

# Innocent until proven guilty?

The presentation of suspects  
in criminal proceedings



Fair

Trials



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### Suspects in Restraints

This report is produced as part of the project "The Importance of Appearances: How Suspects and Accused Persons are Presented in the Courtroom, in Public and in the Media", coordinated by the Hungarian Helsinki Committee (the "**Project**") with partners Aditus Foundation (Malta), Fair Trials, Human Right House, Zagreb (Croatia), Mérték (Hungary), Rights International Spain, and the University of Vienna.

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## Executive Summary

The presumption of innocence has been described as a “golden thread” running through criminal law. It is a norm of customary international law and is protected by numerous international treaties and in national legal systems. The presumption of innocence is crucial to ensuring a fair trial in individual cases, to protecting the integrity of the justice system, and to respecting the human dignity of people who are accused of committing crimes. Despite this, in practice, violations of this important legal principle are common. Public appetite for sensation, real-crime, real-time stories places enormous pressure on public authorities and the media to violate the presumption of innocence. The presumption of innocence also has to be balanced against other aspects of the right to a fair trial (such as the principle of open justice) and other human rights (such as free speech).

This report seeks to identify key threats (and possible solutions) to violations of the presumption of innocence resulting from statements made by public authorities about ongoing proceedings; the content and tone of press coverage; and the use of restraints in courtrooms or in public settings. It draws on a wealth of data: (a) a global survey of law and practice on the presentation of suspects; (b) a sociological study on the impact of images of arrest and different measures of restraint on public perceptions of guilt; (c) content analysis of crime-related news stories in newspapers, online press and broadcast television news programmes in seven countries to assess compliance with the presumption of innocence; and (d) comparative research on the presentation of suspects before the courts in five countries.

## Summary of conclusions and recommendations

### Prejudicial statements

Although it is a clear violation of the presumption of innocence for a public authority to make public statements implying the guilt of a suspect, such statements are a common occurrence in many countries across the globe (including in Europe). This is a particular problem where there is considerable public interest due to the nature of

the offence or identity of the suspect. Furthermore, in many countries there is systemic press reliance on leaks of confidential information from public authorities, which are exceedingly hard to investigate and sanction.

- a. Clear legal regimes are required to prohibit public officials making public statements that imply the guilt of a suspect. Crucially, violations need to be investigated and enforced by impartial bodies, regardless of the seniority of the official in question.
- b. Journalists should not be required to reveal their sources but efforts, detailed in this report, should be taken to address the issue of leaks to the press and to sanction violations.
- c. Where public officials make public statements implying the guilt of a suspect or leak information to the press, effective redress must be provided.

*“Television and newspapers are loaded with interviews of police officers who give journalists copies of arrest warrants and pictures. Police push their agenda with videos they took for the case file – giving the material to TV channels and websites.”*

*– Italian lawyer*

### Press coverage

Media reporting on crime-related cases frequently violates the presumption of innocence. Suspects are commonly presented as though they are guilty and reporting is often unbalanced against the suspect. Some groups of marginalised suspects are more likely to bear the brunt of these problems. This problem is not, however, easily addressed due to the important principle of media freedom, the growing range of media outlets and social media.

- a. 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 on the fairness of trials and the dignity of suspects.

- b. It should be prohibited for the press to take and publish photographs of people in restraints.
  - c. The codes of conduct adopted by professional associations of journalists should contain a specific section on covering criminal proceedings.
  - d. Where reporting is found to violate the presumption of innocence, appropriate measures should be taken to rectify this.
- “The police officers arrested my client at 5 a.m. in the morning. She opened the door in her nightwear, dishevelled. When she opened the door, the press were behind the police. It is to be noted that she is an elderly woman. After the arrest, all newspaper and TV channels broadcast pictures and videos of her and the arrest.”*
- Croatian defence lawyer
- a. Robust legal regimes (and practical infrastructure, such as court layouts) should be put in place to limit the use of restraints and the suspect’s exposure to the public and press at the time of arrest and during transport to and from court.
  - b. Any form of restraint in court should be strictly limited and should only be used where a case-specific decision has been made by the court that this is required. Relevant information on circumstances relevant to the necessity of restraints should be provided to judges well in advance of hearings. Cages or glass boxes should be removed from all courtrooms.
  - c. Training of law enforcement officials is needed to change the culture in relation to the use of restraining measures and special protections against the use of restraints should be put in place for vulnerable groups of suspects (children, elderly people, pregnant women).

### Presentation of suspects in court and in public

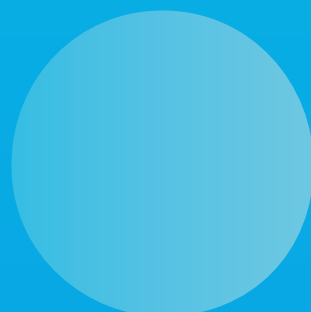
In many countries it is common for suspects to be paraded in physical restraints before the public and media at the time of their arrest and during their transfer to and from court. In courts, too, it is common for suspects to be restrained (even placed in cages or glass boxes) when there is no justification for this. This can cause irreversible damage to a suspect’s reputation and can also affect judgments about a person’s guilt or innocence. Even robust rules governing how suspects are presented in public and in court do not always prove effective in practice, including because of the huge public appetite for these images.

*“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.”*

– EU Presumption of Innocence Directive



# Introduction





## Background

1. The presumption of innocence is the legal principle that any person accused of committing a crime is to be presumed innocent until they are proven guilty according to law. It has been described as a “golden thread” running through criminal law.<sup>1</sup> This broad principle includes a range of rights relating to how suspects are presented in public: public statements made by public authorities before the outcome of the case; the use of physical restraints in courtrooms or in public settings (such as at the time of arrest); and the content and tone of press coverage about ongoing criminal cases. The manner in which suspects are presented to the public can have severe consequences for the fairness of proceedings, the integrity of the justice system, and can undermine the dignity of people who have a right to be presumed innocent.
2. This report seeks to identify key threats to the presumption of innocence resulting from how suspects are presented in public. It recommends possible solutions to the many violations of the presumption of innocence that arise in this context and draws on a wealth of information derived from:
  - A global survey of law and practice on the presentation of suspects in court and in the media by Fair Trials. The study combined a survey of practising lawyers across the EU (the “**LEAP Survey**”)<sup>2</sup> as well as a desk-review of academic research, legislation and case law in 15 jurisdictions across the globe undertaken by Fair Trials’ pro bono partner, Hogan Lovells (the “**Global Survey**”).<sup>3</sup>
  - A sociological study on the impact of images of arrest and different measures of restraint on public perceptions of guilt (the “**Sociological Study**”). This research was conducted using qualitative and quantitative approaches, involving a representative sample of 300 people and six focus group discussions (48 participants).<sup>4</sup> The study was undertaken by Human Rights House Zagreb, Croatia.
  - Content analysis of crime-related news stories in newspapers, online press and broadcast television news programmes,<sup>5</sup> to assess compliance with the presumption of innocence (the “**Media Monitoring**”). This was undertaken in seven countries between June and September 2018 and was coordinated by the Media Governance and Industries Research Lab, at the University of Vienna (Austria).<sup>6</sup>
  - Comparative research coordinated by Hungarian Helsinki Committee on the presentation of suspects before the courts in Hungary, France, Croatia, Malta and Spain (the “**Member States Research**”). This focused on the use of measures of physical restraint.<sup>7</sup> In addition to desk research (drawing on legislation, policy guidance, caselaw and statistical data), semi-structured interviews and online surveys were carried out with practitioners involved in criminal proceedings.

1. UK, *Woolmington v. DPP* [1935] UKHL 1.

2. Members of LEAP were surveyed in November 2017. We are grateful to LEAP members for their input.

3. Australia, Brazil, China (excluding Hong Kong, Macau and Taiwan), England & Wales, France, Italy, Mexico (Federal), Russia, Singapore, South Africa, Spain and the USA (Federal Law, Florida, New York and California).

4. The report of the sociological study, “Research Data Analysis: Research Methodology Document”, (... 2019) is available at: [http://www.kucaljudskihprava.hr/wp-content/uploads/2018/05/KLJP\\_PresumpcijaNevinosti\\_Publikacija.pdf](http://www.kucaljudskihprava.hr/wp-content/uploads/2018/05/KLJP_PresumpcijaNevinosti_Publikacija.pdf).

5. The comparative report of the media monitoring, “The importance of appearances: How suspects and accused persons are presented in courtrooms, in public and in the media, A Comparative Report” (to be published).

6. Austria (Vienna University), Croatia (Human Right House, Zagreb), France (Fair Trials), Greece (Athena Research and Innovation Center in Information, Communication and Knowledge Technologies), Hungary (Mértek), and Malta (aditus).

7. Report to be published.

## An overview of human rights standards

3. The presumption of innocence is a norm of customary international law<sup>8</sup> and is also contained in numerous international treaties.<sup>9</sup> It is often (although not always) expressed as an integral component of the overarching right to a fair trial, but the right to be presumed innocent begins long before the start of a trial and can also apply to subsequent proceedings (such as when a defendant is appealing against a conviction).<sup>10</sup>
4. The UN Human Rights Committee has expressed its frustration that: “the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective.”<sup>11</sup> Thankfully, the work of international human rights courts and treaty monitoring bodies has crystallised many of the key features of the presumption of innocence. The EU has also recently enacted specific legislation to protect certain aspects of the presumption of innocence (the “**Directive**”).<sup>12</sup>
5. With respect to the aspects of the presumption of innocence considered in this report, the following key principles can be derived from international human rights law:
  - **Public references to guilt:** The Directive explicitly provides that state authorities must not publicly refer to a defendant as being guilty.<sup>13</sup> The European Court of Human Rights (“**ECtHR**”) has also ruled that the presumption of innocence is violated if judicial authorities express an opinion that a defendant is guilty, before the defendant has been proven guilty according to law.<sup>14</sup> The ECtHR has ruled that the presumption of innocence can be violated not only by judicial authorities, but also by other public authorities e.g. police and government ministers.<sup>15</sup> In one case against Greece, for example,<sup>16</sup> the ECtHR found a violation when “government ministers – including the Minister of Justice – made statements to parliament impugning the defendants as ‘crooks’”.<sup>17</sup>
  - **Media coverage:** The ECtHR’s guidance on the right to a fair trial, provides that “a virulent press campaign can... adversely affect the fairness of a trial by influencing public opinion and affect an applicant’s presumption of innocence”.<sup>18</sup> For non-adversarial systems, the ECtHR states that “National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence.”<sup>19</sup> For example, in one case against Russia, the ECtHR found numerous violations of Article 6(2), one of which was due to an interview (broadcast on national and local television channels) in which a candidate for governor of the region stated that the accused was a “criminal” who should have been put in prison a long time ago, and referred to him as a “bitch” who would soon be in prison.<sup>20</sup>
  - **Presentation of the defendant:** The Directive provides that defendants must not be presented as looking guilty in court or in public e.g. through the use of shackles or glass boxes, except where strictly necessary.<sup>21</sup> The presentation of the defendant in court has been approached in two different ways by the ECtHR. The ‘dock’ or the use of glass cages or metal boxes, where unnecessary for safety, have been found to be a violations of Article 3, ruling that they constitute degrading treatment. For example, in a case against 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.<sup>22</sup> As for other aspects of the presentation of suspects, the ECtHR has explicitly stated that it is a violation of Article 6(2) when defendants are forced to wear prison garb specifically worn by convicts.<sup>23</sup>

8. UN Human Rights Committee, General Comment 24, para. 8; ICRC Study on Customary International Law, Vol 1 Rule 100, pp. 357-358.

9. Including the International Covenant on Civil and Political Rights (Article 14(2)), European Convention on Human Rights (Article 6(2)), American Convention on Human Rights (Article 8(2)), African Charter on Human and Peoples’ Rights (Article 7(1)), Convention on the Rights of the Child (Article 40(2)(b)(ii)), Universal Declaration of Human Rights (Article 11) and the Rome Statute of the International Criminal Court (Article 66).

10. [Guide on Article 6 of the European Convention on Human Rights](#), European Court of Human Rights (criminal limb) (2018), p. 38.

11. UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), available at: <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>.

12. Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence.

13. Article 4 of the Directive.

14. ECtHR, *Nešák v. Slovakia*, App. no. 65559/01, Judgment of 27 February 2007; *Garycki v. Poland*, no. 14348/02, Judgment of 06 February 2007.

15. ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995; *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000; *Petyo Petkov v. Bulgaria*, App. no. 32130/03, Judgment of 07 January 2010.

16. ECtHR, *Konstas v. Greece*, App. no. 53466/07, Judgment of 24 May 2011.

17. [The presumption of innocence and the right to a fair trial in international law](#), Timothy Otty QC, 2015.

18. [Guide on Article 6 of the European Convention on Human Rights](#), European Court of Human Rights (criminal limb) (2018), p. 60.

19. *Ibid*, p. 40.

20. ECtHR, *Kuzmin v. Russia*, App. no. 58939/00, Judgment of 18 March 2010.

21. Article 5 of the Directive.

22. ECtHR, *Ramishvili and Kokhleidze v. Georgia*, App. no. 1704/06, Judgment of 27 January 2009.

23. ECtHR, *Samoilă and Cionca v. Romania*, App. no. 33065/03, Judgment of 04 March 2008, paras. 99-101; and *Jiga v. Romania*, App. no. 14352/04, Judgment of 16 March 2010, paras. 101-103.

6. As this report shows, these standards are frequently being violated in practice. Furthermore, their practical application is far from straightforward as these are not absolute, unqualified rights, for example: (a) effective communication with the public on public safety matters can be important to building public trust and in conducting certain types of investigations; (b) the use of physical restraints in the courtroom can sometimes be a necessary safety measure; and (c) it is not always possible to identify the source of a leak of information to the press. Black-and-white rules are not easily derived. As discussed below, the right to the presumption of innocence can also come into conflict with other human rights, most notably free speech.
- Supporting legal reform at a national level by:
  - a. Providing a viewpoint that challenges deeply-held preconceptions;
  - b. Offering new solutions to entrenched problems that have not been tried domestically;
  - c. Providing an insight into how specific interventions may operate in practice; and
  - d. Helping to build a more persuasive case for a particular reform or innovation.
8. One striking example of the value of comparative analysis in challenging deeply-held preconceptions, which was identified in the Global Survey, related to the arrest of former IMF chief Dominique Strauss-Kahn in 2011. A number of articles published in France and the US addressed the 'perp walk' that Strauss-Kahn was subjected to in the US. There was significant backlash from the French authorities because, in France, the presumption of innocence bars the media from showing defendants in handcuffs before they are convicted. The difference between US and French practices sparked discussion in both countries (and others) about the use of perp walks in the US (which is discussed further below).

## A comparative approach

7. This report draws together a wealth of information from many different countries. Rather than seeking to present the findings country-by-country, we have tried to draw out key issues and themes, as well as useful examples of good and bad practice.<sup>24</sup> Fair Trials regularly undertakes comparative legal analysis.<sup>25</sup> We believe this can help advance the fairness of criminal justice systems by:
  - Informing standard-setting at an international and regional level, for example, by:
    - a. Demonstrating the need for regional or international standards;
    - b. Identifying and understanding the key challenges to be addressed;
    - c. Starting to engage and connect stakeholders in different countries;
    - d. Identifying possible solutions or approaches that could be adopted; and
    - e. Identifying possible barriers to giving practical effect to standards or, indeed, threats that a particular approach at a regional level could create.

24. **Additional input sought:** We do not suggest that this represents a complete reflection of the law and practice in each of the countries discussed. We would welcome any additional comments or feedback if you would like to add your comments, please contact us.

25. Examples include: "Tainted by Torture: Examining the Use of Evidence Obtained by Torture" (May 2018); "The Disappearing Trial: A global study into the spread and growth in trial waiver systems (April 2017)"; and "A Measure of Last Resort?: The practice of pre-trial detention decision-making in the EU" (May 2016). All available at [www.fairtrials.org/publications](http://www.fairtrials.org/publications).

# The “Perp Walk”

A common practice in the US (see page 37), in which a defendant is restrained and publicly led into a courthouse, police station, or jail “staged” to take place in the presence of the media.

Reuters

# ‘Perp walk’ facing new scrutiny after DSK case

Leigh Jones, 6 July 2011



<https://reut.rs/2JG4pYg>

The New York Times

# The French Have a Legal Point

François Quintard-Morénas, 26 May 2011



<https://nyti.ms/2YVSXeJ>

Le Parisien

# L'affaire DSK remet en cause la pratique du ‘perp walk’<sup>26</sup>

7 July 2011



<https://bit.ly/30O6lxy>

26. In English: *The Dominique Strauss-Kahn prosecution calls into question the practice of ‘perp walk’.*

The background is a solid blue color. It features a large, light blue arch on the left side, which is partially obscured by the text. In the bottom right corner, there is a solid light blue circle.

# **Prejudicial statements by public authorities**

## Introduction

9. It is clearly a violation of international and regional human rights standards for a public authority to make public statements implying the guilt of a suspect. For example, this is clearly prohibited by the Directive. As the preamble explains:

*The presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law.<sup>27</sup>*

And:

*The term “public statements made by public authorities” should be understood to be any statement which refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials.<sup>28</sup>*

10. As we discuss further below, there are varying underlying rationales for this protection, which differ between legal systems: securing the fairness of the trial, the integrity of the justice system, and the dignity of the accused. It is, for example, clear that it could undermine public trust in the justice system (and that of the defendant and victims) if a trial judge were to opine, before hearing the evidence, that they believe a person to be guilty of the crime for which they are being tried. Similarly, public statements by influential political figures could affect the testimony placed on witnesses or influence decision-makers (juries and judges).
11. As with other aspects of the right to the presumption of innocence, however, this right is not absolute. Two explicit exceptions are, for example, provided in the Directive:

*This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.<sup>29</sup>*

This provision is needed to ensure that the obligation not to make statements relating to guilt does not impede the ability of the state to adduce evidence relating to guilt during the trial or in relation to pre-trial hearings, for example, when seeking to establish a reasonable suspicion of guilt as a justification for pre-trial detention.<sup>30</sup> The second exception is:

*The obligation... shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.<sup>31</sup>*

This is explained in the preamble as allowing the release of information, where this is “reasonable and proportionate” for example:<sup>32</sup> “when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence”; “when, for safety reasons, information is provided to the inhabitants of an area affected by an alleged environmental crime”; or, perhaps more concerning, “when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order to prevent a public order disturbance”. Even when these circumstances apply, however, this “should not create the impression that the person is guilty before he or she has been proved guilty according to law”.

27. Para 16, Preamble to the Directive.

28. Para 17, Ibid.

29. Article 4(1), Ibid.

30. ECtHR, *Rasul Jafarov v. Azerbaijan*, App. no. 69981/14, Judgment of 17 March 2016.

31. Article 4(3) of the Directive.

32. Para 18, Preamble of the Directive.



## When do public authorities make public statements?

12. Public statements are generally made where there is a public demand or appetite for them – they are rarely accidental utterances. In the LEAP Survey, a lawyer in Greece, for example, stated that “difficulties generally arise from important cases in which the general public had taken a particular interest.” As the examples highlighted throughout this report demonstrate, violations of the presumption of innocence are most frequently made when: the alleged offence is particularly violent or shocking (and has generated a considerable public response); where it is illustrative of an issue of broader public concern (such as corruption); or where the suspect is a public figure. Examples of such cases include:
    - **Northern Ireland:** *R v. McCann and Others*: relating to press statements made by the Secretary for Northern Ireland in relation to the trial of alleged members of a terrorist group – the Irish Republican Army.<sup>33</sup>
    - **New York:** A press release and conference by a US Attorney following the arrest of the then-Speaker of the New York Assembly, Sheldon Silver, in relation to corruption allegations, stating with regard to the charges that: “[p]oliticians are supposed to be on the people’s payroll, not on secret retainer to wealthy special interests they do favors for”; and that Silver’s case represents a “lack of transparency, lack of accountability, and lack of principle joined with an overabundance of greed, cronyism, and self-dealing”.<sup>34</sup>
    - **Singapore:** Following the arrest of a person suspected of two high-profile murders, Police Commissioner Ng Joo Hee released the following statement: “We [the police] will prosecute him [the suspect] to the maximum extent. He is a murder suspect and will eventually receive just deserts for the heinous crime that he is accused of committing.”<sup>35</sup>
    - **France:** Statements made by Nicolas Sarkozy (then a Minister of the Interior) following the murder of the Prefect of Corsica: “The French police have just arrested Yvan Colonna, the murderer of Préfet Erignac.”<sup>36</sup>
- One Italian lawyer responded to the LEAP Survey: “Television and newspapers are loaded with interviews of police officers who gives journalists copies of arrest warrants and pictures. Police push their agenda with videos they took for the case file-giving the material to TV channels and websites.”
13. In these examples, statements were made in the context of press conferences or press releases. Such statements can also, however, be made in other contexts, for example, by judges in court. A Bulgarian lawyer responded in the LEAP Survey that, in one of their cases, their client was referred to as guilty of a criminal offence at the beginning of the trial. A lawyer in France reported that “it happens often with investigating judges and, every so often, during the hearing, judges speak to the suspect as if they had already been convicted.”
  14. The Global Survey highlighted a case in South Africa, which demonstrates how social media can facilitate such statements, and fuel a ‘trial by tweet’ phenomenon. The case relates to the Minister of Police who in October 2017 tweeted a photograph of eight handcuffed suspects lying on the floor, who had been arrested and were suspected of being connected to the shooting of 11 people, with a series of captions that painted them as guilty. The accused were later released without charge. Media reported that hurtful and threatening comments were made about the suspects by the general public on social media platforms.<sup>37</sup>

33. Ireland, (1991) 92 Crim App R 239.

34. ‘A Swaggering Preet Bharara Charges Sheldon Silver With Public Corruption’, Ross Barkan, the Observer, January 2015.

35. ‘Singapore policeman charged over double murder’, Fox News World, July 2013.

36. Of Doubt and Proof: Ritual and Legal Practices of Judgment, Daniela Berti, Anthony Good, (2016).

37. ‘Oops! Mbalula red-faced as arrest triumph becomes PR nightmare’, by Philani Nombembe and Aron Hyman in the Times Live, October 2017.

## Case study: *Turyev v. Russia* (ECtHR)<sup>38</sup>

Sergey Turyev was arrested on charges of murder and arson. After his arrest, a local newspaper published an interview with the deputy town prosecutor about the spike in the local murder rate. The prosecutor identified Mr. Turyev as “the murderer” of one victim and “complicit” in the murder of another victim. Mr. Turyev requested the disqualification of the prosecutor from his case due to the prejudicial statements. The court refused, and Mr. Turyev was found guilty and sentenced to 20 years’ imprisonment. Mr. Turyev complained to the ECtHR that the prosecutor’s press interview violated his right to the presumption of innocence, because the prosecutor expressly identified that Mr. Turyev was guilty before he was found guilty according to law. The ECtHR found that there was a violation.



38. ECtHR, *Turyev v. Russia*, App. no. 20758/04, Judgment of 11 October 2016.

## Legal protections

15. All of the countries considered in the Global Survey and LEAP Survey reported having some sort of legal prohibition on the making of public statements by public authorities, which violate the presumption of innocence. These include: general constitutional protections for the presumption of innocence (e.g. Estonia);<sup>39</sup> caselaw of apex courts interpreting general constitutional protections of the right to a fair trial (e.g. USA);<sup>40</sup> criminal procedure codes (e.g. Bulgaria);<sup>41</sup> and civil codes (e.g. France).<sup>42</sup> As discussed further below, in a number of jurisdictions, protections against statements result from more wide-ranging rules designed to keep ongoing proceedings secret.
16. One of the challenges in regulating such behaviour is the wide range of bodies, which would fall within the definition of 'public authorities', including police, prosecutors, judges and elected officials. In many of the countries in the Global Survey, this has resulted in various levels of regulation, including codes of practice or rules for specific groups. These tend to provide more detail specifically targeted at the activities of the regulated group:
  - **Australia:** Various law enforcement agencies have policies and procedures in respect of their engagement with the media. For example, the police forces of different States and Territories set out guidance as to engagement with the media during criminal proceedings.<sup>43</sup> In addition, the Offices of the Director for Public Prosecutions across various States and Territories have implemented guidelines. In the State of New South Wales, these guidelines include provisions in relation to the media.
  - **China:** The Supreme People's Court has issued a Code of Conduct for Judges,<sup>44</sup> for example, regulating public statements by judges relating to ongoing cases.<sup>45</sup> The Supreme People's Procuratorate has also issued rules<sup>46</sup> on the professional ethics of public prosecutors of the People's Republic of China.<sup>47</sup>
- **The US:** At both a Federal and State level there are different levels of regulation for officials and professionals in the criminal justice system:
  - o Federal Regulations restrict public statements that may be made by federal prosecutors.<sup>48</sup> These provide, for example, that no statement or information shall be provided to the public for the purpose of influencing, or which could reasonably be expected to influence, the outcome of a defendant's trial. In particular, they should refrain from making statements regarding: "Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement... Any opinion as to the accused's guilt, or the possibility of a plea of guilty [sic] to the offense charged, or the possibility of a plea to a lesser offense."
  - o The American Bar Association has adopted a set of model rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers.<sup>49</sup> Some of these rules specifically regulate statements by prosecutors, including a rule that the prosecutor in a criminal case shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused".<sup>50</sup>
17. In this context, one considerable challenge is the fact that (as the Media Monitoring demonstrates) the media frequently include anonymous quotations from prosecuting or investigating authorities as "sources close to the investigation".<sup>51</sup> Such quotations are often given prominence in coverage and are not balanced out by rebuttals from the suspect, or their lawyers, family or friends. As discussed below, the right to anonymity of media sources, makes it very challenging to identify which public authorities have made statements to the press.

39. Article 22, Chapter II Fundamental Rights, Liberties, and Duties, Constitution of the Republic of Estonia [Estonia], 29 June 1992.

40. USA, *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) (The Supreme Court held that courts may control law enforcement release of information when the court has jurisdiction over a particular criminal prosecution and the release of particular information would create a threat to a fair trial).

41. Article 16, Criminal Procedure Code of the Republic of Bulgaria (2006).

42. Article 9-1 of the French Civil Code: "[e]veryone has the right to be presumed innocent. When, before a final judicial decision on guilt, a person is publicly portrayed as guilty of the facts that are being investigated, the judge... may order any measures... to put an end to the infringement of the presumption of innocence."

43. For example, in the NSW Police Force Media Policy 2016, there is specific instruction to "never release any information that states or implies that someone who has not yet been charged is guilty of a crime" or "discusses prior convictions or criminal record".

44. Faguan Xinwei Guifan, Fa Fa [2010] No. 54 (Code of Conduct).

45. This provides, for example, that judges are not permitted to deliver any speech or comments on the suspects and accused person in public; shall not accept media interviews unless arranged or approved by the court; shall not give any comment that will damage the judicial impartiality or comment on cases under trial or any relevant party during the interview; shall not deliver any speech which affects the solemnity and authority of a valid judgment.

46. Basic Rules on the Professional Ethics of Public Prosecutors of the People's Republic of China, September 2009.

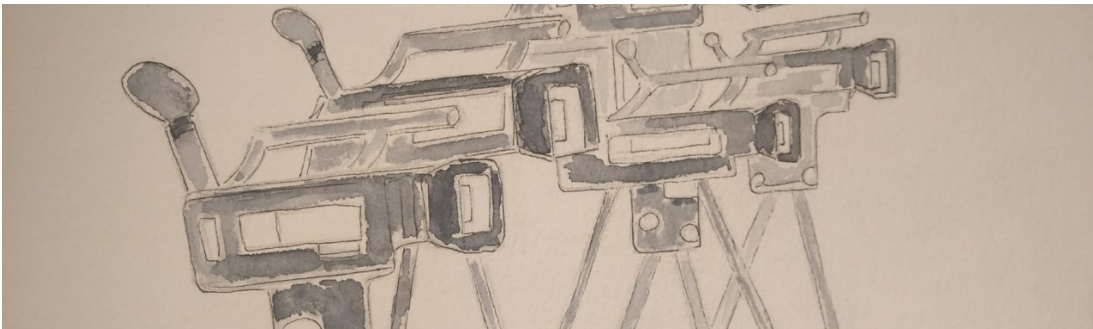
47. These provide, for example, that public prosecutors shall not, in public places and on news media, deliver any speech with prejudice to the solemnity and authority of laws and the image of prosecutorial organs. They shall not put out their personal opinions or make comments on the cases being handled without approval.

48. USA, Code of Federal Regulation, 28 C.F.R. § 50.2 ("Release of information by personnel of the Department of Justice relating to criminal and civil proceedings").

49. [Model Rules of Professional Conduct](#), American Bar Association. As of 2015, 49 out of 50 states in the United States have adopted the rules in whole or in part.

50. 50 Rule 3.8 Ibid.

51. The comparative report of the media monitoring, "The importance of appearances: How suspects and accused persons are presented in courtrooms, in public and in the media, A Comparative Report" (2019) is due to be published.



The background is a solid light blue color. It features several large, overlapping, organic shapes in a darker shade of blue. These shapes are fluid and non-geometric, resembling stylized waves or abstract forms. One large shape is on the left, another is in the center, and a smaller circle is in the bottom right corner.

**Press coverage**

## Introduction

18. There is enormous public appetite for “real crime” stories, for the gruesome details of offences, the demonization of alleged perpetrators and “kitchen table” discussions about “did they/didn’t they do it”. Trial by media can, at its most extreme, come to usurp the legal process, which should take decisions on guilt and innocence (and sanctioning wrongful conduct) out of the hands of the general public and place it in the hands of an independent and impartial arbiter.
19. Deciding whether it should be possible to publish information about ongoing criminal cases and the individuals involved in them (including suspects) is complex and, as discussed below, countries have resolved this question in very different ways. On the one hand, press coverage about ongoing criminal cases can threaten the ability of judges and juries to make impartial decisions based on the evidence presented in court, and can irretrievably damage the reputation of a suspect who has a right to be presumed innocent. On the other hand, the role of a free press is of crucial social importance and is protected by international human rights law.<sup>52</sup> Open justice is also, in itself, a key feature of the right to a fair trial.
20. This challenge of striking the right balance between these conflicting rights has been recognised by governments. For example, in Singapore, Member of Parliament Edwin Tong stated in August 2016 that there is a risk of trial by media, which “undermines the presumption of innocence, and it could taint or discourage witnesses from coming forward and affect the evidence they give in court, and put judges under unnecessary public pressure”.<sup>53</sup> Governments have also recognised the new challenges created by changes in the nature of the media, where members of the public now publish information via platforms like Twitter. For example, in September 2017, the UK Government published a call for evidence to assess the impact of social media on criminal cases and establish whether additional regulation is needed.<sup>54</sup> In March 2019, social media companies agreed to quickly take down prejudicial posts that could jeopardise active trials<sup>55</sup> and the UK Government concluded that extra regulation was not currently required.<sup>56</sup>

## Case study: Jon Venables and Robert Thompson

In 1993, two-year-old James Bulger was murdered by two 10-year-old children: Jon Venables and Robert Thompson. The trial judge recommended a sentence of eight years in prison, which was raised to ten years by the Lord Chief Justice. The media outcry at the sentence was so huge that the Sun newspaper printed coupons for readers to send to the Home Secretary, demanding that the boys be imprisoned for life. Over 21,000 of these coupons were sent to the Home Secretary, as well as a petition with over 27,800 signatures demanding the boys never be released. The Home Secretary further increased the sentence to 15 years, citing “*public concern about this case which was evidenced by the petitions and other correspondence*”.<sup>57</sup>

52. Cf Article 19 of the Universal Declaration of Human Rights.

53. Note by Senior Minister of State for Law, Indranee Rajah S.C., on the Administration of Justice (Protection) Act 2016, September 2016, available at <https://www.mlaw.gov.sg/content/minlaw/en/news/legal-industry-newsletters/note-by-senior-minister-of-state-for-law--indranee-rajah-s-c---o10.html>.

54. ‘Attorney general begins inquiry about social media impact on UK trials’ Owen Bowcott, the Guardian, September 2017.

55. ‘Social media firms agree to quickly take down prejudicial posts’, Owen Bowcott, the Guardian, March 2019.

56. Response to Call for Evidence on the Impact of Social Media on the Administration of Justice, March 2019.

57. UK, R v. Secretary of State for the Home Department, Ex parte V. and R v. Secretary of State for the Home Department, Ex parte T. 1997.



## Secrecy of ongoing proceedings

21. Some countries seek to regulate the risk of trial by media by making ongoing legal proceedings (or aspects of them) secret. There are numerous operational reasons why legal systems regulate disclosure of information to the public about ongoing criminal investigations but secrecy rules can also operate to starve the press of material on which to build stories, reserving the matter of criminal justice for the legal process and the courts. Many examples of secrecy obligations applying in the context of criminal proceedings were identified by the Global Survey:

- **Russia:** A statutory secrecy regime which provides that criminal case materials may only be disclosed with the prior permission of the investigator where the disclosure does not violate the interests of the parties to the criminal proceedings.<sup>58</sup>
- **France:** Under French law "[e]xcept where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret".<sup>59</sup> Any person contributing to such proceedings is subjected to professional secrecy.
- **Mexico:** The parties in a criminal procedure have the right to keep their personal information privileged or confidential, including the circumstances that occur during the procedure. For any authority to provide any third-party information and/or documentation about the criminal procedure could be considered a "crime against the administration of justice".
- **Brazil:** The secrecy of judicial proceedings is considered a matter of considerable public interest and those violating it are liable to both administrative and criminal sanctions.<sup>60</sup>

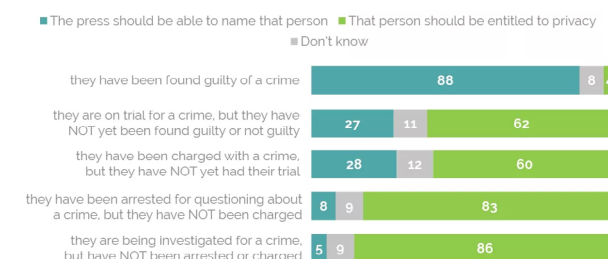
22. While secrecy requirements during criminal proceedings could help to protect the presumption of innocence, it should also be borne in mind that one of the core tenets of a fair trial is open justice. The

European Convention on Human Rights ("ECHR"), for example, protects the principle of open justice.<sup>61</sup> However, it only creates an absolute right to public pronouncements of the judgment and a qualified right in relation to the trial itself (rather than to pre-trial proceedings). This recognises the public interest in the fair administration of justice: justice must not only be done; it must also be seen to be done. It also recognises the role of public scrutiny in ensuring state accountability.

23. The UK's Supreme Court has frequently considered the tension between secrecy and open justice, consistently emphasising that "press reporting of legal proceedings is an extension of the concept of open justice."<sup>62</sup> When it comes to disclosure of the identity of suspects, the approach of the courts has been criticised, including due to its reliance on the untested presumption that the public "understand the difference between allegation and proof".<sup>63</sup> There is evidence of growing public<sup>64</sup> and political<sup>65</sup> support for suspect anonymity. It was notable, however, that, even in countries (such as Austria) where it is unlawful to publish the identity of suspects, this was found to be a frequent occurrence during the Media Monitoring.

### Until someone has been found guilty of a crime, the public think the press shouldn't be able to name them

Do you think the press should be able to name someone, or should they be entitled to privacy if...? %



YouGov | yougov.com

July 19-20, 2018

58. Russia, Federal Law "On Investigation Committee of the Russian Federation" (Articles 17 and 30) and Federal Law "On police" (Articles 5 and 27).

59. Article 11, French Code of Criminal Procedure.

60. Article 5, Brasil, Law 8112/90 and Code of Criminal Procedure.

61. Article 6 (1) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

62. UK, *Khuja (formerly PNM) v. Times Newspapers Limited* [2017] UKSC 49.

63. *'The End of Innocence: Open Justice, Free Speech and Privacy in the Modern Constitution – Khuja (formerly PNM) v Times Newspapers Limited'*, Robert Craig, Modern Law Review, January 2019.

64. A YouGov poll carried out shortly after *Richard v. BBC* found that 86 per cent of people thought suspects should be anonymous while being investigated, 83 per cent after arrest and over 60 per cent thought anonymity should be maintained not just after charge, but until conviction.

65. Cf *'Suspects should have right to anonymity at arrest'*, Mark Easton, BBC, May 2013, citing then Home Secretary Teresa May "I believe that there should be a right to anonymity at arrest" and *'MP calls for "Cliff's Law" to stop media naming suspects before they are charged after singer's High Court privacy win against BBC'*, Charlotte Tobitt, the Press Gazette, July 2018.



## Leaks

24. In order for secret information to make it into the press it needs to be received by the press. Sometimes this happens as a result of clear and easily traceable violations of secrecy rules by public officials. For example, following a school shooting in January 2017 in Mexico, a police officer took pictures of the crime scene and shared them by telephone messages to all his contacts. The images became public knowledge. The police officer faced both administrative and criminal sanctions.<sup>66</sup> More often, secret information is shared as a result of a “leak” of information to the press. This is a common occurrence in many countries.
25. The Global Survey identified a number of countries with express legal prohibitions on the leak to the press of information protected by secrecy laws:
  - In **Australia**, current and former Commonwealth officers are prohibited from communicating information they have by reason of their position and where they are under a duty not to disclose such information by virtue of a law of the Commonwealth.<sup>67</sup>
  - In **Russia**, there are specific prohibitions on investigators and police officers disclosing information subject to the secrecy regime.<sup>68</sup>
  - In **China**, a new criminal offence was recently created for “Disclosing any information that shall not be disclosed in a case not tried in public”.<sup>69</sup>
  - In **France**, it is a criminal offence for professionals entrusted with secret information to disclose it.<sup>70</sup> A leak to the press and to the public by law enforcement officials, or other public authorities, of information that relates to an ongoing investigation is unlawful and the state must rectify any harm suffered.<sup>71</sup>
26. Although there are clear rules prohibiting leaks in many countries, investigating leaks presents significant challenges. For example, one Bulgarian lawyer commented in the LEAP Survey that investigations to locate the source of the damaging information are rare and seldom lead to an indictment; an Italian lawyer stated “if damaging information is leaked to the media, that leak is often not investigated”; and, in Romania, a lawyer commented “when information exclusively reserved for the courts and parties involved is leaked to the public, even if that information could have been harmful to the defendant, the source of the leak is rarely investigated”.<sup>72</sup>
27. Leaks will often be managed very carefully, making it hard to trace the source of the information. There also has to be a will to investigate: one lawyer in France reported in the LEAP Survey that leaks are not properly investigated “because usually it has been released on purpose by the police or the investigating judge to justify their work.” Given the importance of a free press, most countries also allow journalists to protect their sources. For example, almost all American States protect journalistic sources.<sup>73</sup> Countries have been found to be in violation of the human right to freedom of expression by seeking rigorously to enforce laws to prevent leaks.

66. The officer is being prosecuted and was suspended from his position following an administrative process.

67. Section 122.4 of the Australian Criminal Code Act 1995 (Cth).

68. Russia, Federal Law “On Investigation Committee of the Russian Federation” (Articles 17 and 30).

69. Article 36, The Amendment (IX) to the People’s Republic of China Criminal Law.

70. Article 226-13, French Criminal Code.

71. Article L. 141-1, French Code of Judicial Organization.

72. Neither respondent could recall of any cases in which prejudicial publications by the media were sanctioned either by the press council and/or by the national media regulator or other relevant organ.

73. [Journalists’ Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes](#), Henry Cohen, 2007. Note that this journalistic privilege may be subject to exceptions.

## Case study: Cliff Richard

In 2014, the British Broadcasting Company (BBC) published a story that the singer Cliff Richard was under investigation for child sexual offences. The investigation was ultimately dropped, and the singer sued both South Yorkshire Police and the BBC for damages, on the basis that the police had disclosed that he was under investigation and the BBC for publishing the information and violating his right to privacy. The Court found in his favour and awarded damages, and also found that the BBC “manoeuvred” the police into providing them with the information, under threat of publishing the story before the police were ready to conduct the search.<sup>74</sup>

## Case study: The Bettencourt Affair

Liliane Bettencourt was the billionaire heiress to the L’Oreal empire. In 2007, Liliane’s daughter filed criminal charges against the artist François-Marie Banier, a close friend of her mother’s, for taking advantage of her mother’s vulnerability to obtain money from her (it is estimated he obtained over 100 million euros worth of cash and gifts from Liliane, who was in her eighties at the time). As the investigation unfolded, French newspaper *Le Point* published several articles which contained witness statements made to the police about the case. Although the articles didn’t explicitly portray Banier as guilty, they did imply guilt.

Banier brought emergency proceedings against *Le Point*, stating that the publication had violated his right to the presumption of innocence and the right to a fair trial. The Courts ruled in Banier’s favour and ordered *Le Point* to pay compensation. *Le Point* contested the case, stating the French rulings violated their right to freedom of expression under Article 10, but the ECtHR held that *Le Point* had violated Banier’s right to be presumed innocent, and allowed the restriction on the right to freedom of expression to protect the right to a fair trial.<sup>75</sup>

74. UK, *Cliff Richard v. The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch).

75. ECtHR, *Giesbert and others v. France*, App. no. 68974/11, 2395/12 and 76324/13, Judgment of 01 June 2017.

## Case study: *De Telegraaf v. the Netherlands*<sup>76</sup>

Journalists from the daily newspaper, *De Telegraaf*, were taken into custody for refusing to disclose their sources for a story based on secret service intelligence that they had obtained. The newspaper took the case to the ECtHR on the basis that they should be able to protect their sources. The ECtHR held that the Netherlands, by using means of coercion (including telephone tapping and observation) against the two journalists and by demanding the surrender of documents that were in the possession of *De Telegraaf*, had acted in violation of the right to privacy and to freedom of expression.



76. ECtHR, *Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands*, App. no. 39315/06, Judgment of 22 November 2012.

## Regulating what can be published

28. Given the challenges in investigating and enforcing laws designed to prevent leaks, another option is to restrict what can be published. Based on the Global Survey, this does not appear common but examples include France, where although “professionals of information” (journalists or anyone else using and diffusing information) are not subject to the same criminal prohibitions as public officials relating to the disclosure of secret information, the publication of secret information relating to an ongoing criminal investigation may still be a criminal offense.<sup>77</sup> The Media Monitoring nevertheless identified several examples of such materials being published in France. In Italy acts or materials covered by secrecy cannot be published by the press or by other means of communication.<sup>78</sup> The prohibition applies to any person responsible for publication and criminal penalties apply.<sup>79</sup>
29. In many countries, laws prohibiting the publication of secret materials do not apply to journalists. In Brazil, for example, the Superior Court of Justice and Supreme Federal Court have adopted a position that information leaked to the press (even when it had been covered by secrecy laws) ceases to be under constitutional secrecy and may, therefore, be published.<sup>80</sup> Likewise, in the US journalists are generally immune from liability when they fairly and accurately report information that comes from an official source and Supreme Court decisions suggest the US Constitution would rarely allow civil or criminal sanctions for the publication of information about criminal cases.<sup>81</sup>

## Case study: National Newspaper Association of Brazil<sup>82</sup>

The National Newspaper Association filed a constitutional complaint to the Supreme Federal Court against a decision of the São Paulo Federal Court for upholding the conviction of a journalist who had published excerpts from telephone communications intercepted in a corruption case. The Association argued that the criminal offence<sup>83</sup> was unconstitutional as it violated freedom of information and of journalistic expression and failed to guarantee source privilege.<sup>84</sup> The Supreme Federal Court decided that press and journalists who publish the information cannot be held accountable for breach of secrecy.

77. Article 11 of the French Criminal Procedure Code provides for the secrecy of the investigation. This article only binds “participants” to the investigation such as investigating judges, prosecutors, police, clerks,...). It does not bind parties to the investigation or third parties, including journalists. However, journalists may still be criminally responsible when they knowingly publish information or documents that is the product of a criminal offense, e.g. the violation of the secrecy of the investigation by public officials (Article 321-1 of the French Criminal Code).

78. Article 326, French Criminal Code.

79. Italian Court of Cassation, no 15587, 23 January 2017.

80. ADPF 130/DF, Rcl 19464, REsp 984.803/ES, and REsp 1.263.973/DF.

81. See, for example, USA, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) and *Smith v. Daily Mail Publishing Company*, 443 U.S. 97 (1979).

82. Rcl 19464.

83. Under Law 5250/67 which regulated the media services and preceded the Brazilian Constitution of 1988.

84. Under Arts. 5, IV, IX, and XIV, and 220 of the Brazilian Constitution.

## Press coverage – content and tone

30. Even where it is lawful for the media to report on a criminal case, the manner of the reporting can affect the presumption of innocence. Numerous features of press reporting can influence whether a suspect is likely to be perceived as guilty or innocent: comments on his/her character, credibility, or reputation; whether the personal opinion of the prosecutor as to guilt or innocence is given; whether the reporting is balanced; whether emotionally-laden or graphic language or images are used to describe the crime or suspect; and whether a suspect is shown in prison clothes or forms of restraint.
31. The Media Monitoring undertaken as part of the Project (coordinated by the Media Governance and Industries Research Lab at the University of Vienna) monitored crime-related news in six countries to assess whether the media coverage respected the presumption of innocence.<sup>85</sup> Key themes which emerged are outlined below.<sup>86</sup>

### Media Monitoring – Overview of Methodology:

Crime related news stories were identified in six countries (Austria, Croatia, France, Greece, Hungary and Malta) between June and September 2018. In each country, random sampling was made of up to seven national daily newspapers with the largest circulation, plus up to three weekly editions. Not only print versions of the newspapers, but also their online versions were sampled. Further, one main public-broadcasting channel and one private channel with primary focus on the news and with biggest viewership to the news were monitored. Finally, a random sampling was made of ten news stories from up to three news portals not affiliated with print media, TV or radio and with highest Alexa rating. The most typical media examples of crime-related stories were selected and analysed with regard to their respect for key features of the presumption of innocence.

## Case study: Christopher Jefferies

In 2010, the murder of a 25-year-old woman, Joanna Yeates, made headlines across the UK. Five days after her body was discovered, her landlord – Christopher Jefferies – was arrested for her murder. Jefferies, a retired teacher, had an eccentric appearance and manner of speaking and it was widely perceived that he was guilty. As one Guardian article put it, “the unspoken assumption was that no one could look that odd and be innocent.”<sup>87</sup> Yeates’ neighbour was arrested and was ultimately found guilty of her murder.

85. Austria, Croatia, France, Greece, Hungary and Malta.

86. The comparative report of the media monitoring, “The importance of appearances: How suspects and accused persons are presented in courtrooms, in public and in the media, A Comparative Report” is due to be published. The report contains further details of the methodology applied.

87. “Peter Morgan: when I saw Christopher Jefferies I thought they’d got their man”, Stephen Moss, the Guardian, December 2014.

32. **Presentation of suspects as guilty:** Across all six countries (to varying degrees), suspects were presented as guilty, through video material, images, and text. This was usually as a result of allegations being presented as facts. This occurred most often in headlines but also in the content of news stories. For instance, suspects were referred to as “criminals”, “killers” or “rapists” with no reference to ‘alleged’ or ‘suspected’. Examples include a news report in Croatia on the transportation of a drug trafficking suspect from prison to court, which referred to the suspect as “the Croatian Escobar” in reference to a notorious convicted Latin American drug trafficker. Another article in Croatia referred to a suspect as the “Psycho from Travno”, and a “monster”. One headline in Austria about the capture of a suspected robber and sex attacker read: “Brutal robber and sex offender caught”. Another Austrian headline read: “17-year-old girl raped by refugee”.

**Austria: “The presumption of innocence applies”**

Particularly in tabloid press, the sentence “the presumption of innocence applies” (*Es gilt die Unschuldsvermutung*) is often included at the end of articles, which include repeated infringements of the presumption of innocence. The juxtaposition between the content of the story and the final sentence is so stark as to sometimes even make the statement appear ironic.

33. **Marginalised groups:** Media reporting more frequently violated the presumption of innocence in the case of suspects who are migrants, refugees, and/or Muslim. The portrayal of the suspect as guilty was frequently exacerbated in such cases by the use of pejorative language. Examples were numerous across the countries surveyed but included:

- **Malta:** Journalists from across all media platforms (including public broadcasters) made explicit reference to the nationality and ethnicity of suspects. Even when a suspect holds Maltese citizenship but is of non-Maltese origin, the suspect’s non-Maltese origin is underscored. For example, one headline stated: “Russian with Maltese citizenship”.

- **France:** This was a primary concern in news related to terrorist suspects and people suspected of sexual harassment. Islam as a religion, along with its symbols, were often used in such a way as to imply guilt in the context of the purported affinity of Muslims with terrorist activities. In one example, involving allegations against a doctor of sexual harassment, a news report referred to the suspect as being “renowned for his stands in favour of Islam in France”. The information had no relevance to the allegations but appears to have been included to provide context for the alleged misconduct on the basis of cultural incompatibility. The suspect was Muslim.
- **Hungary:** The predominant violation of the presumption of innocence in Hungary related to migrants, with press coverage underscoring the non-national origin of the suspect especially in cases involving alleged crimes seen in populist-fuelled public discourse as linked to the dangers of migration, such as sexual assault.

34. **Identifying the suspect:** As discussed above, some countries seek to protect the presumption of innocence by preventing the identification of the suspect. Despite such laws in Austria, it was common for photographs of the suspects to be published, from which they are identifiable, particularly when it appears from the photos that the suspect is not of Austrian origin. Similarly, in Croatia, the media would usually only publish the initials of suspects but this was not always followed. In one instance, involving a migrant from Algeria, the suspect’s full name was published, the fact he was an Algerian migrant, his place of residence (a hotel) and his profession.<sup>96</sup> In France, full names were more likely to be stated in cases involving Islamist terror suspects and celebrities.

35. **Lack of balance:** In all countries regular use was made of ‘anonymous sources’ for quotes and information that indicates the guilt of the suspect. These sources are described as “close to the investigation”, implying deep inside knowledge and weighing the press coverage in favour of presumptions of guilt. Many examples of this were identified in France. In one

instance, such a quote (involving the evidence reportedly collected and reportedly indicating guilt) was highlighted in bold text in a box embedded within the article. Such quotes were not countered with rebuttals from the suspect or their lawyers, family members or friends. Indeed, it was more common for quotes to be provided reflecting negatively on the suspect from neighbours, the alleged victims' lawyers and the alleged victims themselves. The defence perspective was undermined with the use of sarcastic phrases and comments or by quoting negative remarks from the judge.

36. **Due process rights ridiculed:** Press coverage was identified which suggested that a suspect is guilty because they exercised their right to silence. This was the case in Greece and France. In one particularly shocking example in Austria, a headline read "Graz: Terror suspects had to be freed, Identitarians get monster trial". It implies a double standard between the freeing of terror suspects (for lack of evidence) and the trial of extreme right "Identitarians," inserting the adjective "monster" to suggest injustice and disproportionality. The article also refers to the legal system in the city of Graz as "Absurdistan".
37. There was clear evidence of at least an episodic lack of respect for the principle of the presumption of innocence across all countries and all the media types examined. Some patterns were, however, observable in the intensity of violations depending on the type of media outlet. Public television broadcasters were more likely to respect the presumption of innocence, at least where they were independent of government control (i.e. not in Hungary). This may be in large part due to the fact that public broadcasters are not reliant on advertising revenue and do not therefore rely on 'clickbait' strategies that increasingly (observed across all countries examined) rely on the sensationalism of crimes committed by foreigners, migrants and Muslims. Quality, or legacy, print media where they are independent (i.e. not in Hungary) were also less likely to violate the presumption of innocence. The tabloids in all countries examined were found to violate the presumption of innocence most frequently in their reporting. The biggest offenders, however, were online news websites aligned with populist or far-right ideologies and political parties such as *unzensuriert.at* in Austria.

38. The Media Governance and Industries Research concluded:

*The existence (or not) of regulatory frameworks and self-regulatory bodies such as press councils appears, from the samples we analysed, to have less of a bearing on respect or not for the presumption of innocence than does the political situation in the country.*

In part, the failure of regulatory frameworks was attributed to the fact that (even where they exist) they are not universally respected, particularly by the sectors of the media which most frequently violate the presumption of innocence. In Austria, for example, the authority of the Austrian Press Council is not recognised by the tabloids and online news sites. Its rules on the presumption of innocence therefore have no influence on the media outlets most likely to violate them.

39. In a number of the countries where the Media Monitoring was undertaken, the press (or at least sectors of it) appear to serve a populist and anti-migrant political agenda by generating fear of crimes committed by foreigners. This was most clearly demonstrated in Hungary where Prime Minister, Viktor Orban, has brought the big-reach media entities, such as the public media and major dailies, under his control or influence.<sup>88</sup> It is not, therefore, surprising that Hungarian media (including the public broadcaster) was found in its coverage of crime-related stories, to reflect Orban's political obsession with the 'dangers' of migration, and the defence of Hungary.
40. The manner in which the media engage with crime reporting and the presumption of innocence appears to respond to economic interests that journalists may feel they need to satisfy or cater to, to increase a medium's popularity by, for example, engaging in the cultivation of consumer demand for and supply of sensationalism. In online news, in particular, the clearest violations of the presumption of innocence appeared designed as "click bait", to ensure that advertising income sources remain content, at a time of shrinking advertising revenue.

88. The RSF 2019 world press freedom report ranks Hungary at a low 87<sup>th</sup> place underscoring the lack of media pluralism in the country. <https://rsf.org/en/2019-world-press-freedom-index-cycle-fear>.



The background features several abstract, semi-transparent blue geometric shapes. A large, light blue triangle is positioned on the left side, pointing towards the top right. Overlapping this and the text are other shapes, including a darker blue trapezoid and a medium blue circle in the bottom right corner. The overall composition is minimalist and modern.

# **Presentation in court and in public**

## Introduction

41. It is well-established as a matter of human rights law that the way in which suspects are presented in court or in public can undermine the presumption of innocence. As the ECtHR explained in *Ramishvili and Kokhreidze v. Georgia* (where the suspects had been displayed to the public in a cage in the courtroom surrounded by hooded guards with machineguns):  
  
*[S]uch a harsh and hostile appearance ... could lead an average observer to believe that "extremely dangerous criminals" were on trial. Apart from undermining the principle of the presumption of innocence, the disputed treatment in the courtroom humiliated the applicants in their own eyes, if not in those of the public.*<sup>89</sup>
42. Input from LEAP members during the negotiation of the Directive highlighted practical concerns around the presentation of the accused in court as a key threat to the presumption of innocence.<sup>90</sup> For this reason, Fair Trials advocated for the presentation of the accused to be included in the Directive:  
  
*The Proposed Directive ... overlooks an important component of the bundle of rights protecting suspects from public pronouncements of guilt before conviction, which relates to the appearance or presentation of the accused in the courtroom before and during trial. The recognition that the public presentation of the accused can undermine the presumption of innocence is well established in ECtHR case law, and deserves explicit mention in the Proposed Directive.*<sup>91</sup>
43. Article 5 encompasses presentation in court and in public. However, it only regulates the use of "measures of physical restraints"<sup>93</sup> and would not therefore prohibit the use of clothing that identifies a person as a detainee (such as the orange boiler suit which has become synonymous with Guantanamo Bay detainees). This is, however, referred to in the Recitals to the Directive: "Where feasible, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so as to avoid giving the impression that those persons are guilty."<sup>94</sup> The Directive makes it clear that it does not create an absolute right: measures of physical restraint are sometimes permitted.<sup>95</sup> Their use must, however, be "required" for 'case-specific reasons' related to either 'security' or to the prevention of suspects ... from absconding or from having contact with third persons".
44. Ways of presenting suspects in public which raise questions about the presumption of innocence can take various forms, including: a requirement to wear handcuffs or other restraints in court; court architecture which places a defendant in a 'dock', cage or glass box; the presence of security in court; clothing which identifies a suspect as a detainee; and parading a suspected person in public and before the media at the time of arrest or on the way into court or a police station. This was the primary focus of the Member States Research and was also considered in the Global Survey.

It was not included in the initial draft of the Directive produced by the Commission, but it was added during trilogue negotiations, resulting in Article 5 which provides:

*1. 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.*<sup>92</sup>

89. ECtHR, *Ramishvili and Kokhreidze v. Georgia*, App. no. 1704/06, Judgment of 27 January 2009, para. 100.

90. On 4 March 2014, Fair Trials brought together 17 LEAP members from 14 EU Member States to discuss the proposed Directive published by the European Commission in November 2013. The resulting communiqué, published in April 2014, is available at <https://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Presumption-of-Innocence-communiqué.pdf>.

91. Fair Trials and LEAP: 'Joint position paper on the proposed directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings', November 2014.

92. Article 5 of the Directive.

93. Examples are provided in Recital 20: "such as handcuffs, glass boxes, cages and leg irons".

94. Recital 21 of Directive 2016/343 of the European Parliament and the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

95. Article 5(2) of the Directive.

## Overarching legal protections

45. All of the countries in the Member States Research have protections for the presumption of innocence, which relate to the presentation of suspects in court and in public. In addition to detailed provisions regulating the different contexts in which suspects appear in public, as discussed below, overarching legal protections include:

- **France:** The presumption of innocence is protected in constitutional law and it is directly connected to the use of restraining measures: “everyone is innocent until declared guilty and if it is deemed necessary to arrest a person, the use of restraining measures that are not necessary must be severely punished by law.”<sup>96</sup>
- **Malta:** The laws establishing the principle of presumption of innocence also directly connect this main principle with the use of restraining measures: “suspects and accused persons shall not be presented as being guilty, through the use of measures of physical restraint”.<sup>97</sup> The law does, however, permit the use of measures of physical restraint where they are required for reasons relating to security or to the prevention of suspects or accused persons from absconding or from having contact with other persons.<sup>98</sup>
- The other Member States provide more general protections for the presumption of innocence.<sup>99</sup>

## “Security” measures and uniforms in court

46. In the context of court hearings, all of the countries in the Member States Research have relatively robust rules. As stated above, the Maltese Criminal Code provides that: “suspects and accused persons shall not be presented in court or in public as being guilty, through the use of measures of physical restraint.”<sup>100</sup> This is almost exactly the same as the wording in the Directive. As with the Directive, the police and courts may apply measures of physical restraint if necessary

for security reasons or to prevent suspects or accused persons from absconding or from having contact with other people.<sup>101</sup> There are similar express provisions in French law.<sup>102</sup> In Croatia, Hungary and Spain the presiding judge is required to conduct the hearings in a way that respects the law, including respecting the right to the presumption of innocence of the defendant.<sup>103</sup>

47. In none of the countries considered as part of the Global Survey was there a blanket ban on the use of restraints in court, although in France there exists a broad prohibition to use measures of restraint on a person in court. Interesting case law has emerged in England & Wales, South Africa, and the US to clarify when the use of security measures in court is justified:

- **England & Wales:** There is a presumption that a defendant should be unrestrained in court unless there are reasonable grounds for restraint. The onus is on the prosecution to show reasonable grounds for the use of handcuffs. Defendants appearing before courts should therefore not be handcuffed unless there is a risk of violence or that the defendant will escape. These are the only two factors which may be taken into account when deciding whether or not to restrain a defendant in the courtroom.<sup>104</sup>
- **South Africa:** “The issue of accused persons appearing in court in manacles or leg irons has evoked different and sometimes strong reactions, in the pre- as well as post-constitutional period of the South African criminal justice system.”<sup>105</sup> The High Court has held that under certain circumstances, the practice of presenting the accused in shackles and prison garb may influence a judicial officer to draw an inference about the accused’s character, for example, that he or she is a dangerous person, and may also lead to an inference that he or she has escaped from custody before.<sup>106</sup>

96. Article 9 of the Declaration of the Rights of Man and the Citizen 1789, which has a constitutional rank in the French legal system.

97. Article 366D of the Maltese Criminal Code.

98. Ibid.

99. Croatia (Article 28 of the Constitution and Article 3 of Criminal Procedure Act), Spain (Article 24 of the Constitution) and Hungary (Article XXVIII (2) of Fundamental Law and Article 1 of Code of Criminal Proceedings).

100. Article 366D of the Maltese Criminal Code.

101. Ibid.

102. Article 318 of the French Criminal Procedure Code.

103. Cf Hungary - Article 439 (2) Code of Criminal Proceedings.

104. UK, *R v. Vratsides* [1988] Crim. L. R. 251 CA.

105. South Africa, *S v. Phiri* (2033/05) 2005 ZAGPHC 38, para 8.

106. South Africa, *S v. Phiri* (2033/05) 2005 ZAGPHC 38.

- **The US:** Applying the Fifth Amendment (due process) and Sixth Amendment (trial by an impartial jury), the Supreme Court has held “that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is “justified by an essential state interest” – such as courtroom security – specific to the defendant on trial.”<sup>107</sup> A number of the states surveyed have interpreted and applied this constitutional protection, resulting in recent highly-reported decisions on the need for case-by-case assessments of the necessity of restraints in court:
    - **Florida:** The Florida Supreme Court has held that, as a general rule, a defendant has the right to appear before the jury free from physical restraints; however, the trial judge has the authority and discretion to order restraints on a defendant whose conduct creates the necessity for such restraints and where the use thereof would not impede the defendant’s right to a fair and impartial trial.<sup>108</sup> A hearing on the necessity of such restraints must take place if a defendant objects to their use in a timely way.<sup>109</sup>
    - **New York:** There is a substantial body of New York case law regulating how accused persons are presented in front of juries. A defendant is entitled to appear in court with the “dignity and the self-respect of a free and innocent man.”<sup>110</sup> For example, a defendant may not be physically restrained before a jury unless there is a reasonable basis, articulated on the record, for doing so.<sup>111</sup> Whether a particular measure, such as restraints, prison attire, or the presence of armed officers is permitted requires the court to balance the practical need for the measure against the extent to which it infringes on the defendant’s rights.<sup>112</sup>
48. The LEAP Survey highlighted continuing concerns about the use of restraints in court:
- **Luxembourg:** “Suspects are cuffed by the hands or the leg to a bench in the courtroom.”
  - **Italy:** “Defendants often appear in court behind cages and wearing handcuffs” and “before the case is called, arrested defendants or those who are in pre-trial detention have to wait handcuffed in the courtroom.”
  - **Netherlands:** “In terrorist cases, 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, including in the court itself, that it undermines the presumption of innocence.”
49. Similar practical concerns also arose in the Member States Research. In Malta, a lawyer commented that in one of their cases “in which there were jurors involved, the presence of 2-3 policemen placed around the accused probably influenced the jurors and indicated that the accused is dangerous.” In Hungary, for example, it was highlighted that members of the special forces (wearing black uniforms) sometimes escort defendants where neither the character of the defendant nor the features of the offence justify this increased security measure.

AP

## Ruling Says Courts Cannot Routinely Shackle Defendants

Sudhin Thanawala, 31 May 2017


<https://bit.ly/2HCFNgB>

107. USA, *Deck v. Missouri*, 544 U.S. 622 (2005).

108. See e.g., USA, *Weaver v. State* 894 So.2d 178 (Fla. 2004); *Shelton v. State*, 831 So.2d 806 (Fla. 2002); *Israel v. State*, 837 So.2d 381 (Fla. 2002).

109. USA, *Bello v. State*, 547 So.2d 914 (Fla. 1989).

110. USA, *People v. Roman*, 365 N.Y.S.2d 527, 528 (N.Y. 1975).

111. USA, *People v. Mendola*, 159 N.Y.S.2d 473, 476 (N.Y. 1957) (“If accused is shackled without such necessity, it is reversible error, unless it is clear that no prejudice in the minds of the jury was caused thereby”).

112. See, e.g., USA, *People v. Rouse*, 583 N.Y.S.2d 986, 986 (N.Y. 1992) (holding that concerns about a defendant’s escape attempts and the level of security in the courtroom were sufficient to justify the court’s refusal to remove shackles, and that the trial court was under no obligation to instruct the jury to disregard shackles); *Roman*, 365 N.Y.S.2d at 528 (acknowledging that there may be situations which present problems of implementation of a defendant’s request that he not wear prison garb, but allowing the defendant to wear his own clothing where no such problems existed); *People v. Palermo*, 344 N.Y.S.2d 874 (N.Y. 1973) (permitting brief binding and gagging of the defendant where he was given a warning, where the gag was removed when he became compliant, and where the jury was cognizant of the reasons for his restraint); *People v. Farless*, 666 N.Y.S.2d 832, 833 (3d Dep’t 1997) (denying the defendant the right to wear civilian attire where he failed to object until after the entire jury pool had been able to observe him in prison garb, and where no purpose was served by disrupting the proceedings to find new clothing).

50. Notwithstanding this, in most of the countries in the Member States Research, stakeholders reported that any restraints worn when the suspect enters the court are quickly removed. This is the case in Croatia. One lawyer reported, for example:

*There was a case in which I was defending a particularly dangerous person. He was charged with the attempt of serious assassination and four robberies with the use of force. His appearance and the circumstances of the case would have justified the use of shackles and handcuffs during his trial. However, he was not handcuffed at all. He was only under the supervision of two judicial police officers sitting next to him on each side.*

Similarly, Hungarian stakeholders reported that restraints are almost universally removed at the start of court hearings.

Spain is an exception. While judges reported that handcuffs were routinely removed, defence lawyers did not agree. The vast majority of lawyers said detainees usually wear handcuffs during the judicial procedure and added that judges often reject the request for the handcuffs' removal. It happens, but very rarely.

51. Even if restraints are ordered to be removed by the court once the hearing starts, the damage to the presumption of innocence may already have been done by that time if the suspect has arrived to court in restraints, both in terms of the perception of the judge (who sees the defendant enter in handcuffs and sometimes shackles)<sup>113</sup> and in terms of the fact that the

public has already seen (either directly or in media reports) the defendant in restraints while being escorted or waiting in the corridors of the court house. One particularly extreme example is that of Ágnes Geréb, a 53-year-old gynaecologist who was on trial in Hungary for professional negligence committed by assisting homebirths that ended in the death of the delivered babies. Although there was no risk of absconding, she was restrained by the hands, legs and at the waist. The Hungarian Ombudsman concluded that the simultaneous use of three different restraining measures "against a woman of weak physique was disproportionate" even if the penitentiary institution had only a few days to carry out a risk assessment.<sup>114</sup>

52. It should be noted that the growth in videolink court hearings is fundamentally changing how suspects are presented in (or rather, to) the court. For example, in Hungary, the number of hearings conducted through videoconferencing has been increasing. As the suspect typically attends hearings remotely from a place of detention, restraints are unnecessary and the suspect is therefore spared from having to do a "walk of shame" in front of the court and will not make his/her first appearance before the judge in restraints. Research in the United Kingdom has, however, suggested that videolink hearings can also create dangers for the presumption of innocence:

*I think seeing people via a video link implies (immediately) they must be dangerous/guilty. Perception is everything. Most people look 'shifty' on screens.*<sup>115</sup>

## Case study: Luxembourg

Three men accused of a serious crime were kept handcuffed in a glass box throughout their trial. The handcuffs were only removed when the suspects testified. Despite the suspects' lawyer protesting the use of handcuffs in the absence of any suggestion of violence (other than the nature of the allegations) and the continuous presence of police in the courtroom to ensure safety, the judge and police refused. The court took the position that every detained suspect must be kept in handcuffs in court, without individual determinations of necessity.

113. Overall, the interviewed stakeholders (judges and attorneys as well) considered that physical restraints are unlikely to have a significant impact on the judges' perception of guilt (except in Spain, where there was no consensus on this issue, and according to attorneys, the use of restraining measures does affect judges, whereas judges consider it does not).

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

115. Transform Justice, 'Defendants on video – conveyor belt justice or a revolution in access?', October 2017, p. 30.

## Court architecture – the dock

53. The ability of courts to make case-specific assessments as to the need for restraints can be impeded by court-room architecture. This has created controversy recently in France and given rise to longer-standing concerns in England & Wales.
54. 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.<sup>116</sup> 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.<sup>117</sup> The need for 'secure docks' has been questioned, with a leading NGO noting the absence of data to support the assumption that they prevent violence or escape attempts, and that "the rationale for these increasing security measures and their almost universal roll out has, so far as we are aware, not been documented in public record."<sup>118</sup>
55. Practice in England & Wales is frequently contrasted with other common law jurisdictions, which abandoned the dock during the 20th century. In the US, for example, a series of rulings criticising the practice<sup>119</sup> culminated in a decision by the First Circuit Court of Appeals that the dock was a form of "incarceration" and "inconsistent with the presumption of innocence". Despite this, attempts to limit or abolish the dock in England & Wales floundered in the 20th century and have had only a limited impact on its use.<sup>120</sup>
56. Although judicial guidelines instruct judges to direct juries that they should not make adverse inferences from the defendant's position in the dock, there is growing evidence that juries are nonetheless subliminally given an adverse impression of the defendant by the use of visible restraints.<sup>121</sup> 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. 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.<sup>122</sup>
57. The French government has pursued a consistent policy for several years of increasing the use of glass boxes in court rooms.<sup>123</sup> This culminated in a decree in 2016 that such measures could be used generally across the courts.<sup>124</sup> 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

116. JUSTICE 'In the Dock: Reassessing the Use of the Dock in Criminal Trials' (2015) London: JUSTICE.

117. Ibid., Annex survey conducted by Dechert LLP, available online at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Annex-questionnaire.pdf>.

118. JUSTICE (2015), p. 6.

119. *Commonwealth v. Boyd* 92 A. 705 (Pa. 1914); *People v. Zamorra* 152 P.2d 180, 211-215 Cal 1944; *Illinois v. Allen* 397 US 337, 344 (1970); *Estelle v. Williams* 425 US 501, 512-513 (1976); *Young v. Callahan* 700 F.2d 32, 36 (1st Circuit 1983).

120. A. Lieck "The Prisoner on Trial" (1938) *Howard Journal*, 5, 39-44; L. Mulcahy "Putting the Defendant in their Place – Why do we still use the dock in criminal proceedings" *Brit. J. Criminal.* 2013, 53(6), 1139-1156.

121. J. Stone, "Is it now time to abolish the dock in all criminal proceedings in England and Wales" (2015) *Archbold Review* 3, 7-9.

122. 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, 317-344.

against the introduction and indiscriminate use of glass boxes, arguing that they infringe the presumption of innocence.<sup>125</sup> Both actions were unsuccessful, and while several lawyers also challenged the confinement of their clients in glass boxes before local courts, they succeeded only once before the Pontoise *Cour d'assises*.<sup>126</sup>

58. In April 2018, however, the *Défenseur des Droits* Ombudsman upheld a complaint brought by several French Bar Associations against the use of glass boxes on the basis that such practices violate the defendant's right to be presumed innocent and are in breach of 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.<sup>127</sup>
59. 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.<sup>128</sup> It remains to be seen whether emphasising the role of judicial discretion will be sufficient to stop glass boxes being used routinely.
60. Similar practices also existed in Spain where stakeholders commented on the plexiglass docks at the National Court, which are commonly referred to as "goldfish bowls."

## Case study: Pussy Riot

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." The glass dock made it "impossible" to communicate confidentially with their lawyers. The ECtHR ruled that the presentation of the defendants was a violation of Article 3, and implicitly agreed with the applicants' submission that it "undermined the presumption of innocence".<sup>129</sup>

123. "Sécurisation des box : un dossier « prioritaire » pour la Chancellerie", Dalloz, 24 October, 2017.

124. French Decree no. 2016-08 of 31 August 2016.

125. France, Tribunal de Grande Instance de Paris, 12 February 2018, N° 17/15785 ; Conseil d'Etat, 16 February 2018, N° 417944.

126. "La cour d'assises de Pontoise ordonne qu'un accusé soit jugé hors du box en verre", Dalloz, December 20, 2017.

127. Défenseur des Droits, 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.

128. Responses of the Minister of Justice, available online at <http://www.presse.justice.gouv.fr/archives-communiques-10095/archives-des-communiques-de-2018-12904/adaptation-des-dispositifs-de-securite-dans-les-salles-daudience-31474.html>.

129. ECtHR, *Mariya Alekhina and others v. Russia*, App. no. 38004/12, Judgment of 17 July 2018.





## Clothing in court

61. The Directive does not explicitly regulate the impact of clothing worn by defendants. This was not an issue on which any of the countries in the Member States Research focused, and broadly defendants are, in principle, allowed to wear civilian clothing in court even if they are transported to court from a place of detention. It was, however, highlighted as an issue in the Global Survey. While the use of orange boiler suits in the US has become synonymous with injustice, other countries are seeking to address this threat to the presumption of innocence:

- In **China**, on 10 February 2015, the “Notice regarding Dressing of Criminal Defendants or Appellants in Court” was issued by the Supreme People’s Court and the Ministry of Public Security. It confirms that criminal defendants or appellants should no longer appear in court in detention suits and must be presented in court in formal or casual suits.
- **South Africa:** The Court of Appeal has held that the practice of allowing an accused person to appear in court in prison outfits is undesirable and is to be deprecated. The only instance where the appearance of an accused in prison garb may be justified, is where their trial involves an offence committed in prison or one related to their imprisonment, e.g. escaping from custody.<sup>130</sup> Despite this, concerns have been highlighted about new uniforms for pre-trial detainees introduced in 2015 by the Department of Correctional Services. Uniforms are bright yellow and marked “Remand Detainee”.<sup>131</sup> Public assurances were, however, given that “No remand detainee is to appear in any court proceedings dressed in a prescribed uniform. If a remand detainee does not have adequate or proper clothing to appear in court, he or she must be provided, at state expense, with appropriate clothing.”<sup>132</sup>

130. South Africa, *S v. Mthembu & Others* 1988 (1) SA 145.

131. The Department stated that this was necessary to address hygiene issues because prior to the roll out of uniforms, inmates would wear one set of private clothing throughout the duration of their stay which is often very long. Another reason advanced was that it was necessary to distinguish awaiting trial prisoners from members of the general public such as visitors or contractors working on site which increased the risk of escapes.

132. Per Remand detention deputy commissioner (Vuyi Mlomo-Ndlovu), cited in IOL, “Inmates unhappy with new prison garb”, 25th June 2015, available online at <https://www.iol.co.za/news/inmates-unhappy-with-new-prison-garb-1876294>.

## Media reporting of court hearings

62. As discussed above, the ECtHR protects the principle of open justice<sup>133</sup> and the UK's most senior court has, for example, repeatedly emphasised:

*The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.*<sup>134</sup>

This approach to open justice is, in a number of common law countries, explicitly extended to the press coverage of court hearings. As explained by the Supreme Court of Canada:

*It is only through the press that most individuals can really learn of what is transpiring in the courts. They as listeners or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.*<sup>135</sup>

63. Despite this approach in most countries, the right to open justice is not absolute. The ECtHR, for example, only creates an absolute right to public pronouncements of the judgment and a qualified right in relation to the trial itself.<sup>136</sup> In all of the

countries in the Member States Research, there is legislation restricting media coverage of court proceedings, including to protect the dignity of the accused and the integrity of the justice system. Hungary and France, in particular, have robust rules:

- **Hungary:** Audio and video recordings of the trial must be approved by the presiding judge<sup>137</sup> and the consent of persons present at the hearing must be obtained.<sup>138</sup> If consent is not given, the press is not allowed to take pictures or video recordings in which the person can be identified. While the presiding judge would normally grant permission, s/he may refuse, e.g. in cases where the presence of the press and/or the disclosure of information would violate classified data, jeopardise the successful conclusion of the proceedings, or be a threat to the life or integrity of the accused.<sup>139</sup>
- **France:** The law specifically prohibits taking pictures of persons subject to means of physical restraint: "in cases where the use of handcuffs or any other measure of restraint is deemed necessary, all measures should be adopted to avoid taking pictures or recordings of the person concerned".<sup>140</sup> In order to ensure the dignity of court proceedings, recordings of court proceedings are prohibited without the prior authorisation of the president of the court (and the consent of the parties or their representatives and the public prosecutor).<sup>141</sup> These provisions are deeply rooted in France's legal culture: the prohibition of taking pictures during trials was introduced in the 1950's due to several cases in which the journalists repeatedly disrupted court hearings.<sup>142</sup>

133. Article 6 (1) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

134. UK, *Scott v. Scott* [1913] AC 417.

135. South Africa, *Edmonton Journal v. Alberta* (Attorney General) [1989] 2 SCR 1326.

136. Article 6 (1) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

137. Hungarian CPP, Section 108, paragraph 1.

138. Hungarian CPP, Section 108, paragraph 2.

139. Hungarian CPP, Section 109.

140. Article 93 of the French Law n°2000-516 of 15 June 2000 on the protection of presumption of innocence and victims' rights.

141. Article 38 of the French Law of 28 July 1881 on Freedom of Press.

142. Case of Marie Besnard (1952,1954) and the case of Gaston Dominici (1954).

## Presentation in public (use of restraints at the time of arrest and transportation)

64. Within the courtroom, regulation of how suspects are presented to the public is, perhaps, relatively easy to manage. It is not, however, only in this controlled setting that suspects appear in public. As discussed below, presentation of accused persons in the public domain in restraints or in clothing which identifies them as a 'detainee' or suggests that they are 'dangerous' (for example, at the time of arrest or when they are transferred to and from court) can also impact on the presumption of innocence. In particular, as discussed above, images obtained of suspects in public can provide material to support press coverage, which frequently relies in practice on these kinds of 'compelling' images.
65. The five countries in the Member States Research all had detailed rules relating to the use of restraints at the time of arrest and during transportation to and from court. These all limit the use of restraints to particular situations, with countries explicitly requiring the proportionate use of force:<sup>143</sup> dangerousness is a key factor in France,<sup>144</sup> Croatia (based on the circumstances of the criminal offense, the body type of the person and his or her earlier conviction) and Spain;<sup>145</sup> the risk of absconding is also given as a justification in France,<sup>146</sup> Malta,<sup>147</sup> Croatia and Spain,<sup>148</sup> and ensuring the suspect's compliance with the arrest, in Hungary<sup>149</sup> and Spain<sup>150</sup>.
66. Spain is an interesting example in terms of the use of force at the time of arrest. Specific provision is made to protect the honour and human dignity of a person being arrested, requiring the arrest to be carried out as discretely as possible to protect the honour, image, dignity and privacy of person.<sup>151</sup> In particular, the person should not be exposed to the public unless it is necessary and unavoidable.<sup>152</sup> Specific guidelines provide: "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."<sup>153</sup> Furthermore, it will be necessary to adopt "the appropriate precautions to protect persons who are 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."<sup>154</sup>
67. Sadly, the interviews undertaken with stakeholders in Spain suggest that these rules are not followed:
- [T]he 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 a humiliating fashion.*
68. Spain was not the only country in the Member States Research where interviews indicated that laws on the proportionate use of restraints at the time of arrest were being violated. In Croatia, stakeholders highlighted the practice of the police informing the media about the time and place of an arrest in cases of public interest. One Croatian defence attorney reported on how, in high profile cases, journalists appear at the person's house at the time of arrest:
- The police officers arrested my client at 5 a.m. in the morning. She opened the door in her nightwear, dishevelled. When she opened the door, the press were behind the police. It is to be noted that she is an elderly woman. After the arrest, all newspaper and TV channels broadcast pictures and videos of her and the arrest. So, police officers sometimes deliberately show the person who is under arrest with handcuffs.*
- This clearly intersects with the issue of leaks (the police 'tipping off' the press that an arrest or search is about to take place) and is a practice which was prominently highlighted by the highly-publicised search of the home of, singer, Cliff Richard (discussed above).

143. Cf Malta (Article 75 of the Police Act and Police Code of Ethics, 2002).

144. Article R434-17 §4 of the French internal security code.

145. Article 525, Spanish Criminal Procedure Act.

146. Article R434-17 §4 of the French internal security code.

147. Maltese Criminal Code, Article 355AB, CAP. 9 of the laws of Malta.

148. Article 525, Spanish Criminal Procedure Act.

149. Article 39, Hungarian Regulation on Police Service.

150. Article 525, Spanish Criminal Procedure Act.

151. Safeguarding the constitutional rights to honour, privacy and own image of arrested persons, article 520 Criminal Procedure Act. This provision is also contained in the "Guardia Civil Judicial Police Handbook" (Manual de Policía Judicial de la Guardia Civil), of 10 June 2011 and the "Criteria for the Execution of Procedures by the Judicial Police" Handbook (Criterios para la Práctica de Diligencias por la Policía Judicial), approved by the National Coordination Commission of the Judicial Police on 3 April 2017 and applicable to all police forces. Both handbooks are for internal use and are not available to the general public. The arrest must be reflected in the police report with an explanation of the reasons justifying it.

152. Instruction nine, 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.

153. "Instruction 3/2009 on controlling how arrests are carried out", dated 23 December 2009.

154. Conclusion three, Instruction 3/2009.

69. The Member States Research found significant differences in the legal regimes governing the use of restraints during the transporting of suspects. Malta is the only country which did not have specific legal provisions governing this. What is interesting, however, is that the implications for the question of how suspects are presented to the public depends as much on the layout of courts (and the means of entry to them) as it does on the rules governing the use of restraints during transport to and from court:

- In **France**, based on the national interviews along with the report of the French national preventive mechanism against torture and ill-treatment of 2016, the use of handcuffs while escorting or transferring the accused is almost systematic, with some detainees also shackled. Despite this, detainees rarely arrive at the courtroom wearing restraining measures because suspects must go to the courtroom through a dedicated route hidden from the public.<sup>155</sup>
- By contrast, in **Hungary**, for example, there is no separate route to the courtroom to prevent the suspect being seen in restraints in public. Suspects always arrive in handcuffs, regardless of circumstances. The same applies in Spain.

70. Good practice examples with respect to the arrangement of courts (and transportation of suspects) were identified through the stakeholder interviews:

- In **Spain**, the court presidents can create rules relating to the transportation of the suspect within the court to protect the arrested person's honour and presumption of innocence by ensuring they cannot be seen by the public and journalists. In one relatively new court in Spain, there is a special staircase to the courtroom directly from the holding cells (in the basement) ensuring that the suspect is at no point seen in public wearing handcuffs.
- Similarly, in **Croatia**, it was reported that many courts have dedicated rooms for prisoners where they can wait for the judge to start the hearing.

The rooms are used to avoid any contact with the public or press, and handcuffs are normally removed in that room meaning prisoners can enter the court room without restraints.

71. In **Malta**, the stakeholder interviews undertaken as part of the Member States Research indicated that the use of restraints during the transportation of suspects to court was not accidental.<sup>156</sup>

*A prominent Maltese mogul was stabbed and died. The police arrested a man on the evening of the stabbing. The next day, they brought the accused person wearing a white forensic suit with his hands handcuffed behind his back to the court. They escorted him through a busy pedestrian area and entered to the court through the front doors. Therefore, journalists gained access to him and his pictures were widely shown in the media.*<sup>157</sup>

Several lawyers in Malta noted that the use of restraints in public and escorting of prisoners in restraints through the front doors of the court were more likely to happen to foreign defendants:

*[S]ome 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.*<sup>158</sup>

72. Issues relating to the way suspects are presented in public at the time of arrest or transfer to court were also raised in a number of responses to the LEAP Survey. For example, in Italy, one LEAP member reported that "arrested defendants ... are always escorted in handcuffs into the courthouse and people can easily take photos, which are often used in newspapers and on websites." This is the case in practice even though it is prohibited by the Code of Criminal Procedure.<sup>159</sup> Similarly, in France, concerns have been raised recently in relation to how Ayoub El-Khazani (subsequently convicted of shooting many people on a Thalys Amsterdam-Paris train) was presented in public. A TV channel broadcast the images of El-Khazani barefoot, blindfolded, handcuffed and in light blue hospital pyjamas when

155. The same applies in Croatia.

156. Male lawyer, aged 39, interviewed on the 2<sup>nd</sup> October, 2018.

157. 'HUGO CHETCUTI JAOLA' ZEWG DAOQIET TA' SIKKINA' (Hugo Chetcuti was knifed twice), One News, 7 July 2018.

158. Lawyer interviewed in Malta.

159. According to Article 114 of the Italian Code of Criminal Procedure it is forbidden to publish images of a person deprived of his or her freedom while he or she is subject to the use of handcuffs or other measures of physical restraint, unless the person allows the publication itself.

taken to the courthouse in Paris. Some newspapers wrote that the staging of the suspect surrounded by several hooded policemen is reminiscent of that reserved for Guantanamo detainees in the US.

73. Of the countries examined in the Global Survey, the issue of suspects being paraded in public in restraints in the presence of the media is most prominent in the US, where it has been given the name, 'perp walk'. The Supreme Court has not decided any cases directly relating to 'perp walks', but lower federal courts have. In particular, two major cases have been decided by the Second Circuit. In *Lauro v. Charles*,<sup>160</sup> the Second Circuit recognised the detrimental effect the perp walk has on the presumption of innocence, stating that "a suspect in handcuffs being led into a station house is a powerful image of guilt." The Court held that "[i]n staging the perp walk, [the] Detective ... engaged in conduct that was unrelated to the object of arrest, that had no legitimate law enforcement justification, and that invaded [the plaintiff's] privacy to no purpose. By exacerbating [the plaintiff's] seizure in an unreasonable manner, [the Detective] violated the Fourth Amendment."
74. In *Caldarola v. County of Westchester*,<sup>161</sup> by contrast, the Court found that the perp walk, which was videotaped and broadcast, was justified by legitimate government purposes. It is of particular note that, in *Caldarola*, the Court focused on the legitimate interests in the practice of perp walks. It found this to be justified: "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."<sup>162</sup>

75. Provided, therefore, that there is a 'legitimate government purpose' it would seem that the perp walk does not violate the US Constitution. Not surprisingly, according to the US Marshal Service, "[a]ll prisoners produced for court, with the exception of a jury trial, are to be fully restrained unless otherwise directed by a US District Judge or US Magistrate Judge. For trial by jury proceeding the US Marshal or his/her designee should follow the direction of the presiding judicial official."<sup>163</sup>

Le Monde

## Thalys: polémique autour de la diffusion d'images d'Ayoub El-Khazzani menotté<sup>164</sup>

Matthieu Suc & Nicolas Chapuis, 26 August 2015



<https://bit.ly/2JFOedt>

160. USA, 219 F. 3d 202.

161. USA, 343 F.3d 570.

162. See also, USA, *Calicchio v. Sachem Central Sch. Dist.*, 185 F. Supp. 303, 316 (E.D.N.Y. 2016) (holding that there was no indication that county was staging perp walks, and perp walks did serve legitimate law enforcement purpose).

163. USMS Directives Section 9.1 Prisoner Custody, 3(b). (2010) Available at: [https://www.usmarshals.gov/foia/directives/prisoner\\_ops/restraining\\_devices.pdf](https://www.usmarshals.gov/foia/directives/prisoner_ops/restraining_devices.pdf).

164. In English: *Thalys: polemic around the publication of photos of Ayoub El-Khazzani in handcuffs*



# Do images of arrest and the use of different forms of restraint affect perceptions of guilt?

## Sociological Study – Overview of Methodology

The study comprised of two parts:

- Research was conducted using qualitative and quantitative approaches. The quantitative part of the research included 300 people divided into three groups. Each group was given the same questionnaire, but the accompanying photographs that they had to evaluate were different. Each group was also given three photographs, each showing the simulated arrest of a different person by the police.<sup>165</sup> one group was given three photographs in which no forms of restraint were used; another group was given photographs showing arrested people with their hands cuffed in front of them (medium form of restraint); and the final group was given photographs showing the arrested person with their hands cuffed behind their backs (severe restraint). After being shown each photograph participants completed a questionnaire on whether they thought the person was guilty or innocent, whether they thought the person would be convicted and how they perceive the person. Various questions regarding the sociodemographic characteristics of the person completing the questionnaire were also included.
- In this second research phase, six focus groups were conducted to avoid the classical objection to a quantitative experiment as a method, specifically its isolation from real social situations. Each of six focus groups included eight people from different age groups. The focus groups were shown all of the photographs and asked a series of questions to assess the participants' perceptions of the arrested persons and what crime they might have committed.

### Minimal restraint



### Medium restraint



### Maximum restraint



165. All photos showed middle class persons aged between 25-40. Gender was added as a variable but all other characteristics were unified. Photographs were shot in a unified environment lacking any circumstance of the settings that might influence the judgement of particular situations.

76. In the Sociological Study, Human Rights House Zagreb assessed the impact that images of suspects being arrested and different measures of restraint have on public perceptions of guilt.<sup>166</sup> The key findings were as follows:

- Images of the arrest and the presence of the police result in a very high level of agreement that the person is guilty, no matter what measure of restraint is used. No matter what the measure of restraints was used, there was a high level of agreement that the person in the photograph is guilty. Even when no restraints are shown, more than two thirds of respondents thought that the person is guilty. It is, however, obvious that this confidence rises as the use of restraining measures increases. This was supported by the focus groups where the mere presence of the police was enough for participants to perceive the arrested person as guilty in most cases.
- Respondents read the situation shown in the photographs not through the lens of the presumption of innocence, but as a process in which they tend to trust the police and their actions. This is an important finding when compared to levels of trust in the police (52%) and the legal system (17.3%). Although respondents tend to be distrustful of legal action in an abstract sense, they believe it when it is applied. The underlying logic demonstrated was that the police and measures of restraint would not be present if the person was not guilty of something or at least suspicious.
- The use of force and measures of restraint do play a role in perceptions of guilt. Respondents in the group shown photographs with no restraints considered the person to be guilty 39% of the time; while respondents shown photographs with the most severe measure of restraint considered the person to be guilty 61% of the time. The findings in this respect were more stark during focus group discussions, where handcuffs were seen as a clear sign of guilt and typically commented on as soon as they were seen:
  - *"I think it must be something serious. Because of handcuffs." / "To me this looks like something involving aggression, because of the handcuffs." / "Ah, handcuffs. That means he's guilty." / "She is handcuffed and that's a sign of guilt."*
- In the focus groups, the level of restraint had a clear impact on the severity the of crime people thought the suspect may have committed. When faced with photographs depicting the highest level of measures of restraint.
  - No restraint: *"Alcohol. Weed. Abuse of some drug. Somebody that smokes weed." / "It could be an eviction, or avoiding witness duty, who knows?" / "I have a feeling that there was, you know, simply a*

*raid and he was there. But did he do something..."*

- Severe restraint: *"He was resisting arrest. And it was a more serious crime." / "Murdered her husband. Some kind of murder. She did something impulsive." / "It must have been some violence when they are holding him like that. Or heavy crime." / "We have already concluded that those aggressive guys... You know, dragged in such a way, handcuffed with hands on their back so they cannot move... They are bursting with physical force and maybe this one was aggressive so the police has to take that into consideration. It looks rough, but it's the only adequate procedure for such behaviour." / "She was probably aggressive. To police. Or someone else. She might even killed someone. Maybe she was resisting arrest."*
- Characteristics ascribed to the person in the photograph play a big role. In particular, when a person is seen in a negative light, it is more likely they will be perceived as guilty. It is also more likely that negative traits will be attached to men than to women. In the focus groups, signifiers were identified that participants read as potentially dangerous or "more criminal" than others. One of the most important signifiers was a hooded top worn by one of the males. This was immediately interpreted as an attempt to hide his identity and connected with probable criminal activity. Sunglasses worn by the female were also a signal that she was trying to hide her face. Perceived attempts to hide one's identity is seen as one of the most reliable grounds to interpret a person as guilty.
- When judging the female person, respondents replied with a much lower level of confidence that she would be convicted, with less than a half of them (43%) seeing her as convicted in the future. With the respect to the photographs of men, 60% felt they would be convicted.
- Various questions considering the sociodemographic characteristics were included in the questionnaire but absolutely none of them proved to have any statistical significance. Gender, level of education, age group, birthplace size and size of the city/village where the respondents were living at the time, their previous experience with the Croatian judiciary system, and economic status do not play a role in their perception of whether a person is guilty. The situation is similar when it comes to values. Several questions about values were asked, and it was shown that political values and a post-materialistic worldview do not explain the perception of guilt. It can be concluded that both sociodemographic characteristics and values play a small, if any, role in perception of guilt. Nevertheless, this finding could be attributed to the limited sample size (n=300).

166. The report of the sociological study, "Research Data Analysis: Research Methodology Document" is due to be published. The report contains further details of the methodology applied.



The background is a solid blue color. It features several abstract geometric shapes: a large, dark blue, irregular polygon on the left side; a lighter blue, semi-transparent version of a similar shape behind it; and a light blue circle in the bottom right corner.

# **Underlying rationale and remedies**

## Introduction

77. Differences in the way justice systems are structured in particular countries affect both how the presumption of innocence is protected and the remedies that are available when they are violated. Linked to this, it is also possible to identify differences in the legal concepts, which underpin the very notion of the presumption of innocence.

*"One cannot fully understand the French reaction to the treatment of Dominique Strauss-Kahn without stressing a fundamental divergence of interpretation between France and the US as to the meaning of the presumption of innocence.*

*On one side of the Atlantic, the presumption of innocence is viewed as both a rule of proof and a shield against premature punishment (including humiliation) before conviction. In France, the presumption of innocence is elevated to a personality right and has a distinct place among the right to privacy and the right to dignity."*

François Quintard-Morénas, writing in the New York Times, ['The French Have a Legal Point'](#), 26<sup>th</sup> May 2011.

## Securing the fairness of the trial

78. The violations of the presumption of innocence highlighted in this report could create a risk that independent and impartial judgments by decision-makers in the criminal process are impaired. Both the Sociological Survey (on images of arrest and the use of different forms of restraint) and the Australian research (on the use of the dock) demonstrate that the way suspects are presented in court and in public can affect perceptions of guilt. This is clearly contrary to the underlying principles of justice, which require that "[i]n the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".<sup>167</sup> The rule of law requires impartial decisions to be made as to guilt and innocence based on the law and on the facts that are presented; not based on public pressure for a conviction (created by trial by media), nor influenced by bias in the mind of the decision-maker(s) created by how suspects have been presented in court.
79. The response of the Italian lawyers who conducted the research for the Global Survey to the question "have there been any cases where public references

or prejudicial statements were made against the accused or suspect which influenced the public's opinion of guilt or that had a negative impact in the proceedings?" was noteworthy:

*The public's opinion of an accused or a suspect's guilt is without doubt influenced by media statements, especially if the case in question has received considerable media attention. Common people, with no legal background on criminal proceedings, are easily persuaded to believe that the way a case is described and explained by the media is certainly correct. Prejudicial statements might affect the public's opinion but could not have a negative impact on the outcome of the proceedings. Judges cannot be influenced by public or media references and they always have a duty to apply rules and principles in force in the criminal system; only such rules and principles lead them to a fair decision, to a conviction or an acquittal.*

This aptly summarizes an important legal principle: that judges are, by virtue of their office, required to be independent and will only make decisions based on the law and on the evidence before them. While most criminal law practitioners would recognise that this is a necessary myth, rather than a statement of fact,<sup>168</sup> legal formalism (rather than realism) appears to determine the nature of legal protections against violations of the presumption of innocence undermining the right to a fair trial.

80. Given the concept of judicial independence and impartiality, in those countries considered in this report where professional judges are finders of fact, there appears to have been very little consideration given to the impact of violations of the presumption of innocence on the fairness of the outcome of a trial. Indeed, the ECtHR has stated that "National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence."<sup>169</sup>
81. In practice, this approach does not seem to withstand scrutiny. While it is true that professional judges may be less susceptible to bias as a result of how a suspect has been presented, almost all defence lawyers interviewed in the Member States Research mentioned that judges are also human, so they may not be able to completely free themselves from the

167. Article 6 (1) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

168. Indeed, some recent studies have demonstrated how extraneous factors affect judicial decision making. For example: Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, "Extraneous factors in judicial decisions", *Proc Natl Acad Sci U S A.* 2011 Apr 26; 108(17): 6889–6892.

169. *Ibid.*, p. 40.

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 subconsciously.” Judges themselves recognised this. For example, one Spanish judge said during interview 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, subconsciously, even judges.”

82. The impact on professional judges of the way suspects are presented in court was considered by the South African High Court in the case of *S v. Phiri*,<sup>170</sup> in which a Magistrate referred the case to the Court following a defendant appearing in the trial court wearing shackles and pleading guilty. The Magistrate considered that the guilty plea should be set aside and that the case should be re-tried without the defendant wearing shackles (for which there was no justification). Despite the law stating clearly that “Courts and judicial officers have to be independent and must apply the law impartially and without fear, favour or prejudice”, the High Court observed:

*[S]ome judges have in the past not hesitated to recuse themselves when accused persons appeared before them in prison clothing or leg irons. When a judicial officer does not feel comfortable hearing a case because of factors which could affect his or her impartiality, or be perceived to do so, it is proper to recuse oneself ... a judge who sits in a case in which he or she is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with sections 34 and 165(2) of the Constitution (para 30). The same would apply to a judicial officer who feels that he or she should recuse him or herself in view of certain circumstances, including his or her feelings regarding the appearance of an accused.*<sup>171</sup>

The High Court held that the guilty plea should be set aside.

83. The situation is very different in the US, where the right to a trial by jury is protected by the Constitution.<sup>172</sup> US law focuses on protecting against juries’ decisions being affected by negative portrayals of a defendant in the media or by the use of security measures in court. Thus, in *Deck v. Missouri*, for example, the court highlighted that:

*[T]he offender’s appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community (which is often a statutory aggravator and always a relevant factor); almost inevitably affects adversely the jury’s perception of the defendant’s character; and thereby inevitably undermines the jury’s ability to weigh accurately all relevant considerations when determining whether the defendant deserves death.*<sup>173</sup>

84. A number of legal protections have been developed in the US to address this risk. The Supreme Court has held that “[g]iven the ... difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.”<sup>174</sup> Measures available to US courts to manage the impact of violations of the presumption of innocence on the minds of jurors include:

- **Voir dire:** a practice that allows defence lawyers to remove any jurors who have heard and reacted to pre-trial publicity or prejudicial statements made about the defendant. Prospective jurors are questioned about their backgrounds and potential biases before being chosen to sit on a jury. This can be used by defence lawyers to ensure a jury is not polluted with jurors who have prejudged the defendant before hearing the evidence.
- **Sequestration of the jury:** Where there is concern that publicity after the trial begins could influence jurors, the judge may order sequestration of the jury. During sequestration, jurors are protected from exposure to the media or other outside contacts by being housed in a hotel and transported to the courthouse by court officials.

170. South Africa, (2033/05) [2005] ZAGPHC 38 (4 April 2005).

171. Ibid at para. 18.

172. Sixth Amendment to the US Constitution.

173. USA, *Deck v. Missouri*, 544 U.S. 622 (2005) – concerning a jury’s determination of whether to impose the death penalty. See also *People v. Lopez*, 616 N.Y.S.2d 42 (1st Dep’t 1994) (fair trial was compromised where defendant was forced to be flanked by two court officers at 55 side-bar discussions during jury selection) and *People v. Fioravantes*, 646 N.Y.S.2d 873, 895 (3d Dep’t 1996) (fair trial was not compromised where defendant was briefly exhibited to venire persons in shackles).

174. USA, *Sheppard v. Maxwell*, 384 U.S. 333, 357-63 (1966).

- **Change of venue:** A trial judge can grant a request for a change of trial venue, away from the location of the crime, to avoid prejudice: “the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.”<sup>175</sup>

**The following cases in New York highlight how the courts approach the question of whether to allow a change of venue:**

*People v. Cahill*:<sup>176</sup> Pre-trial publicity did not require change of venue in a capital murder prosecution even though 86% of potential jurors had heard of the case through media accounts and 52% had an opinion as to the defendant’s guilt or innocence. Media coverage had tended to be objective, including “police blotter” reports and news reports on the court proceedings, and the voir dire process successfully removed jurors who may have been biased by pretrial publicity.

*People v. Boss*:<sup>177</sup> A murder prosecution was so overwhelmed by prejudicial publicity that any attempt to select an unbiased jury would be futile: local media constantly repeated the assertion that the defendants’ guilt was conclusively established; the majority of local residents had formed strong opinions that the defendants’ actions were unjustified; the defendants’ indictments had been preceded by mass public demonstrations; and jurors could not be questioned during voir dire on issues of partiality without reinforcing the fear of the consequences that would result from an unpopular verdict.

- **Instructions to the jury:** Where a defendant is presented as being guilty and the trial is ongoing, the trial court can intervene through curative instructions to the jury before the minds of the jurors become prejudiced.<sup>178</sup>

85. This wide array of mechanisms in the US is designed to protect the fairness of the trial against violations of the presumption of innocence. However, where these protections are not successful, the remedies can include the overturning (or reversal) of the conviction

resulting in either acquittal or a retrial.<sup>179</sup> Other countries surveyed also allow for the possibility of violations of the presumption of innocence making a fair trial impossible, for example:

- **England & Wales:** Criminal courts have the ability to stay proceedings after an abuse of process if it would be impossible to give the accused a fair trial.<sup>180</sup> The power to stay proceedings is a discretionary remedy available to the courts and should only be exercised if exceptional circumstances exist, which would result in prejudice to the defendant, which cannot be remedied in other ways. Excessive and adverse media reporting may create a substantial risk of prejudice to defendants (and as such, an abuse of process), and render a fair trial impossible and lead a court to stay proceedings.<sup>181</sup>

*R v. McCann and Others*:<sup>182</sup> The defendants were alleged to be members of the IRA and were charged with conspiracy to murder. During the closing speeches in the trial, the Secretary for Northern Ireland took part in radio and television broadcasts which the court held might have been heard by the jury and made a fair trial impossible.

- Courts in **Australia** have similar powers to stay indictments, including on the basis that a fair trial is impossible due to statements as to guilt. The recent case of *Hughes v. the Queen*,<sup>183</sup> however, demonstrates that courts are reluctant to use such powers, preferring instead to rely on ‘careful directions to the jury’. The Court considered that:

*To uphold the appeal because a permanent stay was refused, despite the prejudicial commentary, before and after the applicant was charged, would be to create a mechanism by which those of ill will could undermine the proper operation of our system of justice...The evidence in this case well demonstrates that the jury system is robust and capable of ensuring that a person accused of serious offences can receive a fair trial, despite prejudicial and ill intended comments widely and irresponsibly published on mainstream and social media.*<sup>184</sup>

175. Rule 21(a) of the US Federal Rules of Criminal Procedure.

176. USA, 809 N.E.2d 561 (N.Y. 2003).

177. USA, 701 N.Y.S.2d 342 (N.Y. 1999).

178. See, e.g., USA, *People v. Jenkins*, 647 N.Y.S.2d 948, 950-51 (N.Y. 1996) (permitting cross examination of alibi witness on his knowledge of defendant’s incarceration where an initial curative instruction was given and a second curative instruction was offered, and where prosecutor was prohibited from mentioning defendant’s incarceration during summation).

179. See, e.g., USA, *People v. Rouse*, 583 N.Y.S.2d 986, 986 (N.Y. 1992).

180. UK, *Bennett v. Horseferry Road Magistrates’ Court and Another* [1993] 3 All E.R. 138, 151, HL.

181. UK, *R v. McCann and Others* (1991) 92 Crim App R 239, *R v. Taylor and Taylor* (1994) 98 Crim App R 361 and *R v. Stone* [2001] EWCA Crim 297; [2001] Crim LR 465.

182. UK, (1991) 92 Crim App R 239.

183. Australia, [2015] NSWCCA 330.

184. Ibid.

86. It is clear that appropriate legal mechanisms are needed to reduce the risk of violations of the presumption of innocence undermining the fairness of the trial. Where interim measures (such as jury selection or change of venue) do not ensure the overall fairness of the trial, the ultimate remedy should be the quashing of the conviction. This focus on making an ultimate assessment of the fairness of the overall trial is, however, insufficient because it is hard to assess what impact extreme violations of the presumption of innocence can have on a defendant, particularly a vulnerable one, and on their ability to prepare their defence.<sup>185</sup> As many legal systems now rely extensively on guilty pleas (with defendants waiving their right to a fair trial) extensive publicity, official statements of guilt and demeaning presentation in court and in public can all operate as mechanisms of coercion: such factors might understandably cause a defendant to believe that they have no chance of acquittal at a contested trial.<sup>186</sup> Furthermore, adverse publicity or official statements relating to guilt might affect crucial pre- or post-trial decisions: (a) extensive publicity and statements by public officials could create pressure for a prosecutor to charge a suspect, even where this may not be justified by the evidence or the severity of the crime; and (b) judges deciding whether to detain a person pre-trial may be affected by impressions that they are dangerous or a flight risk due to how they are presented in court.<sup>187</sup>

## Protecting the dignity of the justice system

87. Although clearly related to protecting the fair outcome of the trial (as a right of the defendant), a number of the countries surveyed address the presumption of innocence, and remedies for its violation, through laws designed to protect the integrity of the justice system rather than the defendant's rights.
88. Concerns about trial by media in Singapore have resulted in new legislation.<sup>188</sup> This creates, *inter alia*, the following offence:

"Any person who:

...

(b) intentionally publishes any matter that

i. prejudices an issue in a court proceeding that is pending and such prejudgment prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending; or

ii. otherwise prejudices, interferes with, or poses a real risk of prejudice to or interference with, the course of any court proceeding that is pending;

(...)

commits a contempt of court."<sup>189</sup>

A number of the other countries surveyed have similar contempt of court rules that criminalise public statements about guilt and inappropriate media coverage.<sup>190</sup> In England & Wales, it is a contempt of court to publish anything that creates a "substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice."<sup>191</sup> In Australia, the media may be in contempt of court if it publishes material in respect of pending criminal proceedings, which has an "objective tendency to interfere with the course of justice."<sup>192</sup>

89. In the South African High Court case of *Phiri*, discussed above, the Court highlights the impact of the routine use of shackles, not on the defendant or on the fairness of the trial, but on the dignity of the legal process:

*Courts have on several occasions expressed the clear view that the practice of accused persons appearing in court in manacles, leg irons, chains, or prison clothing is unsatisfactory, undesirable and objectionable and is to be deprecated and strongly disapproved of ... Ultimately the dignity of the court itself is at stake. It is a civilized forum for rational discourse and analysis, and not a detention, punishment or torture centre. The confidence of the public, both from the perspective of the accused, and his or her family and friends, as well as of the victims of crime and those close to them depends on perceptions of the fairness of criminal proceedings.*<sup>193</sup>

185. Considered by the ECtHR in *T v. United Kingdom*, App. no. 24724/94, Judgment of 16 December 1999: "it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence."

186. Cf Fair Trials, "The Disappearing Trial: Towards a rights-based approach to trial waiver systems", April 2017.

187. Cf Due Process of the Law Foundation (DPLF): "Insufficient judicial independence, distorted pretrial detention: the cases of Argentina, Colombia, Ecuador, and Peru - Comparative Report", September 2013.

188. The Singapore Administration of Justice (Protection) Act 2016 (which came into force on 1 October 2017).

189. Ibid, section 3(1).

190. Including the USA, Australia and England & Wales.

191. UK, The Contempt of Court Act 1981.

192. Known as "sub judice contempt". In instances of sub judice contempt, prosecutions are generally referred to the Attorney General by the relevant trial judge, pursuant to the provisions of the relevant Australian Criminal Procedure Act, although generally courts have an inherent power to bring its own actions in this regard.

193. South Africa, *S v. Phiri* (2033/05) 2005 ZAGPHC 38, para 15.

## Protecting human dignity

90. There is no doubt about the damage that is done to a person's dignity and reputation as a result of the publication of photographs and video coverage about suspects and accused persons in handcuffs, shackles, glass boxes or metal cages or statements referring to their guilt before the court has reached a final and binding decision. This is clearly demonstrated by the facts in the ECtHR case of *Erdogan Yagiz v. Turkey*<sup>194</sup> where the ECtHR found a violation of the right not to be subjected to degrading treatment:

*The applicant, who had been employed as a doctor by the Istanbul security police for 15 years, 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, but was not informed of the charges against him. Two days after his release a psychiatrist diagnosed him as suffering from traumatic shock and certified him unfit for work for 20 days. His sick leave was extended several times on account of acute depression. The applicant filed a complaint and was informed that he had been interrogated in connection with a criminal investigation because of his relations with suspects. He was suspended from his duties until the close of the criminal investigation. The prosecuting authorities discontinued the case against the applicant. 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.*<sup>195</sup>

91. In many countries, the presumption of innocence is linked more to protecting the privacy and dignity of the accused person. Remedies designed to rectify damage done to the person's reputation may be the primary mechanism for redress. One of the key examples of this approach is reliance on defamation

laws (whether criminal or civil). Examples of countries that apply this approach include:

- **Spain:** The Spanish Criminal Code criminalises defamation<sup>196</sup> and slander<sup>197</sup> as offences against honour. In this respect, whenever a judicial or law enforcement authority "accuses another person of a criminal offence while knowing it is false or recklessly disregarding the truth", it shall be punished with imprisonment or a fine. The penalty is increased if this is "propagated through publicity", such as when statements made by authorities are published in the press.
- **Italy:** A suspect can bring an action for defamation against anyone who has made prejudicial statements.<sup>198</sup> An offence to the person's reputation must occur and the offence is an aggravated offence if made by the press or by other means of publicity.<sup>199</sup>
- **England & Wales:** Material that lowers the reputation of a person in the estimation of 'right thinking' members of society generally<sup>200</sup> or is likely to affect a person adversely in the estimation of reasonable people generally<sup>201</sup> is defamatory. That material has to cause or be likely to cause serious harm to the reputation of the person.<sup>202</sup> Christopher Jefferies (discussed above) was, for example, awarded damages from eight newspapers for libel in July 2011.

92. As well as civil defamation, other forms of civil action can be brought by individuals who have been harmed by a violation of the right to be presumed innocent. Examples of this are wide-ranging and include: the ability to file a civil action claiming moral damages derived from an inaccurate and/or wrongly published statement (e.g. in Mexico); an application for the publication of inaccurate information (e.g. in Brazil);<sup>203</sup> actions relating to the publication of private or protected material; and violations of the right to privacy.<sup>204</sup>

194. ECtHR, *Erdogan Yağiz v. Turkey*, App. no. 27473/02, Judgment of 06 March 2007.

195. Summary taken from: <http://hudoc.echr.coe.int/eng?i=002-2789>.

196. Article 208, Spanish Criminal Code.

197. Article 205, Spanish Criminal Code.

198. Article 595ff, Italian Criminal Code.

199. Article 13, Italian Law number 47/1948.

200. UK, *Sim v. Stretch* [1936] 2 All ER 1237; 52 TLR 669, HL(E).

201. UK, *Skuse v. Granada Television* [1996] EMLR 278.

202. UK Defamation Act 2013, Section 1.

203. Articles 186, 187 and 927, Brazilian Civil Code.

204. For example, see *Cliff Richard v. The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch).

## Case study: *Rayney v. The State of Western Australia [No 9]*<sup>205</sup>

In August 2007, Mrs Rayney went missing in Perth. After nine days, her body was found buried in a park. During the period of investigation, there were a series of media conferences conducted by the police officer in charge of the media liaison for the investigation. Mr Rayney claimed damages for defamation in respect of a number of comments that were made in these media conferences. In particular, Mr Rayner had been referred to as the “primary person of interest” and “only” suspect in the investigation. The Court found that, on the basis of the circumstances known to the police at the time, it “cannot be said that there were reasonable grounds to suspect that the plaintiff murdered his wife or that he had so conducted himself as to give rise to that suspicion.” A total of AUD\$2.6m was awarded to Mr Rayney by the Court.

93. In addition to financial compensation, other remedies designed to protect the reputation or dignity of the person affected by breaches of the presumption of innocence can include: a requirement that a statement be retracted (which exists, for example, in Mexico); in France, the power to require the insertion of a correction or the circulation of a communiqué to “put an end to the infringement of the presumption of innocence”;<sup>206</sup> the right to publish an answer in the publication responsible for media coverage, which undermined the presumption of innocence;<sup>207</sup> and removal of articles from an online paper.<sup>208</sup>

*Mexico:* In 2015, a constitutional reform was implemented to guarantee the right of all individuals to respond to any publication containing inaccurate or wrongfully published information, through any media outlet. Under this reform, all media outlets are obliged to let any interested party reply or respond to certain news published in such media, under the same terms and conditions as the ones of the original publication.<sup>209</sup>

205. Australia, [2017] WASC 367.

206. Article 9-1, French Civil Code.

207. In Brazil, this was ordered in the 2015 against the magazine Carta Capital following its allegations that the journalist, Leandro Fortes, was involved in a criminal organization.

208. See, for example, the Serge Dassault Case: [http://www.lemonde.fr/actualite-medias/article/2014/04/07/dassault-liberation-condamne-pour-atteinte-a-la-presomption-d-innocence\\_4397095\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2014/04/07/dassault-liberation-condamne-pour-atteinte-a-la-presomption-d-innocence_4397095_3236.html).

209. “Ley Reglamentaria del Artículo 6, Párrafo Primero, de la Constitución Política de los Estados Unidos Mexicanos, en Materia del Derecho de Réplica”.



## Detering future abuse

94. Many of the violations discussed above could operate to deter a public official or media outlet from violating the presumption of innocence. For example, a significant fine or prison sentence for contempt of court could have a deterrent effect both on the individual or business in question and send a clear message to others. Contempt of court can carry significant penalties. In Singapore, for example, fines of up to S\$100,000 and/or imprisonment for up to three years. Civil damages, while primarily a means of remedying harm to the victim of a violation of the presumption of innocence could have a similar deterrent effect. Some of the non-financial remedies could also operate in this way. For example, a newspaper in Mexico forced to allow a person to publish a response to inaccurate information could suffer damage to its reputation: people may be less likely to trust its coverage in future. Similarly, the reputation of an elected official could be undermined if they are forced to retract a wrongful statement or if a trial collapses because of their comments.
95. In addition, a number of the countries surveyed have remedies which are not designed to ensure the fairness of the trial or correct damage done to the person in question. In the LEAP Survey, lawyers from Bulgaria reported, for example, that when public officials make statements about guilt, disciplinary sanctions were possible (but noted that they had limited effect). Disciplinary actions were also cited as a possibility in the US where a US attorney or Department of Justice law enforcement official could be punished for violating federal regulations controlling the release of information to the public.<sup>210</sup> As in Bulgaria, we understand that these are rarely used. As of 2010, there were no recorded cases of violations resulting in either sanctions or disciplinary action. In Italy, disciplinary offences apply to judicial authorities (including judicial police) if they make public statements or interviews related to people involved in ongoing proceedings.<sup>211</sup> This can result in suspension for up to six months.<sup>212</sup>
96. As well as legal sanctions, internal disciplinary measures exist, operated by employers and industry regulators. In the US federal system, for example, if a person believes that a US attorney has engaged in professional misconduct, they can file a complaint with the DOJ Office of Professional Responsibility. In the case of legal professionals, including prosecutors in some jurisdictions, regulators frequently have the power to sanction misconduct. In some countries, codes of conduct for journalists also regulate press coverage that violates the presumption of innocence. In Italy, for example, the Journalists Code of Professional Ethics establishes that the journalist always respects the right to be presumed innocent and provides detailed rules about the conduct required to respect that.<sup>213</sup> For example, journalists must not give notice of accusations that could damage a person's reputation and dignity without guaranteeing an opportunity for reply.<sup>214</sup>

210. US, Code of Federal Regulation, 28 C.F.R. § 50.2.

211. Italian Legislative Decree number 109/2006.

212. Article 16 ff, Implementation Provisions of the Italian Code of Criminal Procedure.

213. Article 8, Italian Journalists Code of Professional Ethics.

214. Article 9, Italian Journalists Code of Professional Ethics.

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# **Conclusions and recommendations**

97. The presumption of innocence is protected as a matter of law in a wealth of human rights instruments and in national legal systems. It is crucial to ensuring a fair trial in individual cases, to protecting the integrity of the justice system, and to protecting the human dignity of people who are accused of committing crimes. It is clear that the presumption of innocence is affected by how suspects are presented in public, by statements made in public by public authorities about ongoing proceedings, by the content and tone of press coverage, and by the use of restraints in courtrooms or in public settings.
98. There is huge appetite for sensational, real-crime, real-time stories. This creates pressure for public authorities and the media to violate the presumption of innocence. Even without this, it would be challenging to implement these aspects of the presumption of innocence. For example, bright-line rules are hard to define: sometimes it will be necessary to arrest a person in a public place (even if that exposes them to press scrutiny) or to restrain them in court (even if that could affect how they are perceived by the decision-maker). Protecting the presumption of innocence also has to be balanced against other aspects of the right to a fair trial (such as the principle of open justice) and other human rights (such as free speech).
99. Recommendations:
  - a. The EU Directive is an important first step in making the presumption of innocence a reality in Europe but the EU will have to invest considerable time and political will to ensure its effective implementation. Member States' courts will also have to refer questions to the CJEU where it is unclear what EU law requires.
  - b. Meaningful reform will require profound changes of law, practice and culture. Robust laws are important, but a formalistic legal approach will not suffice. Long-term engagement of law enforcement, legal professionals (including judges, prosecutors and the defence) and the media will be crucial, alongside broader public education.

## Prejudicial statements

100. It is a clear violation of the presumption of innocence for a public authority to make public statements implying the guilt of a suspect. This can exert inappropriate pressure on the decision-maker, undermine trust in the justice system and irretrievably damage a suspect's reputation. In practice, however, such statements are a common occurrence in many countries across the globe (including in Europe), particular where there is considerable public interest due to the nature of the offence or identity of the suspect.
101. The important principle that media should be protected from being required to reveal their sources, facilitates the systemic press reliance on leaks from public authorities. These can take various forms: the press being tipped off about a high-profile arrest, the disclosure of the identity of a suspect or leaking of evidence. It also results in the routine use of quotations from the press from "anonymous sources close to the investigation". Such leaks are exceedingly hard to investigate and sanction, and can create significant bias in press reporting.
102. Recommendations:
  - a. Clear legal regimes are required to prohibit public officials making public statements implying the guilt of a suspect. Crucially, violations need to be investigated and enforced by impartial bodies, regardless of the seniority of the official in question.
  - b. Journalists should not be required to reveal their sources but efforts should still be taken to address the issue of leaks to the press (and to sanction violations), for example:
    - Information (such as the time of a high-profile arrest) and evidence should be shared with a restricted group of appropriately-trained people to minimise the risk of leaks.
    - Access to and sharing of restricted information should be monitored where possible (i.e. through technology which records who accesses electronic records); and
    - Leaks should be robustly investigated by an impartial body.

- c. Where it is found that public officials have made public statements implying the guilt of a suspect, redress must be provided. In particularly severe cases, this threatens the chance of the suspect receiving a fair trial, or undermines the integrity of the justice system, it may be appropriate to drop criminal charges or quash a conviction. Other remedies might include the payment of compensation and/or a public apology to victims.

## Press coverage

- 103. There are considerable differences in how countries' legal systems approach the question of how open ongoing criminal proceedings (or aspects of them) should be: some apply high-levels of secrecy (emphasising the importance of securing the fairness of proceedings and protecting the dignity of the suspect); others emphasise the importance of open justice. It is, however, clear that even where countries seek to impose secrecy, this frequently fails where there is considerable public interest in the story.
- 104. Media reporting on crime-related cases frequently violates the presumption of innocence. Suspects are commonly presented as though they are guilty (particularly in attention-grabbing headlines) and reporting is often unbalanced against the suspect. Some groups of suspects (migrants, refugees and/or Muslim) are more likely to bear the brunt of these problems. Although the picture certainly varies between countries and between sections of the press, there is clearly a huge problem. It is not, however, one that is easily addressed (at least, not by legal regulation) due to the important principle of media freedom, and the growing range of media outlets and the democratisation of the news through social media.
- 105. Recommendations:
  - a. 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. Training should be based on the personal participation of former defendants who can share their personal experience on how the coverage of their trial impacted their lives during and after the proceeding.

- b. 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).
- c. It would also be valuable to monitor press coverage (for example, of high-profile crime-related stories) and to use this to expose (and respond) in a timely fashion to reporting that violates the presumption of innocence.
- d. The adoption of a blanket prohibition on taking photos of people in restraints.
- e. The codes of conduct adopted by professional associations of journalists should contain a specific section on covering criminal proceedings.
- f. Where reporting is found to violate the presumption of innocence, appropriate measures should be taken to rectify this. In some extreme cases, for example involving statements by senior political figures or authorities directly involved in the criminal proceedings, where this could fundamentally threaten the integrity of the justice system, and the chance of a fair trial, it may be appropriate to drop criminal charges or quash a conviction. Other remedies might include the payment of compensation, publishing corrections or making public apologies.

## Presentation in court and in public

- 106. Research has shown that if people see an image of someone being arrested they are likely to think the person is guilty; and that the more severe the restraint used, the more likely this is. Despite this (perhaps because of it) in many countries it is common for suspects to be paraded before the media at the time of their arrest or during transfers to and from court. There is no doubt about the press appetite for these images. Neither is there any doubt about how these humiliating images can threaten fair trials or cause irreversible damage to a suspects' ability to recover after the ordeal of being prosecuted (even if they are cleared of any wrongdoing).
- 107. The perp walk has nevertheless become ubiquitous in some countries, most famously the US. Many countries in Europe have robust rules governing how suspects are presented in court (including the use of restraints and how a person is transported to and

from court) including to protect the presumption of innocence. These do not, however, always provide effective protections in practice. Countries have, however, developed good practices in this area, for example, by ensuring that suspects are spared the glare of publicity when they enter and leave court (often in restraints) by providing discrete routes where they cannot be seen.

108. It should be easier to protect the presumption of innocence in the more controlled setting of the courtroom; to ensure that the suspect is not presented in a way that makes them appear guilty. In practice, however, in some countries it is common for suspects to be restrained in court when there is no objective justification for this. Furthermore, many courts are simply set up in a way that makes all suspects look as though they are dangerous. The use of secure docks is common, despite research that shows the impact the use of docks has on whether a person is convicted.

109. Recommendations:

- a. 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 need to be effectively enforced with redress provided to victims.
- b. 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.
- c. The creation of court infrastructure where possible 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.
- d. Training of law enforcement officials in order to change the culture in relation to the use of restraining measures.
- e. Special regulation for vulnerable groups of suspects (children, elderly people, pregnant women) to make it the default that they are not restrained only if absolutely necessary and inevitable.

- f. 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.
- g. 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.



## Annex I: A checklist for journalists reporting on suspects,<sup>215</sup> produced by the University of Vienna

### General

- ✓ We believe in and apply independent, ethical & professional self-regulation
- ✓ We are portraying the suspect fairly
- ✓ We are not seeking to present the suspect as guilty
- ✓ The portrayal of the suspect is in line with the values, norms and legal stipulations of the Directive
- ✓ We are not portraying – visually or in print – the suspect in a way that would make us think they were guilty
- ✓ We are respecting the presumption of innocence

### Reporters

- ✓ Everyone involved in reporting the story is aware of the ethical guidelines on the presumption of innocence
- ✓ Everyone involved in reporting the story is aware of the legal guidelines on the presumption of innocence
- ✓ No one involved in reporting the story has been subjected to peer pressure to present the suspect in a certain way

### Reporting professionalism & style

- ✓ The report is factually correct
- ✓ The report is fair and balanced
- ✓ The report is not sensationalist
- ✓ We are not reporting allegations as fact
- ✓ We have not allowed the race to be first to impact quality or professionalism
- ✓ We do not imply that a suspect's use of the right to remain silent, or retraction of testimony, suggests guilt
- ✓ We do not refer to unrelated criminal cases involving either the suspect or their family
- ✓ We do not refer to criminal cases involving the suspect, in which they were found not guilty

215. This checklist is from a toolkit for journalists reporting on suspects, produced by the University of Vienna and due to be published.

## Reporting professionalism & style

- √ We are not promoting the suspect's guilt by inference or by association (by for e.g. referring to criminal friends or family members)
- √ We do not think that by adding "the presumption of innocence applies" at the end of the report, after having violated the right to presumption of innocence throughout the report, this makes it alright
- √ We are not abusing the use of anonymous sources, by for e.g. granting anonymity where this is not necessary and/or serves as a basis for the sharing of 'information' and 'quotes' that violate presumption of innocence
- √ We do not have box draw-outs of negative quotes
- √ We do not portray the victim's relatives as distressed
- √ We do not use quotes from victim associations, without reasonable counterbalance
- √ We do not exaggeration the danger posed by a suspect
- √ We do not employ loaded metaphors, similes, comparisons etc., such as the "Croatian Escobar", for suspects
- √ The reporting is not one-sided, for e.g. only through the prosecutor or friends of the victim etc.
- √ We do not emphasize nationality, religious faith, gender, culture, migrant status etc. when this is not relevant to the story

## Photos & videos

- √ We are not using symbolic photos that are emotionally laden against the suspect
- √ We clearly identify symbolic photos as such
- √ We clearly denote archive footage as such and without contextualisation
- √ We are not publishing, if permitted to identify the suspect, photos of them likely to violate the presumption of innocence, for e.g. 'aggressive' poses
- √ The report does not contain video or photos of the suspect in appearances implying guilt, for example in shackles, in jumpsuits, in cages, in prison vans, being accompanied by police officers etc.
- √ We are not using footage of crowds shouting for justice



## Editorial independence

- ✓ We have not allowed marketing, clickbait, or revenue considerations to supplant ethical and professional ones in the creating of this report
- ✓ The marketing or advertising department has neither overtly nor subtly or circuitously influenced the way in which the suspect is being presented in this report
- ✓ We have not been influenced by external advertising clients
- ✓ We are not violating the right to presumption of innocence for political reasons, because for e.g. we wish to curry favour with specific politicians, political parties or governments or because we have been pressured by them

## If the suspect is Muslim or migrant:

- ✓ We do not emphasize the religious faith of the suspect if not relevant to the story
- ✓ We do not emphasize the status of the suspect as a migrant, refugee or asylum seeker if not relevant to the story
- ✓ We do not oversimplify or stereotype
- ✓ We do not use sarcasm / subtly tendentious language, for e.g. the ironic hashtag "(another) #IsolatedCase to imply a cascade of crimes by Muslims and migrants, or the use of "Absurdistan" to describe a city where in the opinion of the reporter / news platform foreign Muslim suspects are being treated better than 'domestic' ones, undermining the presumption of innocence
- ✓ We do not use pejorative adjectives such as "brutal" or "out-of-control", "frenzied" etc. or pejorative words such as "jihadists", or loaded epithets like "scum" and "filth", implying guilt
- ✓ Our report is not part of a series of reports on foreign / Muslim / refugee suspects implying only they / predominantly they commit crimes
- ✓ We are not publishing pejorative information likely to fuel bias, such as reference to family members of suspects who are welfare recipients or who have many children or who live in social housing
- ✓ We are not playing to tropes and stigmatisations, such as the 'unemployed migrant living on state handouts'

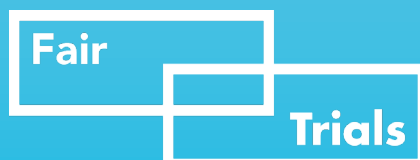
## Privacy

- ✓ We are not publishing the full or partial name of the suspect if doing so is in violation of norms, standards and laws
- ✓ We are not publishing any photos of the victim
- ✓ If the identity of the suspect is per law not to be made public, we are not publishing photos / footage of suspects through which they can be identified, even if they are not named in the report



## Our vision:

A world where every person's right to a fair trial is respected.



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