

Strengthening the judicial protection of fundamental rights of remand prisoners in the European Union

A cooperation research project of :

- CNRS (FR), research unit Société, Acteurs et Gouvernement en Europe - SAGE (CNRS/Université de Strasbourg) and CESDIP (CNRS/Université de St Quentin/Justice):
- NGO European Prison Litigation Network (EPLN) (FR)
- University of Utrecht (NL), Montaigne Center for Judicial Administration and Conflict Resolution
- Helsinki Foundation for Human Rights (PL)
- University of Applied Sciences and Arts of Dortmund (DE)
- University of Florence (IT), Center of Law Theory
- Bulgarian Helsinki Committee (BG)
- Ghent University (BE), Institute for International Criminal Policy Research (IRCP)
- General Council of Spanish Bars (ES)
- Pontifical University of Comillas (ES)

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Context and aims of the project

Previous research¹ has shown that, regarding the violation of fundamental rights in detention, the legal aid systems, the tools giving access to the law and the measures adopted to allow for the intervention of lawyers in prison greatly differ depending on the country.

On the other hand, such differences largely account for the great disparities observed with regards to access to a judge and the effectiveness of rights. As a matter of fact, it appears that access to legal resources in detention and the external intermediaries for prisoners' complaints are critical factors in the judicial protection in detention. This fact is explained by a "*marked underrepresentation in prison of the populations that have the least financial resources and are least educated*" (Gautron & Retiere, 2013), who are often disarmed before legal procedures (Rostaing, 2007; Contrôleur général des prisons, France, 2013 Report, Bouagga 2015). The structure and volume of the remedies are equally determined by the associations that are active in the field of justice (Hodson, 2011).

The attention devoted to this dimension is greatly insufficient at the European level, whether EU law or ECHR law is concerned.

- The directive on legal aid, adopted by the Council on 13 October 2016, which will pertain to criminal proceedings brought against detainees and those falling within the European arrest warrant, will have no impact on litigation related to conditions of detention or to other measures taken by the prison administration vis-à-vis the interested persons. Such

¹ *Monitoring Penal Policy in Europe*, Routledge 2017



disputes, which are burdensome for the applicants (technical complexity, evidence-related problems), are rarely taken on by criminal lawyers, because they imply *pro bono* work.

- National disparities are not corrected by the ECtHR's case law, despite the central role assigned to the right to an effective remedy in the elimination of structural problems in numerous prison systems. The ability of such case law to bring about a transformation in the usage of the law in prison and the role of the judge is actually compromised by the marginal role played by the right to legal aid in the protection of rights in prison. The sentences issued in this field are extremely rare and cover at the same time another ground of breach (Suremain, 2016). The pilot judgements and semi-pilot judgements do not touch upon this dimension, as they are meant to facilitate internal remedies that are aimed, in practice, at eliminating structural violations of the ECHR (N. Kobylarz-Lerner, ECHR, 8/07/14).

The shortcomings in the procedural guarantees in many EU countries thus contribute to the deteriorated situation of several prison systems, which often concerns primarily remand prisons (see *White Paper on prison overcrowding*, CoE, PC-CP (2015) 6 rev 7). The project aims henceforth to facilitate the consolidation and harmonization of avenues for access to the law and to a judge on the part of pre-trial prisoners. In this perspective, it will:

- map laws and practices in the EU in connection with legal aid with the aim of protecting the rights of pre-trial prisoners in detention (conditions of detention and aspects which have an impact on criminal proceedings: security, transfers, geographic distance...), as a prerequisite for adopting EU legislation;
- analyse the conditions in which it would be possible to recognize at EU level procedural rights for pre-trial prisoners, so as to launch an advocacy campaign.

The dissemination of the sensitization results and actions will be conducted by taking into account the diversity of the decision-making levels that are involved in the law-making process of a piece of EU legislation: the European institutions and its bodies (DG Justice, Committee on Civil Liberties, FRA, relevant CoE bodies) and the concerned national authorities (Ministries of Justice, courts, bar associations, National Prevention Mechanisms (NPM), national human rights institutions).

At the same time, measures will be implemented in order to strengthen the relevant rights of pre-trial prisoners, without waiting for a legislative recognition:

- Dissemination to relevant stakeholders on the ramifications of legal aid mechanisms for the defence in court of the rights of pre-trial prisoners, supported by empirical research;
- Recommendation to the authorities and national bar associations on practices especially adapted to the prison context, including digital tools.

Expected results of the project

Firstly, legal aid stakeholders (legal aid services, bar associations, bodies advocating for access to the law, associations defending prisoners) will be informed about the impact of the mechanisms aimed at guaranteeing an effective protection of the rights of pre-trial prisoners. They will also be empowered to redirect their action based on well-established empirical data as well as examples of relevant practices from other countries highlighted by the project.

Secondly, the digital resource models made available to prisoners and their families to facilitate access to justice on the part of public authorities and associations will be inventoried. The



modelling of a digital application will enable in the long term the implementation of digital tools in prison.

Thirdly, the European institutions and its bodies and the relevant national authorities with regards to criminal issues and the fundamental rights will be fully informed of the existing mechanisms in the different Member States and their impact in terms of judicial protection of the fundamental rights of pre-trial prisoners.

These elements will feed into the process aimed at drafting EU norms on prison matters, enabling the emergence of the right of a “substantiated” effective remedy with regards to the needs already flowing from the ECHR. A final conference comprising interested EU and Council of Europe members, scholars and practitioners, will allow to stress the critical role of legal aid in the field of the effective protection of the rights of pre-trial detainees in prison.

Fourthly, advocacy on the part of bar associations and NGOs aimed at the recognition of the procedural rights of pre-trial prisoners will be supported by a prospective analysis of EU law on prison matters, which will detail the theoretical principles underpinning such an innovation and compare it with the requirements and the effects of the ECtHR’s case law.

Workstreams and methodology

The project articulates several types of activities for collecting information in a scientific interdisciplinary approach, through dialogue between theory and practice. It uses comparative legal analysis and empirical socio-legal research, through a critical approach, attentive to the deficiencies of legal systems and changes in the law.

Work package - National and European Law

This workpackage aims at producing an in-depth analysis of national juridical systems as regard to access to rights and legal aids for prisoners, in a European perspective.

Building on results of existing research works the work package will first focus on EU norms on pre-trial detention and detention in general, and will recall the conditions for the elaboration of orientations of public policy in this matter. The ECHR jurisprudence on judicial assistance and prisoners’ rights will also be analysed as regard to the right to access effective, in order to question its coherence as well as its limits.

Secondly the work package will report on national law as well as orientations of national public policies .

In parallel a questionnaire will be designed targeting bars. This will take a more simplified form, taking into account methodological contributions of similar experience realised with the bars. The items collected will be analyzed by thematic areas.

Work package - Actors and Practices

This workpackage examines the actors of legal aid, their formal and informal organizational arrangements and professional practices and the use of law in prison.

Qualitative data will be collected (through interviews, focus groups, etc.) in the nine target Member States to report on the views of practitioners and former prisoners on the conditions for the effective protection of rights and the judicial strategies they adopt, and to measure the impact of



mechanisms designed to facilitate remedies by detained persons.

Work package - Advocacy, best practices and digital innovation

This workpackage aims at putting together, shaping and disseminating the results of the previous work packages, in order to foster advocacy in favor of the consecration by the EU law of procedural obligations for the benefit of detained prisoners, provide actors with tools to improve the effectiveness of their intervention for the defense of fundamental rights of detained persons in the context of the execution of pre-trial detention.

This will first take the form of a white paper, compiling the lessons learned from the in-depth analysis of law and public policies in the nine target countries, the results of the questionnaires distributed to the national bar associations and the conclusions of field studies carried out in work package on Actors and Practices. This white paper will have as main objective to share best practice from national experiences as to the conditions for effective protection of the rights of pre-trial detainees and the judicial strategies adopted by the various actors, and to report on the impacts of mechanisms designed to facilitate access to remedies by detained persons.

A final conference will be held in Strasbourg to disseminate the results of the project on the conditions for the effective protection of the rights of remand prisoners and awareness-raising actions for the various European and national actors.

Secondly the work package aims at developing series of actions aimed at capacity building and immediate improvement of the practice of human rights protection (even before legislative intervention by the EU):

- A series of recommendations will be sent to the authorities in charge of legal aid and to the national bar associations on most appropriate ways of organizing and financing the intervention of lawyers in detention.
- An inventory of tools, including digital ones, available to detained persons and lawyers with a description of their functionalities and highlighting their strengths will be established, enabling their mutual enrichment;
- A digital law library will be developed on the basis of legal tools in open source and those resulting from the *Prison Litigation Network* Project to facilitate the handling of penitentiary litigation. A specific tool (box), including a database, a guide on European jurisprudence, will be developed and deployed in pilot prisons.
- A permanent monitoring body gathering partners and other key actors in the field (academics, advocates, jurists, members of NGOs) will be established in order to ensure a informative and legal monitoring on legal developments occurring at national level as regard to the access to rights and to legal aid for remand prisoners, as well as on developments at the European level.



Calendar

Month	Workpackage	Delivrables
1-8	European and national law	<p>State of the art (Month 1)</p> <p>Data collection grid and analysis matrix, and questionnaires to bars (Month 2)</p> <p>Study of European law (Month 8)</p> <p>9 studies of national laws (Month 8)</p> <p>Instruction for questionnaire data analysis (Month 6)</p> <p>Analysis of questionnaire data (Month 8)</p>
1-12	Actors and practices	<p>Field research tools and frame (Month 1)</p> <p>Field national studies and data comparison and reconciliation (Month 12)</p>
8-18	Advocacy, best practices, digital innovation	<p>White paper – final report (Month 18)</p> <p>Report on digital tools (Month 10)</p> <p>Recommendations to bars (Month 18)</p> <p>Final conference (Month 15)</p> <p>Internet portal (Month 18)</p> <p>Digital library (box) (Month 15)</p> <p>Monintoring body (Month 15)</p>





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