Law Enforcement Toolkit:
the use of restraints and its impact on the presumtion of innocence

aditus accessing rights

Fair Trials

Hungarian Helsinki Committee

DESET GODINA KUĆE LJUDSKIH PRAVA

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Hungarian Helsinki Committee [HHC]

The HHC is one of the leading non-governmental human rights organizations in Hungary and Central Europe. It monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations.

The HHC's main areas of activities are centred on protecting the rights of asylum-seekers, stateless persons and other foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention, anti-discrimination and the effective enforcement of the right to defence and equality before the law.

The HHC is a member of the European Council on Refugees and Exiles (ECRE) and is an implementing partner of the United Nations High Commissioner for Refugees (UNHCR).

Fair Trials Europe [FTE]

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel- the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations.

More information about this network and its work on the right to a fair trial in Europe can be found at:
https://www.fairtrials.org/legal-experts-advisory-panel
Website: www.fairtrials.org
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Rights International Spain [RIS]

RIS is a non-governmental and independent organization composed by lawyers specialized in international law. The organization's mission is the promotion and defence of human rights and civil liberties. RIS identifies violations of civil rights and liberties and work so that the authorities address such violations, in order to secure full enjoyment of human rights for all.

Likewise, RIS seeks a better understanding and application of international human rights law.

Human Rights House Zagreb

Human Rights House Zagreb is a human rights watchdog and advocacy organisation founded in 2008 as a network of civil society organisations, with a goal to protect and promote human rights and

fundamental freedoms. The House's vision is to build a democratic, pluralistic and inclusive society based on the values of human rights, the rule of law, social justice and solidarity.

The House contributes to the development of better-quality law and public policies through research and reporting, monitoring activities, and public advocacy. Through informal education, it raises awareness among pupils, students and youth on social issues and empowers them to be active and responsible citizens.

Aditus Foundation

Aditus Foundation is a non-governmental organisation established in 2011 with a mission to monitor, report and act on access to human rights in Malta. Named for the Latin word for 'access', their work is focused on the attentive analysis of access to human rights recognition and enjoyment. Aditus believes in the universality, interdependence & indivisibility of all human rights. The Foundation's work promotes a society where all persons are able to access and enjoy all their fundamental human rights, and access to justice and remedies should be provided in cases of violations.

Whilst their focus is primarily Malta, the Foundation also works towards highlighting the regional and international dimensions of human rights in Malta.

1. Background

The presumption of innocence is a legal principle stipulating that anybody who has been accused of having committed a crime must be presumed innocent until they are proven guilty in accordance with the relevant laws. As explained in more detail below, this fundamental principle of criminal law sets numerous requirements for state authorities in terms of how they conduct criminal procedures, but it also has important implications concerning their obligations to protect the suspected or accused persons from subsequently irreparable harms that might stem from the procedure way before a final judgment is reached, the perception of guilt by the wider public being one of the most devastating of such potential harms.

This was realised by the European Union when adopting the "Roadmap Directive" on the presumption of innocence. The so-called Roadmap Directives are a set of directives adopted by the European Union with a view to strengthen mutual trust among the Member States in the area of criminal justice. "EU Member States have been cooperating closely on cross-border law enforcement issues, principally through mutual recognition mechanisms such as the European Arrest Warrant (EAW). The effectiveness of such mechanisms relies on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights (ECHR). […] However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. […] In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Procedural Rights Roadmap' […]. Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives, providing minimum standards to ensure mutual trust. Crucially, these bind national authorities in all cases, including those which have no cross-border element."[1]

EU Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence (the "Directive") addresses issues related to the presumption of innocence. Article 5 of the Directive provides that "Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint", such as handcuffs, glass boxes, cages and leg irons.

The European project titled "Suspects in Restraints: the importance of appearances: how suspects and accused persons are presented in the courtroom, in public and in the media — SIR" has been aiming at contributing to the effective implementation of the Directive by reducing the number of instances in which suspects and accused persons are presented in court or to the public in ways that create a perception of guilt. This is envisaged to be achieved through:

[1] Fair Trials: EU Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings: Implementation Toolkit, pp. 6-7, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Children%20Directive%20Toolkit.pdf.

- providing a general overview of the application of restraining measures on suspected and accused persons in five Member States and the extent to which public officials respect the presumption of innocence in their public communications;
- collecting best practices and innovative ideas, and providing guidance on how to apply physical restrictions to suspected and accused persons in court and in public and how to communicate with the media about ongoing investigations and prosecutions;
- raising awareness among public authorities and the media regarding the importance of how a suspected or accused person is presented in court or in the media and highlight the ways in which different practices can increase or decrease perceptions of guilt; and
- strengthening the exchange and cooperation between judicial and media experts across the EU on the application of physical restraints and on communication between public authorities and the media.

The project has been carried out in five Member States of the European Union (Croatia, France, Hungary, Malta and Spain), under the coordination of the Hungarian Helsinki Committee, in partnership with Aditus, Fair Trials Europe, Human Rights House Zagreb, Mérték, Rights International Spain and Vienna University.

The aim of the this toolkit is to present – on the basis of the national reports from the five participating Member States and the comparative report analysing common trends and challenges in these countries – good practices and innovative ideas for law enforcement and judicial officials on how the presumption of innocence and security concerns may be balanced in a way that satisfies the Directive requirements.[2]

[2] The toolkit is a compilation of the work of the project partners with numerous quotations from the country reports and other documents produced in the project's framework. For the sake of clarity and the ease of reading these will not be indicated individually. The following persons worked on the documents providing the basis for the toolkit. *Croatia*: Tea Dabic, Tina Daković and Ivan Novosel; *France*: Laure Baudrihaye-Gérard, Gianluca Cesaro and Karine Gilberg; *Hungary*: András Kádár, Zsófia Moldova and Sára Viszló; *Malta*: Carla Camilleri and Neil Falzon; *Spain*: Lydia Vicente Márquez; *international report*: Laure Baudrihaye-Gérard, Emmanuelle Debouverie and Jago Russell.

2. The presumption of innocence in international and EU law

As explained above, the presumption of innocence is a legal principle stipulating that anybody who has been accused of having committed a crime must be presumed innocent until they are proven guilty in accordance with the relevant laws.

Numerous human rights instruments contain this principle, including the International Covenant on Civil and Political Rights,[3] the Convention on the Rights of the Child[4] and the Universal Declaration of Human Rights.[5]

These are the most important European instruments addressing the issue:

- The **European Convention on Human Rights** ("ECHR"),[6] "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".
- This formulation is practically repeated by the **Charter of Fundamental Rights of the European Union** ("EU Charter"):[7] "Everyone who has been charged shall be presumed innocent until proved guilty according to law".
- The **Directive** itself stipulates[8] that "Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law".

The European Court of Human Rights ("ECtHR") has extensive case law concerning the presumption of innocence. As mentioned above, most of this jurisprudence regards the authorities' obligations in relation to the procedure interpreted in the strict sense, and is viewed as a primarily procedural safeguard. By way of example, the principle requires that the burden of proof should be on the prosecution, and any doubt should benefit the accused.[9]

However, the ECtHR emphasises that while the presumption of innocence is one of the elements of a fair criminal trial, it is not limited to a procedural safeguard in criminal matters: its scope is broader, and requires that no representative of the State should say that a person is guilty of an offence before his or her guilt has been established by a court. In this regard the presumption of innocence may be infringed not only by a judge or court but also by other public authorities, such as ministers or other members of government. "**This is because the presumption of innocence, as a procedural right, serves mainly to guarantee the rights of**

[3] Article 14(2), UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[4] Article 40(2)(b)(i) UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[5] Article 11 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

[6] Article 6(2) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[7] Article 48(1).

[8] Article 3.

[9] European Court of Human Rights, Barberà, Messegué and Jabardo v. Spain, 10590/83, § 77. , basis for the summary is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-10457%22]}

the defence and at the same time helps to preserve the honour and dignity of the accused."[10]

The same idea is expressed by General Comment 13 of the Human Rights Committee, i.e. the United Nations body safeguarding compliance with the International Covenant on Civil and Political Rights. The Committee is of the view that public authorities must refrain from prejudging the outcome of a trial, because "the presumption of innocence implies a right to be treated in accordance with this principle".[11]

Interestingly, although the ECtHR acknowledges that the presumption of innocence has an important role in protecting the honour and dignity of the accused, it has addressed the presentation of the defendant at court in two different ways. The ECtHR has explicitly stated that it is a violation of Article 6(2) when defendants have been forced to wear prison garb specifically worn by convicts, however, complaints concerning security measures – such as the use of metal cages for defendants or handcuffing – have been treated under Article 3, the ban on degrading treatment instead of the presumption of innocence.

> The complainant of *Jiga v Romania* was Director General of the Economic and Budgetary Directorate at the Ministry of Agriculture and Food. He and his co-defendant working in the same ministry were charged with trading in influence, accepting or soliciting bribes, and abuse of office to the detriment of public interests in connection with a privatisation procedure. He was placed in pre-trial detention and taken from the remand house to court during the proceeding which lasted for two years. On these occasions, he was regularly taken to court in handcuffs and dressed in the prison clothing usually worn by convicts. The ECtHR concluded that the applicant's public appearance in prison clothing had not been justified by the authorities. His damage had been increased by the fact that his co-accused appeared at the hearings in civilian clothing, such difference being likely to reinforce the impression that the applicant was guilty.[12] The ECtHR therefore found that there had been a violation of the right to be presumed innocent.
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> In *Ramishvili and Kokhreidze v Georgia*, the ECtHR found that the use of metal cages, as well as armed guards and the live broadcast of the proceedings was 'humiliating' and a violation of Article 3. The case concerned the co-founders and shareholders of a television channel, one of whom was the anchor of a popular TV talk-show. They were on trial for the offence of extortion for allegedly demanding payment in exchange for not disclosing an embarrassing documentary about an allegedly corrupt parliamentarian. The oral hearing on their appeal against the

[10] European Court of Human Rights, Konstas v Greece, 53466/07, § 32. §. basis for the summary is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-531%22]}

[11] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994). See: http://hrlibrary.umn.edu/gencomm/hrcom13.htm.

[12] European Court of Human Rights, Jiga v Romania, 14352/04, §§ 101-103, basis for the summary is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=003-3059630-3394008. See also: European Court of Human Rights, Samoilă and Cionca v Romania, 33065/03, §§ 99-101.

ordering of their pre-trial detention took place in an extremely overcrowded hearing room, where the applicants were kept in a barred dock, surrounded by several guards. The ECtHR concluded the following: "During the judicial review of the issue of their detention, the public had seen [the applicants] in a barred dock which looked very much like a metal cage, separated from the rest of the court room. Heavily armed guards wearing black hood-like masks had been present in the court room. The hearing had been broadcast live throughout the country. Such a harsh and hostile appearance of judicial proceedings could have led an average observer to believe that 'extremely dangerous criminals' had been on trial. **Apart from undermining the principle of the presumption of innocence, the disputed treatment in the court room had humiliated the applicants in their own eyes, if not in those of the public** [emphasis from author]. The special forces in the courthouse had aroused in them feelings of fear, anguish and inferiority. Nothing in the case file suggested that there had been the slightest risk that the applicants, who were well-known and apparently quite harmless, might have absconded or resorted to violence. The Government had failed to provide any justification for such stringent and humiliating measures." [13]

In *Gorodnitchev v Russia*, the applicant arrested on suspicion of theft and two assaults was forced to appear in handcuffs at the public hearings and made several requests for them to be removed, but to no avail. The ECtHR concluded that none of the evidence in the file suggested that had the applicant not worn handcuffs when appearing before the court there might have been a risk of violence or damage, or of his absconding or hindering the proper administration of justice. Although it had not been shown that the handcuffing had been aimed at debasing or humiliating the applicant, it was disproportionate to the security requirements, and therefore the applicant's appearance in handcuffs at the public hearings amounted to degrading treatment.[14]

The EU Directive goes a step further than the ECtHR and clarifies that measures of physical restraint run counter to the presumption of innocence, not just Article 3 of the ECHR. Article 5 of the Directive provides that "**Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint**"

The Directive gives examples for such means of restraint, including handcuffs, glass boxes, cages and leg irons,[15] and also explains that where possible, States should abstain from presenting suspects in court or in public while wearing prison clothes, to avoid giving the impression that those persons are guilty.[16]

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[13] Ramishvili and Kokhreidze v. Georgia, 1704/06, the basis of the summary is is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=002-1708

[14] Gorodnitchev v Russia, 52058/99, the basis of the summary is is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=002-2703

[15] Recital 20.

[16] Recital 21.

3. Impacts of presentation on the presumption of innocence

3.1. Impact on the decision makers

According to the case law of the ECtHR, one of the requirements stemming from the presumption of innocence is that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence that he or she is charged with.[17] How the defendant is presented may however obviously impact the decision makers.

> For example, "recent research in Australia suggests a clear empirical link between the presentation of defendants in court and the likelihood of a guilty verdict, notwithstanding directions to the jury to disregard such factors. More than 400 jurors took part in mock trials, each seeing the same evidence and witnesses but with the defendant presented either beside his lawyer, in an open dock, or in a secure dock. Despite judicial direction, the jury returned a guilty verdict in 60% of cases using a secure dock, compared with 47% of cases using an open dock and just 36% of cases in which the defendant sat with counsel.[18] The research prompted a series of challenges against the use of the dock in Australia, and was considered by practitioners to have considerable implications for England & Wales.[19]"[20]

Similarly to where and how the defendant is seated during trial, the means of restraint, the clothing or very intensive media campaigns suggesting the defendant's guilt can also create assumptions of guilt in the decision makers.

This was acknowledged by the ECtHR in the *G.C.P. v Romania* case. In this case a criminal procedure was launched against the applicant on the suspicion of unlawfully using private funds belonging to his companies in order to increase the capital of a commercial bank and become a major shareholder in the said bank. The case was thoroughly reported by the media: a total of around 350 articles containing information on the investigation and the trial against the applicant were published between 1997 and 2002 in all the major national newspapers. In its judgment, the ECtHR reiterated "that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused", who might become biased against the defendant.[21]

In this case, the ECtHR made a distinction between systems where a lay jury decides on the defendant's guilt and continental systems with professional judges, and noted that professional judges are "less likely than a jury to be influenced by the press campaign against

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[17] European Court of Human Rights, Barberà, Messegué and Jabardo v. Spain, 10590/83, § 77.

[18] D. Tait, M. Rossner and B. McKimmie, "The Dock on trial: courtroom architecture and the presumption of innocence" (2017) Journal of Law and Society, 44, 3, pp. 317-344.

[19] J. Stone, (2015), 7-9; M. Scott 'Docks are nasty relics of eighteenth century injustice. It is time to dismantle them" Barrister Blogger (4 February 2015).

[20] Fair Trial: Innocent until Proven Guilty: The Presentation of Suspects in Criminal Proceedings, p.27.

[21] European Court of Human Rights, G.C.P. v. Romania, 20899/03, § 46.

the applicant on account of their professional training and experience, which allows them to disregard any external influence".[22]

While it is true that professional judges may be less susceptible to the bias-creating effect of appearances associating the defendants with convicted offenders, almost all defence counsels interviewed in the research mentioned that judges are also humans, so they may not be able to completely free themselves from the power of appearances. As one Spanish lawyer said, "they are all affected. It implies identifying that person as dangerous or potentially dangerous, which gives them a criminal profile. It is going to affect the analysis of the facts, whether consciously or unconsciously". And not only counsels said so, some judges themselves shared this view.

> E.g. one of the interviewed Spanish judges said that "the entry onto the stage of someone coming from pre-trial detention is different and he/she is at a disadvantage from the start". According to another judge, "I, and anyone else, end up being affected by all of this, unconsciously, even judges".
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> In France, one of the judges expressed the view that the removal of the measures of restraint is crucial to the interrogation, because the suspect or accused person will express himself or herself more freely if not handcuffed.

Therefore, even in systems where decisions on guilts are delivered by professional judges, appearances can have a serious impact on the full enforcement of the presumption of innocence, so the choices of law enforcement personnel can and do make a difference.

A specific aspect of the issue has been mentioned in the Hungarian research: this is when pre-trial detainees have cases before a civilian court (e.g. family law cases, such as divorce, or civil lawsuits against the penitentiary institution for degrading treatment, such as overcrowding). A number of practitioners mentioned that civil court judges have much less experience with the use of the means of restraint, so it is much more difficult for them to disregard the appearances and also to decide on whether the means of restraint, such as handcuffs should be removed.

3.2. Impact on defendants' ability to exercise their procedural rights

Besides impacting perceptions, the means of restraint can have an adverse effect on the defendants' ability to exercise certain procedural rights, such as the right to have adequate facilities to prepare their defence.

> For instance, members of the Russian feminist punk band, Pussy Riot, were convicted of hooliganism for reasons of religious hatred and hatred of a social group, after they attempted to perform a song on the altar of Moscow's Christ the Saviour Cathedral. During their trial, the defendants were permanently exposed to public view in a glass dock that was surrounded by armed police, with a guard dog next to it despite no evident security risk. The ECtHR ruled that – besides the degrading treatment they had suffered –their right to a fair trial had also been

[22] Ibid., § 48.

violated, “because the courtroom security arrangements, namely the glass dock and heavy security, had prevented the band members from communicating with their lawyers without being overheard during their one-month trial”.[23]

Similarly, in addition to its implications concerning the perception of the defendants, French lawyers brought claims against the introduction and indiscriminate use of glass boxes, because these hinder the communication of and with the defendants. In Orléans for instance, lawyers have complained that defendants placed in the glass boxes “can’t hear anything”.

Although less obvious, and less problematic as far as its overall impact is concerned, handcuffing can also hinder the defendant in his/her ability to prepare the defence. While in most jurisdictions, handcuffs are generally removed from the defendant for the time of the court hearing, in cases when this does not happen, the defendant will have a difficulty in taking notes.

3.3. Impact on the perception by the public

Being subject to criminal proceedings is in itself a severe tribulation for any individual. Being stigmatised even before a judgment is handed down as not only a suspect, but a guilty criminal is obviously even more taxing, causing damage to the individual’s reputation, dignity and self-esteem.

The application of measures of restraint, the publication of photographs and video coverage about suspects and accused persons in handcuffs, shackles, glass boxes or metal cages, and statements referring to their guilt before the court has reached a final and binding decision stigmatise the concerned person is such a manner.

In the ECtHR case *Erdogan Yagiz v Turkey* for instance, the applicant was a doctor who had been working for the Istanbul security police for 15 years, when he was charged with having unacceptable relations with certain suspects. He was arrested by police officers in the car-park outside his workplace. He was handcuffed in public and subsequently exposed in handcuffs in front of his family and neighbours when searches were carried out at his home and place of work. He was then held in police custody at his workplace, where staff could see him handcuffed. Eventually, the prosecuting authorities discontinued the case against the applicant and he was reinstated in his post but was unable to work on account of aggravated psychosomatic symptoms. He was retired early on health grounds and has been treated several times in a hospital neuropsychiatry department. In the course of the proceeding, the complainant “explained in detail the humiliation that he had felt on being exposed wearing handcuffs publicly, at work in front of staff who had been his patients and around his home”. The ECtHR found a violation of the ban on degrading treatment on the ground that “the applicant did not have a record that might have led to fears for security and there was no evidence that he

[23] European Court of Human Rights, Mariya Alekhina and Others v. Russia, 38004/12, basis of the summary is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=003-6147945-7951852.

represented a danger for himself or for others or that he had committed criminal acts or acts of self-destruction or violence against others. In particular the Government had given no explanation to justify the need for handcuffs in the present case."[24]

Another case concerning police personnel charged with a criminal offence was *Samoila and Cionca v. Romania*, where the applicants were police officers "accused by a tobacconist of obliging him to pay them a sum of money to avoid sanctions when the second applicant carried out an inspection. The police ordered an internal inquiry and the press were informed by press release that the applicants had been transferred to other police units for disciplinary reasons after committing certain abuses in the course of their duties. A local weekly magazine published an interview with the commanding officer, who had allegedly declared that he had no doubts about their guilt." In the course of the procedure, the applicants were brought before the court in prison clothes, attire normally worn only by convicts. Therefore, they requested the president of the court permission to wear their own clothes, but the request was refused without any explanation. The ECtHR concluded that this was against the presumption of innocence, as it was "likely to confirm the public's impression that the applicants were guilty".[25]

Thus, in the Samoila and Cionca case, the ECtHR found a violation of the presumption of innocence not on the basis of the impact the presentation of the defendants had on the criminal court (which would be more closely related to the strictly interpreted fairness of the trial), but on the basis of the impact it might have had on public opinion.

The impact on public opinion has two aspects regarding the presumption of innocence. One is the above mentioned factor, i.e. that the actual punishment handed down is not the only consequence one must face in a criminal procedure. The informal punishment caused by the contempt of society and the damage to one's reputation is also at stake. If a person is treated as guilty before he or she is found guilty, then this sanction is imposed on him irrespective of whether or not he or she has actually committed a criminal offence. The other aspect is that strong public opinion may consciously or unconsciously influence the judge, as shown by a Hungarian study analysing the judgments and the imposed sanctions in two very similar cases where the public perception of the perpetrators was very different due to societal biases.[26]

[24] European Court of Human Rights, Erdoğan Yağız v. Turkey, 27473/02. Summary is based on the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=002-2789.

[25] European Court of Human Rights, Samoila and Cionca v. Romania, 33065/03. Summary is based on the legal summary prepared by the Council of Europe/European Court of Human Rights as available at: http://hudoc.echr.coe.int/eng?i=002-2099.

[26] Bencze, Mátyás: Bírói populizmus? Available at: http://szuveren.hu/jog/biroi-populizmus.

4. Typical situations where the presentation of suspects or defendants impacts the presumption of innocence

In the course of the research we have found that the overly restrictive presentation of suspects and accused persons to court can and does run counter to the presumption of innocence in several ways. Below we are summarising the most typical issues and present some good practices identified in the course of the projects.

4.1. Handcuffing during arrest

It was mentioned in a number of countries that media workers are informed by the police (most often informally) about when and where they plan to make an arrest in cases that are of interest for the wider public.

> One Croatian defence attorney claimed for instance that in high profile cases, the police sometimes give a hint to the media about an arrest and then the journalists appear at that person's house. The attorney gave an example, when the police arrested his client, an elderly woman at 5 a.m. in the morning. She opened the door in her nightwear, "with her hair all messy". When she opened the door, the press was behind the police. After the arrest, several newspapers and TV channels showed her picture and the video of the arrest.
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> The information given by one of the interviewed Croatian police officers seems to confirm that the police are well aware of the impact such media coverages may have on how the public perceives police work: "Especially if it comes to some high level criminals, shootings and so, then people are happy with the using of handcuffs. They think then that we are doing a good job."
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> A similar motive behind the practice of notifying the media was put forth in the Spanish report. One interviewee stated the following: "the security forces have on numerous occasions exposed arrested persons to situations where journalists can take pictures or capture images. The police themselves, when carrying out operations, instead of preserving the presumption of innocence and doing what the criminal procedure act stipulates, in order to achieve greater impact, for political reasons, in an attempt to capitalise on the operation in terms of publicity, release images of the arrested person, sometimes lying on the ground, in underwear, in humiliating fashion."

The Spanish example is particularly interesting because in Spain, the legislation expressly prescribes that arrests must be carried out with the utmost discretion: according to the Criminal Procedure Act, arrest should be carried out in the manner which is least harmful for the arrested person. This must be understood as meaning that the arrest must be as discreet as possible in order to protect the honour, image, dignity and privacy of persons.[27] In order to

[27] Safeguarding the constitutional rights to honour, privacy and own image of arrested persons, Article 520 the Spanish Criminal Procedure Act.

protect the arrested person's privacy, he or she shall not be exposed to the public unless it is necessary and unavoidable.[28] In addition, the Prosecution Service's guidelines to the police prescribe that "it is not advisable to order the arrest at social events or in public places, or professional or labour environments, unless there is a flight risk that can only be averted in that way".[29] According to the guidelines both during arrests and transfers, it will be necessary to adopt "the appropriate precautions to protect persons who are being escorted by the police officers from the curiosity of the public and all kinds of publicity, as well as avoiding to the extent possible that they appear handcuffed before photographers and television cameras".[30] Thus, it seems that provisions of general nature, placing a general obligation on law enforcement bodies to protect the dignity of suspects and accused persons and leaving even a narrow room for discretion are not effective enough, as they may be overridden by institutional culture and interests.

> In this regard, a good practice was identified in France, where there is a very clear ban on taking pictures of persons subjected to means of restraint, and a very straightforward obligation for the authorities to prevent such photos from being taken. As it is clarified in the French country report, in 2000, a second paragraph was added to Article 803 of the French Criminal Procedure Code, which prescribes that in cases where the use of handcuffs or any other measure of restraint is deemed necessary, **all measures should be adopted to avoid that pictures or recordings of the person concerned are taken**.
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> In addition, the Law of 29 July 1881 on Freedom of the Press was amended on the same occasion. Under Article 35*ter* of the Law on Freedom of the Press, the circulation of any image of the suspect or the accused person without his/her consent and showing him/her with handcuffs or other restraints is sentenced by a fine of EUR 15000. In a 2004 ruling, the Court of cassation ruled that: "the circulation of the image of a person identified or identifiable, without that person's consent, showing that the person is in pre-trial detention, is prohibited by Article 35*ter* of the law of 29 July 1881, regardless of the comments that accompany the publication of the image, and the circumstances that another newspaper published an identical photograph with the consent of the person concerned".[31]

4.2. Transportation to the court and movement in the court building

Another instance where a lot of damage occurs to the presumption of innocence according to our research is when the suspect or accused person is transferred from the place of detention to the court. In the USA, the "perp walk" (in which a defendant is restrained and publicly led into a courthouse, police station, or jail "staged" to be in the presence of media) is a common practice. While in one case, a federal circuit court recognised the detrimental affect the perp walk has on the presumption of innocence, stating that "a suspect in handcuffs being led into

[28] Instruction 9, Section 4 of Instruction 12/2007, from the Secretary of State for Security on the conduct expected of members of the state security forces in order to safeguard the rights of arrested persons or those in police custody.

[29] Instruction 3/2009 on controlling how arrests are carried out, dated 23 December 2009.

[30] Ibid.

[31] Chambre criminelle – 7 décembre 2004 – n° 04-80.088.

a station house is a powerful image of guilt",[32] in a different case, the same court found that the perp walk, which was videotaped and broadcast, was justified by legitimate purposes, such as "to inform the public about efforts to stop the abuse of disability benefits by its employees," "enhance the transparency of the criminal justice system," "deter others from attempting similar crimes," "[enable] members of the public who may come forward with additional information relevant to the law enforcement investigation," and because the alleged crime was "highly newsworthy and of great interest to the public at large."[33]

As explained above, the European approach is very different and recognises the sometimes irreparable harm such a presentation of a person who is to be presumed innocent may cause, however, the research has shown that this issue is not unproblematic in the Member States participating in the research either.

> For example, in Spain (where – as it was mentioned above – both the law and police instructions as well as the prosecutorial guidelines prescribe that the dignity of defendants shall be protected by the authorities during arrest and transfers), one of the interviewed practitioners said that "from the police van to the cells, and from the cells to the courtroom or hearing, it is standard for the arrested person to always arrive in handcuffs and, once before [the judge], he decides what measures are to be adopted".
>
> In Hungary too, most photos of suspects or accused persons in handcuffs and other means of physical restraint are taken upon arrival to the court (as in the courtroom these means of restraint are usually ordered by the judge to be removed).

In Malta, a discriminative practice was flagged by practitioners, namely that while most Maltese suspects or defendants are driven by car through the back entrance of the court, foreigners are often escorted through the front doors of the court which is situated on a pedestrian street. One lawyer mentioned a case in which a group of migrants charged with rioting in a detention centre were led into the court building tied together with plastic ties or handcuffs and some of them were barefoot. As one practitioner pointed out: "Some defendants are taken directly from the secure area in the court building directly to the courtroom. Other defendants, especially foreigners, and particularly black defendants, are 'paraded' around the outside of the Court building. Regulations regarding the transportation and passage of defendants to and from courtrooms should be more closely defined".

In line with the recommendation of this Maltese lawyer, in some countries, the regulations, the practice of the authorities and/or the infrastructure of the court buildings minimise or at least reduce the chances that arrival to the court may interfere negatively with the presumption of innocence of the transported detainee.

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[32] Lauro v. Charles, 219 F. 3d 202.

[33] Caldarola v. County of Westchester, 343 F.3d 570.

For instance, in Spain, the Heads of the Court in each judicial district can establish guidelines on the use of the physical public spaces in the courts. One interviewed practitioner told the researchers that "in some Provincial Courts, the Head of the Court, stipulated that when the arrested person is being taken from the cells to the courtroom he/she is not to be handcuffed; in courts where few arrested persons are being walked through the corridors". An interviewed judge, has given the instruction "that they not be brought up [from the cells in the basement of the courthouse], for reasons of security and for issues related to the rights of arrested persons, honour, presumption of innocence, to avoid being seen by a journalist. They only come up to the courtroom upstairs during weekends, but in that case, there is no question of coming across anyone, because there is no one around. During hearings, Monday to Friday, they are not brought up." (It is a new, well-equipped courthouse, albeit relatively small, with rooms for identity parades and taking statements in the basement, next to the cells. Only the court officials, the judge and the police have access to the basement.) When they are brought up for trial, "from the cells, they come up a stairway from the basement that connects to the courtroom via an area that is restricted access. They come in handcuffed, they have not passed through the corridors of the courthouse at any time".

Another good practice is the one followed in Croatia, where unless the juvenile is convicted for or suspected of a very serious criminal offence, the escort is carried out by the judicial police officers in a civilian apparel and a vehicle without official marks, and although juveniles are also handcuffed during transportation, the moment when the juvenile arrives in front of the court, the handcuffs are removed, so he or she is escorted to the court without handcuffs.

Also in Croatia, in some courts, there are special rooms for prisoners where they can wait for the judge to start the hearing. The rooms are used to avoid any contact of the defendant with the victim, witnesses and others. During the time spent in the specialised room, judicial police officers remove restraints from prisoners who thus enter the court room without handcuffs or shackles. After the hearing is over they go back to these room and only here do the judicial police officers handcuff them again before transporting them back to the prison.

In court buildings with no special rooms designed for the accommodation of defendants transported from prison, Croatian law enforcement officers try to find other suitable ways to avoid contact between the defendant and others in the corridor, sometimes asking court personnel to find a room in which the defendant can wait for the session to begin.

In France, the detainees must enter the tribunal via a dedicated entrance and in the more recently-constructed courts, premises are organised in such a way that the accused will circulate separately from the public.

Still, the most common practice in the countries participating in the research is that the defendants are transferred to the court, wait in the court building and are escorted to the

courtroom in handcuffs, which are usually only removed from them once the court session starts.

This is because handcuffing is the default practice of law enforcement agencies during escort, although – in line with Article 5(2) of the Directive[34] – the legislation in all of the researched countries would require an assessment of individual case-specific circumstances for law enforcement personnel to handcuff a suspect or accused person.

- Croatia, Articles 23 -26 of the Ordinance on the manner of conducting the security of the departments in penitentiaries and prisons: the use of handcuffs or other means of restraint during transportation can only be ordered if it seems necessary based on the evaluation of the risk of escaping, attacking a judicial officer or other person, or self-injuring;
- France, Article 803 of the Criminal procedure code: "no one shall be handcuffed or submitted to other measures of restraint except if he/she is dangerous to others or for him/herself, or if he/she is likely to abscond";
- Hungary, Article 48 of the Act on Police: police officers may apply handcuffs only to prevent (i) the concerned person from absconding, (ii) self-harm, (iii) attack, or (iv) to put an end to disobedience or resistance;
- Malta, Article 75 of the Police Act: police officers may use such moderate and proportionate force as may be necessary to ensure the observance of the law;
- Spain, Article 525 of the Criminal Procedure Act: extraordinary security measures (including handcuffing) may only be applied in the event of "disobedience, violence or rebellion, or when preparations or an attempt to escape have been made" and for the time that is strictly necessary.

The reason for the discrepancy between the general principle and the practice of escort seems to be that in most jurisdictions the fact that someone is detained is taken to grant in itself the conclusion that he or she is too dangerous or too likely to abscond to be transported without means of restraint. And although in most jurisdictions the handcuffs are ordered to be removed by the court once the hearing starts, the damage to the presumption of innocence is done both in terms of the perception of the judge – who sees the defendant enter in handcuffs and sometimes leg cuffs – and in terms of the public which sees – either directly or in media reports – the defendant being escorted or waiting in the corridors of the court house in means of restraint.

> One outstanding example is that of Ágnes Geréb, a 53-year old, fragile gynaecologist who was on trial in Hungary for professional negligence committed by assisting homebirths that ended in the death of the delivered babies. She was in pre-trial detention, however, not because of the risk of absconding. Nevertheless, she was handcuffed, leg-cuffed and waist-cuffed too. The Hungarian Ombudsman concluded that the simultaneous use of three different restraining

[34] Paragraph 1 shall not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.

measures “against a woman of weak physique was disproportionate” even if the penitentiary institution had only few days to carry out a risk assessment.[35]

Another, illustrative example of the power of routine and internal practices was provided by a Croatian attorney, who reported a case in which his client had been acquitted by the court. The defendant was brought from the investigative prison to the court, so he had to be taken back, since he had to collect his personal belongings from the prison. Therefore, the judicial police officers who escorted the client to the judge had to take him back to the prison. Although the judge acquitted the client and handed down a decision to terminate his custody, the judicial police officers handcuffed the client again when they were getting ready to transport him back. The lawyer told them that his client had just been acquitted, he was a free man, and asked them not to handcuff him. However, the officers told him that had to handcuff the client, because that was the standard protocol for transportation. Similar instances have been reported from Hungary too. According to attorneys, while an acquitted person is free to leave from the court building, if he or she wants to return directly to the penitentiary institution to collect his or her belongings instead of doing it later, it does happen that he or she will be handcuffed on the way back.

Similarly, a telling example of routine handcuffing is the internal order of the chief penitentiary commander regulating the escorting of inmates held in Hungarian penitentiary institutions,[36] which prescribes – among others – that if the inmate uses a walking cane or a walking frame prescribed by the penitentiary health personnel, the so called leading-cuff shall be secured on him or her in a way that does not hinder his or her movement, which means that even in the case of people whose movement is so severely restricted that they need a walking frame, using shackles is seen as the norm.

Despite the wide use of means of restraint in the course of transportation and the subsequent escorting of the defendant in the court building, we have identified – both in norms (legal and internal) and in the accounts of the interviewed practitioners – some aspects that could serve as the basis of practice that is more in compliance with the requirement of proportionality.

Vulnerability is taken into account in many countries in most of the cases. For instance, in Croatia, an exception to the general practice of handcuffing prisoners during transportation is if there is a disability, or if a person’s mobility is otherwise significantly hampered, if a pregnant woman in a visible state of pregnancy is escorted or if the concerned person is obviously ill. Similarly, in Malta, pregnant women and people with disability (depending on the type of disability) were mentioned as exceptions to the general rule of handcuffing, while a respondent added that the age of the concerned person is also a factor to be taken into

[35] Commissioner for Fundamental Rights (Hungary), report no. AJB-6796/2010.

[36] Instruction no 26/2018. (V. 15.) of the National Commander on transporting detainees to the authorities outside the penitentiary institution.

account. In Spain, practitioners' views were not fully unanimous on the issue, but most of them confirmed that elderly, disabled or handicapped people, children (particularly those between 14 and 15 years of age), persons with obvious health problems or heavily pregnant women are rarely handcuffed. In France, the criminal procedure code prescribes that extra-care is required for the assessment of the dangerousness of minors, and thus also for the need to use means of restraint on them. It is also understood that persons whose mobility is impaired on account of their age or health are unlikely to pose a danger that would substantiate the need to apply means of restraint to them.

The *offence the concerned person is charged with* has also been mentioned as one of the factors to be considered. Interestingly, many interviewed law enforcement officials brought this up in the context that serious offences justify the use of the means of restraint, but did not elaborate on how the less serious and/or non-violent nature of the offence would allow them to refrain from using handcuffs when they escort people to the court. For instance, in Croatia, it was mentioned that the criminal offence with which the person is charged must be given significant weight in the sense that serious criminal offenses with elements of violence, attacks on life and limb, robberies and murders make it likely that the concerned person will be presented in handcuffs.

In this regard, France can be cited as a good example. According to internal Ministry of Justice guidelines of 1 March 1993, persons sentenced to only a short term of imprisonment are regarded as "unlikely to pose the dangers referred to in the law" according to which "no one may be forced to wear handcuffs or restraints unless he is considered either a danger to others or to himself, or likely to attempt to abscond".

In addition, while the nature of the offence is obviously an important factor, it is important to recall that even in the USA, where – as we could see above – the attitude to the use of restraints in public is very different from that in Europe, there is jurisprudence concluding that "ordering restraints relying only on the serious nature of the charged crime (murder in 1st degree)" is "not objectively reasonable […]. To hold otherwise would encourage courts to order restraints for all defendants charged with serious offenses. *State v. Jones*, 678 N.W.2nd 1 (Minn 2004)".[37]

The specific characteristics and behaviour of the concerned person also came up in most interviews. In Spain, the attitude of the arrested person was mentioned as a factor to be considered when deciding on restraints, one Croatian police officer said that the suspect's proficiency in martial arts prompted him to tie his legs too. In Malta, the aggressive, violent character of the suspect was mentioned as something that can be decisive. It is obvious that the track record of violence or

[37] Minnesota Judicial Training Update, https://blogpendleton.files.wordpress.com/2014/06/pendleton13-05-ordering_defendants_to_wear_restraints_during_trial.pdf.

the dangerousness of the suspect because of his or her physical features or competence in combative sports can substantiate the need for using means od restraint. Interestingly again, in this regard we mostly heard about examples for when it is necessary to apply means of restraint, and not about cases where certain personal traits or actions deem it unnecessary. What might be mentioned as a good example is France where a person's voluntary surrender to the police is regarded as a factor pointing towards the lack of danger underlying the need for means of restraint.

The *environment, the circumstances, the audience* (including whether media interest is to be expected) were not really mentioned as factors influencing the use of means of restraint. There was only one police officer, in Malta, who mentioned referred to the presence of the suspect's child as something that impacted his decision to refrain from using handcuffs: "yes, once I chose to remove handcuffs from a detainee as his young children were present outside the courtroom and I didn't want them to see him wearing handcuffs. I do not regret it".

The internal order of Hungary's chief penitentiary commander regulating the escorting of inmates held in Hungarian penitentiary institutions contains a very detailed list of factors to be taken into account when organising the escort of a detainee to court and deciding about the security measures to be taken. The list contains, among others, the following features:

- the number of personnel conducting the escort and their levels of qualification;
- the physical features of the personnel conducting the escort and their competence in self-defence;
- the physical and safety features at the premises to which the detainee must be escorted;
- the expected time that the escort must wait before and after the procedural act to which the detainee is escorted;
- the physical features and strength of the detainee his or her competence in martial arts or sports requiring physical strength, his or her military past if any;
- the detainee's health and mental status;
- the offence the detainee is charged with or convicted for;
- the severity of the prospective punishment and what impact this may have on the detainee's behaviour;
- the criminal past of the detainee his or her behaviour during his or her previous detention if any;
- the expected number and mood of relatives who will be present at the premises where the detainee is escorted;
- the presence and interest of the media;
- whether there is a secure room where the detainee can wait (for a longer period of time if necessary) at the premises where the detainee is escorted.

In France, a specialised IT system (GENESIS) is used to maintain a record of all the information relating to the detention (in particular any incident, for example if the detainee appeared

before the disciplinary commission, or the attitude of the detainee towards prison guards) so that this information can help to define and refine the level of "escort". While the French system has its problems (the database is fed only by information from prison staff and police, and can help create an image of danger about a detainee, and maybe more importantly, detainees cannot challenge the data that is filled into the system), the idea of creating a database for assessing risks, which is accessible to both the escorting authorities and the courts, and can be reviewed and challenged by the concerned detainee may be useful for making informed and well-grounded decisions on the use of restraints.

Besides often violating the defendants' fundamental rights, the routine approach of handcuffing detainees during escort creates another, much less obvious risk: since judges are used to the fact that the escorting law enforcement officers use means of restraint on everyone irrespective of how dangerous they are, they also routinely order the removal of handcuffs. A recent Hungarian case has shown what negative consequences this may have.

An inmate serving his prison sentence was tried for a minor criminal offence (damage to property). He was escorted from the prison to the court in handcuffs. The judge ordered the removal of the handcuffs, and the trial took place without any incident, however, when the prison officer wanted to put back the handcuffs on the defendant after the verdict had been pronounced, the defendant started a fight with the guard, grabbed his handgun and absconded. He was eventually caught, but only after taking a security guard as hostage, carjacking a vehicle and forcing its driver into a car chase, trying to carjack another vehicle, getting into a fight with the driver of this other car, and finally a shooting by the police as a result of which the fugitive was severely wounded. It turned out only later that he had been serving a prison sentence for armed robbery. It is unclear whether this information was communicated to the judge by the escorting officer, and whether the court made the decision to remove the handcuffs knowing about the violent criminal past of the defendant. The penitentiary administration claims that when the judge orders the removal of the handcuffs, the penitentiary personnel is not in the position to debate the decision. In any event, the case shows that when the law enforcement personnel use means of restraint indiscriminately, this can put the judges' attention to rest and make they believe that the application of restraints is always unnecessary.

> In this regard, a Spanish practice mentioned by one law enforcement officer can be regarded as a good example. According to the officer, in the respective region the judge is always informed in advance of the risk involved with the person to be presented to the court so that the judge can consider the necessary measures in advance. If the information on the characteristics of the suspect or accused person is provided to the judge in advance, the kind of miscommunication that might have happened in the Hungarian case is less likely to occur.

4.3. Other elements of escort impacting the presumption of innocence

Not only the means of physical restraint can have an adverse impact on the presumption of innocence when the defendant is presented in court. As it was mentioned above in the Section on the international legal framework, in some countries, such as Romania, there have been cases when the defendants were presented in uniforms worn by convicted prisoners. Not only

the ECtHR, but also other courts around the world have come to the conclusion that this is a violation of the fundamental rights of defendants who have not been found guilty and are therefore to be presumed innocent. For instance, the South African Court of Appeal has held that the practice of allowing an accused person to appear in court in prison garb is undesirable and is to be deprecated. The only instance where the appearance of an accused in prison garb may be justified, is where his trial involves an offence committed in prison or one related to his imprisonment, e.g. escaping from custody.[38] In the countries researched, no problems have been raised in this regard: defendants are allowed to wear civilian clothing in court even if they are transported to court from reman prison.

Another aspect is the number of equipment of the law enforcement personnel carrying out the escort. During the international survey preceding the research,[39] a Dutch lawyer claimed that in cases where the defendants are charged with terrorism, "guards are military men, wear vests and have M16 rifles (or some other serious firepower). Suspects detained in maximum security prisons are surrounded by so many security measures, also in the court itself, that it undermines the presumption of innocence."

> From among the researched countries, it was mentioned in Hungary that sometimes it may also undermine the presumption of innocence when the black uniformed members of the special forces escort defendants in cases where neither the character of the defendant nor the features of the offence justify this increased security measure. One respondent pointed out that it is sometimes not the intention of intimidation or the showing of force that lies behind this excess, but the fact that due to a shortage in the number of personnel in the penitentiary system, only members of the special forces are available to carry out the escort of lower risk inmates.
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> One good practice in this regard is the escort of juveniles in Croatia, where not only the handcuff is removed immediately upon arrival to the court, but the escorting officers usually wear civilian apparel so as to minimise the damage the escort may make to the dignity and the presumption of innocence of the young defendant. The same practice is followed in Spain. According to the interviewed juvenile judge, the use of handcuffs on minors/juveniles in the courtroom is exceptional. Minors do not enter the courtroom in handcuffs. In addition, when the minor is transported to the court from a closed centre, escorting police officers are not in uniform and they sit in the back of the courtroom so they cannot be identified as police.

4.4. Courtroom architecture

The ability of courts to make case-specific assessments can be impeded by courtroom architecture. As it was explained above, a research in Australia has shown that the use of the

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[38] *S v Mthembu & Others 1988 (1) SA 145.*

[39] Members of the Legal Experts Advisory Network ("LEAP"), the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations and coordinated by Fair Trials, were surveyed at the beginning of the project.

dock for seating defendants can have very serious implications for the presumption of innocence and the mindsets of the people perceiving the defendants in this way. Court architecture has created controversy recently in France and given rise to longer-standing concerns in England & Wales, and in the initial survey it was also revealed that it also happens in Italy that defendants appear in court behind cages (in addition to wearing handcuffs)

By default, defendants at trial in England & Wales are seated in the "dock". Although there is no legal requirement for defendants to be kept in the dock, in almost all trials they remain there throughout, leaving only to give evidence.[40] In theory, judges have complete discretion to make other arrangements, but in practice they do so only occasionally, and lawyers rarely request for their clients to sit elsewhere. Where defendants are permitted to sit elsewhere, the decision is usually driven by practical concerns, rather than any concern relating to the presumption of innocence.[41] The use of this arrangement was considered by practitioners to have considerable implications for England & Wales.[42] In 2015, the then Lord Chief Justice remarked that removing the dock would result in better trials and reduced costs.[43]

dock" (England & Wales)

usually, now, a "secure dock" with high walls made of glass panels.

Out of the researched countries, France has the most serious issues with court architecture. The French government has pursued a consistent policy for several years of increasing the use of glass boxes.[44] This culminated in a decree in 2016 that such measures could be used generally across the courts.[45] The legal profession and the judiciary objected in strong terms, both at the time of the decree and at the opening of new courtrooms in several cities (including Paris and Toulouse) with glass boxes installed, and the addition of glass boxes to existing courtrooms which previously did not have them. The *Association des Avocats Pénalistes* and the *Syndicat des Avocats Français* each brought claims against the

[40] Justice "In the Dock: Reassessing the Use of the Dock in Criminal Trials" (2015) London: Justice.

[41] Ibid., Annex survey conducted by Dechert LLP, available online at http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Annex-questionnaire.pdf.

[42] J. Stone, (2015), 7-9; M. Scott 'Docks are nasty relics of eighteenth century injustice. It is time to dismantle them" Barrister Blogger (04 February, 2015), available at: http://barristerblogger.com/2015/02/04/docks-nasty-relics-eighteenth-century-injustice-time-dismantle/.

[43] "The dock has had its day says Law Chief", The Times, January 27, 2015.

[44] "Sécurisation des box : un dossier « prioritaire » pour la Chancellerie", Dalloz, 24 October, 2017

[45] Decree no. 2016-08 of 31 August 2016.

introduction and indiscriminate use of glass boxes in administrative courts, arguing that they infringe the rights of the defendant, including the presumption of innocence. To date, two legal actions were unsuccessful, leaving the decision to use the glass box to the court on a case-by-case basis.[46]

In April 2018, however, the *Défenseur des Droits* ombudsman upheld a complaint brought by several French Bar Associations against the use of glass boxes. The ombudsman founded the decision on the explicit basis that such practices violate the defendant's right to be presumed innocent and on the Directive. The Ombudsman also ruled that the indiscriminate use of glass boxes is not proportionate to alleged security concerns, as no individual risk assessment is carried out before the hearings, and made several recommendations to the Minister of Justice and the Minister of the Interior, including that they: (a) repeal the current regulations that provide for the systematic installation of secure boxes in courtrooms; (b) limit the appearance of defendants in secured boxes to cases where there is a serious risk to the safety of the hearing and where alternative measures would be insufficient; and (c) develop boxes that respect the fundamental rights of defendants.[47]

In response, the Ministry of Justice ordered the removal of barred boxes (resembling cages) from the country's courtrooms, and clarified that it is up to the judge in each case to decide whether to place the defendant in the glass box.[48] It remains to be seen whether emphasising the role of judicial discretion will be sufficient to stop glass boxes being used routinely. Lawyers continue to engage in protests against the use of glass boxes in courtrooms across the country, and the Paris Bar Association has prepared template pleadings for lawyers to use to apply to have their client removed from a glass box.[49]

Glass boxes also exist in Spain, but only at the National Court in Madrid and their use is limited in practice to terrorism cases.

In other countries concerned by the research, the court architecture's implications regarding the presumption of innocence are not as straightforward. However, it was mentioned in Croatia, Hungary and Spain too as a problem that the defendant is sitting in the middle of the courtroom apart from his or her defence counsel. On the one hand, this singles him or her out (which might have an impact on how he or she is perceived, as it has an element of shaming in it), and on the other, it

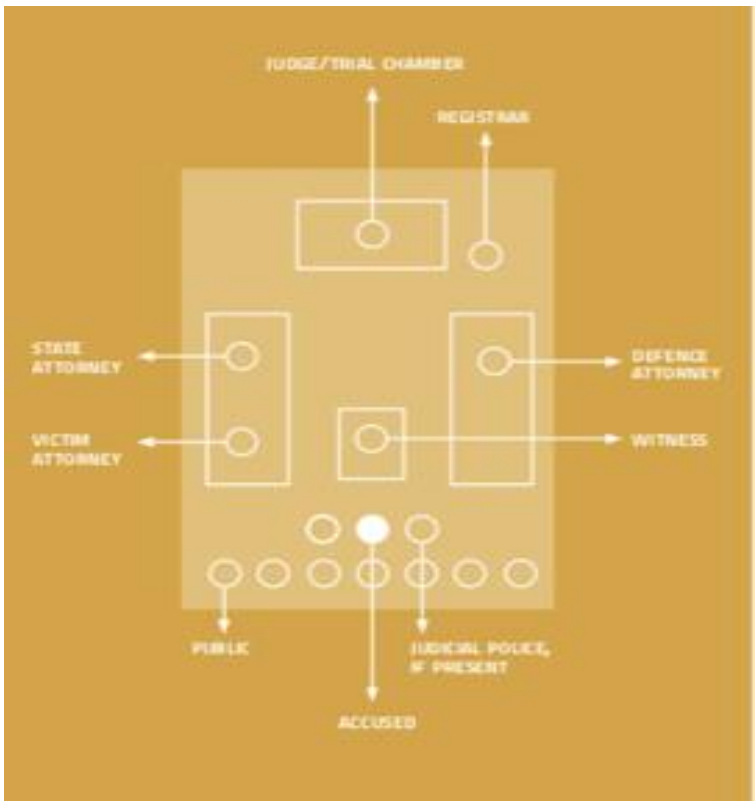
[46] Decision 17/15785 of the *Tribunal de Grande Instance de Paris*, 12 February 2018; Decision N° 417944 of the *Conseil d'Etat,* 16 February 2018.

[47] Décision 2018-128 Relative À L'implantation De Box À Barreaux Et De Box Vitrés Dans Des Salles D'audience Des Palais De Justice, Pour Faire Comparaître Les Personnes Prévenues Et Accusées Lorsqu'elles Sont Détenues, 17 April 2018.

[48] Responses of the Minister of Justice, available online at http://www.presse.justice.gouv.fr/art_pix/2018.04.18%20-%20Communique%20de%20presse%20-%20Adaptation%20des%20dispositifs%20de%20s%E9curit%E9%20dans%20les%20salles%20d'audience.pdf ;

[49] See: http://www.avocatparis.org/box-vitres-des-conclusions-types-votre-disposition.

makes it impossible for him or her to freely consult with the counsel in the course of the procedure (below is a picture of the Croatian arrangement).



In Spain, a quarter of the legal professionals interviewed stated that apart from the measures of restraint, what is decisive regarding the perception of the defendant is the *mise-en-scene*: where the accused person is located in the courtroom, how and who he or she is sitting with. Even if the accused person is not handcuffed, it is an external sign that there are well-grounded suspicions of guilt if measures are taken in relation to him or her that are not taken with regard to others. The practitioners were of the view that the staging of the trial should be as neutral as possible.

5. Other good practices mentioned

One interesting factor that interviewees mentioned in Hungary as having a positive impact on the practice of using handcuffs as a means of restraint was a change in the wording of the legislation expressing more straightforwardly than the previous text that handcuffs can only be used under certain circumstances. Article 41 of the the service regulations of the Hungarian police[50] was amended in December 2015. The original text ran as follows: "the use of handcuffs in the cases identified in Article 48 of the Act on the Police is especially justified vis a vis persons who…", while the amended text stipulates that "the use of handcuffs may be justified only in the cases identified in Article 48 of the Act on the Police, if the preconditions for using means of restraint as determined in the Act on Police and this Decree prevail, especially vis a vis persons who…". The interviewed practitioners are of the view that this simple amendment has induced a decrease in the use of handcuffs, and although the old routines and attitudes do not fade away too easily, the change has been tangible.

Conducting hearings through videoconferencing has also been mentioned as a good practice in the Hungarian research. Ever since the new Code of Criminal Procedure entered into force on 1 July 2018, the number of hearings conducted through videoconferencing has been on the rise. It was mentioned that besides being time and cost effective, due to the fact that no transportation is needed, it significantly reduces the risks in the case of high security inmates (including those who serve sentences or for or are remanded for violent crimes against life and limb).

This reduction of risk can have a positive impact on the presumption of innocence in the sense that the application of means of restraints will be unnecessary. The suspect or accused person will then be spared from having to do a "walk of shame" in front of or in the court building and will also not make his or her first appearance before the judge in handcuffs or shackles. It was also mentioned as good practice due to the fact that the period of transportation and the temporary placement of detainees in the penitentiaries where they are detained for a few days before and after the court hearings are the most problematic from the point of view of intra-inmate violence and other abuses.

An interesting example for the benefits and the disadvantages of videoconferencing is provided by the case of a homeless woman in Hungary, who was subjected to a petty offence proceeding under Hungary's Draconian law, according to which if a homeless person is warned in vain to quit living in a public space three times within a certain period of time, on the fourth occasion the police will be obliged to arrest him or her and initiate a petty offence proceeding against him or her. This happened to a 61-year old homeless woman in October 2018, who was – after three futile warnings – arrested and taken to court for sitting on a street bench with her blanket, pillow and dog leashed to the bench. She did not put up any resistance, however, the police handcuffed her when she was taken to the court. The judicial clerk adjudicating her case decided to hear her through videoconferencing so that she would not have to be walked through the corridors in handcuffs.[51] While – in light of the circumstances

[50] Decree 30/2011 (IX. 22.) of the Minister of Interior on the Service Regulations of the Police.

[51] https://hvg.hu/itthon/20181019_Elindult_a_masodik_hajlektalan_per__itt_mar_nagyobb_a_keszultseg.

of the concerned person and the case – it seems to have been unjustified to handcuff her, and it is rather difficult to understand why the clerk failed to order the police to remove the cuffs, the case highlights that the use of videoconferencing may be used to preserve the dignity of suspects and accused persons.

The case also shows the problems that may arise during videoconferencing: the woman's lawyers working for a human rights NGO were sitting in the courtroom and were not allowed to join her in the videoconferencing room, and their argument that the judicial clerk should hear their client in person was also refused. This shows that videoconferencing may raise serious issues in relation to the right to defence and the right to be present at an oral hearing, so it is of utmost importance to balance these rights through carefully designing the facilities and procedures used for videoconferencing. It is also possible to make distinctions regarding the types of procedural acts for which videoconferencing is used (e.g. use for subsequent hearings on remand may be less problematic than use for the initial remand hearing or court sessions aimed at deciding on the guilt of the defendant). Finally, it should be for the defence to decide whether or not to use videoconferencing, or otherwise important fair trial rights and principles (such as immediacy and the right to be heard in person) may be sacrificed for considerations of convenience and alleged safety.

6. Recommendations

Based on the above identified problematic examples and good practices, the following suggestions can be made:

1) Robust legal regimes should be put in place regarding how suspects are presented in public. These should limit the use of restraints and limit the suspect's exposure to the public and press (at the time of arrest, where possible, and during transport to and from the court). Violations – including leaks to the press on upcoming arrests – need to be effectively enforced with redress provided to victims.
2) Training should be offered to journalists on the presumption of innocence to help them understand this important but complex issue and the impact their reporting can have.
3) The codes of conduct adopted by professional associations of journalists should contain a specific section on covering criminal proceedings.
4) Only the journalists who have undergone training on these issues should be allowed to cover criminal proceedings (c.f. the mandatory training for legal aid lawyers).
5) The adoption of a blanket prohibition on taking photos and recording visual images of people in restraints should be considered.
6) The use of any form of restraint in court should be strictly limited and should only be made where a case-specific decision has been made by the court that this is required. The dock (whether cages or glass boxes) should be removed from all courtrooms. Free and easy communication between the defendant and the counsel should be guaranteed through their placement in and the outline of the courtroom.
7) Where possible court infrastructure should be created to make sure that defendants are not exposed to public attention when they arrive and leave in restraints, and that this should be a requirement whenever a court building is constructed or renovated.
8) Training of law enforcement officials should be put in pace in order to change the culture in relation to the use of restraining measures.
9) Special regulation for vulnerable groups of suspects (children, elderly people, pregnant women) should be put in place making it the default option that they are not restrained. The use of measures of restraint with regard to members of these groups should only be allowed if absolutely necessary and inevitable.
10) Other circumstances reducing the likelihood of the need for the application of means of restraint (the minor nature of the offence, voluntary surrender) should also be identified and it should be prescribed that if these prevail restraints should be applied only exceptionally if other circumstances make it absolutely necessary and inevitable.
11) Relevant information on circumstances that may substantiate or weaken the necessity of using means of restraint shall be provided to judges well in advance of hearings so that they could make a sufficiently informed and well-grounded decision on whether means of restraint are necessary to be applied in the courtroom. The information may be provided through a database for assessing risks, which is accessible to both the escorting authorities and the courts, and can be reviewed and challenged by the concerned detainee.