman or degrading treatment[18]. In ruling under Article 3, which allows no exception, the Court established a non-derogable right to decent conditions of detention. As a consequence, the State must «organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties»[19]. Beyond the issues of material conditions of detention and health care, the Court has constructed a category-based protection for detainees, incorporating the doctrine created by other bodies of the Council of Europe, and particularly the «soft case law» of the CPT. Case law has gradually addressed many aspects of life in detention, mainly on the basis of Articles 2, 3, 5 and 8 of the Convention.

To ensure the respect of the wide ranges of rights thus recognized by its case law, the Court has imposed a number of positive procedural obligations, first and foremost the right to an effective remedy. These mechanisms must, inter alia, be independent, with the power to make binding decisions, capable of preventing or ensuring both the cessation of the breach as well as adequate reparation in the interest of the injured party[20].

The Court has defined the procedural obligations of States in this area all the more precisely as the effectiveness of remedies is in its view a crucial issue. Its judicial policy has been to make the right to an effective remedy a privileged means for the eradication of endemic problems in Europe's prison systems[21]. The measures that the Court requires States to take in its pilot and quasi-pilot judgments (when finding that the violation is structural in the respondent State) consist in the establishment of such remedies. The handling of this dispute by the domestic courts is also a vital necessity for the Court: large portions of the repetitive applications which obstruct it concern the conditions of detention. In this context, it can be expected that the Court will be particularly attentive to the obstacles encountered by detainees in accessing redress mechanisms. What is really happening in its case law? The purpose of enumerating the developments in the following section is not simply to recall the procedural requirements identified by the Court in prison matters; rather, it is to consider the Court's approach to overcoming these structural difficulties, as well as the procedural means it promotes in this area.

16 *F. Tulkens, "droits de l'homme en prison", in J.-P. Céré (dir), Panorama européen de la prison, L'Harmattan, coll. "sciences criminelles", 2002, p.39.*

17 *Kudla v. Poland [GC], 26/10/2000, no. 30210/96.*

18 *Peers v. Greece, no. 28524/95 19/04/2001; Dougoz v. Greece, no. 40907/98.*

19 *See for example, Varga and others. v. Hungary, 10/03/2015 no. 14097/12.*

20 *B. Belda, Les droits de l'homme des personnes privées de liberté, Contribution à l'étude du pouvoir normatif de la Cour européenne des droits de l'homme, Bruylant/LGDJ, 2010.*

21 *4 Ananyev and Others v. Russia, nos. 42525/07 and 60800/08, 10/01/2012; Neshkov and Others v. Bulgaria, Nos. 36925/10 et al., 27/01/2015, and Atanasov and Apostolov v. Bulgaria, no. 65540/16 and 22368/17, dec. 27/06/2017; Varga and Others préc.; Torreggiani and Others v. Italy, nos. 43517/09, 08/01/2013, and Stella and Others v. Italy, no. 49169/09, decision of 16/09/2014.*

2. THE EFFECTIVE REMEDY MODEL UNDER ARTICLE 13: A REMEDY THAT PRISONERS CAN EXERCISE ON THEIR OWN

2.1 The Court's preference for simplified remedy mechanisms, rather than a system that allows for the intervention of the lawyer

Although the Court has abstained from providing a model for the system of remedy, its clear preference for independent authorities or penitentiary judges takes into account not only a specific concern for the responsiveness of the mechanism and its knowledge of the penitentiary environment, but also its accessibility for detainees. The Court is therefore fully aware of the specific problems of the prison population when it comes to access to courts. To remain schematic, it can be said that its response aims to adapt the characteristics of the appeal bodies, rather than imposing legal assistance measures that would allow detainees to bring their cases before the ordinary courts.

Various factors are taken into account, in this regard: the cost of proceedings, the complexity of related rules and procedures, protection against reprisals, etc. In the Ananyev pilot judgment, the Court is satisfied that the procedure for preventive remedy provided for by domestic law is implemented at no cost to the applicant (§109). As to the compensatory remedy to be established in execution of the judgment, the Court asserts that it must not include a regime with legal costs, which place an excessive burden on an applicant whose action is with good cause (§228).

As for access to legal aid, case law appears to be rather sparse. From the perspective of a fair trial, the Court takes into account the absence of legal aid but declares in its conclusions, not on the grounds of a right to judicial access—which is usually the grounds on which it considers the issue of free legal aid—but rather in terms of a failure to be personally heard before a judicial body[22]. It should however be noted that, in its judgment in Aden Ahmat v. Malta of 23 July 2013[23], regarding physical conditions for the retention of illegal immigrants, and for which the findings may be transposed to disputes regarding the prison system, the Court expressly asserted that the absence of a structured system of legal aid posed in itself a problem in terms of access to recourse, regardless of the merits thereof (§66). However, it does not seem that such a position has been taken at this time in a penitentiary case, whereas a country such as Russia, which has been subject to a pilot judgment, does not offer free access to lawyers in this area. In reality, the Court insists rather on the filing of the complaint before the competent organs by the detainees themselves, emphasising the simplicity of the procedures[24] or requiring the adaptation of rules governing the establishment of facts (see below).

Specific diligences are imposed on authorities in situations concerning the incrimination of people with mental health issues, obliging such authorities to act under their own initiative to assess the situation in question. Thus, in the judgement on Sławomir Musiał v. Poland[25], the Court considered that, as the applicant suffered from a psychiatric disorder that had lowered his mental faculties, «it should not be required or expected that he use with the greatest attention all the remedies available under the code for the application of sentences.» (§73). Some cases regarding detainees with no such issues include indications in favour of a requirement for an action proprio motu[26], but such an obligation does not appear to be systematic in case law as it is in the preceding hypothesis.

One major obstacle to exercising means to rights in prison—the fear of reprisals—now seems to be taken into account. In the judgment Neshkov and others v. Bulgaria, the Court went to the trouble of specifying that the detainees must be able to complain with no fear of punishment or prejudicial consequences due thereto (§191), thanks to the support of the European Prison Rules. The

22 *Vasilyev v. Russia, 10/01/2012, no. 28370/05; Beresnev v. Russia, 24/12/ 2013 no. 37975/02.*

23 *no. 55352/12, § 66.*

24 *See also Neshkov v.Bulgaria, prev., §191; mutatis mutandis, Marin Kostov v. Bulgaria, no. 13801/07, §§ 47-48, 24 /07/2012.*

25 *No. 28300/06, 20/01/2009.*

26 *See for example, Kalashnikov v. Russia (dec.), 18/09/2001, no 47095/99.*

Court bases itself mutatis mutandis on the solution given in a case where the applicant was placed in isolation due to his or her complaints to the prosecutor[27]. This innovation has not at this stage resulted in an «operational» instruction, which may require a specific protection mechanism for a person making a complaint.

2.2 A regulated process, allowing the detainee to act alone

The Court has developed dense procedural requirements allowing for the effective intervention of an external body, despite the fact that applicants remain entirely under the control of the administration, and that the latter represents the sole party with access to evidence. It has worked to simplify the procedural mechanisms, in order to bring the protection afforded by article 13 within the reach of detainees. This rationale makes it possible to handle the most common issues in European penitentiary systems: promiscuity related to overcrowding, insalubrity, constructions that are unfit for human habitation, etc. In other words, the data for the dispute lends itself to descriptions and discussions on evidence in fairly simple terms.

In this respect, the pilot judgment in Ananyev recalls in a very explicit manner (§228) that it should merely be required that interested parties produce elements that are easily accessible to them, such as detailed descriptions of their conditions of detention, declarations by witnesses, or responses from inspection bodies; it would then be up to the authorities to refute these allegations by producing their own documents, demonstrating that the conditions of detention do not contradict Article 3 of the Convention.

Case law does not appear to have really considered the issue of investigatory measures, in particular expertise, which require a professional to inform the judges of their field with regard to technical questions[28]. It is not given that the system resulting from current case law may allow appropriate treatment of the disputes involving complex issues.

It is important to note, however, that this concern for simplification does not result in dissolution of the procedural requirements inherent in judicial review. Under Article 13, the consideration of claims by detainees must follow a procedure which is defined by law and that ensures the participation of interested parties. This means both allowing relevant facts to be independently established and also avoiding claims of detainees being ignored. The interested parties must be able to respond to observations made by the administration, in order to prevent their allegations from being negated by contradictory statements made by penitentiary services. In addition, the body must be obliged by law to rule effectively on the claims. In this respect, authorities such as the Prosecutor—responsible in some central and eastern European States for checking the legitimacy of authoritative acts—were considered to be inadequate for the purposes of Article 13, as they did not allow detainees to follow the progress of their proceedings nor to dispute the statements of authorities[29]. The same considerations, further to those regarding the absence of an enforceable power, led the Court to refuse to see Ombudsman institutions as an effective remedy[30]. However, the Court's position is not unambiguous, as when it considers the conduct of the proceedings, it does so with the implicit consideration that the detainee is alone in the face of the administration.

3. THE RIGHT TO A FAIR TRIAL: SIGNIFICANT POTENTIALITIES, INSUFFICIENTLY REALIZED

3.1. The restrictive approach to the scope of criminal guarantees

Article 6§3, which applies to "criminal" charges, contains safeguards that could considerably strengthen the detainee's position in disputes between himself or herself and the administration. In particular, a person charged with a criminal offence who does not wish to

27 *Reference made to article 70.4 of the European Prison Rules of 2006, and, mutatis mutandis, Marin Kostov v. Bulgaria, prev., §§ 47-48.*

28 *For an example requiring an expertise to establish the facts, in another area of law (medical fault) under the protection provided by article 8, see S.B. v. Romania, no. 24453/04.*

29 *Pavlenko, no 42371/02 , §§ 88-89, 01/04/2010; Aleksandr Makarov, no 15217/07 §86, and Ananyev, cited above, §99. Neshkov and others v. Bulgaria, cited above, §212.*

30 *See for example Ananyev and others, cited above, §§105-106.*

defend himself or herself in person must be able to have recourse to legal assistance of his own choosing from the initial stages of the proceedings (Article 6§3 (c)). In addition, Article 6§3 (c), encompassing the right to legal aid, is subject to two conditions, which are to be considered cumulatively: (1) the accused must show that he lacks sufficient means to pay for legal assistance; (2) the interests of justice require an accused to be provided with free legal representation[31].

The question of the scope of application with regard to the criminal aspect of Article 6 is therefore decisive. In this respect, the main issue is the assimilation of disciplinary proceedings to a "criminal charge" within the meaning of Article 6. Under current case law, disciplinary proceedings are considered as criminal charges only if they entail an extension to the duration of the sentence to be served[32]. In the absence of a practical extension to the duration of a detainee's deprivation of liberty, the guarantees of Article 6§1 (criminal) and 6§3 do not apply in principle[33]. The case law in prison matters has remained unchanged, even though the criteria of article 6§1 (criminal limb) have significantly changed[34], and should have led to an extension of the criminal field in prison disciplinary litigation.

This lack of prison case law is compensated by the significant extension of the scope of application with regard to the civil aspect of Article 6§1 in this area. However, the procedural guarantees provided in this context are insufficient.

3.2. The civil aspect of Article 6§1: an extensive scope of application, but very specific safeguards

The civil aspect of Article 6§1 seemed to be, in the early 2000s, a potential vector for the establishment of the procedural rights for the detained population. Taking an incremental approach, the Court has recognized the applicability of this text to several categories of measures. Compensation claims filed by prisoners concerning poor material conditions of detention[35] or inadequate health care[36] fall within the scope of these categories. The article also applies to restrictions imposed on a detainee's right to receive money from outside prison[37] or on family rights, whether the question is a limitation of access to the visiting room[38] or security measures surrounding visits by relatives, such as the use of a separation system[39]. Besides this central core of rights of a private character, the Court's conception of what falls within the scope of the "sphere of personal rights" is comprehensive and comprises a potentially wide variety of prison situations: limitations of access to the prison yard, resulting from the implementation of a high security regime[40], or confinement of a prisoner to the disciplinary block[41], etc.

The right of access to a court has been established as such by the Court in the renowned case Golder v. The United Kingdom [GC], which concerns the rejection of a prisoner's claim to the right to consult a lawyer, with the aim to bring defamation proceedings against a warder[42]. The Court stresses that such a hindrance to access can in fact contravene the Convention, just like a legal impediment (§ 26). In an exemplary manner, the Court ruled that such an opportunity had not been granted to the applicants in the case Stegarescu and Bahrein v. Portugal, which concerned the isolation of prisoners accused of preparing a prison break. The Court took account of the fact that the applicants in that case had never had access to the text of the decisions ordering their confinement. In the eyes of the European judges, such a procedure did not enable the persons concerned to effectively challenge the measure at issue. This requirement seems to be particularly relevant, and could then be the starting point for developing a consistent case law in disputes concerning security measures, where the prison administration is ready to invoke public order in order to refuse an explanation to the persons concerned about the decisions that have been made against them. The concern about ensuring a viable referral to the courts is present in the cases in which the Court ruled that excessive procedural constraints, such as the one requiring a list of all persons concerned by the procedure, are a breach of the right of access to a court[43], as is the exceedingly short timeline of the procedure[44].

Unsurprisingly, the question of accessibility to the court comes up in terms of its financial dimension in prison litigation. This is the case because, to begin with, such accessibility entails the cost of fees. In this respect, the capacity of the applicant to pay for the

31 *This requirement is looked at especially with regard to the capacity of the prisoner to present his case – for example, on account of unfamiliarity with the language used in court and/or the particular legal system.*

32 *In relation to the date of release that the person may have anticipated under domestic law. See Ezeh and Connors v. The United Kingdom; No. 39665/98 and 40086/98, 9/10/2003; Young v. The United Kingdom, no. 60682/00, 16 /01/2007*

33 *See Payet v. France, no. 19606/08, 20/01/2011; Štitić v. Croatia, no. 29660/03, 8/11/2007*

34 *Jussila v. Finland [GC], no. 73053/01, 23/11/2006. In principle, the criterion of the nature of the offence must take precedence over the others.*

35 *Beresnev v. Russia (prev.).*

36 *Vasiliev v. Russia (prev.).*

37 *Enea v. Italy [GC] no. 74912/01, 17/09/2009*

38 *Gülmez v. Turkey, no. 16330/02, 20/05/2008; Enea v. Italy (prev.).*

39 *Stegarescu and Bahrin v. Portugal, no. 46194/06, 6 /04/2010, § 35-39.*

40 *Ibid.*

41 *Razvyazkin v. Russia, no. 13579/09, 03/07/2012*

42 *Golder v. the United Kingdom, 21/02/1975, § 36, Series A no. 18.*

43 *Shishkov v. Russia, No. 26746/05, 20/02/2014*

44 *Ibid.*

legal costs, and the stage of the proceedings when these costs are due, are elements to be taken into account. These purely financial restrictions, totally decoupled from the prospects of success of the appeal, must be the subject of particularly rigorous scrutiny. In the case Ciorap v. Moldova[45] the applicant was denied access to a court on the grounds that he had not paid the fees of the proceedings. According to the Court, the person concerned should have been exempted from the payment, regardless of his capacity to pay, taking into account the severity of his allegations (in this case, torture).

As far as free legal aid is concerned, the case law considers that, unlike what is common in criminal matters, Article 6§1 does not imply such support in all litigation related to a "right of a civil character". The situation could differ, though, when this assistance is indispensable in gaining effective access to a court, on the basis of the particular circumstances of the case, and in particular on the basis of the importance of the issue for the applicant, of the complexity of the right or of the applicable procedure, and of the capacity of the defendant to effectively present his case in person. In prison-related matters, the Court seems quite reluctant to take a stance. In several cases, it took into account the absence of legal aid, but only with the purpose of reinforcing its line of argument, and not on the grounds of the right of access to a court, but rather on the grounds of the failure to appear before the judicial body[46].

Taking into account the tendency by States to try to flout the logistical constraints deriving from the transfer of prisoners to the courthouse, the failure to appear before the court and the absence of a public hearing constitute key areas where a breach of Article 6§1 is found. These violations, which can go hand in hand, are in general examined when taking into consideration other elements of the proceedings, with the aim of assessing their fairness in its entirety, on the basis of the requirements of equal arms and of the adversarial principle. Article 6 does not guarantee the right to personal presence before a civil court, but rather a more general right to present effectively one's case, provided the principle of equal arms vis-à-vis the opposing party is respected[47]. The State retains the right to choose the means to be used for the purpose of guaranteeing such rights. As for the hearing requirement, it does not apply systematically in cases in which written exchanges are deemed more appropriate, depending on the circumstances (for instance, when no issues of fact or law are present that could not be adequately solved on the basis of the file and of the written observations of the parties). Personal presence, oral or written form of the proceedings, legal representation etc., are also issues that must be analysed in the broader context of the "fair trial" safeguard: it should be verified whether the applicant has been given a reasonable opportunity to comment on observations or on evidence produced by the other party, and to present his/her case under conditions that do not put him/her at a disadvantage vis-à-vis the opposing party.

4. CONCLUSION

The situation of the procedural rights of detainees under the Convention is rather paradoxical. The Court has developed a considerable body of case law to give effect to the substantive rights granted to detainees. It has endeavoured to respond to the concrete difficulties encountered by detainees in terms of access to a judge. However, in its case law under Article 13, the Court fails to take into account the essential role of the lawyer from the point of view of access to justice, which is even more essential for detainees. The model promoted is based on a twofold assumption: that of the autonomous prisoner, able to orient himself in the procedures; and that of the judge, spontaneously applying the requirements of the Convention. This representation is contradicted by field surveys, as shown in the following chapters.

As far as the fair trial principles are concerned, they could be formidable tools for the safeguard of fundamental rights in the enclosed world of prisons. As a matter of fact, the protection, which is guaranteed under Article 6, concerns a limited number of aspects. The concrete obstacles faced by prisoners, resulting from their situation of complete dependence on the prison's administration, from their socio-economic situation and from the inaccessibility of the measures providing access to the law outside of the prison system, are considered in a very incidental manner by the Court with regards to Article 6. In acting thusly, the Court is seriously undermining the construction it has itself patiently developed.

45 *No. 12066/02, 19/06/2007*

46 *Larin v. Russia, No. 15034/02, 20/05/2010; Vasilyev v. Russia; Beresnev v. Russia (prev.).*

47 *Larin v. Russia (prev.)*

CHAPTER 2
THE NEED FOR EU MINIMUM STANDARDS ON DETENTION

1. INTRODUCTION

More than 569 000 accused and convicted prisoners are held in prisons throughout the European Union. More than 90 000 of them are in pre-trial detention[48]. Detention conditions are regulated at different levels, ranging from the constitutional law, to prison law and international conventions. On the European level, the protection of fundamental rights in Europe in general and in European prisons in particular should be guaranteed by both the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFREU). Relevant human rights provisions foreseen in both instruments include those prohibiting torture and other forms of inhumane and degrading treatment or punishment. Prison life must—as an absolute minimum—conform to the standards spelled out in both instruments.

In practice, violations of the ECHR and CFREU provisions are not uncommon in detention settings. The ECtHR has held numerous times that **poor detention conditions** within EU Member States constitute a violation of the Convention rights[49]. Monitoring bodies such as the European Committee for the Prevention of Torture equally emphasize that detention conditions continue to be problematic in many countries[50]. The same goes for NGOs like Fair Trials International[51]. In addition, academic research in several EU Member States reveals that detention conditions are such that they hinder a safe, humane and rehabilitation oriented detention[52].

Poor detention conditions are not only problematic in themselves since they constitute violations of fundamental rights, but they also compromise judicial cooperation in criminal matters within the European Union, hence the importance of EU-action on the matter. The EU has developed several instruments to enhance judicial cooperation in the last two decades, based on the principle of mutual recognition.

Mutual recognition instruments rely on the intrinsic mutual trust between the various EU countries. The concept of mutual trust refers to the idea that all Member States intrinsically trust each other's judicial system, thus including how pre-trial detention and custodial sentences are executed. The idea of mutual trust was deemed justified, since all Member States were to be equivalent to each other due to their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law[53]. In short, EU Member States have a shared basis of fundamental rights in their society, which justifies the principle of mutual recognition based on mutual trust.

48 *Based on the latest Eurostat data, which shows the number of prisoners for 2016. Eurostat does not show the number of prisoners in Belgium and Scotland for 2016 (yet). See Eurostat, Prison capacity and number of persons held (crim_pris_cap), last updated on 10 January 2019. LINK*

49 *The ECtHR provides a summary of its most relevant case-law on detention conditions on its website. See European Court of Human Rights, Press Unit, Factsheet – Detention conditions and treatment of prisoners, January 2019, www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf.*

50 *Annual reports and reports of visits to states parties are available online, at http://www.cpt.coe.int.*

51 *Fair Trials International, A Measure of Last Resort? The practice of pre-trial detention decision making in the EU, 2016. LINK*

52 *Vermeulen, G., Van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P. & De Bondt, W., Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures, Antwerp, Maklu, 2011; Vermeulen, G., Van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P. & De Bondt, W., Material detention conditions, execution of custodial sentences and prison transfer in the EU Member States, Antwerp, Maklu, 2011; Eeechaudt, V., Penitentiair tuchtrecht en internationale detentie-standaarden, naleving in België en Frankrijk, Antwerp, Maklu, 2017.*

53 *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, PB C 12, 15 January 2001.*

As of today, two mutual recognition instruments allow for prisoners to be confronted with prison conditions in another EU Member State: the European Arrest Warrant and the Framework Decision on the transfer of prisoners[54]. Being increasingly used in the judicial cooperation between the Member States, it is clear that the execution of mutual recognition instruments could lead to violations of fundamental rights of pre-trial and convicted prisoners. This concern has not only been expressed by different scholars[55], but is also supported by recent jurisprudence of the Court of Justice of the European Union in the joined cases Aranyosi-Căldăraru, in which execution of the EAW was refused due to poor detention conditions in the issuing Member State[56]. **Violations of fundamental rights within the various countries of the European Union are thus an impediment to judicial cooperation between the Member States.**

The fact that executing a European Arrest Warrant can be synonymous to cooperation between Member States at the expense of the fundamental rights of the surrendered person has previously given rise to EU action. The past decade the EU has played a major role in strengthening the procedural rights of suspects and accused persons as Member States agreed that common minimum standards were necessary to facilitate the execution of mutual recognition instruments. Indeed, the lack of a common understanding of human rights standards across EU Member States hampers EU cooperation and reflects the need for an EU-wide understanding of prisoners' fundamental rights. So, although individual EU Member States are responsible for their detention conditions, the European Union has convincing reasons to take a lead in this matter.

Hereunder the discussion will further clarify why the European Union is correct to be concerned about prison conditions. Firstly, it will explain why the current Council of Europe instruments are not adequate to ensure smooth EU cooperation. They were designed with another goal in mind, and cannot provide the necessary preconditions for EU mutual recognition instruments (1). Subsequently, the evolution of judicial cooperation in criminal matters within the European Union will be set out (2,3,4). The problems encountered in the execution of these MR-instruments will be highlighted. Next, the importance of fundamental rights for the proper functioning of EU instruments (5) and the results of the Stockholm Programme, adopted hereto, will be discussed (6). The Post-Stockholm Programme (7) also refers to the need to establish of minimum procedural safeguards for suspected and accused persons in criminal proceedings throughout the European Union.

All of this will underline the need to pay attention to prisoners' rights on the EU-level. Moreover, it will explain why this is nothing more but the next logical step in the EU policy on judicial cooperation in criminal matters.

2. WHY THE PROTECTION PROVIDED BY THE ECHR IS INSUFFICIENT

The ECHR sets out fundamental rights for suspects and defendants in criminal proceedings within Europe. Article 6 on the right to a fair trial and article 3 on the prohibition of torture are two of the most important provisions for the protection of human rights in criminal cases. Violations of the ECHR rights are dealt with by the European Court of Human Rights. In practice, the Strasbourg Court is not always able to adequately enforce ECHR rights in the domestic criminal justice systems of the Member States[57]. For instance, Member States are obliged to effectively protect the rights of their citizens, yet violations of article 6 occur in all EU Member States as has been demonstrated by ECtHR case law against all of them.

The Court allows that Member States have a margin of appreciation when transposing ECHR standards to national legislation. This means that there is **no standard implementation** of the Convention, resulting in a different implementation of the ECHR rights in each Member State. The European Commission acknowledges this: 'despite the fact that the law and criminal procedures of all Member States are subject to the standards of the Eu-

54 *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002 and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5 December 2008.*

55 *Sanger, A., "Force of circumstance: the European Arrest Warrant and human rights", Democracy and Security 2010, afl. 1, 17-51; Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", New Journal of European Criminal Law 2015, afl. 4, 457-480.*

56 *CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru.*

57 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 82.*

ropean Court of Human Rights, there are often some doubts about standards being similar across the EU'[58]. Moreover, a 2009 study shows the worrying discrepancy between the ECHR-obligations and the domestic legislation of some Member States as well as its implementation in practice. Certain fundamental rights, including basic aspects of a fair trial in the ECHR such as the right to remain silent, to have access to the file and to call and/or examine witnesses or experts, were not provided for in EU Member States' legislation. Nor was the implementation of ECHR-standards in practice in line with what the ECtHR required.[59]

The Strasbourg Court equally deals with **repetitive cases**. Repetitive cases refer to cases on matters which have been dealt with by the Court in previous cases but which remain problematic because the concerned Member State fails to take the necessary action to improve or adjust the situation[60]. This shows that judgments sometimes fail to bring systematic change in a country's practice[61]. Since more than a decade the ECtHR has adopted 'pilot judgments' to force Member States to make structural improvements when the Court identifies systemic problems in a Member State[62]. The Member State receives clear indications of the type of remedial measures needed to resolve the problem and are closely supervised by the Court during the process[63]. Despite the pilot judgments and while the jurisprudence of the ECtHR shows general lines of thought, decisions of the Court are inextricably linked with the specific circumstances of the case. This makes it challenging to deduce general rules from its case law. As a result, whether a Strasbourg judgment will have actual consequences for the national legal system depends to a large extent on how national authorities interpret the judgement as they have a substantial margin of appreciation in this respect[64].

So, while the ECtHR has been successful in setting general minimum standards on fundamental rights, in practice, fundamental rights in detention are not guaranteed in many European countries[65]. In this context, the European Commission similarly observed that: "While an individual can have recourse to the European Court of Human Rights (…), this has not proved to be an effective means of ensuring that signatories comply with the Convention's standards[66]."

3. HISTORICAL DEVELOPMENT OF JUDICIAL COOPERATION IN THE EU-CONTEXT

Certain historical developments made the European Union gear its attention to protecting fundamental rights as a necessary next step to ensure further judicial cooperation between the EU Member States. This evolution has been the most pronounced when it comes to fundamental rights in criminal proceedings, but, as will be argued further, should equally be envisaged in the area of imprisonment.

On 14 June 1985, France, Germany and the three Benelux countries signed the Schengen Agreement, allowing for free movement between the five countries, the so-called Schengen Area. The abolition of border controls aimed at facilitating the free movement of persons, goods, services and capital, but at the same time facilitated cross-border crime. Thus, judicial cooperation between the Member States became crucial. Hence, the Amsterdam Treaty (1997) further developed the European Union's competences in the field of judicial cooperation and introduced the concept of the Area of Freedom, Security and Justice (AFSJ). This notion referred to the European Union not only as an area in which the free movement of persons was simplified, but also as an area where different police and judicial authorities would cooperate effectively[67].

To facilitate cooperation, the European Council introduced the concept of mutual recognition as the new cornerstone to judicial cooperation in criminal matters. This decision was taken at the European Council of Tampere of 1999[68]. The principle of mutual recognition differs significantly from traditional cooperation between Member States. Originally, assistance in criminal matters had

58 *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC(2011) 430, 11 April 2011.*

59 *Spronken, T., Vermeulen, G., de Vocht, D., van Puyenbroeck, L., EU Procedural Rights in Criminal Proceedings, Antwerp, Maklu, 2009.*

60 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 82-83.*

61 *European Court of Human Rights, Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year Friday 27 January 2012, Address by Sir Nicolas Bratza President of the European Court of Human Rights, 4.*

62 *Rule 61 Rules of Court of the European Court of Human Rights.*

63 *See European Court of Human Rights, Factsheet – Pilot judgments, January 2019.*

64 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 83.*

65 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 82.*

66 *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, 11 April 2011, 6.*

67 *Ibid., 36.*

68 *Tampere European Council 15 and 16 October 1999, Presidency conclusions.*

to be requested, whereas mutual recognition requires States to execute the decision taken by the issuing State. This results in the executing State losing some of its sovereignty in the enforcement of criminal decisions on its territory. However, depending on the instrument involved, the executing State still retains some power to refuse to execute the issuing State's decision[69]. Interestingly, mutual recognition would need to contribute to a twofold objective: "Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights[70]." In practice, attention was directly mainly at strengthening cooperation while the protection of individual rights was rather neglected.

The principle of mutual recognition was not an entirely new concept when it came to cooperation between EU Member States. The principle was already applied in the economic sphere with the establishment of the EU internal market. Mutual recognition meant for instance that if one Member State deemed a product safe for its citizens, other Member States would accept this decision and thus consider the product safe for their own citizens too. Mutual recognition allowed Member States to avoid the difficulties with having different legal systems within one economic area and avoiding the hurdles linked with harmonising the national contingencies when marketing goods throughout the entire European Union. Wanting to overcome the difficulties related to the differences between national criminal law systems too, the European Union decided at the Summit of Tampere to extend the principle of mutual recognition to criminal matters.

Although the introduction of the principle of mutual recognition is an extension from its application in the internal market, there is an important difference. The European Council assumed that for the application of the principle of mutual recognition in criminal matters, the underlying law needs not be comparable. The application of the principle in the internal market, however, usually requires either at least some basic comparability of underlying national laws, or the adoption of EC legislation to ensure that those national laws are sufficiently comparable[71]. Mutual recognition in criminal matters was a simplified version to ensure that judicial decisions taken in one Member State would indeed be recognized by every other Member State as if it was their own decision. Member States were expected to execute each other's judgements without feeling any need for further requirements or adaptation checks against their own procedural standards. So, mutual recognition was to be considered recognition **without any imposed formalities**[72]. For instruments based on mutual recognition to work, **mutual trust** between the ratifying Member States is thus a crucial prerequisite[73]. This trust is grounded, in particular, on Member States' shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law[74].

4. DIFFICULTIES FACED BY MUTUAL RECOGNITION INSTRUMENTS: THE CASE OF THE EAW

The execution of the Programme of Measures **to implement the principle of mutual recognition of decisions in criminal matters** dominated the Justice and Home Affairs' agenda of the European Union after the European Council of Tampere. It led to the extension of the EU acquis with several mutual recognition instruments, of which the European Arrest Warrant (EAW) is the most well known[75]. The instrument provided a simplified and more flexible surrender of suspected and sentenced persons in criminal matters. It replaced all previous extradition procedures between EU Member States[76].

Judging by the numbers, the instrument is an operational success. Data are not available for all EU Member States, but recent figures show that at least 6518 people surrendered on the basis of an EAW in 2015[77]. Data also show that the yearly total number of executed European Arrest Warrants show a positive trend.[78]

69 *Peers, S., "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", Common Market Law Review 2004, afl. 41, 10*

70 *Programme of measures of 30 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15 January 2001.*

71 *Peers, S., "Mutual recognition and criminal law in the European Union: has the Council got it wrong?", Common Market Law Review 2004, afl. 41, 3.*

72 *Vermeulen, G. & De Bondt, W., EU Justice and Home Affairs: institutional and policy development, Antwerp, Maklu, 2014, 101.*

73 *Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters. COM(2000) 495, 26 July 2000.*

74 *Programme of measures of 30 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15 January 2001, 10-22.*

75 *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190, 18 July 2002.*

76 *Böse, M., "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant" in: Ruggeri, S., (ed.), Human Rights in European Criminal Law, Cham, Springer, 2015.*

77 *Commission Staff Working Document. Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2015, SWD(2017) 320, 28 September 2017, 5.*

78 *Ibid., annex III.*

The Framework Decision on the EAW exhaustively lists the refusal grounds for mandatory and optional non-execution of the European arrest warrant. No reference is made to violations of fundamental rights as an explicit refusal ground for the execution of an EAW. This can be explained by referring to the assumed mutual trust Member States had in each other, which, after all, justified the adoption of mutual recognition instruments. In other words, EU Member States were assumed to respect fundamental rights and violations of these rights were thus not taken into account[79]. The preamble of the EAW Framework Decision stresses the basis for mutual recognition by explicitly recalling that the EAW "is based on a high level of confidence between Member States[80]". Therefore, the execution of an EAW can be postponed or cancelled "only in the event of a serious and persistent breach" of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, by one of the Member States[81].

In practice, the fine line between mutual recognition and the obligation to respect fundamental rights raised multiple issues when executing EAW's. The lack of judicial control, the abolishment of several safeguards and an excessive reliance on mutual trust entailed the risk of human rights violations. Later on, the Court of Justice of the European Union (CJEU) addressed the balance between mutual recognition and respect for fundamental rights on several occasions, revealing a gap between the expected and the actual mutual trust between the EU Member States[82].

On 5 April 2016, the Court of Justice of the European Union ruled in the joined cases **Aranyosi and Căldăraru**[83]. In the Case of Aranyosi, Hungarian judicial authorities issued two European arrest warrants with respect to a Hungarian national, Mr. Aranyosi. He was suspected of having committed two offences of forced entry and theft in Hungary. In this case, the EAWs were issued for the purpose of criminal prosecution. In the case of Căldăraru, Romanian judicial authorities issued an EAW with respect to Mr. Căldăraru who was sentenced to one year and eight months imprisonment for driving without a driving license. In this case, surrender was requested for the purpose of executing the sentence in Romania.

Since the two men had been located in Germany, the German authorities were to execute the warrants. The German judiciary, however, found that the detention conditions in Hungarian and Romanian prisons might be of such a nature that they violated fundamental rights, in particular the provisions in the ECHR (art. 3) and the CFREU (art. 4) prohibiting inhuman or degrading treatment or punishment. The ECtHR ruled in 2014 and 2015 that Romania as well as Hungary had violated the ECHR as their prisons were overcrowded[84]. Moreover, reports issued by the European Committee for the Prevention of Torture were very critical of the prison conditions in both countries. The extradition would thus potentially lead to the imprisonment of Mr. Aranyosi and Mr. Căldăraru in conditions violating fundamental rights. Therefore, the German court referred to the Court of Justice of the European Union for a preliminary ruling to ascertain whether execution of EAWs can or must be refused when there are strong indications that the detention conditions in the issuing state infringe fundamental rights of the persons concerned.

The CJEU ruled that that execution of an EAW must be postponed, and ultimately refused, if the person concerned would be at risk of inhumane or degrading treatment due to the detention conditions he or she would be subject to if surrendered to the issuing Member State. The Court thus recognized that the risk of fundamental rights violations were a refusal ground for the execution of an EAW. By doing so, the CJEU clarified that **mutual trust is not unconditional and that Member States must assess respect for human rights prior to surrender following an EAW**[85]. The CJEU gave some guidance as to the kind of assessment that national authorities are required to make if serious concerns regarding prison conditions are being raised: "[the EAW] must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the **executing judicial authority must** determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a Euro-

79 *Article 1(3) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190, 18 July 2002.*

80 *Ibid., preamble, 10.*

81 *Ibid., preamble, 10.*

82 *For a short overview, see Eurojust, Case Law by the Court of Justice of the European Union on the European Arrest Warrant, October 2018, 69 p.*

83 *CJEU 5 April 2016, joined cases no. C-404/15 and C659/15 PPU, Aranyosi and Căldăraru.*

84 *See ECHR, Vociu v. Romania, 2014; ECHR, Bujorean v. Romania, 2014; ECHR, Mihai Laurențiu Marin v. Romania, 2014; ECHR, Constantin Aurelian Burlacu v. Romania, 2014; ECHR, Varga and Others v. Hungary, 2015.*

85 *Bovend'eerdt, K., "The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in The Area of Freedom, Security, and Justice?", Utrecht Journal of International and European Law 2016, afl. 83, 112-121.*

pean arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of **the conditions for his detention** in the issuing Member State, to **a real risk of inhuman or degrading treatment**, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, in the event of his surrender to that Member State[86]." In case of objective, reliable, specific and properly updated evidence of detention conditions that violate fundamental rights, the executing state is thus obliged to ascertain the risk of inhuman or degrading treatment in the event of surrender of the person. In case of a real risk "the executing judicial authority must request that supplementary information be provided by the issuing judicial authority". The former may seek the assistance of the central authorities of the issuing State, which "must send that information within the time limit specified in the request"[87]. Subsequently, "the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk[88]".

The Court judgment in the joined case Aranyosi-Căldăraru acknowledged that **detention conditions** are a **decisive element in the application of the principle of mutual recognition** of judgments in the European Union Area of Freedom, Security and Justice. This judgment has to be considered groundbreaking since it is the first in which the CJEU acknowledges that protection of fundamental rights limits the principles of mutual trust and recognition in judicial cooperation. The fact that surrender following a European Arrest Warrant has been actually refused by the CJEU due to a violation of fundamental rights has made it painfully clear that the Court acknowledges that the lack of mutual trust in the judicial cooperation between Member States is well founded. Thus, **human rights violations cannot be ignored when deciding upon the execution of a European Arrest Warrant. The principle of mutual recognition does not relieve the executing state from its obligation to respect fundamental rights**[89]. Accordingly, inadequate detention conditions in Member States can seriously hamper judicial cooperation using mutual recognition instruments based on mutual trust.

5. ATTENTION FOR PROCEDURAL RIGHTS

The refusal to execute European Arrest Warrants and other mutual recognition instruments, coupled with CJEU case law, show that the European Union cannot blindly assume mutual trust. After all, mutual recognition relies on mutual trust and confidence, and can therefore be seriously hindered by divergent interpretations of and respect for fundamental rights. The awareness grew that the current discrepancies in levels of procedural safeguards between Member States could seriously affect the realisation of 'an area of freedom, security and justice[90]'. However, the focus was primarily laid on introducing minimum standards related to the procedural rights of suspect and accused persons and not on detention conditions. Nevertheless, rather than expanding the EU acquis with mutual recognition instruments, the EU decided to adopt minimum standards throughout the entire EU, thus providing a real basis for the until then presumed mutual trust between the Member States.

5.1 A false start

The Commission highlighted the importance of developing procedural safeguards for suspects and defendants in criminal proceedings on the EU level in a Green Paper of 2003[91]. Mutual trust between the EU Member States had to be enhanced by harmonising the application of existing ECHR standards at the EU level[92]. The minimum threshold regarding suspects' procedural rights in the EU are after all set by the European Convention on Human Rights, a treaty to which all EU Member States are party. Despite this, divergent application of the ECHR in the various Member States hindered the reliance on mutual trust[93]. The main role for the European Union according to the Green Paper lies thus not in setting standards but in developing practical instruments for enhancing the visibility and the efficiency of the operation of existing ECHR standards at the EU level[94].

86 *Para. 6 CJEU 5 April 2016, joined cases no. C-404/15 and C659/15 PPU, Aranyosi and Căldăraru.*

87 *Ibid.*

88 *Ibid.*

89 *Böse, M., "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant" in: Ruggeri, S., (ed.), Human Rights in European Criminal Law, Cham, Springer, 2015.*

90 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 87.*

91 *Green Paper on procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75, 19 February 2003.*

92 *Ibid., 9.*

93 *Vernimmen-Van Tiggelen, G., & Surano, L., Analysis of the future of mutual recognition in criminal matters in the European Union, 20 November 2008.*

The European Commission attempted to guarantee certain procedural rights on the EU level by presenting a proposal for a Framework Decision on procedural rights in criminal proceedings throughout the EU in 2004[95]. The explanatory memorandum to the proposal reads: "If **common minimum standards** are applied to basic procedural safeguards throughout the EU, this will lead to increased confidence in the criminal justice systems of all the member states which in turn will lead to more efficient judicial cooperation in a climate of mutual trust". The 2004 proposal thus did not envisage the creation of new rights nor the monitoring of compliance with the rights resulting from the ECHR, but **aimed at ensuring a reasonable level of protection for suspects and defendants in criminal proceedings in order to comply with the principle of mutual recognition**[96]. This goal underlines the fact that the EU recognized that mutual trust still had to be built, although several mutual recognition instruments had already been adopted relying on the presumed mutual trust between the Member States. Nevertheless, no political agreement could be reached on the proposal. Several opposing Member States argued that they doubted the added value of the 2004 proposal in relation to the ECHR since they were convinced that the latter provided adequate protection for the rights of suspects and accused persons in the EU. Additionally, the lack of legal basis in the EU Treaties for such an initiative was put forward. Some Member States claimed that the EU did not have the competence to deal with the issue of procedural rights[97].

5.2 Changing EU competences under the Lisbon Treaty

The Treaty of Lisbon provides a stronger basis for the protection of rights of suspected and accused persons in criminal proceedings[98]. Amongst others, the Lisbon Treaty introduced new working structures, not only significantly simplifying the decision making process in the field of criminal law, but also strengthening the supervision of the Court of Justice in the area of judicial cooperation in criminal matters. Framework decisions were replaced with directives as main legislative instrument and majority voting replaced unanimity voting when adopting legislative proposals. The latter gave a new impetus to negotiations for new EU minimum standards. A directive is also a more stringent legal tool than a framework decision, since they generate direct effect, that is to say that they must be strictly complied with when the provisions are described unconditionally and are sufficiently precise and clear[99]. As a result it has become easier, both in the preliminary negotiation process and in the enforcement of compliance, for the EU to guarantee the protection of procedural rights via minimum rules.

The provisions in the Lisbon Treaty with regards to the area of judicial cooperation have changed the context in which the European Arrest Warrant and other mutual recognition instruments operate. The Lisbon Treaty finally provides—almost a decade after the declaration at the Summit of Tampere—a treaty-basis for mutual recognition as the cornerstone for judicial cooperation in criminal matters[100]. Furthermore, the Lisbon Treaty clarifies the until then ambiguous relationship between approximation of national criminal law and mutual recognition. Thus, mutual recognition as well as approximation are both fundamental for judicial cooperation. Approximation is to be seen as a means to guarantee the proper functioning of mutual recognition, from which it follows that measures to approximate the laws of the Member States are only appropriate when mutual recognition requires so[101].

In relation to substantive criminal law, the Lisbon Treaty goes explicitly beyond the point of view that approximation is solely required for cross-border judicial cooperation. Approximation should not only be limited to particular serious crimes with a cross-border dimension but should also be used to ensure the effective implementation of Union policy in an area that has been subject to harmonisation measures[102]. Thus, the Lisbon Treaty provides a general competence provision for the approximation of substantive criminal law by means of directives[103]. This point of view seems to be slightly different in relation to procedural criminal law. The Treaty provides EU competence to adopt minimum rules on the rights of individuals in criminal procedures, but this competence is not general, but functional, following from the necessity requirement of article 82(2)(b) TFEU stating that the EU only has competence on the matter of procedural rights to the extent necessary to facilitate mutual recognition and police and judicial coopera-

94 *Green Paper on procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75, 19 February 2003, 9.*

95 *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328, 28 April 2004.*

96 *Spronken, T., Vermeulen, G., de Vocht, D. & van Puyenbroeck, L., EU Procedural rights in criminal proceedings, 2009. LINK*

97 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 86.*

98 *Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 87-89.*

99 *Klip, A., European Criminal Law. An Integrative Approach, 2nd edition, Cambridge, Intersentia, 2012, 50-51; Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 87.*

100 *Article 82(1) TFEU.*

101 *Vermeulen, G. & De Bondt, W., EU justice and home affairs: institutional and policy development, Antwerp, Maklu, 2014, 103.*

102 *Art. 83 TFEU*

103 *Hecker, B., "The Development of Individual Rights Protection in European Criminal Law After the Lisbon Treaty" in Ruggeri, S., (ed.), Human Rights in European Criminal Law, Cham, Springer, 2.*

tion in criminal matters having a cross-border dimension. What is striking in this wording is that the EU competence in the protection of procedural rights is considered to be a flanking measure for mutual recognition instead of autonomously necessary to address the effects of the operation of mutual recognition instruments on the individual, already well-known by then[104]. This is made clear by the preambles of the Directives based on Article 82(2) TFEU, justifying the measures by linking them to mutual trust. In any case, regardless of the intention, the Lisbon Treaty allocates a central role to procedural rights in the EU area of criminal justice.

5.3 Attention for procedural rights: The EU Procedural Rights Roadmap

Together with the entry into force of the Lisbon Treaty, the Swedish Presidency presented the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[105]. In this Roadmap, strategic guidelines for developing an Area of Freedom, Security and Justice were formulated, in which the Member States recognised the need for measures on the protection of procedural rights at European level. The preamble pointed out that there was "room for further action on the part of the EU to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards". The Roadmap identified five procedural rights in criminal proceedings which should be prioritised: translation and interpretation (Measure A); information on rights for suspected and accused persons and information about the charges (Measure B); legal advice and legal aid (Measure C); communication with relatives, employers and consular authorities (Measure D) and special safeguards for suspected or accused persons who are vulnerable, owing, for example, to age, mental, or physical condition (Measure E). The Roadmap also invited the European Commission to consider presenting a Green Paper on pre-trial detention (Measure F).

The Preamble of the Roadmap follows a twofold reasoning in acknowledging the importance of the establishment of procedural rights protection measures. It is stressed that common minimum standards in procedural law are considered essential "in order to facilitate the application of the principle of mutual recognition." Furthermore, the Council recognized that "procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial." This second argument is important since it explicitly links the establishment of procedural rights at EU level to ensuring a fair trial, thus no longer appointing procedural rights as mere flanking measure for mutual recognition but as an autonomous prerequisite for a fair trial. Recital 10 also explicitly refers to this second argument by stating that EU action in the field of procedural rights is needed to improve the balance between existing EU policy on law enforcement and prosecution on the one hand and the protection of procedural rights of the individual on the other. The Roadmap is the first instrument to put forward rights that should be guaranteed on the EU level, but it is also the first in its kind to explicitly mention how these results should be achieved. The Roadmap was subsequently implemented as an explicit part of the Stockholm Programme[106].

6. RESULTS OF THE STOCKHOLM PROGRAMME: DIRECTIVES AND A GREEN PAPER

The implementation of the Roadmap has, to date, resulted in six directives on procedural rights in criminal proceedings, five of which were prioritised in the Roadmap, and a Green Paper on pre-trial detention. As previously stated, the mere fact that procedural rights are laid down in directives is added value in itself, even if these rights are comparable to those adopted in the ECHR. As directives are legally binding, the EU member states are obliged to implement the rules on procedural safeguards in their national legislation. This guarantees a uniform interpretation of the procedural rights.

104 *Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", New Journal of European Criminal Law 2015, afl. 4, 478-479.*

105 *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4 December 2009; Spronken, T., "Effective defence. The letter of rights and the Salduz-directive" in Vermeulen, G. (ed.), Defence rights. International and European developments, Antwerp, Maklu, 2012, 89.*

106 *§2.4 The Stockholm Programme – An open and secure justice serving and protecting the citizens, OJ C 115, 4 May 2010.*

6.1 The directives

The directives adopted in accordance with the Roadmap create direct rights for all individuals involved in criminal proceedings within the EU Member States. In other words, it creates rights not only for those involved in cross-border cases involving mutual recognition, but also for individuals involved in purely domestic cases too[107]. Some states strongly opposed this, claiming that the EU only has the competence to establish minimum rules for procedural rights for individuals involved in criminal matters having a cross-border dimension. Due to the institutional changes brought by the Lisbon Treaty, in which unanimity voting was replaced by majority voting, no consensus upon the matter was needed. The directives are applicable at all stages of the criminal proceedings, from the moment a person is suspected or accused of having committed a criminal offence until the final decision, including the resolution of any appeal.

The first directive following from the Roadmap, being the Directive on the right to interpretation and translation in criminal proceedings, was adopted in 2010[108]. The directive had to be transposed to national legislation before 27 October 2013. The provisions should guarantee that the suspected or accused person understands what is happening and is able to make himself understood. If the person does not speak or understand the language that is used in the proceedings, he or she has to receive interpretation assistance.

The second measure, Directive 2012/13/EU on the right to information in criminal proceedings, was adopted in May 2012 and had to be implemented by the Member States by 2 June 2014[109]. This Directive ensures that all suspects and accused persons in the EU should be orally informed of their rights in criminal proceedings and of the accusation against them.

Measure C of the Roadmap, on legal advice and legal aid, is addressed in two distinct directives. The right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings were dealt with in the third directive, together with the right to communicate upon arrest (measure D)[110]. Member States had to comply with this Directive by 27 November 2016. The right of access to a lawyer applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence.

The fourth directive was not prioritized in the Procedural Rights Roadmap, emphasizing the non-exhaustive nature of that list. The directive strengthens the right to be presumed innocent and addresses the right to be present at the trial[111]. This directive was adopted in March 2016 and had to be nationally implemented by 1 April 2018.

The fifth directive introduces procedural safeguards for vulnerable persons, more specifically children involved as suspected or accused persons in criminal proceedings[112]. It was adopted in May 2016 and has to be implemented by the Member States by 11 June 2019. The directive is linked to measure E of the Procedural Rights Roadmap, which called for specific safeguards for individuals involved in criminal proceedings which are explicitly vulnerable due to for instance their age or mental or physical condition.

The sixth and last directive to date addresses the right to legal aid, the second part of measure C of the Roadmap[113]. It was adopted by the Council in October 2016 and has to be complied with by the Member States on 11 June 2019. The purpose of the directive is to ensure the effectiveness of the right of access to a lawyer by ensuring that financial and judicial support is granted in criminal proceedings to all accused persons who cannot afford a legal defence with their own resources. The Legal Aid Directive is only applicable to suspected and accused persons in criminal proceedings and to requested persons in EAW proceedings. It is important to notice that the scope of the Legal Aid Directive is thus rather small. Within the specific EAW framework, responsibility of the lawyer in the issuing state goes beyond mere legal advice in criminal proceedings, since he has to assist the lawyer in the executing state by providing him with information and advice. This is the only case in which legal aid can be provided outside the limited borders of criminal proceedings. This means that the Directive on Legal Aid will have no impact at all on litigation related to detention conditions.

107 *Mitsilegas, V., "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", New Journal of European Criminal Law 2015, afl. 4, 462.*

108 *Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26 October 2010.*

109 *Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1 June 2012.*

110 *Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6 November 2013.*

111 *Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11 March 2016.*

112 *Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21 May 2016.*

113 *Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, O J L 297, 4 November 2016.*

6.2 The Green Paper on Pre-Trial Detention and Detention Conditions

The Procedural Rights Roadmap also invited the Commission to present a Green Paper on pre-trial detention and detention conditions. The Commission presented a Green Paper in June 2011[114]. The Green Paper covers the interplay between detention conditions and mutual recognition instruments such as the European Arrest Warrant, as well as pre-trial detention. The Green Paper is the first measure specifically focusing on detention conditions and aspects of pre-trial detention.

The purpose of the Green Paper was to identify appropriate measures to counter the impact of detention issues on mutual trust and thus on mutual recognition and judicial cooperation generally within the European Union. The duration of pre-trial detention varies considerably between the Member States. There are also significant disparities between Member States in definition, terminology and practice of pre-trial detention. Although detention issues are deemed to be the responsibility of Member States, the EU, too, deemed it had a certain responsibility to bear, notwithstanding the principle of subsidiarity. The EU's interest in the matter of pre-trail detention is threefold. Firstly, excessively long periods of pre-trial detention are detrimental for the individual. Secondly, lengthy pre-trial periods and poor detention conditions in general affect the mutual recognition instruments and consequently prejudice the judicial cooperation between the Member States and, lastly, they do not represent the values for which the European Union stands[115].

The Commission distinguished several issues in relation to pre-trial detention and identified different possibilities to improve detention conditions within the EU. To start with, the presumption of innocence is too often neglected. Pre-trial detention has a serious impact upon the persons involved and by extension upon their families and friends, even more when this takes place in a prison in a foreign country. Case law under art. 5 of the ECHR demonstrates that pre-trial detention is to be seen as a measure of last resort, it is therefore only deemed acceptable if there are no possible alternatives. Pre-trial detention is however too often an automatic, self-evident act, which it is not allowed to be under the ECHR provisions. The regular reviews are often a simple formality to meet the requirements under the ECHR. Suspected or accused persons who are non-nationals are often automatically put in remand due to their flight risk. Research shows that once pre-trial detention has been imposed, the detainee has a greater chance of being sentenced with a prison sentence post-trial. Moreover, many EU countries are faced with overcrowded prisons and poor detention conditions.

Concerning pre-trial detention the Green Paper explored the need for the European Union to establish minimum rules in order to strengthen mutual trust. The Commission specifically focused on the possibilities to impose provisions on a statutory maximum length of pre-trial detention and on the regularity of the review, referring to the recurring obligation for judicial authorities to justify extension of the pre-trial detention. Regarding detention conditions, the Commission explored the role of the EU in ensuring equivalent detention standards throughout the European Union by establishing minimum standards and monitoring of the detention conditions. On the level of the Council of Europe, there are the European Prison Rules, which address the issue of prisoners' access to legal advice and legal aid, and the monitoring by the Committee for the Prevention of Torture (CPT), which publishes country-specific reports and recommendations. While said instruments have their respective strengths, compliance with the European Prison Rules is not mandatory and the recommendations of the CPT are not binding. The Green Paper informs that eleven Member States and the large majority of NGOs were in favour of EU minimum standards on obligatory and regular reviews of the grounds for detention. An example of such standard is the obligation for national judicial authorities to verify at certain intervals whether the prerequisites for pre-trial detention continue to exist. The majority of the Member States was not in favour of harmonizing maximum time periods of detention. Many Member States also did not support the adoption of EU minimum standards, arguing that the principle of subsidiarity meant that the EU lacks a legal basis to set minimum rules related to pre-trial detention. Moreover, they argued that the ECHR already provides a basis for mutual trust.

114 *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, 14 June 2011, 2.*

115 *Ibid., 3.*

7. THE POST-STOCKHOLM PROGRAMME (2015–2020)

Following from the Green Paper and the adoption of the five directives related to the proposed measures of the Roadmap on Procedural Rights, the priorities set out in the Roadmap have been addressed. Still, as was mentioned in the Roadmap itself and the subsequent in EU documents, the Roadmap did not contain an exhaustive list of issues to be addressed, but identified several priorities. The European Parliament already pointed out that "further work remains outstanding in relation to pre-trial detention, administrative detention and the detention of minors, in respect of which standards in many Member States fall short of human rights and other international standards. It called upon the European Commission "to revisit the case for establishing such standards in relation to pre-trial detention, administrative detention and detention of minors through legislative action" in its mid-term review of the Stockholm Programme[116].

Despite this, the post-Stockholm Programme setting out the European Union's policy lines for the period of 2015-2020 does not mention the establishment of minimum and enforceable standards on pre-trial detention. In 2014, the European Council recalled that one of the key objectives of the Union is to build an Area of Freedom, Security and Justice without internal borders, and with full respect for fundamental rights[117]. While it brought attention to the work that was undertaken (i.e. the directives following from the Roadmap), the Council also agreed that mutual trust in Member States' justice systems should be enhanced, including by continued efforts to strengthen the rights of accused and suspect persons in criminal proceedings.

So, while strengthening the rights of accused and suspect persons in criminal proceedings was mentioned as a key action point for the European Union's policy in 2015-2020, an explicit reference to establishing minimum standards on pre-trial detention is lacking. That said, the European Commissioner for Justice, Vera Jourová, mentioned pre-trial detention reforms as one of her top priorities in a speech of 25 April 2016: "My priority here is to improve the procedural safeguards related to pre-trial detention. The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation. **Poor detention conditions can indeed lead to refusal of extradition under the European Arrest Warrant**, as the European Court of Justice has recently made clear. Furthermore, pre-trial detention should only be a last resort solution. We see however that it is often used too early. Conditions in pre-trial detention are often worse than those in regular prisons[118]."
The European Parliament equally expressed its will to pursue prison conditions in line with fundamental rights, in its resolution on prison systems and conditions of October 2017: "The European Parliament calls for the Commission and the EU institutions to take the necessary measures in their fields of competence to ensure **respect for and protection of the fundamental rights of prisoner**s, and particularly of vulnerable individuals, children, mentally ill persons, disabled persons and women, **including the adoption of common European standards and rules of detention in all Member States**[119]."

8. CONCLUSION

Since the very establishment of an Area of Freedom, Security and Justice with the Treaty of Amsterdam, mutual recognition instruments have taken a pivotal role in ensuring judicial cooperation between EU Member States.
The creation of an internal market without internal borders equally entailed closer cooperation between judicial authorities, ensuring cross-border crime could be dealt with swiftly. Mutual recognition, which implies that Member State recognize judicial decisions in criminal matters and execute them without further requirements, allowed for cooperation between Member States without the need to interfere too much with national criminal law. This made sense, as criminal justice is an area in which Member States are sensitive when it comes to a loss of sovereignty. With the European Arrest Warrant and the Framework Decision on the transfer of prisoners, the EU currently has two mutual re-

114 *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, 14 June 2011, 2.*

115 *Ibid., 3.*

cognition instruments, which allow for a swift transfer of suspects and convicted persons to other Member States.

Mutual recognition, however, requires mutual trust between these Member States. Indeed, Member states must feel confident to rely on each other's decisions without controlling them vis-à-vis their own substantive and procedural criminal law standards[120]. This means Member States need intrinsic trust in each other's judicial authorities, including in other Member States' commitment to fundamental rights. In practice, however, Member States have proven to have very different levels of protection of fundamental rights, showing that mutual trust sometimes lacks a factual basis. In other words, respect for fundamental rights in all Member States cannot de facto be assumed. As such, fundamental rights violations lead to distrust in each other's judicial system, which in turn hampers swift cooperation based on mutual recognition instruments. Guaranteeing fundamental rights thus not only serves the interests of the individuals involved, but is equally essential for the swift functioning of mutual recognition instruments. In practice, detention conditions in Member States, which violate fundamental rights, have led to the execution of mutual recognition instruments, such as the European Arrest Warrant, being refused.

The European Commission recognized that there was de facto no equivalent commitment to fundamental rights in all EU Member States and realised the implications for judicial cooperation between Member States. The Commission therefore proposed to harmonise the application of existing ECHR standards at the EU level. Indeed, the difficulty was not that fundamental rights did not exist, but rather the broad margin of appreciation the ECtHR gave to Member States regarding how ECHR-standards must be interpreted, which posed a threat to mutual recognition. Moreover, the non-conformity of some Member States with ECHR standards also contributed to mutual distrust. To ensure full implementation of the ECHR standards and the consistent application of existing standards across Member States, and, thus, to facilitate the use of mutual recognition instruments such as the European Arrest Warrant, the European Council decided to develop its own minimum standards[121]. Consequently, the EU adopted six directives, which strengthened the procedural rights of suspected or accused persons in criminal proceedings. To date, minimum standards deal, amongst other, with the right of access to a lawyer, the right to communicate with third persons, the presumption of innocence and the right to legal aid.

The introduction of minimum standards for suspects and accused has thus been targeted at a uniform interpretation of procedural rights in criminal proceedings. Nevertheless, ensuring a consistent application of ECHR standards not only proves difficult when it comes to procedural rights. As case law has made it abundantly clear, the current manner in which people are taken and held in pre-trial detention has proven to be in violation of ECHR standards in many Member States on many occasions[122]. Just as was the case with the procedural rights of suspects and accused, problems currently experienced in pre-trial detention have a major impact on mutual trust and the use of mutual recognition instruments between Member States[123]. Taking this reasoning a step further, the detention conditions for convicted prisoners, which are equally problematic in many Member States, can also hamper swift cooperation between Member States, as both the EAW and the Framework Decision on the transfer of prisoners allow for the transfer of convicted persons.

The more open prisons are to judicial oversight, the better the chances are that these prisons will provide humane, safe and rehabilitation-oriented detention conditions. A first step towards EU minimum standards on pre-trial detention should therefore consist of guaranteeing prisoners a proper access to justice and a swift access to a lawyer in case their fundamental rights are at stake. Guaranteeing that prisoners can take up their case with an independent oversight body could provide the necessary impetus to ensure that prison conditions are in line with ECHR standards, and, thus, that mutual trust between Member States is strengthened. EU minimum standards focussing on access to justice and to a lawyer for pre-trial prisoners are therefore the first step to ensuring a swift mutual recognition-based cooperation between Member States, with minimum intervention from the EU when it comes to regulating detention conditions.

116 *Para. 47 European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme, 2013/2024(INI),*

117 *Conclusions of the European Council (26/27 June 2014), EUCO 79/14, 27 June 2014.*

118 *Speech by Commissioner Jourová at the European Criminal Law Academic Network, 2016.*
Annual Conference, 10th Anniversary, Brussels, 25 April 2016. LINK

119 *Para. 57 European Parliament resolution of 5 October 2017 on prison systems and conditions, 2015/2062(INI).*

120 *Vermeulen, G., "Mutual recognition, harmonisation and fundamental (procedural) rights protection" in Maik, M., (ed.), Crime, Rights and the EU. The future of police and judicial cooperation, London, 2008, 89.*

121 *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4 December 2009.*

122 *See the EUPRETRIALRIGHTS chapter on the ECHR case law.*

123 *CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru.*

CHAPTER 3
ACCESS TO RIGHTS IN POLICE CUSTODY: HIGH DEGREE OF HARMONISATION OF RIGHTS, BUT PERSISTENT DIFFICULTIES

1. INTRODUCTION

As pointed out in detail in the previous chapter, the situation of persons in police custody has been the subject of extensive European Union legislation guaranteeing them precisely defined procedural rights. This state of law contrasts sharply with the penitentiary field, where the applicable standards are almost exclusively those resulting from the ECHR and those resulting from the Council of Europe's soft law. In this normative configuration, an overview of the capacity of EU standards to perform transformations in national laws and practices appears to be a relevant benchmark to steer the analysis of the access to law and to the judge in penitentiary facilities. This chapter focuses on police custody, understood here as a form of detention managed by a police force, and ranging in time from the initial arrest of a suspect to his/her presentation to a court after a series of police interrogations.

The aim is not so much to draw up an inventory of the laws and practices concerning police detention law (an issue which has already been dealt with)[124]. Rather it is to serve as a counterpoint to the central object of the research, which concerns the prison field. In this perspective, the chapter reviews how, in the area of police detention, the rights that concern our research - access to rights, legal aid, access to lawyers - are translated into national laws and implemented in practice.

2. THE RIGHT TO INTERPRETATION AND TRANSLATION AND THE RIGHT TO INFORMATION: STEPS IN THE RIGHT DIRECTION

The implementation of Directive 2010/64/EU has led to the adoption within the national legislations of nearly all the countries examined of a series of measures ensuring that suspects or accused who do not speak the language of the proceedings are entitled to translation and interpretation for free.. Nearly all surveyed states foresee such right already at the early stage of investigation proceedings, including police detention and interrogation, and extend it to the communication between the suspects or accused with his/her lawyer at police premises. Countries such as the Netherlands have implemented subsidised telephone interpreting services, which help save time and distance or availability contingencies. Dutch defence lawyers have a subscription to this service and can make use of it, ensuring interpretation of communications with their clients, not only during police custody but also during pre-

[124] *See the chapter on "The need for EU minimum standards on detention".*

trial detention. Regrettably, in other surveyed countries, the right to free translation and interpretation seems not to be applied in full to the interviews that the defence lawyer may hold with the accused once in pre-trial detention. Not even in the cases when such communication is in direct connection with the lodging of an appeal or other procedural applications, as foreseen by the Directive. For example, in Spain and Italy communications between the defence lawyer and his/her client that take place in prison facilities are usually translated by resorting to other fellow inmates. Resorting to interpreters once the accused leaves the police premises and is transferred to a prison facility is not common practice and is not covered by the State-financing scheme of interpretation and translation.

The right to translation and interpretation does not fully apply in Bulgaria as regards persons suspected of criminal offences who may be held in custody for up to 24 hours on the basis of an administrative order issued by law enforcement authorities. Bulgarian law and jurisprudence define this 24-hour police detention as administrative in nature, regulated by administrative law and falling outside the scope of the criminal proceedings. Even though the law foresees that when police detainees do not understand Bulgarian, they shall be informed of the reasons for their detention in a language they understand, it does not provide for the right to ensure translation during lawyer-client communications, nor does the Legal Aid Act cover the costs incurred by a lawyer when making use of interpretation services. There is also no requirement in the Bulgarian legislation to secure translation of documents to persons detained following a police administrative order.

As for the right to information of detained or arrested persons during police detention it is a positive aspect that all the surveyed countries have legal provisions (mainly as a result of the implementation of Directive 2012/13/EU) foreseeing the obligation to inform detained or arrested persons of the rights that assist them in criminal proceedings and of the accusation against them. All surveyed countries foresee the delivering upon arrest or detention by law enforcement authorities of a “Letter of Rights”. However, as uncovered by the research, in some of the surveyed countries, like Italy, the Letter of Rights does not include the right to notify a close relative or third person the fact and place of the detention nor the right of access to a doctor. In other surveyed countries, the Letter of Rights simply amounts to a cut-and-paste of the legal text itself, without any further instruction for the practical realisation of these rights. This literal transcription also makes it hard for an average person to understand the rights (s) he is entitled to. Yet, the main shortcomings identified refer to the inconsistency between law and practice. In the day-to-day practice of many of the surveyed countries, detainees are not always and systematically provided with a letter of rights. Sometimes they are informed orally or the letter of rights is handed only upon specific request.

The right to information is to be interpreted as to also encompass the right of access to the materials of the case (art. 7 of Directive 202/13/EU). Documents that are essential for effectively challenging the lawfulness of an arrest or detention in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention. In day to day practice, the research has shown that in some of the surveyed countries (Italy, Spain, Bulgaria) law enforcement authorities refuse to make available to the detainee or his/her lawyer the materials on the basis of which the police has become convinced of the existence of evidence of the commission of a crime. Lawyers get to see the materials of the case only shortly before the hearing where the competent judicial authority is called to decide upon the lawfulness of the arrest or detention takes place. Hence, what the Directive sets as the permissible ceiling is in practice the general standard. This practice leaves lawyers little time to really prepare the defence and seriously impairs the equality of arms between the investigating or prosecuting authorities and the accused[125].

[125] *This is also an important finding of EU DG-Justice research project DETOUR - Towards Pre-trial Detention as Ultima Ratio : Comparative Report, Vienna: Institute for the Sociology of Law and Criminology 2018, p. 30, p. 55, p. 75.* LINK

3. THE RIGHT OF ACCESS TO A LAWYER. THE INTERPLAY BETWEEN DIRECTIVE 2013/48/EU AND THE ECTHR CASE-LAW: STILL REASONS FOR CONCERN

More problematic has revealed the right of access to a lawyer (covered by Directive 2013/48/EU). The provisions of the implementing national legislations and the Directive (see recital 53) must align with the abundant jurisprudence of the ECtHR on this issue, which underlines the importance of the investigation stage for the preparation of the criminal proceedings. The Court has repeatedly noted how "national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings". The particular vulnerability of a detained or suspect person at the investigation stage "can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself" (Salduz v. Turkey [GC][126] §52, §54). Against this background, the Court has laid down that "in order for the right to a fair trial to remain sufficiently practical and effective... access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right" (Salduz v. Turkey §55)[127]. The interplay of Directive 2013/48/EU and the abundant jurisprudence of the ECtHR on the right of access to a lawyer, should in theory, have paved the way for a harmonised and unequivocal legislation governing the right of access to a lawyer. In some of the surveyed countries, like the Netherlands for example, this has been the case and the combination of ECtHR case law and EU law has helped to establish new and clear standards. In the Netherlands for a long time there was no right of access to a lawyer for suspects during police interrogation. As a result of the ECtHR Salduz-jurisprudence, the Dutch Supreme Court introduced the right to consultation of a lawyer before the first interrogation by the police. This led to discussion whether the Dutch practice was in line with the ECtHR case law that seemed to suggest that the lawyer should also be present during the interrogation. The discussion moved rapidly with the adoption of Directive 2013/48/EU and as of 1 March 2017, formal legislation implementing the directive and formally acknowledging this possibility is in force.

However, in other surveyed countries, access to a lawyer during police detention continues to raise some issues. In Poland, as noted by both the Ombudsman and the First President of the Supreme Court, there are a series of discrepancies between national legislation and the requirements arising from Directive 2013/48/EU. The lack of implementation results from the failure to guarantee the full access to a lawyer to persons who are not initially suspects or accused but become suspects or accused in the course of questioning by the police, in particular the problem concerns: the lack of national legal provisions on the access to a lawyer of a suspected person in connection with the act of his/her presentation (Article 74 § 3 in conjunction with § 2 point 1 of the CCP); the lack of assurances of contact of a suspect with the lawyer before the first hearing in the context of presenting charges (Article 71 § 1, Article 301 and Article 313 § 1 of the CPC); and the lack of judicial review of a decision to limit the right to contact the defence lawyer (Article 73 § 2 and Article 245 § 1 of the CPC). In Bulgaria too, access to a lawyer during the initial 24-hour police detention period remains highly problematic. This issue was at stake in the Grand Chamber judgment Simeonovi v. Bulgaria[128].

Finally, in the Italian case, the possibility for competent judicial authorities to delay in exceptional circumstances a detained person's access to a lawyer for up to five days have been denounced by the CPT as in violation of the right of access to a lawyer and potentially enabling other violation of fundamental rights.

126 *ECtHR, Salduz v. Turkey [GC] nº 36391/02, 27 November 2008*

127 *The recent weakening of the requirements arising from this case-law should be noted. In Ibrahim and Others v. United Kingdom (no. 50541/08, 13 September 2016), the Court held that the lack of "compelling reasons" for restricting access to legal advice does not suffice to establish a violation of Article 6, as it is still necessary to "examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair." In Beuze v. Belgium [GC] (n.º 71409/10, 9 November 2018) the Court further expanded this approach by applying it not only to cases concerning case-specific decisions to restrict access to a lawyer, but also to cases involving systemic restrictions stemming from legislation.*

128 *ECtHR, Simeonovi v. Bulgaria, No. 21980/04, 12 May 2017.*

As far as access to a lawyer during the early stages of police detention, some positive aspects evidenced by the research should also be mentioned. In Germany, a decision of the Federal Court of Justice upheld that for better legal protection of the detainee or arrested person the right of access to a lawyer needs to be extended so as to cover the right to get information about whom to contact and how. This is not fulfilled by simply handing out a phone list of the local bar or a publicly available phone directory to the detainee to find a lawyer. Rather, it is indispensable to expressly mention the "emergency service" provided by the local lawyers' associations and information about how to contact the said service is to be given, regardless of the solvency of the detainee. As a consequence of the court decision, an addition was made to Section 136 of the Criminal Procedure Code in September 2017 (para. 1, sentences 3 and 4). In Spain, the General Council of the Spanish Lawyers has developed a call centre for the automatized processing of the applications for a lawyer filed by detainees or arrested persons in police custody[129].

4. LEGAL AID: THE KEY TO AN EFFECTIVE AND PRACTICAL IMPLEMENTATION OF THE RIGHT OF ACCESS TO A LAWYER

For the right of access to a lawyer to be exercised practically and effectively, it must be complemented by the right to legal aid (covered by Directive (EU) 2016/1919)[130]. The research, however, has spotted certain practices that certainly do not facilitate an effective and practical implementation of the right of access to a lawyer. For example, in the Czech Republic, the right of access to a lawyer during the early stages of police detention is foreseen in the legislation but there is no legal aid to pair it with. That is, detainees or arrested persons in police custody can contact a lawyer but at their own cost. The right to legal aid arises only from the moment the person becomes officially accused (obviněný).. In Bulgaria, police detainees have the right to legal assistance by a legal aid lawyer if they are "unable to retain a lawyer of their own choice" (art. 28(2) of the Legal Aid Act). However, the legislation does not contain further guidance on how the ability of detainees to retain a lawyer is to be determined. Besides, practice reveals that they tend not to be informed that assistance from a lawyer is free of charge for them. This might explain why, as reflected by the data from the National Legal Aid Bureau, the share of police detained persons who are granted legal aid in Bulgaria is insignificant[131]. Issues concerning the quality of legal aid have also been spotted insofar as the presence of legal aid lawyers during police detention is of a purely formal nature, aimed at ensuring that the detention protocol is "duly" filled in and that it contains the lawyer's signature. Finally, In the Netherlands, the financing structure for legal aid in criminal cases in general and for legal aid during police custody in particular, has been a point of vehement discussion. Lawyers find that the remuneration is too low and it is feared that there is going to be a trend of decline in the number of lawyers willing to participate in the legal aid scheme.

5. CONCLUSION

The present research has evidenced a high degree of harmonisation among the surveyed countries of the procedural guarantees assisting police detainees, even if some shortcomings persist. Some of these shortfalls are of a systematic nature due to a misalignment between national statutory provisions and EU law; others are due to the fact that law and practice seem not to always go hand in hand.

129 *For further information on the functioning of the call centres, see: https://www.abogacia.es/abogacia_servicio/centralita-de-guardias/ (In Spanish)*

130 *Directive (EU) 2016/1919 has to be transposed into national law by 25 May 2019.*

131 *In 2016 the number of police detained persons granted legal aid was 25 out of 48,588 registered detentions (i.e., legal aid during the year covered 0.05 % of the number of the detained persons), and in 2017 legal aid was provided in 47. This data suggests that the Ministry of Interior Act does not contain access conditions and a mechanism for securing legal aid during police detention.*

Despite these persistent difficulties, the transformations brought about by European standards in this area are considerable.

The implementation by Member States of the EU directives on procedural rights in criminal proceedings largely explains this alignment. To date, similar minimum standards in police custody dealing, amongst others, with the right to information, the right to translation and interpretation and the right of access to a lawyer, are at some degree present in all the surveyed countries. As regards the latter, the right of access to a lawyer during police custody, the case law of the ECtHR has also played a significant role in its interpretation and delimitation, particularly since the groundbreaking case Salduz v. Turkey [GC] [132]

The case of police detention clearly highlights the differences in terms of performative effects of the ECHR and EU standards. In this respect, the casuistic approach of the ECtHR weakens its ability to harmonise national laws. In addition, the rise of the principle of subsidiarity and the lack of consistency in the case-law of the ECtHR, as reflected in Beuze v Belgium [133], justify the crucial need for a stronger commitment by the European Union to the protection of fundamental rights and the rule of law.

[132] *Salduz v. Turkey [GC] prev.*

[133] *Beuze v. Belgium [GC], prev.*

CHAPTER 4
THE ORGANIZATION OF ACCESS TO RIGHTS IN PRE-TRIAL DETENTION: A BLINDSPOT OF PUBLIC POLICIES

1. ACCESS TO LEGAL INFORMATION, A COMPLEX BUT ESSENTIAL CHALLENGE

The affirmation of principle, solemnly stated more than 35 years ago, that «justice cannot stop at prison gates[134]» is anything but self-evident. The effectiveness of prison remedies depends on two sets of preconditions, which are partly independent of the guarantees attached to the procedure itself: prisoners' knowledge of the law governing their personal situation and the possibilities of appeal granted to them, on the one hand, and sufficient confidence in the independence, diligence and effectiveness of the remedy, on the other.

The issue of access to legal information is multi-level, and its complexity must be understood in order to address the reality of prisons in this area.

First, in order to initiate proceedings in a given case, the detainee must first of all be aware that the administration has not complied with the applicable law, and that a judge is likely to agree with him against the administration. What may seem obvious in everyday life outside of prisons is not always the case within. Indeed, the prisoner must be aware that there is a legal order that prevails over the statements of his or her interlocutors, who embody the legitimate authority in the prison (supervisors, the prison director, the regional or central administration, etc.).

Second, beyond this awareness that the activity of the administration is governed by law, the detainee must have access to legal documents that enable him to argue his claims, or even only to begin to formalise his problem and submit it to a legal professional, if such legal assistance is provided. However, legal problems do not generally arise in a binary manner. They require legal operations of varying degrees of complexity: tests of sufficient basis, of necessity, of proportionality, etc. Similarly, legal reasoning requires the use of sources of rights that vary according to the subject: prison law, general administrative law, criminal law, criminal procedure, and European human rights law. Moreover, even in countries with a Romano-Germanic legal tradition (where case law plays a less important role as a formative source of law), access to written law is not sufficient to reflect the applicable law: the applicant must necessarily refer to the case law of the competent courts, the Constitutional Court, the European Court of Human Rights, etc. The law applicable to prisons is nowadays the product of intertwined legal orders. In making a plea, it has now become inconceivable not to refer to the case law of the European Court of Human Rights,

134 *Campbell v. United Kingdom, 28/06/1984, § 69, Series A no. 80*

including the most common issues in everyday prison life (searches, family visits, disciplinary sanctions, correspondence control, etc.).

Third, beyond acquiring knowledge of the law applicable to his situation, the prisoner must be aware of the applicable remedy available to him and its main characteristics. In the event of a plurality of remedies (annulment, summary proceedings, compensation, etc.) it should be clear for the prisoner, which is the most appropriate way to put forward his legal complaint. What are the conditions of admissibility of applications? What is the applicable regime of proof in this matter (how should he demonstrate the reality of the facts he denounces, when everything is done without external scrutiny)? What can the court (or quasi-judicial body) be asked to do to remedy the violation of his rights?

Thus, taking legal action is by nature a complex process. This complexity is compounded by the fact that prisoners have cumulative disabilities in access to justice, even in countries with the highest gross domestic product. These include low economic, social, and cultural capital, which often go hand in hand with great difficulties reading and expressing oneself orally and in writing. The report on Belgium shows, for example, that due to a lack of legal knowledge, the initiative for appeals usually comes from lawyers. Poland seems to stand out in that the professionals, who were interviewed, report a relatively high level of legal awareness on the part of detainees. Access to legal documentation (in written form) seems relatively more fluid than elsewhere, although interviewees report difficulties in understanding legal terminology (see the report on Poland). Ultimately, given the complexity of the issues at stake, effective access to justice for prisoners requires a proactive policy on access to rights behind bars, adapted to the specific problems of the prison population. However, the major lesson that emerges from this study is that this policy is largely lacking everywhere, at different degrees.

Access to legal information can be provided through two types of interventions: 1) making the relevant norms freely accessible[136], whether they result from texts or case law; 2) organization of legal access points in prisons, in which a legal professional explains legal issues and outlines remedies and how to use them[137]. In this respect, some countries have an organized system of legal advice; others see monitoring bodies performing this function de facto. From a practical perspective, it is difficult to conceive of one without the other. In most cases, the detainee must have a minimum knowledge of the applicable law in order to decide to use a legal access point and properly formulate his problem. On the other hand, based on several field research reports from the project, the access to legal documents alone is generally insufficient, given the problems of understanding legal language and the complexity of the judicial architecture.

2. A NARROW CONCEPTION OF THE ACCESS TO LEGAL STANDARDS

2.1 The law's accessibility requirement limited to house rules

The starting point for enabling access to law is to adequately inform prisoners of their rights and duties and the means for their implementation. In this respect, a common observation is that **the provisions establishing the obligation to provide legal information do not precisely specify the rights and legal obligations that prisoners must be informed of, as well as the standards to which they must have access.** This is the case, for example, of the legislation adopted by the 16 German Länder, none of which specifies the scope of the obligation imposed on the administration in this area[138]. In view of this indeterminacy, administrations systematically consider that this obligation is satisfied by the provision of house rules (in German) and reference to the availability of the relevant law in the library. Besides informing prisoners of their rights and legal obligations, all countries examined also foresee that they should be instructed on the house rules of the particular prison facility where they have been admitted, as well as on other provisions related to their pre-trial

135 *G. KELLENS, van DE CONINCK, G.DEMET, S., en KELLENS, O., L'information juridique en milieu pénitentiaire, Programme protection juridique du citoyen, Services fédéraux des Affaires scientifiques, techniques et culturelles, Bruxelles, mai 1996 (239 p.) ; Durand, C. (2014). Construire sa légitimité à énoncer le droit. Étude de doléances de prisonniers ». Droit et société, 87(2), 329 348 ; Durand, C. (2014). La figure du détenu procédurier, cristallisation des usages illégitimes du droit. In: Ferran, N. and Slama, S., ed., Défendre en justice la cause des personnes détenues. Paris: La Documentation française, 65-70.*

136 *Either through oral information or by making texts available*

137 *This intervention, which is not linked to proceedings before a court, may, if necessary, lead to this result, if the prisoner is convinced of the need to lodge an appeal.*

138 *E.g. Sect. 6 para. 2 of the Act on Pre-trial detention in North Rhine-Westphalia.*

139 *Some of the countries examined establish under one single provision the obligation to inform prisoners of their rights and duties and on the possibility of accessing legal texts (for example France and Poland), whereas other countries institute the access to legal texts as a separate provision (like Netherlands and Spain).*

detention[139]. Either way, all of the countries examined proceed similarly. The obligation to inform prisoners of their rights and duties is fulfilled through the delivery of a brochure prepared by the prison administration. As regards the obligation to provide access to legal texts, it is mainly implemented by making the main penitentiary law and regulatory texts available for consultation in the library.

In other terms, **the administrations consider access to information only from the perspective of popularization, through brochures that briefly describe the principles of prison operations.** This approach is legitimate and necessary, but it is not sufficient, as it does not put detainees in a position to defend their rights and file complaints. The brochure that is usually handed to pre-trial detainees upon admission to inform them of their rights and duties is intended to be easily understandable and is, therefore, a condensed and simplified adaptation of the compendium of prisoners' rights. In addition, this documentation is designed to enable the prisoner to orient himself within the prison system and more specifically to comply with prison rules. It means that, in practice, many of the rights assisting pre-trial detainees are left out. This is often the case concerning the possibility to benefit from free legal support. More broadly, this documentation is not sufficient to grasp the extent of the discretion available to the administration. In most cases, it does not include sufficient details to draft an appeal with reference to precise standards.

For example, in France, the administration distributes an 80-page guide[140]. Reference is made to recourse mechanisms only with regard to the possibility of contesting a disciplinary sanction, and again in terms too brief to allow for an appeal to be lodged in accordance with the admissibility requirements. The standard internal regulations contain information on internal administrative remedies but do not mention appeals to the courts. A circular also provides for a standard «extract» from the house rules to be delivered to each prisoner, which sets out, in a fairly brief manner, the possibilities for challenging prison conditions. In practise, however, the dissemination of this standard extract is very irregular, as shown by NPM visit reports. In Italy, according to the Head of the Prison Administration, the ineffectiveness of the system derives from the inadequate knowledge of their rights by prisoners, which is due, in turn, to the insufficient legal training and information provided in prison. In order to solve this issue, the Head of the National Department of the Prison Administration declared that a 4 pages leaflet should be distributed among prisoners. In the Netherlands, according to the Explanatory Memorandum with the PPA, the house rules, if set up as a catalogue of the rights and obligations of the prisoner, are suitable to provide the prisoner with the necessary information about his internal legal position[141].

Besides these issues, the empirical research undertaken within the project has demonstrated a gap between theory and practice. In Spain, for example, the general obligation to provide legal information is acknowledged in the Prison Regulations. The reality, however, is that in most cases prisoners are neither provided with an informative brochure, nor with the house rules but are only given oral information during their first interview with social workers or educators upon their admission to the prison facility.

In Belgium, the Research of Eechaudt (2017) about disciplinary cases in prisons reveals that in none of the seven involved penitentiary institutions, the detainees received a copy of the internal rules upon being admitted to the prison. Repeatedly, the prison personnel was reluctant to provide the internal rules to detainees who were asking for them. Reasons varied from unwillingness from prison personnel to internal rules not being available or outdated. Furthermore, the research found that the information provided on discipline in penitentiary facilities was incomplete and outdated. Hence, detainees were unaware of new disciplinary infringements and more stringent disciplinary sanctions implemented by a legislative amendment of 2013[142].

The lack of access to up-to-date and harmonized house rules is a cause for concern in Bulgaria as well. In the case Lebois v. Bulgaria, the ECtHR found that the internal orders setting out the practical details of how detainees in a pre-trial detention facility could exercise their statutory rights to receive visits and use the telephone were neither published nor even

140 LINK

141 *Kamerstukken II 1994/95, 24 263, 3, p. 12.*

142 *Eechaudt, V. (2017). Penitentiair tuchtrecht en internationale detentiestandaarden : naleving in België en Frankrijk (Vol. 54). Antwerpen: Maklu. P.77*

made accessible to the detainees in a standardized form. Accordingly, the restrictions on applicants' visits and use of card phones were therefore not based on adequately accessible rules and not "in accordance with the law". The authorities do not seem to have grasped the extent of the problem, since the action plan established in July 2018 concerning the execution of this judgment merely mentions that instructions have been given, so that the houses rules regulating the visits and the use of the phone would be translated into the two official languages of the Court. No general measures to harmonize house rules and control the effectiveness of their availability to the prison population are indicated.

Another set of problems identified is the **limited range of legal texts that prisoners may access within prison.** Indeed, most of the provisions establishing the obligation to provide pre-trial detainees with access to legal texts refer solely to (primary) penitentiary legislation. In France, the only legal documents available, generally, are the Criminal Code and the Code of Criminal Procedure. The International Prison Observatory (OIP) distributes a very comprehensive prisoner's guide (see below) but it is often missing from prison libraries. In Bulgaria, the researchers found[143] that there were no opportunities for those detained in investigative detention facilities to access legal literature unless it was provided to them by relatives or friends during visits. Moreover, some prisoners claimed that they were allowed to bring in legal materials only in the shape of books, but no information printed from the Internet. Investigative detention facilities are not equipped with libraries. Although libraries should have an important role in providing legal knowledge to prisoners, even prison facilities, in practice, possess very limited and out-dated collections of legal literature (primarily legislation), if any. In 2018 the law library in Sofia prison, which was unique for the entire penitentiary system in Bulgaria, was shut down and merged with the general prison library due to space considerations. The law library had several advantages. It possessed print-based legal collections, as well as a laptop with subscription to a legal database, updated several times throughout the year (provided by a private donation). The library clerk was an inmate with good knowledge in penitentiary law, assisting prisoners in their legal research, preparing legal documents, providing other information and contact details of institutions, as well as translation. The situation is more favourable in other countries. In Poland, according to the interviewed prisoners, the Prison Service staff provides them with the legal acts, and the representative of the National Preventive Mechanism has also confirmed that the access to legal acts is limited only exceptionally and rarely.

One constant is the inability of detainees to access domestic or international case law because it is legally or practically impossible to use the legal digital resources available on the Internet. Only the report on Poland mentions access to legal software, which is sometimes made available in libraries. It does not appear that the European Court of Human Rights portal is accessible there. Under these conditions, the prisoner who initiates an appeal alone (which is the scheme implicitly favoured by European norms' approach) finds himself in a situation of major imbalance before the judge vis-à-vis the opposing party. More broadly, the digital divide amplifies the exception of prisons vis-à-vis other state institutions in terms of legal framework. Because of the differential access to texts and case law, the law used as a common reference is a prosaic and elliptical law, produced by the administration itself, and completely out of step with the legal order, as it is known in the outside world.

2.2 Proliferation of lower-level normative texts, generally inaccessible in their current version

The frequency of amendments to laws and regulations means that those made available to prisoners are frequently obsolete, as reported in the reports on France, Italy and Poland. An essential principle from the point of view of legal certainty is that for a text to be enforceable, it must be accessible to the person concerned. Prison administrations, however, take multiple decisions on the basis of inaccessible texts.

Effective access to the rule is also made impossible by the **frequent proliferation of lower-level normative texts (circulars, memos), which are generally neither available to prisoners nor even to legal professionals, since they are often not published or are made accessible with**

143 *but this reflects recurrent situations in the countries studied.*

several years of delay. Though the impact on the every day life of prisoners is, considerable; these texts are rarely made available in the libraries or only made accessible to prisoners upon request.

In the case Frérot v. France, where the ECtHR found a violation of Article 3 ECHR due to full body searches of prisoner after each prison visit during a period of two years, the fact that practices differ from one prison to another and that the strip search regime was defined by an unpublished internal administrative circular had considerable weight in its reasoning. The Court "finds it understandable that the prisoners concerned, such as the applicant, might feel that they are the victims of arbitrary measures on that account. It can accept that this feeling might be aggravated by the fact that the rules on prisoner searches (…) are mainly set out in an instruction issued by the Prison Service itself (…) and, moreover, allow each prison governor a large measure of discretion[144]". As to the refusal, on the basis of a ministerial circular, to forward the applicant's letter to a fellow prisoner, the Court recalled that "a text of this nature, enacted outside the exercise of normative power, cannot be seen as the «law» to which Article 8 of the Convention refers in particular"[145].

As a matter of facts, these rules are unknown even to the professionals that may provide legal support to the prisoners. National laws do not address the issue of making this regulation available. Dutch law is an exception in this respect, as it expressly provides for access to subordinate standards. The Model Regulations for house rules determine that the prisoner must be able to inspect the Penitentiary Principles Act (PPA), the Explanatory memoranda to the PPA and the Penitentiary measure, the ministerial regulations and the circulars. These materials must at least be made available in the library, which is a noticeable exception in the law of the countries analysed. However, there is a great disparity among prisons as to whether (parts of) this information is in fact available. Respondents, including prison governors themselves, do not know exactly what information is available in the prison library.

2.3 A new challenge: managerialization and invisibilization of norms

In addition to this classic phenomenon of proliferation of lower-level norms, there are now other challenges from the point of view of access to the law in prisons: the trend towards the development of managerial tools to organize the work of prison staff[146]. The development of new public management is accompanied by the use of professional guidelines that are subject to continuous changes in order to adapt the work of prison staff. As pointed out by C. Rothmayr Allison, "managerial rationality takes precedence in this process of adaptation and adoption of legal norms when reframing legal ideas[147]", and hence do not comply with the quality requirements of the law as set out by the Strasbourg Court. These guidelines evolve rapidly and are communicated to employees through hierarchical channels, generally electronically (for example, in the form of a professional frame), without concern for the legal requirements of enforceability. Yet, these instruments cause interference in the rights of detainees.

Policies dedicated to deal with radicalisation in French prisons are particularly characteristic of this movement. Several models have been experimented (the UPRA, "Units for the Prevention of Radicalisation", QER, "quartiers d'évaluation de la radicalisation", units for the evaluation of radicalisation) and these have changed so quickly that all respondents of the research on France, including within the prison administration and among concerned human rights defenders, find that there is no unified strategy from the Prison administration. A respondent labelled the situation "total chaos". One of the respondents stresses how these units are created in a highly politicized context, where the prison institution has to follow the declarations of politicians without even being given adequate time to evaluate earlier experiments. G. Chantraine and D. Scheer have shown[148], following their ethnographic survey, that the QERs are "an extremely sophisticated, extremely restrictive security system that totally constrains the bodies and gestures of prisoners". As they pointed out, the concrete modalities of operation of these units "are invisible in the unit's specifications and internal regulations, and more broadly its institutional framework". This situation is eminently damageable from the point of view of rights since, on the one hand, the deten-

144 *Frérot v. France, 12/06/2007, No. 70204/01, §47.*

145 *Ibid, §. 59. For the requirements of "quality of the law", see below, 1.3.*

146 *Cliquennois, G. (2013), Le management des prisons, Bruxelles : Larcier, coll. "Crimen".*

147 *Rothmayr Allison, C. "Le droit et l'administration de la justice face aux instruments managériaux. Présentation du dossier ", Droit et société, vol. 84, no. 2, 2013.*

148 *Presentation at the conference organised, as part of this project, at the European Court of Human Rights on 6 and 7 December 2018.*

tion regime is that of a high security unit, and that the assessment of "radicalisation", which brings prisoner to the unit, is done according to criteria that are opaque, and which cannot be contested legally. These phenomena are not limited to France but can be observed in other countries, including the Netherlands[149].

It is as if the high priority of the fight against terrorism makes it possible to avoid minimum legal requirements. However, the prison treatment of radicalisation only exacerbates a broader phenomenon. With regards to overcrowding in Belgium, M-S. Devresse showed that, "prison professionals are torn between ambivalent and impractical criminal policies and a managerial diktat that focuses on the preservation of the institution and not on the substance of their work; they are led to favour defensive postures that, if they allow people to stay afloat, do not allow any consistent vision in the very long term[150]".

In other words, these new forms of normativity lose sight of the requirements of the ECtHR. It is a settled-case law that, in matter of interference with a right, the requirement of quality of the law is that it should be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him. Especially, it implies that a "law which confers a discretion must indicate the scope of that discretion[151]". Based on a logic of evolution and flexibility, the new modes of writing prison law tend to free themselves from the requirement of framing the administration's discretionary power when one or more fundamental rights are at stake. Thus, the logic of the implicit powers of the prison administration, which the case law of the European Court had intended to thwart[152], is resurfacing as a result of the modernization processes.

3. PROSPECTS FOR TOOLS FOR ACCESS TO THE LAW

It is true that making prison standards accessible and understandable to the prison population is a particularly complex exercise. Covering all the legal issues that affect the daily life of the prisoner opens up a very broad spectrum, and the variety of legal uses in prison requires different levels of legal technicality to be addressed.

However, the example of the initiative of the International Observatory of Prisons (Observatoire international des Prisons—OIP) in France shows that this is feasible. This NGO has succeeded in designing a «prisoner's guide» that fulfils these characteristics and is popular with both prisoners and professionals. In 704 pages, this book follows the entire journey of a prisoner, from the first to the last day of prison, with a set of questions and answers (873 in total). The various stages - entering prison, living in prison, enforcing one's rights, preparing for release - are discussed successively and are followed by clear explanations of the rule of law, confronted with its daily application and illustrated by testimonies, analyses and press articles. The Belgian section of this organization has successfully undertaken the same exercise in French (however for the moment not in Dutch). In Germany, such a guide was published and began to be distributed in prison, before the prison administration prohibited its entry into detention, invoking risks to internal order. In Spain, prisoners rely largely on the handbook "Manual on Prison Execution: How to defend oneself in prison", which is distributed for free by the NGO Cáritas. These initiatives are, however, isolated and carried out by NGOs. This means that NGOs have the burden of the complex task of finding the funding for this work.

The development of digital technology would be a major opportunity to develop tools for access to law that meet the challenges of the legal divide that characterizes prisons. Digital tools make it possible to cover the variety of legal issues that arise in prison. In addition, it makes it possible to provide different levels of information, ranging from simple explanations of the rules to the use of law under conditions similar to those prevailing outside: navigation on government legal information sites, national case law database, European Court database, access to guides elaborated by the European Court, etc. As a matter of fact, none of the

149 *Amnesty International Netherlands and Open Society Foundations (2018), Submission to the UN Committee against Torture- Ill-treatment in the context of counterterrorism and high-security prisons in the Netherlands.*

150 *Devresse, Marie-Sophie. « La gestion de la surpopulation pénitentiaire : perspectives politiques, administratives et juridictionnelles », Droit et société, vol. 84, no. 2, 2013, pp. 339-358.*

151 *See Lebois v. Bulgaria, prev. §§61-66. Similarly, see Doerga v. The Netherlands, prev.,§§49-50 : In this case concerning the recording and storing of a prisoner's telephone conversations, the ECtHR considered that rules in question lacked both in clarity and detail and gave no precise indications as to the circumstances in which prisoners' conversations could be monitored, recorded or retained or the procedures to be observed, and therefore did not afford appropriate protection against arbitrary interference by the authorities with the applicant's right to respect for his private life.*

152 *Contrary to the early doctrine of "inherent limitations" developed by the Commission, it is established that the only permissible restrictions to prisoners' rights are the ones clearly provided for in the general provisions of the Convention or in the individual articles. See Golder v. UK, prev., §44.*

prison administrations concerned seem to have launched this process. Digital technology cannot be the only answer to the prison population's lack of legal knowledge, given the difficulties that some prisoners have with written materials or the use of technological tools. However, combined with access to legal advice, digital technology would make it possible to widely open up the dissemination of rights into prison.

4. PROVISION OF LEGAL ADVICE IN PRISON: A CRUCIAL BUT VERY RARE SERVICE

Everything in prison justifies the intervention of a legal professional to provide legal advice. As noted, from the point of view of the access to the rights and to the courts, the prison population accumulates social, cultural and economical disadvantages. Second, from a technical point of view and contrary to the generally accepted idea, prison law is a complex law. It covers different areas of law (administrative law, criminal law, constitutional law, European human rights law), and in some countries involves several orders of courts—civil, criminal and administrative (for example, in France, Belgium and to a certain extent the Netherlands). The report on Germany thus reflects a state of law on pre-trial detention that is so complex, that even experienced professionals have difficulty mastering its subtleties and are reluctant to engage in it. The law is at the same time very sophisticated and ineffective in practice. One of several reasons for the latter is the threat of a claim to be rejected due to a perceived lack of legitimate interest in the proceedings, e.g. after the end of pre-trial-detention, while the time of its ending is unknown to the detainee and procedures are unpredictably long.

Such context would require enhanced measures in terms of access to rights to compensate for these difficulties. However, such an approach is not followed anywhere by actors responsible for implementing access to rights policies. Globally, the level of legal advice provided in remand prison is very limited. With regard to remand prisoners, a strong implicit consideration is that the lawyer in charge of the criminal case will provide legal advice on any matter relating to the rights of his client. This hypothesis is undermined by the findings of the empirical work carried out in all the countries covered. There are a whole series of reasons for this. The first is that the client is aware of the limited time available to the lawyer to deal with his or her criminal case and, as a result, is reluctant to divert the lawyer from this priority. Second, the lawyer in charge of the criminal case is not necessarily familiar with the procedures and substantive law governing prison matters. Taking steps to resolve such rights violations would be a burden that could mobilize much time and ultimately imply high costs for the lawyer and his firm. Another finding of the research is that when there is a strong activity in the area of access to rights, it is most often based on the initiative of civil society, whether it is non-governmental organizations or university legal clinics.

That being said, the European panorama in this area is contrasted. With regard to the provision of legal advice (prior to any judicial proceedings and before the appointment of a lawyer in such a perspective), there are several configurations. This task can be assumed:

—predominantly, by members of the prison administration, in addition to their usual activities;

—predominantly, by external bodies in charge of monitoring and/or mediation in prison, and which perform this function incidentally;

—predominantly, by institutional mechanisms (State or Bar service) specifically dedicated to access to rights;

—predominantly, by NGOs under an agreement with the prison administration or not;

—a combination of these stakeholders, depending on the location.

In a first group of states, **access to legal**

advice is a blind spot in public policy, and what is being done in this area is at the initiative of civil society, depending, however, on the latter's interest in the matter and on the latitude of action allowed by the prison administration or the Judiciary.

In Bulgaria, no legal information is provided in detention facilities. The penitentiary system completely relies on the lawyer to inform the detainee about his other (human) rights and the legal remedies available. The dynamism of litigation is in large part due to the activity of NGOs, and in the first place on the Bulgarian Helsinki Committee. However, direct access to prisoners, especially pre-trial detainees, by NGO representatives is heavily restricted. While criminal proceedings are still pending, representatives of human rights organizations are only allowed to meet with a detainee upon the explicit permission of the prosecutor (in the pre-trial stage) or the trial judge (during the trial). The practice of the Bulgarian Helsinki Committee indicates that obtaining permission from the prosecutor can be an unpredictable and lengthy procedure. The organization has received numerous refusals to conduct visits with pre-trial detainees, many of which were unmotivated.

In Germany, though the law provides for a system of legal advice, in practice the same situation prevails. It could, in theory, be possible to provide pre-trial detainees with initial advice out-of-court about their rights with respect to the conditions of their detention under the scope of the so-called Beratungshilfe-system, as it is open to any kind of legal procedure that is not (yet) related to a court proceeding. However, though the literature on prisoner's rights after a conviction punctually mentions this option, there is not one hint of an according possibility for pre-trial detention neither in the literature nor the jurisprudence. This is all the more problematic since civil society engagements in the field of access to rights is much more marginal than in other countries. At this point, there are only two NGOs nationwide, each linked to a university, which support prisoners' rights and provide legal advice[153]. In Poland or Italy, legal advice is also largely based on the activity of NGOs and law clinics, but in practice they play a larger role at the national scale. In the Czech Republic, the system of access to law has recently evolved, so that consultations are no longer located in specific places. In theory, this system opens up the possibility of providing legal advice services in prisons. However, the issue of detainees has not emerged in the discussions surrounding the reform, and no further development in this regard has been considered so far.

At the end of the spectrum, **other legal systems take into account in their legislation and/or institutional organization the specific needs of the prison population in terms of legal advice. However, in this second group of states, this requirement is reduced by the effect of austerity policies or performance imperatives.**

In Belgium, the obligation to provide legal information in prisons has been foreseen in the Prison Act, after several studies showed that prisoners were largely dependent on the goodwill of the prison staff for legal information[154]. There is thus a specific need to provide legal information in prisons[155]. The "legal first-line support system" is responsible for the dissemination of legal information and the provision of a first legal advice to citizens in general and to detainees in particular, as they are a vulnerable group. In at least three districts, the attendance of a lawyer to provide legal first line support is not foreseen in prison. In two of these districts, there used to be a lawyer but because lawyers reported misuse of the system and because prisoners are automatically entitled to a pro deo lawyer, attendance has been discontinued. In a different district, duty shifts were organised in prison on a weekly or monthly basis, and lawyers giving legal second line support went to prison to give legal advice. This was replaced by a two weekly telephone permanence, for budgetary reasons. In another district, lawyer attendance in prison still exists, but takes place only once a month, during one hour. The lawyer signs up at the prison, and all prisoners requesting legal advice are sent to the lawyer one by one.

In the Netherlands, the Legal Service Counters are state financed and provide so-called

153 *One is the "Verein für Rechtshilfe im Justizvollzug des Landes Bremen e.V." which gives legal advice to people in all places of detention in the federal state of Bremen. The other one is called "Strafvollzugsarchiv" (The Prisons Archive) and was constituted at the University of Bremen as well. It provides written legal advice for people in detention nationwide.*

154 *Kellens, G., De Coninck, G., Demet, S. & Kellens, O. L'information juridique en milieu pénitentiaire, Brussels, Services fédéraux des Affaires scientifiques, techniques et culturelles, Bruxelles, 1997 ; Ronse, M., "Drie jaar systematische rechtshulp in de centrale gevangenis te Leuven: een terugblik", Panopticon 1992, 341-365; Vandenbempt, I., "Rechtshulp in de centrale gevangenis van Leuven", Winket. Tijdschrift van de federatie van de Vlaamse Gevangenisdirecteurs 1999, afl. 4, 53-65.*

155 *Eindverslag van de commissie "basiswet gevangeniswezen en rechtspositie van gedetineerden", Parl.St. Kamer 2000-01, nr. 1076/1, 175.*

first line legal aid in almost all disciplines. Before the establishments of these Legal Service Counters between 2003 and 2006, the State financed so-called Legal Aid Offices (Bureau Rechtshulp). These Offices provided consultation hours in penitentiary institutions, which seemed to filter out a lot of superfluous complaints. Legal Service Counters are also said to be present in penitentiary institutions, with consultation hours, but most of the research respondents indicated that physical presence of advisors is scarce at best. A respondent explained that finances for this kind of legal support dried up and that since then, general staff have taken over and support is now mainly provided through telephone. Although the annual plan for 2018 still mentions consultation hours by employees in 'several' penitentiary institutions, none of the respondents seemed familiar with any information regarding these consultation hours, so it cannot be said that they are a widespread or well-known practice. As a result, the system is increasingly based on other forms of legal mediation. In particular, it foresees that pre-trial detainees should be informed of their right to file a complaint or appeal and to turn to the member of the Supervisory Committee serving as a visiting officer on a monthly or weekly rota basis. The visiting officer can provide the prisoner with information on his legal position, and advise him whether or not to file a complaint on a specific matter. The visiting officer, however, can also mediate in the conflict, and in this way facilitate a settlement. There is no strict legislation on the way in which the visiting officer has to perform his duties and as such s/he has quite some discretion as to what advice to give the detainee. Respondents also refer to the university legal clinics, which are active in several prisons, as well as the role played by prison workers and often fellow prisoners as providing legal information.

In Spain, in the frame of the so-called Service for Legal Advice in Prison ("Servicios de Orientación Jurídico Penitenciaria" SOJPs), lawyers ascribed to this Service visit prisons on a weekly basis and advice prisoners on different legal issues, mainly on prison law and the procedure before the Prison Administration and the first steps for seizing the Judge for Prison Supervision. They also provide advice on how to request a lawyer from the "duty shift" system, or the possibility and the procedure for applying for free legal aid, etc. These lawyers provide legal advice only, and do not represent prisoners in court. The SOJPs are totally free for prisoners but are not covered by the free legal aid scheme. Each SOJP is financed differently: in some cases, it is subsidized by the Bar Associations, in others by the Autonomous Communities (though not from the same budget lines as free legal aid) and in some Bar Associations it is even provided by lawyers in an altruistic manner without any economic compensation, or the remuneration for lawyers from the SOJP is very low. It is a highly requested service, which regrettably is not available in every Bar Association with a prison facility within its circumscription. Due to the economic crisis, the budget of numerous SOJPs has been reduced up to the point where the provision of such services rely on the altruism of the lawyers ascribed to the Service.

In France, at first sight, the system seems very attentive to the question of access to rights in prison. This is partly due to the fact that this issue played an important role in the debates on prison reform. In 1999, the President of the Supreme Judicial Court, in charge of a mission on improving the control of prisons, insisted on the access to rights, as well as, a year latter, two parliamentary committees of inquiry which issued landmark reports on prisons taking similar strong stands on the issue[156]. Despite this strong political demand, this requirement was watered down as part of the reform that led to the 2009 Penitentiary Act. The implementing norms and practices of the Ministry of Justice have largely gutted it. The Penitentiary Act provides that «every detained person must be able to know his rights and to this end benefit from a system of free legal consultations set up in each facility». This system of free legal consultations is provided for through "legal-access points" (Points d'Accès aux Droits or PAD), which are not specific to the prison system but also exists in town halls. According to the law, these consultations are intended to respond to any request for legal information from detained persons, with the exception of those relating to the criminal case, the implementation of the sentence or for which a lawyer is already assigned. The lack of mentioning of issues related to prisoner's rights inside the prison undermines the

156 *The Commission of Inquiry of the Senate stated that "most detainees were unaware of their rights and remained distraught about some of the measures taken by the prison administration and found to be arbitrary. The generalisation of lawyers' consultation service would provide them with a competent contact person. These consultations could make it easier for them to access legal aid. ». The Commission of Inquiry of the Lower House, expressed that "It is difficult to ask the prison to play a role as a reminder of the law when you do not know which law applies. The detainee thus suffers the proliferation of rules as an oppressive straitjacket and not as a guarantee against arbitrariness. He is ignorant of both external laws and internal rules. The least that can be said is that this access to the law is ignored, if not totally ignored, in the definition of the missions of the prison administration."*

actors' understanding of what legal advice covers. The Prison administration considers that questions relating to life in the prison and conflicts with the prison services are excluded from the scope of the legal assistance provided by the PAD. The legal information guide published by the Penitentiary administration states, as regards the PAD, "Its role is not to inform you or assist you with questions related to Penitentiary law (administrative procedure and planning measure of your sentence). These questions are the responsibility of the Prison Probation Service." The agreements concluded by the Ministry of Justice with the actors involved in the access to the rights are in line with this understanding.

As a result, questions related to the exercise of rights in prisons are referred either to the lawyer (although we have seen how such transmissions are limited in practice) or to prison staff. While some issues related to social rights or administrative formalities outside the prison are unproblematic, this is not the case in situations where the prison administration's lack of knowledge of a right is at stake. As a matter of fact, **the penitentiary has no interest in disclosing extensive information on whatever litigation is possible.** In this case, when information circulates, it is usually informally, or through prisoner contacts with NGOs.

This is another common finding: **detainees are very largely dependent on outside organizations for legal assistance. This means that in most cases they are forced to use means of communication, such as telephone or mail, which are monitored by the prison administration.** Permission to telephone may be refused and letters intercepted. In France, the clandestine interception of letters is a recurrent cause for concern, including when it comes to the correspondence with the NPM[157]. In a case concerning the practice of systematic body searches in a prison in northern France, the Supreme Administrative Court even found that letters from the OIP, the main human rights organization in this field, were regularly intercepted by prison staff to prevent them from communicating with prisoners[158]. **Therefore, the fact that legal consultations can take place physically in detention plays an important role in terms of the effectiveness of rights.**

5. FOREIGN-NATIONAL PRISONERS, ISOLATED AMONG THE ISOLATED

The problems of accessibility of the law are multiplied for foreign-national prisoners, due to the lack of translation of all the legal information to which prisoners are entitled by legislation. As a result, **foreigner-nationals evolve in a world where they do not understand the rules and their situation of vulnerability is seriously increased.** The Czech case is quite characteristic of the general situation in this area. Upon their admission, all pre-trial detainees are provided with a written document informing them of their rights and obligations known as "Poučení pro vazbu", which is available in a wide range of languages[159]. However, the house rules are available only in Czech, which means that important daily aspects of detention, which are regulated by these internal rules, are not translated, including the schedules for showers, for medical consultations and for the educational and recreational programs. Concerning legal aid, these internal rules explain the practicalities for requesting an interview with a lawyer, such as whom the request form should be addressed to or where the interview will take place, but regrettably this information is available only in Czech. Sworn interpreters are de facto absent in prisons. Fellow prisoners or prison staff are usually relied upon to provide translation when the prison governor or prison staff wants to communicate with a prisoner, even during disciplinary proceedings. The sheer number of languages spoken in prison means that it is not always possible to find someone who can translate. Further, there are serious ethical and practical issues regarding the use of prisoners or staff as translators, as the prisoner who doesn't speak the language might choose to withhold information because the topic is sensitive or in fear of retaliation. In Belgium, interpretation by telephone involving a sworn

157 *«Je n'ai qu'à défendre les droits fondamentaux, si je puis dire!», Droit et société, vol. 87, no. 2, 2014; Contrôleur général des lieux de privation de liberté, Rapport d'activité 2018, (2019) Dalloz.*

158 *Council of States, 3 October 2018, OIP v. Minister of Justice, n°413989.*

159 *e.g. English, Bulgarian, French, Croatian, Mongolian, Macedonian, German, Polish, Romanian, Russian, Serbian, Spanish, Ukrainian and Vietnamese.*

interpreter is available for social workers and certain other services. However, this interpretation is only provided when discussing the prisoner's social problems, not in prison litigation.

In France, three general possibilities are stated for translation in prison: (1) to ask for an external professional interpreter to come to the prison and translate, an almost impossible task since a special permission from the Penitentiary administration should be obtained, which is a process that may take up to 3 month; (2) to ask the Penitentiary administration itself for an interpreter, but due to the lack of existing budgets for interpreters in prison, this solution is usually unavailable. The final solution is (3) to rely on a fellow detainee or member of staff to act as an informal interpreter, with obvious consequences for the confidentiality of the discussions. In these cases, information, which has been overheard, by prisoners or staff can very quickly circulate inside a prison.

6. CONCLUSION

Access to law is the first step towards the effectiveness of rights. From this point of view, **a striking observation for all the countries concerned is the absence of a voluntary policy in this area, and often even the altogether absence of such a policy.** Far from being conceived as a factor in restoring social and political ties, law is perceived with suspicion in prison, including at the central level. Paradoxically, law is understood as a risk of disorder and disobedience, not as a necessary basis for authority. At the local level, the empirical surveys show that despite very significant progress in the establishment of mechanisms of remedies and external oversight bodies, resistance to the entry of justice into prison remains very high. With the exception of the Netherlands, the empirical surveys show that the use of law in prisons has not become commonplace and that it leads to confrontational situations and exposes prisoners to various forms of reprisals. As the head of the NPM of France, who was previously a very prominent judge at the Administrative Supreme Court, once pointed out, "everything that looks like law, in fact, is perceived not as something that could clarify the behaviour of professionals, that could help them make choices, etc., but as a set of additional constraints that will prevent them from managing the fate of the person in their charge in the ways they wish. Therefore, it is absolutely essential for them, in a way, to prevent the introduction of the law. And, in particular, the introduction of law in the hands of detained persons. And that, to this end, any means are admissible. I underline with big red lines: any means are admissible.[160]"

In this context, **the effectiveness of prisoners' access to rights, which is the necessary prerequisite for access to justice, requires a committed policy by all stakeholders, which would operate the various levers available.**

Such a change of perspective implies **taking into account the law's accessibility requirement in the first place when designing standards and the general normative layout.** The texts must be comprehensible and must make it possible to understand the scope of the administration's powers. They must then be part of a coherent and hierarchical set of texts.

Second, **access to rights can no longer be conceived today without access to legal books and/or digital legal tools.** The intertwining of legal disciplines and orders, and the essential role of the judge, make it essential to be able to consult government sites that make the law accessible, but also jurisprudence databases. Digital technology can allow to disseminate information of different levels of accuracy and complexity and therefore to reach a wider audience. Public decision-makers, both at the state and European levels, must shift from cautious attention to proactive policies in these regards.

Finally, legal consultations in detention are primordial for a coherent policy on the access to rights in prisons. The low social, cultural and economic capital of the incarcerated population, and the risk of arbitrariness resulting from the fact that rights are exercised without public scrutiny, makes the physical presence of legal intermediaries in the prison essential. Only in this way can the prison institution become familiar with the defence by prisoners of their rights and the imperative of the rule of law be affirmed behind bars.

160 *« Je n'ai qu'à défendre les droits fondamentaux, si je puis dire » ! », prev.*

CHAPTER 5
LEGAL AID SCHEME: A TOOL FOR REFORM, IN NEED OF INVESTMENT

1. INTRODUCTION

The position of prisoners wishing to defend their rights is weakened by inadequate access to legal information within prisons, as seen in the previous chapter. Simplified procedures for obtaining assistance from lawyers under national legal aid[161] schemes could compensate for this handicap. To what extent do public authorities take into account the need for prisoner's access to the free assistance of a lawyer? Do the modalities for implementing relevant policies acknowledge the specificities of the prison context? What dynamics are policy makers following, and what are the implications in this respect regarding the circulation of complaints mechanisms promoted by the Council of Europe? The following developments will show that, (1) from a legal point of view, there is unanimous recognition of the right of access to legal aid for prisoners, even if the characteristic weaknesses of prison law (predominance of internal administrative procedures, uncertainties about the justiciability of penitentiary measures) hinder the exercise of this right. (2) The system of access to legal aid is very heterogeneous, creating significant disparities between countries in question. (3) Despite the difficulties observed, structured policies regarding legal aid create positive dynamics that are not sufficiently taken into account by European actors.

2. ACCESS TO LEGAL AID IS RECOGNIZED AS A PRINCIPLE, BUT SUFFERS FROM THE DEFICIENCIES OF PRISON LAW

2.1 Consensus of States on the principle of detained populations' access to legal aid

From a strictly legal point of view, none of the national systems exclude prisoners from legal aid. **There is consensus that procedures to protect fundamental rights within prisons entail the right to legal aid.** Significant variations can, however, be observed between the surveyed countries, even between States that have opted for penitentiary judges like Italy, Spain or Poland, which is a model that the ECtHR perceives as a simplified redress mechanism[162]. The right to legal aid may result from texts expressly referring to penitentiary proceedings (e.g. Italy) or from the application of legal aid to any legal proceedings, whatever they may be (e.g. France).

The case of Germany is particular in that access to legal aid as such is not available in prison matters when it comes to pre-trial detainees. The lawyer in charge of the criminal case is also expected to attend to any matter connected to detention. Additional charges can only arise in case of court hearings or very few other matters, but in most cases no additional fees arise. The German report shows the serious limitations of this system. Indeed, in practice the effectiveness of the right to judicial review is deprived of its substance, even though it is the cornerstone of the protection of rights in Germany (see below).

2.2 Legal aid systems do not take into account the importance of internal administrative procedures

In most states, internal procedures are numerous and are organized either before decisions are taken, such as in disciplinary matters, or as a means prior to court proceedings. **In the**

161 *For the purposes of this study, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.*

162 *Norbert Sikorski v. Poland, no. 17599/05, 22/10/2009, § 161; Neshkov and Others v. Bulgaria, no. 36925/10..., 27/01/2015, §282.*

majority of the examined countries, there is a common understanding that legal aid is not granted for internal proceedings within prisons (i.e. before the prison administration), even if the possibility of being assisted by a lawyer is acknowledged by law. Certain national penitentiary legislations do allow the inmate to consult or even be represented by a lawyer during disciplinary proceedings before the prison administration, but the legislation on legal aid does not provide for the remuneration of the costs incurred (Italy, Czech Republic, Spain, Poland and Bulgaria). Counter examples are France, Belgium and the Netherlands. In France legal aid is also foreseen in isolation proceedings (as a preventive measure) before the prison administration, but is not provided for other internal procedures, such as the withdrawal of employment or prison exit permits.

The lack of (free) assistance by a lawyer during the administrative phase has major consequences from the point of view of access to the judge. First, the writings exchanged at this stage often have the concrete effect of setting the dispute, particularly with regard to the description of facts. Hence, the arguments exchanged at this stage may legally or factually limit the possibilities of adequately arguing the appeal at a later stage. Moreover, the absence of a lawyer makes it very difficult, in practice, to collect factual evidence to support the detainee's position. In the jurisdictional stages evidence or testimony contradicting the administrations' assertions are rarely provided. Another critical issue appears to be the very limited time allowed to prisoners in order to appeal a disciplinary sanction (as is the case of Italy, 10 days, or Spain, 5 days), which practically hinders the possibility of contacting a lawyer and preparing a successful appeal. Further, some systems require an appeal to the administration before referring certain issues to the court, as is the case, in practice, in Spain (see below). However, internal remedies are largely distrusted, as shown, for example, by the statistics provided by the Polish report. This has the effect of dissuading detainees from exhausting internal remedies, even if that means finding themselves deprived of access to the judge. Above all, the detainee may not know the remedy and how to use it. For example, in a number of German Länder, this information is not communicated to the detainee who has been sanctioned, while in other Länder the written disciplinary decision is not communicated to him/her and it is up to him/her to request it. When questioned by the CPT, the German Government considers that the low number of appeals is due to the fact that the prison population accepts decisions, and is unrelated to a problem of access to the judge due to lack of information.

For all these reasons, the presence of the lawyer in the administrative stages is essential. The possible intervention of a lawyer during the jurisdictional phase is not sufficient to compensate for defects affecting the previous procedure.

2.3. The indeterminacy of the legal regime governing prison measures has an impact on access to legal aid.

The lack of a clear recognition of a right to a judicial review has implications on the access to legal aid. In France, the scope of decisions subject to judicial appeal is uncertain. For some of them (transfers between institutions, changes of detention regimes, etc.), recourse to a judicial authority is in principle excluded. This presumption of inadmissibility is ruled out if the prisoner shows that the decision in question involves his fundamental rights, a complex and somewhat obscure legal qualification. Sometimes (even if it is not the majority of cases) legal aid is refused because the legal aid office anticipates a very uncertain legal reasoning.
In Italy, the legislation grants legal aid in all proceedings in front of the penitentiary judge, "provided that the interested party must or can be assisted by a lawyer". The Constitutional Court and the Cassation Court have repeatedly affirmed that proceedings before a single penitentiary judge are included within the legal aid scheme. Yet, periodically, this interpretation is contested for different types of proceedings, which lack a clear jurisdictional nature, given that the legislator has not so far amended the misleading provisions in the law accordingly to the case-law.

3. HETEROGENEOUS LEGAL REGIMES, RESULTING IN WIDE DISPARITIES BETWEEN STATES

3.1 Administrative formalities of legal aid, a frequent obstacle to access to the judge

All States condition the granting of legal aid to the financial means of a prisoner, mostly by referring to income ceilings set by law. This requires the prisoner to prove his or her income and assets, which is often a challenge when it requires the provision of supporting documents from external administrations. These administrative formalities often form a major practical obstacle, often to a point where detainees are discouraged from seeking legal aid, even if they might have met the financial criteria. However, national laws and practices differ widely.

In Belgium, in theory, detainees enjoy a rebuttable presumption of inadequate means of subsistence. In practice however, members of the Bureau for Legal Support indicated that they apply a policy in which detainees are almost automatically granted legal aid, unless there are very obvious counter indications suggesting that the detainee is able to afford a lawyer himself. When the prisoner informs the prison administration, the latter sends a fax or an email to the Bureau for Legal Support, including evidence that the person requesting the assistance of a legal aid lawyer is imprisoned. A standard application form exists, but it is rarely used. A similar situation can be observed in France. Although the regulations state that a review of the applicants' resources should be made by the legal aid office and that there is an obligation to complete a form, it is a very widespread practice for legal aid offices to be satisfied with a certificate of prison attendance. It is common for lawyers to take care of these formalities.

However, this approach, which benefits incarcerated populations, is under threat in both countries. In France, the complete dematerialization of the application for legal aid, which was recently announced by the government, risks calling into question these practices, and, paradoxically, may significantly complicate the access of detainees to legal aid and to law. The modalities of this prison reform have not yet been defined, but there is a risk that it will considerably complicate the process and eliminate the practices of legal aid offices that are very favourable to prisoners. In Spain, the applicant can authorize the competent legal aid commission to access all his/her economic information (electronic file processing), shortening substantially the terms and avoiding possible frauds.

In Bulgaria, legal aid is requested from the court either orally or in writing. The applicant must submit a written declaration for his/her property status to the court. Legal aid cannot be granted prior to bringing the case to court. In practical terms that means that applicants can request legal aid only after or along with the submission of the (preliminary version of their) request to the court. Concerning pre-litigation legal aid, applicants are required to attach documents, certifying their socially or financial disadvantaged status. This system is rarely used[163]. In addition, in administrative litigation, beneficiaries of legal aid are not automatically considered exempt from paying legal fees, such as expert fees, or translation. The claimants must apply for exemption of payment of payment of fees. The court will assess the applicants' financial resources. Another recurring problem lies in the difficulties encountered by prisoners in paying legal costs from within the prison, which exposes them to having their applications declared inadmissible.

In the Czech Republic, scattered legal provisions regulate access to legal aid, which entails a lack of public awareness about its availability. The criteria for eligibility are not clear, and both courts and the Bar seem to enjoy a large margin of discretion for granting legal aid. Even though the financial situation is the main criterion, no exact economic threshold is foreseen, leaving room for much disparity. On the other hand, the situation creates a certain flexibility, as it is not just

163 *In 2017: 291 over 492 requests were approved.*

the economic situation of the applicant that is considered. Consideration is also given to the social situation of the applicant, to his/her health condition, as well as to the amount of the court fee, to the probable cost of supplying evidence and to the nature of the claim filed. In Italy, only a very small percentage of defendants access legal aid in prison (16% of the prison population) due to the low financial ceiling, coupled with the fact that those who do qualify are often unaware that they can apply. Foreign nationals (third-country nationals, who constitute an over represented prison population in Italy and tend to be more economically deprived) are required to provide via the consulate a certificate of their property and income issued in their country of origin. Italian nationals and EU citizens only need to produce an auto-certification. Recently the Court of Cassation has ruled that whenever there is an impossibility to provide the foreign country certificate, the person shall be granted legal aid and an auto-certification will suffice.

3.2 Organizational and budgetary procedures that are governed by ordinary-law arrangements

In all countries, legal aid is provided mainly—if not exclusively—from the state budget. With the notable exception of the Netherlands, the absence of statistics regarding prison litigation is also true in relation to procedures where legal aid has been granted. It is therefore not possible to assess the financial weight of these disputes. Austerity measures that largely affect European judicial systems obviously affect legal aid programmes as well[164]. In Spain, some autonomous communities reduced the remuneration awarded to legal aid lawyers (by 40%, for example in Valencia) and in others remuneration levels have been frozen or have increased very little over the last ten to fifteen years. This has also been the case in Poland and in Bulgaria, where legal aid fees are set significantly lower that the minimum fees that can be charged by lawyers. In Bulgaria, these fees have not been updated since 2006[165]. In Italy, in 2014, the remuneration of lawyers was cut of a third and the increased budget for legal aid in criminal proceedings (142 millions compared to 99 millions in 2011) is only due to the high increase of legal aid applications. In France, the recent increase in the legal aid budget was the result of significant social movements on the part of lawyers. There, the basic value unit grew from 26.5 Euros to 32 Euros, and the income ceiling for legal aid eligibility was raised.

The organisational arrangements of the legal aid schemes are not specific to the prison system. Rather, they are common to the judicial orders to which the competent courts ascribe (criminal, administrative or civil courts). As for the Complaints Committees in the Netherlands, they are under the competence of the legal aid office. Research does not allow drawing conclusions in terms of the effectiveness of any particular model. However, leaving the competence to decide on the granting of legal aid to the court, which hears the relevant dispute, appears problematic (Germany, Bulgaria). Indeed, such a system carries a high risk of budgetary considerations being taken into account when legal aid is charged to the court's budget.

Remuneration levels are highly variable. A European comparison would require complex weightings, integrating standards of living, social and tax charges, etc. The national reports opted for comparisons with other litigation areas. National reports show that, in any case, remuneration is almost always lower than the actual cost of the work provided, and that it does not allow law firms to operate in a cost-effective manner. Remuneration is considered acceptable only for a few types of litigation (eg. in the Netherlands, the remuneration provided for the highest categories of cases—roughly 300 Euros— is considered adequate only in straightforward cases; by contrast, the level of remuneration in disciplinary matters in Belgium amounts to 180 Euros.)

As for the determination of the amount of retribution, the lawyer is most commonly paid in accordance with a system of predetermined remuneration levels based on a schedule of various procedural acts, and set by the concerned Public Administrations (France, Belgium, Netherlands, Spain, Poland, Italy). It means that the legal aid system does not work with a fixed hourly rate, but instead with a remuneration per point. The Polish system allows for an increase of up to 150 per cent of the fixed amount to take into account the volume of work done.

164 *See, European Union Agency for Fundamental Rights (2011) Access to justice in Europe: an overview of challenges and opportunities*

165 *In 2018 the Bulgarian Ministry of Justice proposed to increase the maximum amounts of the fees per case. The reform was justified by the existence of a huge gap between the fees normally charged by lawyers ad those reimbursed under the legal aid scheme, the introduction of new requirements towards legal aid lawyers' performance and the decreased number of cases paid under the legal aid scheme. By the beginning of 2019 the draft law had not yet been adopted.*

Delays in the payment process are described everywhere as highly problematic (see next chapter), including the Netherlands, where a declaratory system with random checks is in place. This system that most Dutch lawyers seem to find workable, poses some problems regarding prison litigation: the lawyer will have to perform the merit test him/herself. If in a later stage the Legal Aid Board finds that his/her declaration does not meet the criteria, this does not only mean that the subsidy will have to be refunded. It can also mean that the lawyer will be the object of more thorough scrutiny, which involves a lot of administration time. As a consequence, lawyers will want to avoid this situation, which can be an obstacle in the process or receiving legal aid[166].

3.3 Significant differences in the parameters of the merit test

As for the substantive conditions under which legal aid is granted, most states have introduced a merit test linked to the proceedings. In Poland, this test concerns compensation claims that are made in civil courts. In Spain, where legal aid for prison litigation is in principle only available for appeals (unless there has been a serious breach of procedural rights), there is no merit test, although the legal aid lawyer may indicate the impossibility of initiating the procedure, in which case this opinion leads to two additional examinations. Similarly, in Italy, such a test is not scheduled for criminal cases and before the penitentiary judge.

Countries that use the merit test do so according to very different parameters. From this point of view, the French and Belgian systems are, again, more favourable to applicants. Such applicants are entitled to the test, unless the procedure envisaged is inadmissible or manifestly ill founded. Moreover, the admissibility requirement is generally not strictly interpreted. Another group of states have a much more restrictive approach, whereby the legal aid scheme is limited to the more complicated cases. In such instances—as the Netherlands, which is representative of this model—the prisoner is assumed to be able to litigate independently. These prisoners have access to standard forms, which they can use to file the complaint. In the event of complicated factual circumstances or legal complexity, or in certain cases of substantial interest (such as human rights violations), a lawyer can get a legal aid certificate. As a rule, this is also true of any appeal against the decision of the Complaints Committee. Regarding the proceedings before administrative courts in Bulgaria, the merit test consists of an assessment regarding the nature and extent of the benefit that the applicant might expect to gain by receiving legal aid, and also a determination about whether the claim is founded, justified and admissible. Such an assessment involves a balancing of the expected cost of the lawyer's intervention against the interest of justice in resolving the case.

Obviously, the merit test has a significant impact on access to legal aid. In the Netherlands, in 2017, detainees were assisted by legal aid lawyers in about one quarter of all complaints and appeals[167]. However, as is common in prison matters, legal conditions are not sufficient to reflect the full scope of the situation. Other parameters come into play, such as the detainees' awareness of the legal aid system, the credibility they give to the lawyers appointed in this context, or the contra legem practices that are sometimes deployed by the services in charge of granting legal aid. In Poland, detainees usually represent themselves in penitentiary cases, despite the absence of a merit test. Sometimes they are represented by legal aid attorneys but mostly in cases concerning suspension of the execution of a prison sentence or conditional early release, not the conditions of detention. The research has not lead to a clear explanation for this phenomenon. In Italy, a bureaucratic approach to mass prison litigation may be one reason for the low number of legal aid cases. In the end, the specialized prison jurisdiction model largely determines the conditions for referral, insofar as it encourages detainees to act on their own (except, of course, when the use of a lawyer is mandatory).

Even if more complete statistical data would be necessary to reach clear-cut conclusions, the findings already available concerning the systems at hand suggest that any approach whereby the simplification of procedures for referring cases to a reviewing body would make it possible to relegate the question of legal aid should be approached with reservations. In the Netherlands, the Complaints

166 *Further details on the consequences for lawyers of these shortcomings are examined in the following chapter*

167 *A 149% increase between 2012 and 2017 (while the number of complaints/appeals increased 9%). According to the field research, more and more lawyers seem to discover the possibility of subsidized prison litigation, however not always bringing with them the necessary expertise. Maybe as a consequence of these findings, the Legal Aid Board announced in March 2019 that they are to apply a stricter policy, with a strengthened obligation to state grounds for the eligibility for the certificate.*

Committee considered complaints fully or partially well-founded only in about 7.6% of all cases. About one quarter of the complaints were considered not founded, and 18% of the complaints were declared inadmissible. In addition, Amnesty International's research on institutions for detainees who are prosecuted or convicted of terrorism shows that, on a regular basis, complaints commissions only examine appeals in accordance with international law standards if the applicant expressly invokes them, even though these standards should be included in such reviews as a matter of practice. This could suggest that the assistance of a lawyer substantially could modify the conditions for the intervention of the Complaints Committee. Interviews conducted in Poland, with the exception of those with prison staff, show that remedy mechanisms are widely considered ineffective. The same observation emerges extensively from the study on Italy.

4. DESPITE THEIR SHORTCOMINGS, LEGAL AID POLICIES HAVE POSITIVE DYNAMIC EFFECTS, WHICH ARE INSUFFICIENTLY TAKEN INTO ACCOUNT DURING THE REFORM PROCESS

4.1 The positive dynamics created by legal aid policies

The implications of inadequate legal aid remuneration are discussed in the following chapter. Despite the shortcomings and limits observed, a structured legal aid scheme is likely to create dynamics conducive to an improvement in the protection of detainees' rights. This is the case of France, Belgium, Spain and, to a lesser extent, the Netherlands. Not only because it enables the provision of legal services in practice, which in turn allows for prison matters to reach the courts, but it also contributes to the specialization of lawyers in this field. More to the point, it allows some of them to intervene regularly in prison, which has a positive dynamic effect. This activity advances litigation that creates jurisprudence, which in turn elicits academic interest, making it possible to move the prison issue out of its marginal place in legal disciplines, and allowing for a heightened consideration of the fundamental rights of prisoners.

In this respect, the example of France is significant. Although the lawyers' entry into disciplinary commissions was accidental (the Ministry of Justice did not anticipate this effect of a 2000 law), state legislation very quickly provided for access to legal aid in this area. As a result, a number of bars organized rotations of lawyers into disciplinary committees, allowing for a fairly large territorial network. The place of prison issues has developed very clearly in academic education: they were non-existent until the end of the 2000s, and are now regularly included in bar admission-exams.

The activity of these lawyers, made possible by legal aid, increases the opportunities for a public debate on prison issues and, as described in the next chapter, encourages the representative bodies of bars to take up prison issues in the societal debate and to make the fundamental rights of prisoners a more prominent issue. The mobilization of lawyers during the very harsh 2016 Belgian prison strikes is characteristic of this phenomenon. Intended to support the social demands of prison staff,

the strikes resulted in serious violations of prisoners' rights. Lawyers initiated a massive wave of appeals in response, which led to the state being ordered to ensure minimum access for detainees to hot meals, showers, family and lawyer visits, etc. This intervention thus helped to structure national debates around the prison crisis, both at the media and political levels.

The German case provides a sharp contrast to these examples. The report on Germany shows that legal protection for pre-trial detainees is an unexplored topic in criminal policy as well as academia. Although Germany is the country where, in principle, judicial protection with respect to prison matters is most firmly rooted—as a result of very strong constitutional jurisprudence dating back to the 1970s—interviewees unanimously conceded that litigation on living conditions in pre-trial detention does not exist in practice. The lack of attention to such matters sharply contrasts with the number of complaints from convicted prisoners.

The research made clear that if cases regarding living conditions in pre-trial detention were financed by legal aid separately from the criminal case, the perceived importance of this issue would be subsequently heightened. A special fee would draw attention to these kinds of complaints and presumably initiate the training of lawyers and other forms of knowledge transfer between colleagues. The research pointed to the necessity of not only granting separate legal aid for the complainant with respect to detention conditions but also allowing for a separate lawyer to handle aspects of the case that are not otherwise connected to the criminal law proceedings.

4.2 Legal aid, a lever of transformation ignored by national and European policies

The major issue of the effectiveness of appeals from the ECtHR perspective has been recalled in a previous chapter. It was also noted that ECtHR case-law paid little attention to the subject of legal aid in prison matters, neither has this issue been reflected in the Strasbourg Courts' pilot and quasi-pilot judgements.

It is remarkable that the issue of access to legal aid has not emerged in the context of the executive process of pilot or quasi-pilot judgements—as shown by the cases of Poland[168], Italy[169], Bulgaria[170] and Belgium[171], which have all been concerned by such procedures. One of the objectives of the system of pilot judgements is to increase pressure on the respondent states in order to ensure that their own courts properly deal with appeals.

As shown in previous research, these procedures have the effect of placing prison reforms on the agenda in the countries concerned, significantly increasing the recognition of legal protection issues. In Italy, the pilot judgement procedure urged the introduction of the first fully jurisdictional set of remedies for the violation of prisoners' rights. Moreover, such procedures give rise to high-level technical cooperation activities, initiated by the Council of Europe. Thus, Bulgaria and Poland benefited from the project, implementing "pilot, [and] 'quasi-pilot' judgements (...) in the field of detention on remand and remedies to challenge detention conditions[172]». The project was implemented in close co-operation with national authorities, international experts, and the Registry of the ECtHR, as well as with the CPT. The project objective was to promote systems of preventative and compensatory remedies enabling detainees to challenge poor conditions of detention.

The process of execution of the pilot judgements has given rise to extensive discussions concerning specific procedural issues. However, it appears that the assessment of the conditions on which lawyers can be mobilized in the proceedings have been largely ignored in this process. The stakeholders—the Council of Europe and state authorities—run the risk of undoing the considerable efforts that have already been made, if they do not clearly address the deployment of lawyers in these proceedings.

However, the decision taken very recently by the Committee of Ministers in the group of cases concerning the authorities' failure to provide prisoners with copies of documents necessary for their application to the European Court (violation of Article 34) needs to

168 *Orchowsky v. Poland, no.17885/04; Norbert Sikorski v. Poland, no.17599/05, 22 /10/2009*

169 *Torreggiani and o. v. Italy, no. 43517/09, 8/01/2013*

170 *Neshkov v. Bulgaria, no. 36925/10, 27:01/2015*

171 *Vasilescu v. Belgium, no. 64682/12, 25/11/2014*

172 *LINK*

be highlighted. The Committee of Ministers stated that "it is essential to ensure that these procedures are effectively implemented in practice; noted with interest therefore the envisaged amendments to regulations to (…) increase access to secondary free legal aid and internet resources which would further assist prisoners obtain access to documents[173]". It is a positive signal of awareness of the crucial nature of this issue.

5. CONCLUSION

There is a broad consensus among national policies on the recognition of the right of prisoners to legal aid for prison litigation. Germany stands out in that separate legal aid for pre-trial detainees is not available as such: prison disputes are theoretically handled by the lawyer in charge of the criminal case, without additional remuneration. Notwithstanding this broad consensus, internal administrative procedures, which play an important role in the exercise of prisoner rights, are generally not covered by legal aid schemes. The impossibility of resorting to a legal aid lawyer in this context is likely to bias or even prevent subsequent proceedings.

Nevertheless, and despite these difficulties, where structured legal aid policies are pursued, they have the effect of amplifying the awareness of prison issues by generating positive dynamics: consolidation and autonomization of prison law, involvement of representative institutions of lawyers, emergence of new leading opinions, etc. To a large extent, this positive dynamic factor is currently ignored in the context of the ECtHR's judgement execution processes, although positive developments seem to be emerging in this respect. Addressing this deficiency seriously would significantly advance the processes of establishing effective remedies and of ultimately eliminating identifiable structural violations.

At the end of the day, access to justice for detainees is generally conceived by national systems in a paradoxical way. While prisoners face social, economic and cultural challenges, they are largely denied the principle—widely acknowledged outside prison walls—that effective access to justice requires the assistance of a legal professional.

The example of the Polish system, which follows the model of a penitentiary judge[174], evidences the decisive contribution of lawyers. Both the Ombudsman's representative and the detainees interviewed there said that without a lawyer, they could not properly represent themselves before the courts. The massive proportion of applications declared inadmissible highlights the validity of a lawyer's assistance under a legal aid scheme for all countries examined.

173 *CM/Del/Dec(2019)1348/H46-34, 6 June 2019 (decision regarding the Naydyon group and Vasiliy Ivashchenko v. Ukraine (Application No. 16474/03)).*

174 *Regarding the «preventive remedy».*

CHAPTER 6
THE LEGAL PROFESSION'S INVOLVEMENT IN THE ACCESS TO COURT: THE UNEQUAL MOBILIZATION OF BAR ASSOCIATIONS

1. INTRODUCTION

In a majority of countries within the survey, detention conditions are a recent domain of litigation and, in many national situations, this litigation itself emerged through legal activism initiated by lawyers and NGO activists. If lawyers can thus be expected to be involved in prison litigation, the forms of this involvement and the profile of these practitioners still remain to be analysed. Part of it is institutionalized and defined by national legal provisions: as we will see, in most surveyed countries, Bar associations are indeed officially in charge of organizing duty shifts for prison litigation, and sometimes the provision of legal advice services directed to prisoners. While a series of legal provisions organize lawyer's access to detention facilities, the actual involvement of the legal profession however, is still in need of additional, more practical actions that depend on different sets of actors.

If many shortcomings will then be noted on the side of Bars, it should be reminded here that their sometimes limited involvement reflects above all the limited importance of prison issues in public policies and in legal practice in general. It is indeed a common finding of most policy analysis that the condition of prisoners and their access to their rights receive poor attention from the media and are rarely present on the political agenda—a lack of visibility and legitimacy which also accounts for insufficient attention from Justice and Penitentiary administrations, and limited public funding for legal initiatives in this sector. While being directly impacted by this logic, Bars will not be encouraged to focus on the already poorly visible legal situation of prisoners. In the same way, Bar associations have to defend and promote the legal profession within an economy where prison litigation, again, is usually not a profitable activity and does not account for much of the everyday business of law firms as we will see. Prisoner's rights however remain a matter of concern for ethical reasons. Although initiatives have been and are currently taken all over Europe, more attention is needed to face the current challenges of prisoners' defence.

A first challenge largely rests on Bar associations themselves: in addition to the organization of duty shifts in cooperation with courts and Bureaus of legal aid, they are in charge of ensuring the training of lawyers in the specific domain of prison litigation, sharing information on these matters, and facilitating lawyer personal awareness and involvement in prison matters. As we shall see, growing interest for prison issues can be noted within many European Bars. However, this involvement remains too limited in most surveyed countries to have significant impact on the organization of prisoner's defence: defenders who specialise in prison litigation, while being economically fragile, receive only occasional attention and help form the Bars they belong to (1). The second major challenge the legal profession has to face when dealing with prison litigation dwells in the peculiar situation of their clients, who are by definition locked up and unable to easily contact the outside world. When it comes to defending their rights, especially regarding the very conditions of their detention, the possibility for lawyers to contact their clients and have actual access to detention facilities is all the more crucial. Even if Bar associations have been active on this matter as well in most surveyed countries, significant limits to this organization of legal defence inside prisons should be noted (2).

2. ORGANIZING A COHERENT DEFENCE SYSTEM: THE LIMITED INVOLVEMENT OF BAR ASSOCIATIONS IN PRISON MATTERS

The unequal involvement of bar associations in the organization of defence has important consequences on the facilitation of prison litigation. In most countries that participated in the survey, it is a legal requirement for Bars to supervise lawyer intervention in criminal cases, above all through the organization of duty shifts for lawyers who then remain available to take a case ex officio. While duty shifts and legal aid are not necessarily associated, they do share a strong connexion and their possible limits may increase difficulties in effective access to legal advice and defence. It is then crucial to present the different systems of duty shifts in the surveyed countries, and provide a critical analysis of the efficiency of these systems. Such an analysis is not limited to the mere capacity of bar associations to provide courts with a list of lawyers who will be on duty and take cases at any given time. Assessing the efficiency of Bar associations intervention also means to take into account their capacity to train these lawyers on matters as specialized as prison litigation, to circulate information on these matters, and more broadly, their general concern over prison issues and their will to engage into active policies to promote prison litigation.

Bar associations and the organization of duty shifts: major discrepancies between and within countries—In many countries part of this study, bar associations have to manage part and sometimes the whole organization of duty shifts on criminal matters—which usually includes litigation over conditions of police custody and pre-trial detention. While this type of organization is widespread in most European countries, discrepancies between Bars may create inequalities in access to legal counsel and to actual defence before court. The first possible obstacle is a common, but serious one: the complexity of procedures that imply effective connexion between courts, Bureaus of legal aid and bar associations. Such a process may be simplified by the existence of a centralized body designed to examine demands for a legal aid pro bono lawyer. In Belgium, Bureaus for Legal Support established by local Bars are for example in charge of deciding upon the appointment of a pro bono lawyer and thus verify whether an applicant has adequate means of subsistence. Initiating the process however remains problematic in many situations—as in the case of Italy where cases possibly available for legal aid with an ex officio lawyer are commonly first spotted inside prisons by NGOs operators or legal clinicians who provide prisoners with a list of lawyers working with legal aid at the local Bar, but who have to renew this operation for each new application, losing much time in the process.

If these obstacles belong to the everyday limits of any administration, a more specific issue is that of lawyer training and legal proficiency when it comes to highly specialized matters such as prison litigation. While it is the concern of bar associations that lawyers taking a duty shift do have proper training for the job, strong discrepancies can be observed—leading to inequalities in access to legal counsel and possibilities for litigation. In most surveyed countries, defendants who ask for an ex officio lawyer will be provided one out of a list of defenders officially registered on a duty shift, with or without the possibility to choose this defender within the list[175]. These lists are commonly established by national and/or local Bars, with however different requirements, particularly regarding lawyers' training and legal specialities. In Netherlands for example, prisoners may choose their own lawyer, as long as this lawyer is on a specific list (in that case, established by the Legal aid bureau) and is a criminal law specialist (otherwise they will have to pay for the lawyer themselves). Even in that case, a specialization on criminal matters does not entail the defender's proficiency in prison litigation: as in many countries, prison law is not a widely preferred field of expertise among defence lawyers. As a result, a defence lawyer already assigned for the pre-trial assistance of a prisoner may be reluctant to assist him or her in penitentiary proceedings. In other surveyed countries, duty shifts

175 *In Germany the defendant may chose any lawyer s/he wants as his/her defence counsel in the criminal trial, without the requirement of such lawyer having to be oficially registered in a list. In case of pre-trtial detention the government will prefinance the provision of legal services by the said lawyer.*

dedicated to prison matters may not exist, or may be limited to certain Bars—typically those of major cities or regions. In Poland, larger bars (Regional Bar Council or Regional Council of Legal Advisors) allow theirs members to indicate the preferred scope of cases in which they can provide legal aid. At the local level or self-governing level, legal support to detainees is not regulated and there are no additional provisions regarding additional mandatory legal consultation. In contrast, in Spain, duty shifts focused on penitentiary issues exist in the majority of bar associations with a prison facility in their sector. In this same country, appointment of a duty shift lawyer will also notably be accelerated by the existence of automated switchboards or call centres connected to police stations.

The lack of involvement of Bars in the training of lawyers—This uneven official specification of lawyers' fields of expertise takes a problematic dimension when connected with the unequal involvement of bar associations in the professional training of lawyers. The role of Bars as training providers is indeed all the more important as national legal systems may include a special qualification in criminal law for lawyers—as is the case for France, Belgium or the Netherlands, among others—but usually propose no specific qualification on penitentiary law.

An additional complication is brought by the fact that prison litigation is itself a diverse legal sphere, involving action before administrative or judicial bodies with different procedures according to the prisoner's situation. In Germany for instance, lawyers who may be experts in penitentiary law for convicted prisoners may on the other hand have insufficient knowledge of the specific rights of pre-trial detainees, especially since those rights were only recognized after a 2006 decision of the Federal Constitutional Court, and are actually enforced at the local level through 16 different länder procedures. While pre-trial detainees—as opposed to convicted prisoners—always have a lawyer on their side, the number of complaints is nevertheless vanishingly low. In the same way, Bulgaria has experienced renewed interest for prison litigation after a 2017 legal reform, which opened new avenues for judicial protection of prisoners' rights. While this lead to an increased demand for lawyers competent enough to litigate such cases, it appears that currently this demand has not been met, as there are hardly any training opportunities for lawyers who wish to specialize in this subject area within Bulgarian academic legal trainings. Finally, the Italian respondents of our survey, report scarce knowledge of the complex penitentiary law and particularly of the ECHR and ECtHR's case law by lawyers working in prison, a problem aggravated by the poor knowledge of the English and French languages by Italian lawyers and judges alike. As a result, almost no use has been made of the ECtHR protective provisions for prisoners in the past years.

In this context, a common finding of this study is the general lack of offers for training within bar associations in all surveyed countries. In all national situations, local Bars are reported to organize training for lawyers as part of legal requirements on lawyer continuous education, with however no specialized programs on penitentiary law—not to mention the situation of pre-trial prisoners. In many countries, mandatory courses organized by bar associations will mainly feature special training sessions on criminal law in general. In this respect, Spain distinguishes itself clearly. Depending on how big the Bar Association is, the duty shifts are defined according to more specific legal fields, and this could include a duty shift for prisoners (beside others devoted to minors, foreigners, etc.). If the local Bar Association has a specific duty shift for penitentiary issues ("turno de oficio de vigilancia penitenciaria") it is compulsory to attend a course on criminal law and penitentiary law to be able to enrol. However, the volume of training provided varies quite significantly between bars. In the case of Netherlands, even if other parties, like the Knowledge Centre of Supervisory Committees, do offer courses on penitentiary law, this is not the case as far as Bars are concerned. This lack of specific training by Bars on penitentiary law, is in contrast with the thorough training they provide concerning criminal law. Dutch local bars offer a general training in criminal law for lawyers alongside more specialized courses provided by a Bar-created foundation in cooperation with Utrecht University and the Amsterdam Vrije Universiteit, and all because the legal aid scheme requires lawyers to be specialized in criminal law for them to be registered at the Legal aid bureau. Penitentiary litigation though, is not an object of similar concern. As mentioned before, the Dutch

Bureau of legal aid does not make any specific distinction regarding penitentiary proceedings. Any lawyer specialized in criminal law can then be eligible, with no additional training required. Multiple examples could be drawn from other situations—in France, no mandatory continuous training in prison law is expected by the Bar for criminal lawyers, although every lawyer registered with a Bar association is required to complete a 20-hour continuous education programme for each calendar year. A similar situation is observed in Belgium, where lawyers taking duty shifts should give proof of their knowledge of the given area of law—again, criminal law—with no other training obligations or special statutory qualifications required for lawyers specialised in a certain matter, such as prison law. Italian respondents, on their side, report no courses or training provided by the local and national Bars on this subject, while in Bulgaria an introduction in execution of sentences law is offered in some law faculties as an elective course, but is entirely missing from the training programmes of the National Bar training centre and the Legal aid board. In the same way, most national respondents noted a general absence of Bar-edited specialized documentation—such as leaflets or handbooks—on penitentiary law and prison litigation. From this point of view also, Spain is an exception, since some Bars publish newsletters in prison law.

This problematic situation may receive different explanations, starting with the poor visibility of penitentiary issues within Bar Associations. As some interviewed lawyers reported, national Bar associations and Bars of major cities usually focus on legal areas able to bring many cases and significant profit—such as corporate law—with less attention for more modest cases such as those related to prison, which are furthermore financed by legal aid and offer almost no economic interest. Such a remark also reminds the different points already noted in the introduction of this section: Bar associations, first, are part of a tight economy where profitable legal branches have to be given prime importance for the good of the profession as a whole. Second, issues that are poorly visible for Bars are also the ones that get little visibility from government officials and policy makers in the first place. If Bar associations are thus not primarily responsible for such a situation, this lack of training and interest still appears to be a major problem in most countries part of the survey—especially in relation with the economic and social situation of defenders who specialize in prison litigation throughout Europe.

The economic situation of prison litigation lawyers: small businesses, poor profit, and strong moral involvement — On this part, countries participating in the survey show an almost similar pattern: lawyers who specialize in prison litigation are mostly younger lawyers, who work on their own or as part of smaller law firms, with a comparatively modest income[176]. These smaller businesses have little financial means to invest in prisoners' defence, but their young members are also less likely to hold politically significant offices within Bar Associations and thus bring more visibility to the prison issues they focus on. As a result, they fail to bring prison litigation to the agenda of major Bars, on an equal footing with other relevant issues, or within smaller Bar Associations with no means or personnel to organize effective training of information sharing on these questions.

Finally, even these specialized lawyers do not engage exclusively in prison litigation cases, for a financial reason: in all surveyed countries, a majority of complaints over conditions of detention involve prisoners with few or no financial means, forcing their defenders to rely on the legal aid system. In view of the recent budget cuts in these systems, this means prison litigation, as a specialty will be associated with poor remuneration. Indeed, in all countries part of the survey, prison litigation is widely described by lawyers as a non-profitable activity. Other organizational issues connected to national systems of legal aid add to this situation and bring more economic strain for prison litigation lawyers: in many countries, lawyers mention problems related to the determination of the amount of the aid. The competent bodies (Bar associations or Legal aid bureaus) enjoy important discretion in this activity which may for example lead to rejection of some applications based on purely formal reasons, leaving indigent prisoners with no means to pay their lawyers as in the case in Spain. Other, more common problems involve national systems of credits for legal aid refund—which, as all legal categories, may not be comprehensive enough and may exclude a great part of the lawyer's initiatives on a case, obliging lawyers to work part of their time for

176 *In the Netherlands it has been reported that some of the larger and more wealthy firms have (also young) lawyers who specialize in prison litigation to serve their clients, should the need arise. These firms may not act out of moral involvement, but they do feel they need to be able to provide these services to meet their clients expectation.*

no fee. In the same way, several respondent lawyers in different countries reported problems of delays in the payment of the aid, due to bureaucratic complexity. Excessive delays—frequently over a year—are for example reported in France, Belgium, Netherlands or Czech Republic. Such a situation means that only long-term financial balance may be achieved on prison litigation cases. In the meantime, younger lawyers starting a business are compelled to find other sources of income to face their everyday costs. In order to remain in business, they typically have to diversify the profile of cases they defend, with prison litigation cases only making up to a smaller part of their activity. Whatever work they put in prison litigation will in many cases be performed out of a moral or political will to act in favour of the detainees, but it has to be combined with other legal specialities for economic survival.

While such an economic pattern may hold in many countries, its negative effects on the defence of prisoners are double-edged. One the one hand, it is providing support to deficient legal aid systems which do not in themselves guarantee effective access to justice for indigent prisoners, and which only endure thanks to the commitment of lawyers willing to work for very low fees. Specialized lawyers are aware that accepting poor remunerations resulting from reduced legal aid refunds, out of political commitment for the cause of defence, allows the system of legal aid to endure in spite of budget cuts. Dysfunctional systems which could be the object of substantial reforms may then remain untouched, while on a broader political level, this situation may even contribute to the general impression among the public and decision makers that these cuts are economically sound. As stated by many lawyers, such work for free or almost no remuneration amounts to "disguised pro bono work" which they see in some countries (such as Belgium, Netherlands or France) as the only reason why legal aid schemes are still holding financially.

The second major consequence of this current condition of legal aid systems is its effects on the quality of defence, at different levels. It first impacts the rigor and precision of their legal work on each case: the certainty that each individual prison litigation case will only bring poor remuneration, may indeed lead lawyers to multiply cases in order to reach financial balance—with the risk of reducing the work in an individual case to a fast and basic intervention with no in-depth study of case specifics. The second effect of the economic strain defenders have to face on legal aid-based prison litigation cases concerns the possibility of unethical lawyer behaviour. Again, examples could be multiplied on different national situations: respondent lawyers mention sheer deviations, for instance from lawyers who ask unaware clients for extra off-the-record money for a case that is already officially selected for legal aid. But many respondents also report less radical but more widespread practices, such as lawyer selection of cases according to their expected eligibility for legal aid—leading to rule out of defence a number of vulnerable prisoners.

Making up for institutional shortcomings: the obligation for prison litigation lawyers to be self-reliant—Although legal and institutional frameworks can then help, another common feature of the national situations studied in this survey is the self-organization of lawyers who specialize in prison litigation. The General Council of the Spanish Bars is the only example of institutional integration of prison issues at the national level. It has in its structure a Subcommittee on Penitentiary Law under the Free Legal Assistance Commission. Elsewhere in Europe, another specificity of lawyers engaged in prison litigation proves to be crucial: as previously suggested, these defenders may be economically and socially disadvantaged, but they share in most countries a common moral involvement in favour of prisoners' rights, and engage in this type of defence for advocacy as much as legal practice. Due to this activist commitment and because few institutional resources exist, these lawyers then commonly create their own networks in order to share information and legal decisions, to compensate for isolation in local Bars where their specialty may not be represented, and, when these networks can achieve sufficient importance, to make prison issues visible to other colleagues and create awareness within national Bar associations.

Several examples of this self-organization can be found in the national surveys this document is based upon, with different patterns of relations between these networks, Bar associations, or NGOs active in the field of prisoners'

defence. French lawyer network A3D—Avocats pour la Défense des Droits des Détenus (Lawyers for the Defence of Detainees' Rights) is an example of the latter: the very creation of the network is an initiative of members of a major French organization, the Observatoire International des Prisons, whose members had opened new legal venues for prisoners through litigation but needed contacts with dedicated lawyers to make these new possibilities work by bringing more cases to court. On the lawyer's side, the economic organization of the prison litigation field dissuaded most lawyers from engaging in costly, long and uncertain legal action, and prevented them from achieving a global view of prison issues nationwide—a situation that made this NGO backup a crucial help. Other lawyer networks may feature similar activist commitment to the defence of prisoners, while being more officially recognized as a group of specialized defenders—such as Unione Camere Penali, an Italian organization of lawyers strongly dedicated to the issue of legal aid. In Bulgaria on the other hand, no dedicated networks of prison litigation professionals are reported, reinforcing the possible isolation of lawyers who wish to get involved in this particular practice. This unfavourable situation is partially offset by the existence of a large NGO, well organized and strongly involved in litigation at internal and European level. In prison matters, Germany and Czech Republic combines a non-existence of network on the part of lawyers and the almost absence of NGOs involved in the field of litigation. To summarize, lawyer activity on prison litigation is not just focused on a very specific and narrow legal speciality. As such, it is also based on a small number of actors, and a particular economy with multiple restrictions: being a recent and rather modest speciality, it concerns a small number of usually younger practitioners, with little institutional power to increase the visibility of their practice and gain more recognition from major Bar associations. While increasing concern and new initiatives from Bars can be noted on prison issues, their still limited official existence, combined to the economic difficulties due to the over-representation of legal aid-funded cases among their clients, puts prison litigation lawyers under strain—and is a strong incentive for them to self-organize into networks of mutual help. Such organization is even more needed when lawyers have to confront with the particular world of detention.

3. ACCESSING DETENTION: STILL A DIFFICULT TASK FOR LEGAL PRACTITIONERS

In all countries part of our surveys, lawyers have access to detention facilities to meet their clients and in some cases to perform other duties. Our study however reminds that this legal possibility is never self-evident—its enforcement may always be submitted to discussion or restrictions from penitentiary administrations for reasons of simple convenience and organization, but also out of disguised or open hostility towards defenders. This type of tension may grow even stronger when conditions of imprisonment become the very object of litigation and in the case of remand prisoners whose criminal case is not settled, and whose connection with the outside world may as a result be put under scrutiny by prison officers. All these factors combine to make relationships of Bar Associations with Penitentiary administrations even more crucial.

Formal relations between Bar associations and Penitentiary administrations: a minimal and uncertain connection—Although Bar associations have to contact Penitentiary administrations on a regular basis, relationships between these two bodies are the first issue at stake. In many cases, no stable and organized relationship really exist, a situation that may be either due to lack of interest, or clear hostility, and which forces Bars to go to court if they wish to obtain changes in the reception of lawyers inside prisons. In the Dutch case, no institutionalized and permanent relations exist between the Bar and the Penitentiary administration, and judiciary intervention is regularly needed—as in August 2018, when a new digital application was imposed on lawyers for communication with inmates and to make appointments at a high

cost and with no guarantee of confidentiality. Two lawyer's associations supported by the Dutch Bar had to file an application for a temporary injunction to suspend the obligation to use the app while the case is still pending. Other national examples show similar situations: in France, few national connections and almost no local contacts are reported; there are none in Italy or Czech Republic; and in the Belgian case, contacts are either non-existent or difficult at the federal level, while local cooperation may exist only when initial distrust can be overcome.

In this context, legal requirements may still organize lawyer presence inside detention places, with different formats in the surveyed countries. In some of them, Bars are responsible for organizing legal advice inside prisons, as in the case of the "Service for Legal Advice in Prison" ("Servicios de Orientación Jurídico Penitenciaria", or SOJPs) in Spain, or the first-line legal support performed by Belgian Commissions of legal support. In these cases, lawyers are present inside detention facilities to provide detainees with legal counsel, but do not represent them in court. While these services appear to be efficient, they have no apparent equivalents in other countries and are under economic strain in both cases—in Belgium, recent shifts in public policy have lead to budget cuts and to the suppression of such help, or to its replacement by telephone consultations. In Spain, lawyer remuneration from this type of counsel is very low and, even in those cases where funding has been cut, may lead practitioners to work only out of an altruistic motivation and without economic compensation.

Material arrangements for lawyer access: still a frontline for lawyers—For lawyers who represent the personal interests of a prisoner, the possibility to enter detention facilities is a crucial, but a still problematic possibility. In all surveyed countries, lawyers may enter prisons upon presentation of a specific habilitating document, which may be delivered, by a court, the Penitentiary administration or the local Bar Association. In practice however, a series of obstacles still exist in a majority of cases

Some of these limits are purely material, but have significant impact on the capacity of lawyers to organize effective defence. Scheduling lawyer visits may be problematic in some countries, as lawyers' professional schedules have to match the peculiar timeframe and organization of the prison. In some countries (as in Italy) a simple phone call from the lawyer is enough to schedule a visit, but other situations feature misunderstandings and delays. An interesting initiative in this regard is the telematic service recently developed by the Spanish Prison Administration and the General Council of the Spanish Lawyers[177]. This collaboration framework aims at facilitating communications between prison facilities and Bar Associations for better management of the visits by pre-arranging them on-line, and by enabling lawyers to print their access document (or e-pass) from their personal desk.

Many interviewed lawyers in diverse countries notably mentioned the geographic distance from their office to most detention places as a definite problem, since they imply time-consuming travels in order to meet one or a few prisoners. Although most lawyers will use a personal vehicle to get to prisons, difficulties of access to many remote detention facilities through public transportation is also frequently raised. This fact should itself be connected to what has been stated before on the particular economy of prison defence: for lawyers with limited income and the obligation to maximize every case and intervention, this difficulty is interpreted by some respondents as another reason why a growing number of lawyers are reluctant to engage into prison litigation, while the practice itself is seen as non-profitable.

Some of these limits are explicitly featured in national legal provisions, or more commonly, in local prison rules—thus creating problems of discrepancies and unequal treatment, as rules may be different from one detention place to another. Among these legal restrictions are the rules regarding security checks for lawyers as they enter detention facilities. A series of national reports mentions additional waste of time for lawyers who have to go through the general line dedicated to visiting families when entering prisons, either

177 *See Instrucción I 4/2006 "Dirección General de Instituciones Penitenciarias regarding lawyers' visits", and for a factual presentation LINK (in Spanish).*

because they are granted no particular privilege in terms of security checks at prison gates, or because these privileges are legally defined but are ignored, intentionally or not, by the prison staff. Added to these critical remarks is the widespread issue of interdiction for lawyers to bring their personal laptop or other electronic devices inside detention places. This limitation, however ordinary it may seem, takes greater importance in the view of the unequal access of lawyers to the administrative files of their clients, which is generally denied by penitentiary administrations in most surveyed countries. The possibility to bring documents inside prisons, to obtain them from the Penitentiary administration, and finally to hand them down to prisoners when meeting them appears as an issue in a majority of the countries.

Connected to this last question are the problematic material conditions of meetings between lawyers and their clients in detention. In all surveyed countries, such meetings are supposed to take place in special designated premises, usually a meeting room, guaranteeing confidentiality of conversations. Legal limitations may exist but only concern certain criminal matters (such as terrorism or organized crime). In many national situations however, the conditions of these meetings do not seem to respect legal requirements. A first issue concerns the material state of meeting rooms—including problems of rooms reduced to a small booth where a simple conversation may not be held in serene conditions, rooms without proper heating or air conditioning, or rooms that are used for interviews with multiple actors—probation officers, NGO representatives or families—and which are barely available as a result for interviews with lawyers. The second and more problematic issue concerns the absence of effective confidentiality in many cases. When conversations have to happen over a telephone or in a room that is wired for prisoner surveillance, concerns over full secrecy of conversations arise, as mentioned by respondents in the Netherlands, Bulgaria or Poland. Finally, the particular problem of confidentiality for conversations with certain categories of detainees, namely transgender or foreign detainees, is pointed out in most reports. In the last case, translation is needed while many national regulations do not impose the presence of an interpreter for meetings internal to prisons. In most of those cases, translation is then performed by another prisoner, a situation which makes any confidentiality obviously impossible, and which does not guarantee the accuracy of translation on precise legal matters.

A significant change in the conditions under which lawyers operate in detention should be noted in the case of detainees suspected of terrorist radicalization. Some reports from MNPs[178] or international NGOs[179] have highlighted the violations of the rights of defence suffered in this context. The difficulties mentioned concern first of all the transfers of detainees to places of detention far from the courts, which considerably complicate the work of lawyers. Secondly, systematic body searches are carried out on detainees during visits with their lawyer, which dissuades the persons concerned from meeting their lawyer. Generally speaking, lawyers are unable to challenge measures taken against their clients because the elements on which the administration relies are kept secret[180]. Often, the measures themselves are not formalized and it is not possible to indicate their precise nature and duration when drafting an appeal. The remedies are often poorly identified (for example, in France, it is difficult to know whether to refer the matter to the criminal judge or the administrative judge). When remedies are identified, the competent bodies are very reluctant to effectively review the grounds and proportionality of the contested measures, and very reluctant to apply the case law of the ECtHR.[181]

Coming to terms with prison social order: how local routines may hinder effective contact between lawyers and their clients—If formal rules may then already create unequal treatment for detainees and their defenders in different places of detention, a major challenge for effective prisoner access to legal defence is the possibility for lawyers to contact them and perform their legal duty within the peculiar social world of detention. While this document has already shown how detention life has become a matter of legal concern and litigation in the last twenty years in most European countries, the everyday en-

178 *CGLPL (France), Radicalisation islamiste en milieu carcéral 2016 : L'ouverture des unités dédiées, 2016. In April 2016, 31 lawyers of the Paris Bar filed a complaint with the NMP concerning violations of the rights of the defence in this context.*

179 *Amnesty International Netherlands and Open Society Foundation, Ill-treatment in the context of counterterrorism and high-security prisons in the Netherlands, 2018.*

180 *See, regarding Belgium, Teper Lea, Zone d'ombre carcérale, l'isolement en aile D-radex, Journal des tribunaux, 2018, p 960.*

181 *See, Amnesty International Netherlands and Open Society Foundation, Ill-treatment in the context of counterterrorism and high-security prisons in the Netherlands, prev.*

forcement of detention is mainly made up of informal rules and arrangements between prisoners and the detention staff, and among prisoners themselves. Regardless of what formal rules may state—and sometimes against those rules—these actors develop routines and a complex economy of favours, mutual obligations and finally produce a specific order that may become a significant obstacle to effective access to legal support. National reports within this research give many examples of such limits lawyers may experience when entering a detention facility to meet a client, whether deliberate or involuntary.

The first remark deals with the attitude of the prison staff. On this matter, a majority of lawyers in all countries note a deliberate tendency from prison officials to disregard the rights of defenders when they may interfere with their own practical organization: while being entitled to visit their clients at all times, lawyers may not be granted access to them when no detention staff can be made available to bring detainees to visiting rooms. In some cases, these movements from prisoners' cells to visiting rooms may be used by members of the staff to deliberately impose a long wait on a lawyer they dislike. This type of behaviour is particularly noted for lawyers specialized in prison litigation, who may be seen as "disturbers" by some detention officials as their action tends to underline problematic detention conditions and general malfunctions within the penitentiary system. As a result, legal actions and even more legal victories directed by these lawyers against detention conditions may be "rewarded" with extended waiting periods and deliberate staff unavailability at visiting hours. Such attitude is particularly signalled in France and in Belgium, with added occasional arguments between lawyers and prison wardens or surgeons in this last case.

Other issues related to the social order of prisons include the attitude of prisoners as litigants. Focusing on prison litigation indeed implies that prisoners will contact a lawyer with a view to challenging the very conditions they experience on a daily basis. Such a situation may limit their will to engage into such activity in multiple ways. Ordinary detention first offers other formal or informal ways of dealing with problems related to detention conditions—from raising issues over detention conditions as part of the general defence strategy in the criminal case, to negotiating with the prison staff. On a more conflictual note and in addition to what has already been stated on the attitude of the prison staff, some national reports note that prisoners may be dissuaded from challenging poor detention conditions by fear of retaliation from prison officials. Prisoners who mention their fears to their lawyers are usually advised to file a motion in the last days of their detention to avoid long-term mistreatment, but an unknown number of cases thus never make it to court.

Another, more common situation that may hinder the emergence of cases is the understandable focus of prisoners on their main criminal case: while this main procedure is an ever-present matter of concern to them, problematic conditions of detention may be both seen as unavoidable and provisional, giving limited interest to prison litigation initiatives that will not bring any result before the prison time is served. This problem is accentuated by the specific situation of pre-trial detainees, who may only spend a short time in the prison or specialized remand centre they have been assigned to and will not have sufficient time or concern to challenge their detention conditions.

The multiplicity of such obstacles to effective access of lawyers to detention facilities gives renewed importance to the presence in detention of other legal counsellors, such as NGO representatives.

The development of digital technology would be a major opportunity to develop tools for access to law that meet the challenges of the legal division that characterizes prisons. Digital tools enable the coverage of the variety of legal issues that arise in prison. In addition, they enable the provision of different levels of information, ranging from simple explanations of the rules to the use of law under conditions similar to those prevailing outside: navigation on government legal information sites, national case law database, European Court database, access to guides elaborated

by the European Court, etc. As a matter of fact, none of the prison administrations concerned seem to have launched this process. Digital technology cannot be the only answer to the prison population's lack of legal knowledge, given the difficulties that some prisoners have with written materials or the use of technological tools. However, combined with access to legal advice, digital technology would make it possible to widely open up the dissemination of rights in prison.

4. CONCLUSION

While currently the individual action of lawyers is obviously of pivotal importance in protecting the rights of detainees, and most often carried out under complex conditions and with very low remuneration, the role of the Bars as institutional actors remains quite limited (with the notable exception of Spain). The prison issue has not yet really emerged as a specific issue requiring regular and organized intervention by representative institutions. In particular, the rather considerable development of prison law at the level of the European Court of Human Rights case law and at the level of national laws has not resulted in a corresponding evolution in the political undertakings and in the organization of Bars associations.

This situation is doubly paradoxical. First, the performance of lawyers' duties in the prison environment faces material, ethical and economic difficulties that are not commensurate with the problems encountered in most other areas of professional practice. Second, prison issues have a major impact on the preparation of the criminal trial and the exercise of the rights of defence, which are traditionally emblematic themes of the mobilization of representative institutions.

However, initiatives taken by groups of lawyers, often supported or even initiated by NGOs do raise today the visibility of prison issues within Bars, in parallel with the role played by academic doctrine. As a result, this downward impetus should also be matched by initiatives at the European level to make up for the delay: as previously stated, limits of Bar involvement in prison issues only reflects a lack of visibility and concern for these same issues from Justice administrations and within public policies in general. European initiatives are thus strongly needed.

CHAPTER 7
NGOS AND LAW CLINICS: A LEADING ROLE IN PRISON REFORMS, EXERCISED IN PRECARIOUS CONDITIONS

In a context where public authorities are neglecting their mission to provide access to legal resources in prisons, and where the Bars remain generally in retreat on the issue, NGOs and law clinics[182] naturally play a leading role as facilitators of the use of law by detainees and, more broadly, of the mobilisation of law for strategic purposes. This is all the more true as NGO action becomes more judiciarized, and as the reduction in scope for manoeuvring in the political arena makes judicial and constitutional leverage essential. Given, on the one hand, the structural problems affecting most national systems (and the extent of the prisoner demand for legal services that is generated as a consequence) and, on the other, the low popularity of the issue of prisoners' rights, the implementation of these missions constitutes a major challenge for the organisations concerned. If the actors of civil society play an obvious leading role in this field, it is at the cost of considerable difficulties, the extent of which is not yet adequately taken into account at the European level.

1. A LEADING ROLE, EXERCISED WITH UNEQUAL MEANS

1.1 Civil society organisations active in prison litigation, a heterogeneous environment

The NGO community brings together a wide range of actors from country to country, and with respect to means and methods of action. In terms of corporate purpose, NGOs specifically dedicated to prisoner rights issues can only be found in France, Belgium, Bulgaria (an NGO of legally registered prisoners, see below), and Italy (also active in the field of migrant detention and in both cases backed by the University). Elsewhere, the prison issue is handled by generalist human rights NGOs. In terms of importance, the Helsinki Foundation for Human Rights (Poland) and the Bulgarian Helsinki Committee stand out clearly among the players in the litigation field. These organizations have a significant number of salaried members (50 and 37 -full-time and part-time, respectively). They are well integrated into international networks, and have specific departments dedicated to both legal advice and strategic litigation. Organizations from other countries are of much less prominence. The French section of the International Prison Observatory (OIP-SF) has only one employee for litigation, despite being very active at the national level; the organization's Belgian section has no salaried staff whatsoever. Although they remain a rare phenomenon, networks organized by prisoners who may possess a practical or more formal legal knowledge—commonly known as "jailhouse lawyers"—should be counted among legal facilitators. This is the case for the Bulgarian Prisoners' Association for Rehabilitation (BPRA), which has no employees and relies on the volunteer efforts of prisoners. Such prison volunteers are mostly engaged with preparation work for lawyers, but they also conduct litigation work—both on their own behalf and that of other prisoners—while facing frequent retaliation from prison administrations (including disciplinary sanctions or more informal harassment).

Formal, institutionalized university legal clinics play a large role in some countries (Italy, Poland, Germany, Netherlands). Beyond supporting prisoners and lawyers, they train future lawyers and raise awareness and experience of prison law and litigation among new generations of the legal community. In Italy, legal clinics—especially the Altro Diritto clinic (University of Florence)—are becoming an important

[182] *Some of which have been set up as autonomous structures with specific objectives and should be regarded as NGOs within the meaning of the Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe*

means of litigation. The organization provides legal advice and helps prisoners to fill claims; further, its members mediate with prison administrations to solve cases. It is now working to create legal clinics in a large number of Italian law departments. Poland probably hosts the densest network of legal clinics within the scope of the survey: the Polish Legal Clinics Foundation coordinates a network of about 25 university law clinics, funded by universities with pro bono support from sources such as foundations, private law firms, the Ministry of Justice and the European Law Students' Association Poland. Poland is the only country whose system of legal clinics combines the attributes of a major «classical» NGO and a highly structured, significantly endowed clinical law network. Other national examples may include student organizations, as (for example) the union of student legal counsellors and other student groups who work along with the European Network of Clinical Legal Education, in Germany, or those who document and explain prisoner rights and prison laws as the "Prison Archive" (Strafvollzugsarchiv) in that same country. Other nations, however, may offer poor resources in this regard; such is the case in France or Bulgaria, when only few legal clinics exist.

1.2 A leading role in domestic and international legal dynamics

In some countries, NGOs have played a central part in creating networks and peer alliances to organize and to share experiences, best practises, and legal decisions. In many European countries, they have taken an even greater role in initiating prison litigation as a practice: early, landmark decisions confirming the legal right to challenge detention conditions in court were frequently won by lawyers belonging to such organizations, either acting as plaintiffs or representing the interests of prisoners (France, Poland, Bulgaria). This early intervention accounts for the important role that NGOs continue to play in prison litigation and, more broadly, in prison reform: Most surveyed countries feature networks of NGOs dedicated to the defence of prisoners' rights, whose members are usually able to mobilize sharp, comprehensive legal expertise. Furthermore, many such NGO members have become routine litigators for the courts while remaining true to their activist roots: This is true not only for national courts, but also with respect to regular action before the ECtHR (particularly in Bulgaria, Poland, and France), with landmark decisions on prisoner rights directly connected to NGO initiatives. These organizations thus perform multiple tasks that include fostering public awareness or raising funds for the defence of prisoners' rights, disseminating legal information on the topic, bringing together specialized lawyers, and, finally, performing legal counsel and engaging into strategic litigation themselves. (The strategic litigation dimension is mainly present, in a structured form, in Poland, Bulgaria, France and Italy. In Belgium, while NGOs mainly serve as a forum for consultation, lawyers play a more prominent role in piloting strategic litigation.)

2. NGOs FACING MULTIPLE CHALLENGES

2.1. Difficulties in accessing financing

Although the activity of legal support relates to a major sovereign function - justice—such activity is not delegated by the State to NGOs; this is to say, with few exceptions, it is not carried out with public funding. Legal support for prisoners therefore requires a significant investment, in terms of organization and fundraising, on the part of NGOs. Yet access to funds for this type of activity, in particular the litigation dimension, is limited. A report of the FRA[183] highlighted «[f]unding cuts for some CSOs or certain activities, with a move away from advocacy, litigation and awareness-raising activities and towards the provision of health care or social services». In addition, litigation is explicitly excluded from the list of activities that can be funded through EU programmes, and the same rule applies to EEA and Norway Grants. In other words, national and European public funds are not easy to mobilize in this area. For the most part, therefore, organizations must submit projects to foundations in a way that matches those foundations' priorities, or they must cover their activity using funds raised elsewhere or for other purposes. In the end, there is a clear disproportion between, on the one hand, the essential role of NGOs with respect to of the rule of law, and, on the other, the funds available to them to that end.

[183] *FRA (2018), Challenges facing civil society organisations working on human rights in the EU.*

2.2 Intervention conditions dependent on the rules on locus standi

The rules pertaining to locus standi vary significantly in the countries studied. Unlike discrimination or environmental issues[184], international norms do not provide for any privileged procedural regime for NGOs in prison matters.

Even soft law, in particular the European Prison Rules, does not take this crucial factor into account. The legal regimes are therefore inconsistent in this area. Some systems, for example, fear promoting mass litigation and highlight the interests of justice[185]. France, by contrast, has a favourable regime, one that allows the IOPC-FS to act on two levels: It can both challenge secondary legislation (or the lack of it on a question) and, if necessary in this context, also refer the deficiencies of the law to the Constitutional Council. The OIP-SF was granted locus standi to act in the interest of an identified group of detainees, for example, to request work in a particular prison or to request the termination of a body search regime. However, France is an exception in this regard.

Many nations will simply forbid the very presence of such bodies when it comes to litigation, or will impose significant limits to their capacity to appear before court. In Belgium, the two main NGOs working on prisoner rights (the Belgian branch of the International Prison Observatory and the Human Rights League) are not entitled to initiate action with the Council of State. In Bulgaria, NGOs may in principle challenge secondary legislation. National courts generally undertake a narrow approach to the interpretation of whether a legitimate interest is at stake, often finding NGOs' appeals of statutory legislation inadmissible. In addition, n civil, administrative, and criminal proceedings, NGOs cannot represent claimants.

However, the most common policy on the part of NGOs (at least in Bulgaria, Poland, France, and Italy, where the prison litigation is structured) is to take on individual cases, as long as their outcome can have significant consequences on prisoner rights in general.

No matter how efficient these actions may be, NGOs still lack a powerful tool for effectively enforcing prisoners' rights as long as they lack legal standing. The main objection to such recognition of the role of NGOs—the fear of abuse of litigation and of an overload of court cases—should not be an obstacle, given both the small number of litigants involved, and also the already intense (if not formal) engagement of NGOs in each case: In most situations, de facto NGO support to a litigating prisoner will eventually assume the form of official legal representation. Examples of such situations can be seen in the French OIP and the Bulgarian Helsinki Committee, whose members have been defending personal cases and bringing to courts general and fundamental questions regarding effective detainee access to litigation. As stated above, the most common NGO policy is to take on individual cases, as long as their outcome can have significant consequences on prisoners' rights in general. However, finding an applicant who can adequately carry a case is very complicated. This is particularly true for pretrial prisoners, who fear repercussions during their criminal trials.

Normative developments are necessary to recognize the essential role of NGOs in terms of preventing ill treatment and bringing national law into line with international requirements. A wide locus standi makes it possible to intervene early when a text or practice causes violations, and can thus prevent major disputes.

2.3. The ambiguous relationship between NGOs and penitentiary administrations

A more political issue is that of the uneven and problematic relationship between NGOs and administrations in charge of running prisons. In several countries, NGOs that enter prisons and subsequently criticize conditions of detention may eventually lose their access altogether. In Spain, the ROSEP network—encompassing many of the social organizations that in some way intervene in the criminal environment—was banned from entering prison without being given any explanation, after the release of a report concerning the situation in a particular facility. The same is true of the organization Salhaketa. In France, on Sep-

184 *Reservation made to the very restrictive possibilities of acting before the ECtHR under the conditions provided for in the judgment Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania , no. 47848/08.*

185 *For a general outlook, see European Parliament, Standing up for your right(s) in Europe - A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts, European Parliament.*

tember 2018, the Ministry of Justice informed the association Genepi that the agreement between them—in force since 1976—would not be renewed. This students' association, the main actor from civil society active in places of detention, leads socio-cultural workshops with detainees. The administration criticised the group for a decrease in its activities, and especially for positions it found hostile to the government's policy. However, the role of testimony and shared information among detainees and students was an integral part of the group's mission. A PR campaign was necessary for the government to reverse its decision, a process which took several months. Such situations help to explain the decision made by certain NGOs, such as the French OIP, not to be present within prisons, but rather to take alternative forms of action with the aid of a vast network of prisoners, lawyers, prison personnel, and volunteers—who themselves enter prisons on a regular basis and who themselves participate in monitoring. While the actual prospect for NGO representatives to access prisons, and to communicate with prisoners there, is in itself an issue, these events remind us that such access always has a price for dedicated organizations. In Bulgaria, direct access to prisoners, especially pre-trial detainees, by NGO representatives is heavily restricted. While criminal proceedings are still pending, representatives of human rights NGOs could meet with a detainee only upon the explicit permission of the prosecutor, supervising the case (in pre-trial stage) or the trial judge (in trial stage).

3. CONCLUSION

NGOs play an essential role in the prevention of ill-treatment. In its decision Bulgarian Helsinki Committee v. Bulgaria[186], the Strasbourg Court stressed «the work of civil society in the process of protecting the rights of people of extreme vulnerability». Beyond this aspect of direct protection, NGOs play a crucial role in bringing national laws into line with the requirements of the ECtHR, whether in litigation before domestic courts, cases brought before the European Court, or dialogue with the Committee of Ministers on the supervision of enforcement by the latter. While this narrative is relevant to many national situations, a striking finding of this research is the lack of acknowledgement of the importance of NGOs in the defence of prisoner rights. In this regard, the European situation embodies a paradox: On the one hand, it combines a dense network of active NGOs, and a rather significant recognition of these NGOs as privileged interlocutors of the ECtHR (due to the essential role they play in litigation before this court). On the other hand, there is a partial or complete denial within the European system of their role as litigants.

Three series of developments seem essential in this area. First, a significant expansion of funding opportunities is needed. To that end, a financing instrument dedicated to the promotion of the rule of law in the EU, which the European Parliament has called for[187], is essential. It is equally decisive that the exclusion of litigation from the scope of European funding should be removed. Secondly, European standards, in particular those laid down by the Council of Europe, should take into account the essential role played by NGOs in meeting the requirements of the ECtHR with respect to the prison system. States should be encouraged in this context to extend the locus standi granted to NGOs before the domestic courts, and to provide adequate guarantees for their intervention in detention. Finally, the bodies responsible for the protection of human rights defenders should take into account the specific difficulties of action within prisons. These organizations are totally dependent on the goodwill of the administration and are therefore subject to various forms of blackmail. This concern is not sufficiently addressed at the European level.

186 *Dec. No. 35653/12, 66172/12, 28/06/2016*

187 *European Parliament (2018), European Parliament resolution on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level (2018/2619(RSP)), prev. See further: Liberties, European Parliament Votes to Better Protect Freedoms, But Council Yet to Agree, available at: https://www.liberties.eu/en/news/ep-vote-values-program-freedoms-democracy-civil-societyhuman-rights/16805*

GENERAL CONCLUSION

Under the influence of the case law of the European Court of Human Rights, the recognition of the fundamental rights of detained persons has progressed considerably over the last twenty years. However, these efforts are undermined by the difficulties faced by detainees in bringing cases to court. To determine the reasons for this phenomenon, this research has brought forward an in-depth assessment of national situations regarding access to legal assistance for remand prisoners, and how these issues were addressed by European law.

THIS ANALYSIS HIGHLIGHTS SIX SERIES OF KEY OBSERVATIONS:

1 It is well-established that prisoners have cumulative disabilities in access to justice. These include low economic, social, and cultural capital, which often goes hand in hand with great difficulties in reading and expressing oneself orally and in writing. In addition, initiating legal proceedings leads to confrontational situations and exposes prisoners to various forms of reprisals that discourage them from exercising their rights. This research shows that, in this matter, pre-trial detainees constitute a particularly vulnerable category. They are less inclined to take action to ensure respect for their fundamental rights for fear that their actions will have a negative influence on their criminal proceedings. They are often reluctant to call on their lawyers to resolve violations of their rights, for fear that such requests could lead to a reduction of the time spent by the lawyer preparing the criminal case, which is a priority for them.

2 The particular vulnerability of this category of detainees is largely ignored procedurally by the European law, at the ECtHR and, even more at the EU level.

First, and rather paradoxically, while the effectiveness of the domestic remedies regarding prison conditions is a fundamental issue for the ECtHR, it fails to take into account factors that are essential to the effectiveness of these mechanisms. The ECtHR has developed a considerable body of case law to give effect to the substantive rights granted to detainees, particularly on matters of access to a judge. **The Court, however, fails to take into account the essential role of the lawyer from the point of view of detainee's access to justice**, and more generally neglects the many material obstacles prisoners have to face. Its vision is to encourage the simplification of procedures to enable the detainee to act alone, rather than to favour the intervention of a lawyer to ensure the defence of his interests. The result is a general weakening of the legal protection of detainees.

The EU, on its side, has initiated action in reference to another production of the ECtHR: the court's minimum standards for criminal proceedings. Considering the unequal respect of these standards among member states and the need for judicial cooperation, the EU adopted six directives setting its own minimum rules in criminal matters. However, these standards do not address issues concerning the fundamental rights of prisoners in prison. As of today, two mutual recognition instruments allow prisoners to be confronted with prison conditions in another EU Member State: the European Arrest Warrant (EAW) and the Framework Decision on the transfer of prisoners. Being increasingly used in the judicial cooperation between the Member States, it is clear that the execution of mutual recognition instruments could lead to violations of fundamental rights of pre-trial and convicted prisoners. This concern is particularly supported by recent jurisprudence of the Court of Justice of the European Union in the joined cases Aranyosi-Căldăraru (joined cases C-404/15 and C-659/15 PPU), in which execution of the EAW was refused due to poor detention conditions in the issuing Member State. Violations of fundamental rights within the various countries of the European Union are thus an impediment to judicial cooperation between the Member States. The lack of a common standard now appears to be a serious problem from the point of view of cooperation in criminal matters at the European level.

3 Access to legal information is the first step towards the effectiveness of rights. A striking observation is the absence of a voluntary policy in this area, and often even an altogether absence of such a policy. Far from being conceived as a factor in restoring social and political ties, law is perceived with suspicion in prison: It is understood as a risk of disorder and disobedience, not as a necessary basis for authority. The report highlights three sets of problems. (i.) The administrations consider access to legal information **only from the perspective of popularization**, through brochures that briefly describe the principles of prison operations. While this approach is legitimate and necessary, it does not put detainees in a position to defend their rights and file complaints. Indeed, there is a limited range of legal texts that prisoners may access, and the case law, in particular that of the ECtHR, is almost systematically unavailable. (ii.) Effective access to the law is made impossible **by the frequent proliferation of lower-level texts (circulars, memos)**, which are generally neither available to prisoners nor even to legal professionals, since they are often not published or are made accessible with huge delay. (iii.) The development of new public management is accompanied by **the use of professional guidelines that are subject to continuous changes** in order to adapt the work of prison staff. Based on a logic of flexibility, these new modes of writing prison law tend to free themselves from the ECtHR's requirement of framing the administration's discretionary power.

4 **There is a broad consensus among national policies on the recognition of the right of prisoners to obtain assistance from lawyers under national legal aid schemes** for prison litigation. However, the lack of common standards allows the coexistence of very different systems and very different levels of protection within the European Union. In particular, countries that use the merit test linked to the envisaged proceedings do so according to very different parameters. Remuneration of lawyers under the legal aid scheme are highly variable. In any case, remuneration is almost always lower than the actual cost of the work provided, and that does not allow law firms to operate in a cost-effective manner. In addition, delays in the payment process are described everywhere as highly problematic. Despite these difficulties, **where structured legal aid policies are pursued, they have the effect of amplifying the awareness of prison issues by generating positive dynamics**: consolidation and autonomization of prison law, involvement of representative institutions of lawyers, emergence of new leading opinions, etc.

5 **This report also highlights the importance of non-state actors.** Obviously, **lawyers** are crucial in the protection the rights of detainees: as this report points out, the intervention of lawyers in prison as early as the police custody phase has a major impact on the criminal trial. **However, we have also stressed the limits of bars commitment to the defence of pre-trial detainees' rights.** While prison law has developed at both European and national levels in the past two decades, and while the exercise of the rights of defence has long been an emblematic theme for the profession, prison matters have rarely emerged as a specific issue for Bars. Such minor attention is all the more problematic as the economic situation of lawyers who engage in prison litigation is complex and usually precarious, notably due to the low level of legal aid remuneration in most countries. It is mostly through informal self-organization and altruistic political dedication that lawyers working in this specialty can achieve common work and information sharing. Such an organization, however, does not solve all the different material, ethical and economic difficulties lawyer encounter.

6 If the focus is not on individual defence but on the role played as a collective actor, it is certainly NGOs, and to a lesser extent law clinics, that are at the forefront. To some degree, their intervention compensates a lack of political concern and legal protection in this area. However, there is a lack of acknowledgement of their major role, whether financially, practically or procedurally. (i.) Legal support for prisoners requires a significant investment, in terms of organization and fundraising. However, little funding is available for this type of activity. In particular, States are reluctant to finance litigation against them and, as a general rule, European Union funding instruments exclude this type of activity. (ii.) The implementation of rights protection activities

in prisons places NGOs in a situation of total dependence on the administration. Organisations are dependent on administrative authorisations to access the prison and may be subject to retaliatory measures. (iii.) The role played by NGOs in the protection of Convention rights, at the individual level, but above all from a structural or systemic perspective, is not recognized at the processual level. Among the national laws studied, NGOs rarely have a locus standi allowing them to act as applicants. Despite the fact that detainees are a particularly vulnerable category and that intangible rights are most often at stake, NGOs do not benefit from a favourable procedural regime as found in the field of environmental law or protection against discrimination.

*** These conclusions underline **the urgent need for a committed policy by all stakeholders, which would operate the various levers available.** Such a policy should be initiated at the European level, bringing together legal requirements and soft law defined by Council of Europe and EU institutions. At the national level, the writ of the rule of law do not imply mere political awareness and will to act; they also require a **change of perspective when designing legal texts and organizing their enforcement.** Indeed, access to justice in prison cannot be conceived without a precise definition of the administration's prerogatives and a strict definition of the conditions under which it can legally restrict the exercise of rights. Failing this, exercise of complaint will be just a theoretical and thus illusory right.

Beyond this essential general consideration, the analysis of national situations makes it possible to make a number of recommendations on how to overcome the difficulties encountered in prisoners' access to justice.

RECOMMENDATIONS

TO THE EUROPEAN UNION INSTITUTIONS:

1 The evolution of the European Union's institutional architecture defined by the Lisbon Treaty and the increasing problems of cooperation in criminal matters due to the divergence of detainees' rights protection systems in Europe reflect both the possibility and the need for a European Union's legislation in the penitentiary field. Building on the legislative work carried out under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, the European institutions should develop directives on the procedural rights of detained persons, in order to ensure greater respect for the Charter of Fundamental Rights in European prisons. Taking into account the requirements identified by the Strasbourg Court in prison matters on the basis of Articles 6 and 13 of the ECHR, these texts should also set out clear minimum standards for access to legal information and legal aid.

2 The right to legal information must include (a.) the right of detained persons to have access, like all citizens, to the laws and regulations in force and to the case law of the courts, including the case law of the CJEU and the ECtHR ; (b.) the right to access all norms governing their personal situation in detention, including low-level normative texts (circulars, memos…); (c.) the entitlement to free legal advice, involving the regular presence in detention of legal professionals able to answer legal questions from detainees, in particular with regard to violations of their fundamental rights in prison. This intervention should be surrounded by adequate guarantees in terms of qualification, independence and confidentiality, and should result in regular information to the public on the services provided and the difficulties encountered.

3 The right to legal aid must cover all disputes that may involve a fundamental right in detention. It must include the right to (a.) information on the conditions required for the recognition of the right to legal aid: economic criteria, documents to be submitted, time limits, etc.; (b.) advice and guidance before the process is initiated, including an initial analysis of the viability of the claim; (c.) assistance in the drafting of the application form for legal aid; (d.) deliverance of a resolution, recognizing or temporarily refusing legal aid, with information on the consequences of the denial; (e.) the possibility to judicially challenge the decision on legal aid.

4 The European Union institutions should take into account the essential role played by NGOs in terms of protecting fundamental rights and respecting the rule of law in Europe's prison systems. Litigation, particularly strategic litigation, is now recognized as one of the most effective means of correcting structural or systemic problems. It is also an essential lever for the execution of the judgments of the ECtHR. It is therefore essential that the general rule excluding litigation activities from the scope of EU funding be abolished. It is also essential that the separate financing instrument dedicated to the promotion of the rule of law in the EU, which the European Parliament has called for[188], be established and mobilized to defend the rights of detainees.

TO THE COUNCIL OF EUROPE:

5 In line with its Recommendation Rec(2004)6 on the improvement of domestic remedies, the Committee of Ministers should issue recommendations aimed at strengthening the effectiveness of domestic remedies in prison matters, so as to draw conclusions from the obstacles encountered in practice by prisoners in accessing justice. In particular, such key aspects as the access to legal information in detention, legal assistance, legal aid and the conditions for NGO intervention should be considered as integral components of the effectiveness of remedies in the prison field. The ongoing process of revising some of the European Prison Rules and related commentary[189] could lead to the adoption of detailed standards in this area. Failing this, a specifically dedicated recommendation should be adopted on this subject.

188 *European Parliament resolution on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level (2018/2619(RSP))*.

189 *European Committee on Crime Problems, 74th Plenary Session, 5-7 June 2018, CDPC(2018)11.*

6 Technical assistance actions, and in particular those carried out in the context of the execution of ECtHR's judgments involving the creation of an effective remedy, should take into account the determinants of access to the judge in prison, in particular access to an effective legal aid system. In addition, the consideration of the issue of legal aid as part of the monitoring of the effectiveness of procedures, as was the Committee of Ministers' approach in the Naydyon and Vasiliy Ivashchenko v. Ukraine group of cases[190], should be generalized.

7 Pressure on NGOs working in prisons is a specific issue because (i) their action is carried out in places under the full control of the administration, they are entirely dependent on the executive in their daily activities and (ii) they play an essential role in terms of protecting the core of fundamental rights, which are particularly threatened in prisons. They should therefore be the subject of particular vigilance on the part of the bodies devoted to the protection of human rights defenders.

8 The bodies involved in the reform process of the ECHR mechanism should take into account that the recognition of a large locus standi before the ECtHR for the benefit of NGOs defending the fundamental rights of persons deprived of their liberty would represent an advance in terms of streamlining litigation at European level and early elimination of violations of the Convention.

TO NATIONAL AUTHORITIES:

9 In view of their responsibility for the effective guarantee of the rights and freedoms set out in the Charter and the ECHR, States should develop, in consultation with the judicial authorities, bar associations and relevant civil society actors, a comprehensive policy on access to justice in prison. This policy should aim at the full recognition of the right to legal information and the right to legal aid, as described above (see para. (2) and (3)). In addition, in line with the commitments made during the high-level conferences on reform of the Convention system, especially in Brussels (26 and 27 March 2015) and Copenhagen (12 and 13 April 2018), States should ensure the translation of the relevant ECtHR's case law and legal materials into their national languages, in order to guaranty a large understanding of ECHR principles and standards in the area of prison law.

10 States should provide their legal aid systems with the necessary human and budgetary resources to operate effectively for the benefit of the incarcerated population, taking into account two issues specific to prisons. (i.) States should ensure that detainees have access to a lawyer remunerated by the legal aid system during the administrative proceedings that precede the judicial stage in many countries. (ii.) As mentioned above, the purpose of prison litigation is very often to ensure the protection of non-derogable fundamental rights. Remuneration levels should be sufficient and should not burden lawyers with the financial effort of judicial protection of these rights, which is an essential obligation of the State. These remuneration levels should take into account the particular burden resulting from lawyers' difficulties in accessing their incarcerated clients and the technical complexity of the litigation fields concerned.

11 States should ensure a favorable environment for NGO intervention in the penitentiary field (a.) Legislation should provide NGOs with guarantees of access to prisons for their legal assistance activities. This access should not be compromised when the NGO takes legal action against the administration or makes public statements that displease it. (b.) States should procedurally facilitate the legal action of NGOs in defence of the human rights of prisoners, taking into account their particular technical skills and ability to react quickly before human rights violations become more widespread. NGOs should be able to appeal against regulations that infringe fundamental rights. They should also be able to act in the case of individual situations or concerning an identifiable group of persons, when it appears that the concerned persons are not in a position to defend their rights.

190 *CM/Del/Dec(2019)1348/H46-34*

TO BARS:

12 For enabling lawyers to play their full role in safeguarding the fundamental rights of detained persons, Bar Associations should: (a.) advocate for the remuneration under adequate conditions within the legal aid schemes of the procedures in this field; (b.) in cooperation with public authorities, promote penitentiary legal assistance services; (c.) include within their organisation charts structures (committees, (sub-)commissions, working groups or other) specifically dedicated to prison issues and entrusted with the defence of the rights of persons deprived of liberty and of the interests of lawyers regularly involved in prison litigation; (d.) offer prison law as part of the continuing training of lawyers, incorporating the European law dimension; (f.) develop thematic digital resources to facilitate the argumentation of prison appeals, to keep lawyers informed of the developments in this field of law and to facilitate their professional practice.

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