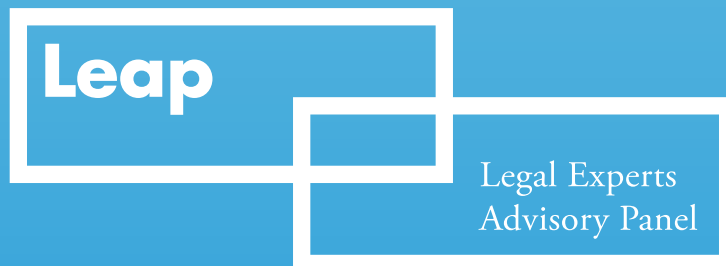


Justice in Europe

Annual Report
2019-2020



Who we are

The Legal Experts Advisory Panel (LEAP) is a European network of criminal justice reformers, with over 200 members from across Europe. Its membership includes:

LAW FIRMS:

Legal practitioners are in the front line of the fight to protect the right to a fair trial. Their first-hand experience in police stations, detention centres and courts is an invaluable tool to identify and challenge failures and abuses in the criminal justice system.

ACADEMIC INSTITUTIONS

Academics help analyse comparative trends and identify the gaps in existing frameworks. Their research work is key to inform legal changes. Academics also provide solid expertise into the legal trainings organised by Fair Trials.

CIVIL SOCIETY ORGANISATIONS

Civil society organisations help to raise awareness about fair trial issues among the

general public and advocate for change. They act as a watchdog against any backsliding on defence rights.

LEAP exists to improve respect for internationally-recognised fair trial standards in criminal cases across Europe by:

- Supporting networking and exchange of information between criminal justice experts across Europe to encourage cooperation, build understanding of different justice systems and exchange good practice;
- Sharing information on developments with international fair trial standards and engaging experts in the effective application of those laws;
- Informing the development of criminal justice and human rights policies within Europe; and
- Informing and supporting the work of LEAP members in using international human rights standards to improve respect for fair trial rights through advocacy, litigation, public campaigns and research.

LEAP is coordinated by the Brussels office of Fair Trials, the global criminal justice watchdog. Find out more about Fair Trials on www.fairtrials.org

 [@fairtrials](https://www.facebook.com/fairtrials)

 [@fairtrials](https://twitter.com/fairtrials)

 [Fair Trials](https://www.linkedin.com/company/fair-trials)



This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of this publication are the sole responsibility of Fair Trials and can in no way be taken to reflect the views of the European Commission.

Contents

Who we are	2
LEAP in Context	4
LEAP activities - highlights	5
LEAP's Priorities	6
Effective implementation	6
New legislation	6
Address emerging issues and long-standing challenges	6
Spotlight on Cyprus	7
Effective Implementation	8
Spotlight on the presumption of innocence	9
Role of the Luxembourg Court	11
Plain Language	12
Pre-trial detention	13
Advocating for EU legislation	14
Using existing EU standards	15
Effective assistance in pre-trial detention	15
Victims of violence in detention	17
Spotlight on the European Arrest Warrant	18
Who has the power to issue EAWs?	18
EAW – what about alternatives?	19
BREXIT	19
Spotlight on Poland	21
Emerging Issues	22
Evidence/admissibility:	22
Trial waivers:	22
Big data and algorithms:	23
Discrimination:	23
Audio-visual recording:	23
LEAP's initial response to COVID-19	24
Keeping people out of detention	24
Remote justice	25
Emergency measures and the rule of law	26
LEAP beyond the EU	27

LEAP in Context

In early 2019, it was already clear that the shared values that underpin the EU were facing unprecedented threats from populist, nationalist and anti-minority movements. The rule of law was in crisis in some Member States, most notably Poland and Hungary. Governments were stifling independent critique of and opposition to policies that violate human rights and the rule of law. The austerity agenda had starved investment in fair and effective criminal justice.

For the EU, 2019 was a big year with European Parliament elections in May and the appointment of a new Commission later in the year. As in previous election cycles, this presented a key window in which to seek to inform the EU's priorities in the area of criminal justice. In this context, LEAP was eager to emphasise that the EU's work to build an area of security, freedom and justice in Europe has never been more important and that this must be underpinned by a clear commitment to the rule of law, human rights and to justice in Europe. In his confirmation hearing before the European Parliament, Commission Reynders stated:

“Concerning the European Arrest Warrant, I will continue to monitor its application and work closely with you and with member states to continue to improve it. ... I will also look into how prison conditions in the Union could be improved and I would explore the idea of establishing minimum standards for pre-trial detention in order to strengthening trust.”

By early 2020, a new challenge to justice in Europe had emerged. COVID-19, and responses to it, have already started to have an unprecedented impact on criminal justice systems across the globe: courts are being closed, lawyers are no longer advising their clients in police stations, court hearings are being moved online, and the virus has entered already inhumane and overcrowded prisons. Pre-existing fears for the rule of law have been exacerbated by new emergency powers and new criminal offences. LEAP plays a particularly important role in this context helping to ensure that the rights of suspects and prisoners (often overlooked at the best of times) are not forgotten during this crisis.

Giulia Borgna, Lawyer (Italy): “Being able to discuss these issues with colleagues from all over Europe and to share the difficulties encountered at the domestic level, has allowed me to view things from a broader perspective and to take back new ideas to put into practice.”

LEAP activities - highlights

Some of the highlights of LEAP's work in the past year include:

The LEAP Annual Conference which took place in Lisbon in February 2020 brought together dozens of LEAP members from almost every EU Member State as well as candidate countries. We heard from inspiring keynote speakers (including Judge Paulo Pinto de Albuquerque of the European Court of Human Rights) and engaged through plenary discussions and break-out groups on a range of topics: technology and its implications for criminal justice across Europe; implementation of European defence rights laws; and the implications of the rule of law crisis in Europe for cross-border cooperation.

Many other LEAP meetings and events took place during the year, including meetings of the Advisory Board as well as the NGO sub-group of LEAP, JUSTICIA. Expert meetings took place on the Court of Justice of the European Union and in several Member States, thanks to the support of our LEAP members. Training was also provided to LEAP members in using storytelling for effective advocacy.

Many thanks to LEAP members for their engagement over the past year and to the

team at Fair Trials for all of their hard work on the coordination of LEAP's ambitious work programme, in particular: Alex Mik, Iva Petkovic and Marianna Tuokkola.

LEAP's greatest strength is the breadth of its members' knowledge and experience. We launched the LEAP forum in August 2019 with the hope that it will become a useful resource for all of our members, allowing quick access to the wealth of knowledge held in the network. In the forum, LEAP members can easily ask questions and expect quick responses. Members can also find and share important information and keep up to date with Fair Trials' activities.

Fair Trials conducts regular surveys of the LEAP membership. This year we asked LEAP members: "Has LEAP helped in your work? How?" Some of the responses are provided throughout this report.

From early 2020, Fair Trials' staff and many LEAP Members are now working in lock-down. Even in that context, however, LEAP continued to be active. LEAP members have been working with Fair Trials to track how justice systems and fair trial rights are being affected by COVID-19.

“Jordan Daci, Lawyer (Albania): LEAP activities are an excellent source of knowledge when many excellent colleagues share their own experiences Moreover, LEAP and Fair Trials' key documents and data are very useful in our daily work and can be successfully used as quick reference for some hot justice and fair trial topics.”

LEAP's Priorities

In early 2019, LEAP identified a number of key issues on which the new European Parliament and Commission should focus, but these priorities also became focal points for LEAP during the year.

EFFECTIVE IMPLEMENTATION

Adoption of legislation is only the first step towards improved fair trial protections. EU-wide laws will only have an impact in practice if they are implemented effectively.

Interpretation of EU law The text of new EU laws leaves considerable uncertainty and further clarity is needed.

Technical support The Commission (directly and through civil society) should assist Member States in addressing obstacles to protecting procedural rights.

Robust enforcement Procedural rights are now protected by EU law, but they need to be enforced, which requires:

- **Data** The collection of consistent and reliable data on the operation of criminal justice systems in the EU; and
- **Resources** The Commission needs greater resources to monitor Member States' work on implementation of the Directives and to enforce compliance.

NEW LEGISLATION

The Roadmap presents important first steps towards common minimum defence rights in

Europe but it is not "job done". A number of other key aspects of a fair and effective justice systems are being violated in EU Member States which could be usefully addressed by minimum EU standards

Pre-Trial Detention The excessive use of pre-trial detention is a pervasive problem in many Member States that the EU must tackle.

Reform of the European Arrest Warrant ("EAW") Misuse of the EAW is violating the human rights of EU citizens and must be reformed.

ADDRESS EMERGING ISSUES AND LONG-STANDING CHALLENGES

Evidence/admissibility Effective standards on the admissibility of evidence are crucial to effective evidence-sharing and the enforcement of fair trial rights under EU law.

Trial Waivers (plea bargaining) The EU is well-placed to be a world-leader on a rights-based approach to the growing phenomenon of trial waivers.

Audiovisual recording During police interviews, audiovisual recording could play a key role in preventing coercion and protecting rights.

Big data and algorithms The EU is well-placed to get ahead of the curve and develop a rights-compliant regulatory framework in this area.

Discrimination Some groups require special protections for their right to a fair trial to be respected on equal terms with others and steps must be taken to address the reality of direct discrimination.

Spotlight on Cyprus

Despite being a well-established Member State of the EU, most of Cyprus' procedural laws still derive from the colonial legislation enacted by the British and are very much based on Common Law. Cyprus has adopted EU law, but criminal justice professionals continue to follow rules that feel as if they are from a different time, and in fact are.

One example is Cyprus' criminal investigation procedure, which continues to heavily rely on the Judges' Rules, which were originally introduced in England in 1964. These are guidelines for the processes of investigation and questioning and help to determine whether resulting statements and confessions can be accepted as evidence in court. They were initially introduced to ensure that confessions be made voluntarily and provide oversight of the different stages of an interrogation. However, while the Judges' Rules were abolished in England in 1984 and replaced with the Police and Criminal Evidence Act, they remain in force in Cyprus.

"The Judges' Rules are in complete contradiction to the Directives", explained Demetra Sorvatzioti, LEAP Advisory Board Member, a lawyer and academic in Cyprus. Under the Judges' Rules, the police will for example continue to question a suspect who has decided to exercise their right to silence. Another LEAP member, Nicoletta

Charalambidou, a defence lawyer and representative of KISA (Action for Equality, Support, Antiracism) highlighted cases where suspects were questioned for eight hours without a lawyer. Suspects' rights to information are often violated, meaning they are unable to access other rights.

Although Cyprus has adopted the six EU directives on procedural rights, their implementation clearly remains patchy. Judges have appeared to be reluctant to engage with EU law, and there have only been a few preliminary ruling requests. Most criminal justice professionals still rely on laws older than the EU directives, and consequently suspects' rights are not safeguarded. For example, a suspect's file might not be shared with their lawyer, who will then have to decide their plea without access to sufficient information. Demetra Sorvatzioti told us of a recent instance where the court was not going to grant her client legal aid: "The court accepted my arguments and granted legal aid, but no lawyer or judge knew the existence of this directive".

Cyprus has been found by the European Court of Human Rights to have violated various human rights and serious shortcomings have been identified in its implementation of the Directives. This places vulnerable groups in particular danger. It is time for Cyprus to update its procedural laws.

Effective Implementation

Efforts by LEAP members made a significant contribution to the creation of the EU Procedural Rights Directives – a suite of Directives that protect the fundamental rights of defendants in the EU. We now need to make sure they are effectively implemented in all EU Member States.

LEAP contributes to this by:

- **Supporting national advocacy** for effective transposition of the Directives into national law. LEAP encourages the engagement of defence practitioners, academics and civil society in work to advocate for effective implementation within their own countries. It allows for the exchange of experience between Member States.
- **Increasing awareness** of EU fair trial standards by providing online and in-person training and written guidance and toolkits on EU law for legal practitioners. LEAP members also support each other in applying these laws in practice by, for example, developing and sharing template legal arguments for use in court.
- **Offering expert support:** Implementation of the Directives requires far more than legal transposition. Take, for example, the right of early access to a lawyer. This requires states to create systems for the swift appointment of a lawyer to attend police stations at unsociable times of day and night. Bringing together experts from across the EU allows for the exchange of good practices and LEAP members collaborate on in-depth projects to support practical implementation of procedural rights.
- **Encouraging enforcement** of the rights protected by the Directives by providing information to the European Commission about failures in implementation by Member State. LEAP members also breathe life into these EU standards by seeking their enforcement in national courts and remedies where EU rights are violated.
- **Increasing clarity:** LEAP members are also working to encourage cases to be referred to the Court of Justice of the European Union (“CJEU”) for preliminary rulings where further clarity is needed on the meaning of the Directives.

Anna Pivaty, Maastricht University (Netherlands):

“LEAP has helped to put the results of my academic work into practice.”

Spotlight on the presumption of innocence

Nobody should be treated as a criminal until they have been found guilty by court after a fair trial. Violating the principle of the presumption of innocence undermines defendants' dignity and right to a fair trial.

Although the right to be presumed innocent is now enshrined in EU law, violations are frequent. Fair Trials' report *"Innocent until proven guilty? The presentation of suspects in criminal proceedings"* published last year shows that public statements of guilt, media coverage presenting the suspect as guilty, and the use of restraints in public are very common. The research was produced together with the Hungarian Helsinki Committee, Aditus Foundation, Human Rights House, Mérték, Rights International Spain, and the University of Vienna, with pro bono support from Hogan Lovells. Since the publication of the report, Fair Trials and LEAP have held several events to highlight the threats to the essential right to be presumed innocent and discuss the findings of the report.

In October 2019, over 40 Lithuanian criminal justice actors met in Vilnius at an event co-organised by Fair Trials and LEAP member, Human Rights Monitoring Institute, after a series of high-profile cases, including a corruption case involving high-ranking judges and lawyers, sparked serious debate about the application of the right to be presumed innocent. Soon after the suspects were detained, photos of their arrests were posted online by media outlets, accompanied by sensationalist headlines such as: "Never before seen corruption in courts" and "A decade of court system changes was not enough to snuff out corruption". Although their names were not published, readers were able to identify the handcuffed suspects. When photographs of a defendant in handcuffs, sensationalist headlines, and statements from authorities have been published, they will often remain guilty in the eyes of the public, no matter the verdict.

Bulgaria experiences similar problems relating to media reporting of cases. LEAP member and criminal lawyer Asya O. Mandzhukova-Stoyanova has explained that in some cases, suspects are kept waiting outside the courtroom or lying handcuffed in the street to be photographed by the media. In one case a person's arrest was even carried out twice so it could be filmed. In June 2019, a cyberattack targeted Bulgaria's tax agency, compromising nearly every citizen's personal data. Due to the unprecedented scale of the hack, the authorities and the media were eager to find a culprit and quickly accused 20-year-old Kristian Boykov, a researcher specialising in detecting vulnerabilities in computer security systems. He was arrested and charged with cyberterrorism, an offence which allowed the prosecutor to use much harsher investigative means and detention measures. Several public statements and alleged evidence were released against the suspect and the company he worked for, portraying him as guilty. Such statements can exert inappropriate pressure on the decision-maker and irretrievably damage a suspect's reputation.

Appearances don't only matter in the press but also in the courtroom. Even though some countries have developed good practices, for example by providing discrete routes to limit the suspect's exposure to the public and the press, it is still common for suspects to be restrained in court when there is no objective justification for this. With the use of secure docks for example, many courts are simply set up in a way that makes all suspects look as though they are dangerous. Again, laws should limit the use of restraints and the exposure of the suspects to the public and all violations need to be effectively enforced with redress provided to victims. Training should be offered to law enforcement officials in order to change the culture regarding the use of restraining measures. The Directive on the presumption of innocence as well as case law of the European Court of Human Rights make clear that authorities should avoid presenting suspects or accused persons as guilty through the use of physical restraints like handcuffs unless there is a clear security risk.

Role of the Luxembourg Court

LEAP is actively seeking to promote the use of EU law in domestic criminal proceedings, and to encourage criminal practitioners to see the Court of Justice of the EU (“CJEU”) in Luxembourg as a regular and accessible forum.

Designed to build upon the European Convention on Human Rights, the six EU Directives on procedural rights for suspects and defendants come full of promise: the citizen gets clear, directly effective rights and criminal courts across Europe becomes a frontline enforcer of EU law, potentially at the expense of inadequate national laws.

The CJEU has an important role to play in clarifying questions of interpretation of EU law and in facilitating the process of the implementation of the EU Procedural Rights Directives by explaining their proper interpretation. These questions can (or must) be referred by national courts while the case is still live with the CJEU often providing an urgent response.

We created a working group within LEAP dedicated to supporting practitioners initiating referrals to the CJEU, and through this process we have also developed a series of useful tools for lawyers:

- A toolkit which sets out exactly how the process works and helps guide lawyers through the process of making preliminary references to the CJEU;
- Toolkits on each of the Directives, highlighting areas in which clarification from the CJEU is most needed;
- Template applications for preliminary references which can be adapted by lawyers across the EU, focusing on the right to information and the European Arrest Warrant; and
- A compendium which maps the growing body of CJEU case law on criminal justice measures.

Elizabeta Ivicevic Karas, University of Zagreb (Croatia):
“LEAP has helped me by broadening my knowledge and perspectives, especially by giving me the possibility to participate in excellent projects.”

Plain Language

If you can't understand your rights and the language used in the justice system, you don't have meaningful access to justice. Information should be clear enough (in wording, structure and design) for the intended audience to easily find, understand and use it. Clear communication, not only benefits suspects and defendants (who need to understand their rights in order to exercise them); it can also facilitate the work of law enforcement and increase public trust in justice.

EU law now requires that Member States provide people who are arrested or detained with a written document explaining their rights which is in simple and accessible language (a letter of rights). The reality, however, is very different. Generally, there is limited awareness of the importance of plain language amongst criminal justice professionals. This is often exemplified by how letters of rights are drafted. In some countries, for example, the letters consist of cut and pasted excerpts taken from complicated national laws, failing to take into account the often vulnerable situation of people being taken into custody.

Fair Trials has been working with LEAP members (the Hungarian Helsinki Committee (HHC), APADOR-CH and Antigone) to improve communication with people in the

criminal justice system and to create new, easy to understand, letters of rights. We are aiming to build on the achievements of previous research (led by HHC) which examined the letter of rights used in Hungary and we developed a more easily understandable version with the help of plain language experts and attorneys.

Rewriting these letters of rights poses a number of challenges: different letters of rights for children, adults, suspects in custody and those who are not; letters may vary from one locality to another; what information is most important to the suspect and what details to exclude; what order to explain these rights in. The support of plain language experts from across the EU, as well as members of LEAP, has been crucial to help address these challenges.

Fair Trials organised a Train the Trainers workshop in Brussels in November 2019, which brought together plain language experts and criminal defence lawyers from 13 member states. The purpose of the workshop was to introduce the concept of plain language, but also to try and instigate more action at a national level. We hope that, through initiatives like these, LEAP members can become part of a broader movement for the use of plain language in criminal justice.

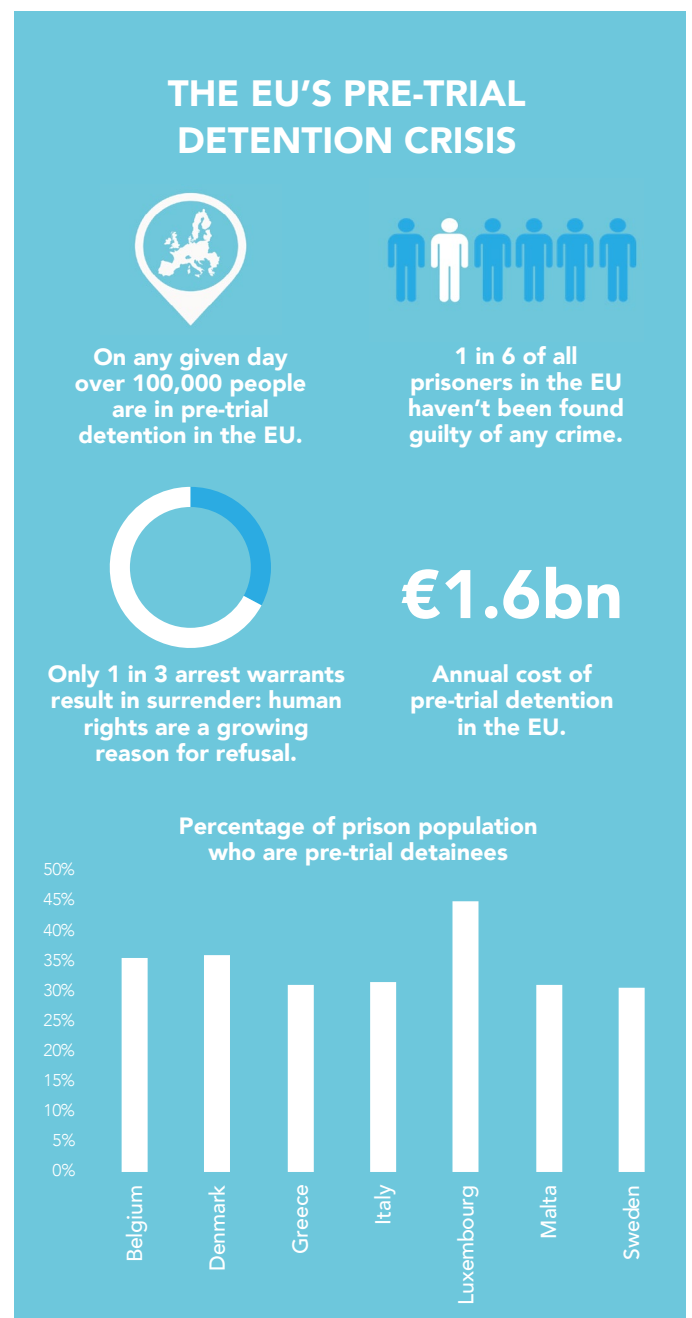
Pre-trial detention

The Roadmap presents important first steps towards common minimum defence rights in Europe, but more is needed to end policies and practices that violate the right to a fair trial and that threaten the area of freedom, security and justice. While there are many challenges which could be usefully addressed by minimum EU standards, LEAP has focused, in particular, on addressing the overuse of pre-trial detention.

Pre-trial detention deprives a person, who has not been convicted of any crime, of their liberty. Taking that fundamental right away from someone who is legally innocent should be the very last resort. However, pre-trial detention is often overused, with terrible consequences. In addition to the loss of liberty, not only does pre-trial detention have implications for the presumption of a person's innocence and their access to justice, it also impacts the detainee's health, employment situation, family life, housing and livelihood. Pre-trial detention can also be wrongly used as an investigative tool to increase the likelihood of a confession.

There are over 100,000 people across Europe currently being held in pre-trial detention, trapped in a legal limbo that can last for years. Pre-trial detainees represent approximately 23% of the total prison population. The overuse of pre-trial detention contributes to the EU's crisis of overcrowding in prisons which degrades prison conditions and puts the physical and mental health of prisoners at risk.

Pre-trial detention is also a financial burden for states. According to a recent study published by the European Parliamentary Research Service pre-trial detention costs EU Member States around €1.6 billion per year. The study found that Member States could reduce by €162 to €707 million per year in what they spent on "'excessive' pre-trial detention".



ADVOCATING FOR EU LEGISLATION

LEAP has continued to advocate for EU legislation to address the over-use of pre-trial detention.

It called on the European Commission to table legislation on pre-trial detention that protects the right to liberty and the presumption of innocence, and the European Parliament and Council should ensure that it:

- contains key procedural protections;
- requires the use of alternatives to detention;
- excludes minor offences and considers the proportionality of detention;
- ensures that reviews are regular, meaningful,

and evidence based;

- includes time limits protecting defendants against excessive pre-trial detention and;
- provides a right to challenge unlawful pre-trial detention and compensation for innocent people.

Although the new Commission has still not tabled any proposals, Commissioner Reynders has indicated that this is being considered:

“I will also look into how prison conditions in the Union could be improved and I will explore the idea of establishing minimum standards for pre-trial detention in order to strengthening trust.”

Rebecca Niblock, Lawyer (UK): “I think the most useful thing about LEAP is having a network of lawyers in other jurisdictions to call upon.”

USING EXISTING EU STANDARDS

Although the EU has so far failed to create robust standards on pre-trial detention, it has introduced other legislation with the potential to protect the rights of suspects in pre-trial detention and to reduce the unjustified and excessive use of detention.

EFFECTIVE ASSISTANCE IN PRE-TRIAL DETENTION

EU law now protects many rights which should allow the defence to participate effectively in pre-trial detention proceedings: timely access to the case file; legal assistance during police questioning and pre-trial detention hearings; consulting with their lawyer in police custody; and the assistance of an interpreter when needed.

Access to a lawyer at the initial stages of the criminal process can prevent unfairness and increase the chance that a person will be released. “The presence of a lawyer is undoubtedly vital to fairer pre-trial detention proceedings; but it is the effectiveness of that representation, beyond mere presence, which is key,” wrote Thomas Smith, Senior Lecturer

in Law in the University of the West of England Bristol, and LEAP Member in a guest post for Fair Trials.

Last year, Fair Trials and LEAP partners the Bulgarian Helsinki Committee (Bulgaria), the Centre for European Constitutional Law (Greece), the Hungarian Helsinki Committee (Hungary), Antigone (Italy), and APADOR-CH (Romania) published the study “*Effective Legal Assistance in Pre-Trial Detention Decision-Making*”. It assesses the impact these procedural rights protections are having on the fairness of pre-trial detention decision-making; in particular, whether suspects are receiving effective legal assistance.

It highlighted five key areas of concern:

Knowledge of defence rights

You can’t exercise your rights if you don’t know what they are. Without effective communication about their rights, suspects may not have the chance to consult a lawyer before the first judicial hearing at which decisions on pre-trial detention may be made, and by which time, they will likely have already been interviewed by the police.

Right of access to a lawyer and to legal aid

Suspects have a right to access a lawyer while in police custody and to obtain legal assistance in the context of decisions on pre-trial detention. In reality, not all countries properly uphold this right. Even where the law on paper is good, in practice it is hard or impossible for many suspects to exercise their right of access to a lawyer. Many places where suspects are detained also lack the facilities for confidential consultation between a lawyer and their client.

Access to the case file

In order to argue for their clients to be released pre-trial, lawyers need information about the case. Even though EU law recognises this, many Member States deny the defence access to this information, for example by giving prosecutors overly broad discretion to restrict access or creating practical obstacles to accessing or copying materials.

Right to interpretation

Non-nationals are over-represented among detainees in the EU and many suspects require access to interpretation. Thanks to EU law, we've seen Member States implement

changes to protect this right. However, there are persistent problems with poor quality interpretation and poor working conditions which prevent interpreters performing their important role.

Lack of alternative measures

Most legal systems recognise that pre-trial detention is a measure of last resort and allow for alternatives to imprisonment pre-trial. Despite this, in practice, judges tend to rule in favour of prosecutors' requests for detention, rather than applying alternatives or ordering release. Lawyers should advocate for their clients to be released or for alternative measures, but this is hard without time to prepare for the hearing, consult their client and consider the case file.

LEAP members are now seeking to address these concerns through litigation, national and regional advocacy and research:

VICTIMS OF VIOLENCE IN DETENTION

Putting a person in detention makes them vulnerable to violence. Detained people are isolated, stigmatised, and lack access to information and to communication with the outside world. Detention is not transparent – there is a lack of accountability and oversight. Procedural safeguards of people held in detention are not guaranteed either. Places of detention can and often do operate as a kind of legal black hole, even though states are legally and morally responsible for the safety of the people they detain.

Fair Trials worked with five members of LEAP (REDRESS (The Netherlands), Centre for Peace Studies (Croatia), Antigone (Italy), Hungarian Helsinki Committee and Civil Rights Defenders (Sweden) to examine the barriers to access to justice for detained people who suffer physical violence in detention, whether by detention staff or other detainees. We considered law and practice in six Member States, with a major focus on pre-trial detention in the context of criminal proceedings.

Where detainees suffer from violent crime, they are victims with rights under EU law, even if they are also criminal suspects

themselves. There is, however, a common failure to recognise that people can be both detainees and victims at the same time and that detainees' procedural rights and their rights as victims can co-exist. This conceptual dichotomy has serious implications for the ability of detained victims of violence to access and exercise Victims' Rights.

We also found that the ineffective implementation of the rights of victims (protected by EU law) for those in detention results in a lack of adequate investigations into, and accountability for, violence. This contributes to a climate of impunity, leading to the recurrence of acts of violence, arbitrariness and, ultimately, threatens the rule of law itself in places of detention. It leaves detainees in an unbearable position of vulnerability, contributing to high levels of mental ill-health, self-harm and suicide.

The project produced numerous reform recommendations for regional and national law-makers, but also for actors within the criminal justice system (prison services, judges, prosecutors and lawyers). LEAP members will be actively engaging on follow-up advocacy and litigation to advance respect for the rights that EU law is supposed to guarantee for victims of violence in detention.

Spotlight on the European Arrest Warrant

The European Arrest Warrant (EAW) has continued to feature heavily in the work of many LEAP members. It was a major theme at the LEAP Annual Conference and Advisory Board meetings and it has been a focal point for strategic litigation initiatives. LEAP provided input into a review of the operation of the EAW by the European Parliament; and its members have shared expert advice about important emerging decisions of the Court of Justice of the European Union (CJEU), and have collaborated on numerous individual cases.

WHO HAS THE POWER TO ISSUE EAWs?

A series of rulings by the CJEU during the year sought to address the questions surrounding who could issue an EAW. So, who can issue EAWs?

According to the CJEU, only judicial authorities deemed completely independent from the executive can do so. This means that the issuing judicial authority must be in a position to take into account all incriminatory and exculpatory evidence, without the risk that its decision-making power could be influenced by external directions, in

particular from the executive. To satisfy this requirement, the independence of the issuing judicial authority must be guaranteed by statutory rules and an institutional framework. The CJEU also confirmed that the concept of “judicial authority” is not limited to judges or courts, but more broadly to the authorities “participating in the administration of criminal justice” in each Member State. Therefore, the concept extends to public prosecutors that are institutionally independent.

In the case of Germany for example, the CJEU concluded that public prosecutors are exposed to the risk of being influenced by the executive in their decision to issue an EAW because the Minister for Justice has the power to issue instructions to them. Although the CJEU recognised that the current German government is unlikely to exercise this power, the political landscape in the country could change in the future. In the light of the growing trend of governments attempting to influence and control the judiciary, this ruling reflects a stand against government interference in judicial functions.

The independence of the judiciary is a key element of the right to fair trial, as enshrined in Article 47 of the EU Charter on Fundamental Rights. The CJEU had already taken a stand on the independence of the judiciary in the *Celmer* case, on the extradition of a suspect from Ireland to Poland, stating that a judicial authority must refuse to extradite if it considers that the individual's fundamental right to an independent tribunal and, therefore, their right to a fair trial, are at risk on account of deficiencies likely to affect the independence of the judiciary in the issuing Member State.

EAW – WHAT ABOUT ALTERNATIVES?

One of the long-standing areas of concern has been disproportionate use of the EAW in circumstances where less intrusive alternatives might be used. This leads to a disproportionate interference with fundamental rights and places unnecessary burdens on the resources of Member States. Some countries introduced refusal grounds based on proportionality, but the Commission has issued guidance stating that it is up to the issuing judicial authorities to determine whether issuing an EAW is justified including whether other judicial cooperation measures could be used.

Despite this guidance, LEAP members have continued to raise concerns about the use of the EAW when alternative measures would be more appropriate. In practice it is often impossible for lawyers to challenge the decision to issue an EAW (on proportionality grounds) in the issuing country. Even though EU law now requires people subject to EAWs to have access to a lawyer in the issuing Member State, this right is often impossible to exercise in practice. Many countries also do not have a clear legal mechanism to challenge the decision to issue an EAW and refuse access to the case file before surrender takes place.

This and other hot topics were discussed during the LEAP Annual Conference and at national meetings organised by LEAP members. The CJEU working group of LEAP also developed template pleadings to challenge EAWs where there is concern that the issuing authority did not duly conduct a proportionality review. It is designed to encourage domestic courts to refer a question to the CJEU for a preliminary ruling on the right of the executing authority to suspend surrender applying the fundamental EU law principle of proportionality.

BREXIT

LEAP members have long expressed concerns about the uncertain role of the UK in European criminal justice cooperation post-Brexit. Given the willingness expressed by both the EU and UK Government to ensure continued cooperation on security, we have considered the key areas where human rights commitments are needed given the significant impact of extradition on human rights. Any failure to ensure adequate human rights protections is likely to have a negative impact on the fairness, effectiveness and long-term sustainability of any agreement.

Security cooperation based on mutual trust operates on a shared set of common minimum standards. These include the European Convention on Human Rights (ECHR), and increasingly, the rights contained in EU law on the procedural rights of suspects in criminal proceedings. In order to obtain an extradition treaty that operates in the same way as the EAW, the UK must ensure that it complies with the growing body of EU law on minimum rights standards for participation in extradition under mutual recognition. Political will to conclude an agreement will not be sufficient: without alignment of standards, there is a significant possibility that the compatibility of the treaty with EU law will be challenged before the CJEU and in Member States' courts. Furthermore, as a growing area of EU law that continues to develop, the UK will need to commit to

compliance with minimum standards on an ongoing basis. This will be necessary to ensure that divergence does not appear in the long-term.

In 2014, the UK introduced reforms to give British courts the power to refuse extradition under EAWs where the interests of justice or the rights of the accused would be adversely impacted. These protections should be retained. There has been growing recognition across the EU that mutual recognition must not take precedence over fundamental rights, and the CJEU has set binding legal precedents to refuse extradition where fundamental rights are threatened. UK courts must continue to comply with ongoing CJEU jurisprudence on refusing extradition where required to protect human rights, as a baseline standard of protection.

Since the introduction of the EAW, a range of security cooperation measures have been introduced by EU law which mitigate the need for states to resort to harsh security measures such as extradition. If the UK and EU Member States only have access to extradition this will inevitably impact the rights of people accused of crime, and would diverge from the growing momentum across the EU towards more proportionate cooperation that respects human rights. Both the UK and the EU (and the people affected by future cooperation) would be best served by a comprehensive security treaty with a range of measures.

Spotlight on Poland

In 2009, the European Court of Human Rights concluded in the case of *Kauczor v. Poland* that Poland had a structural problem concerning the overuse of excessively lengthy pre-trial detention. Since then, a series of modifications have been made to Polish criminal law, criminal policies, the structure of courts and organisation of the prosecution service, and the practices of criminal justice authorities. So what is the situation regarding pre-trial detention in Poland now?

The Helsinki Foundation for Human Rights (HFHR), a LEAP member, published a report last year aimed at answering this question. Entitled “the trials of pre-detention” the report identifies two distinct periods and trends in the last decade: from 2009 to 2015 and then from 2016 to the present. The number of individuals in pre-trial detention during the first period decreased consistently from 9,460 in 2009 to 4,162 at the end of 2015. However, that trend reversed in more recent years, and as many as 8,365 individuals were being held in pre-trial detention on 31 May 2019. Currently, 90.46% of the requests to apply pre-trial detention are granted.

The report states: “The reading of ECtHR judgments highlights a number of key problems associated with the application of pre-trial detention: the long duration of detention; the failure to give case-specific

grounds for decisions on the application or extension of detention; disregard of non-custodial preventive measures; the recurrence of boilerplate arguments in extension decisions; citing the severity of the penalty or the nature of the alleged offence as a primary justification for the entire length of the requested pre-trial detention period.”

The report suggests that the impact of legislative changes on jurisprudential practice has been limited in Poland. HFHR recommends work be done to change attitudes toward criminal policies and to take away instruments from executive policy makers that allow them to influence specific judicial outcomes.

Over the past five years, the right-wing governing majority has passed dozens of bills that have widened political influence over the judiciary system and undermined the right to a fair trial. In August last year, the members of the JUSTICIA European Rights Network expressed their concerns in a letter to the President of Poland regarding the compatibility of a new amendment to the Code of Criminal Procedure with standards in international law. Under the amendment, public prosecutors will have a final say in some cases concerning pre-trial detention. If the court decides to revoke pre-trial detention and change it to bail, the prosecutor will be entitled to file an objection against such a decision, thus forcing the court

Emerging Issues

to suspend the execution of its judgement. LEAP has also urged the Commission to use the next five years to address longstanding and emerging challenges to justice in Europe, assessing the potential for EU intervention (including legislative) on a range of topics

EVIDENCE/ADMISSIBILITY:

Evidence has always been at the heart of criminal justice, forming the building blocks of the criminal case. However, challenges remain to address questions regarding the admissibility of evidence which is relied on by the prosecution when it has been obtained in violation of the EU's procedural rights standards. LEAP members have recently launched a new project to address these questions. The EU has also increasingly engaged in facilitating the cross-border exchange of evidence between Member States. Over the past year, LEAP has been active in responding to proposals for new EU

laws for cross-border e-evidence exchange which (in their current form) raise grave concerns for human rights.

TRIAL WAIVERS:

Countries across the globe, including EU Member States, are seeking to make criminal justice more efficient by creating new incentives for defendants to waive their human right to a trial by pleading guilty (including through "plea bargaining"). Without safeguards to ensure fairness and transparency in the justice system and to prevent coercive "incentives", this can create considerable challenges for human rights and the rule of law. If properly implemented and enforced, the pre-trial procedural rights protected by the Directives could mitigate many of these risks. The EU is well-placed to be a world-leader on a rights-based approach to trial waivers. LEAP members were please to start a project this year on this topic.

Constance Ascione Le Dréau, Lawyer (France):
“LEAP has broadened my horizons and enriched my toolbox in terms of what we should/could fight for, both as lawyers and as citizens.”

BIG DATA AND ALGORITHMS:

Some EU Member States are piloting projects in their criminal justice systems which gather and process large quantities of data through the use of algorithms. Existing experience of this in the United States demonstrates the threats and opportunities it poses, including by “baking in” bias in criminal justice. The EU is again well-placed (given its focus on fighting discrimination and protecting privacy) to get ahead of the curve and develop a rights-compliant regulatory framework for algorithmic criminal justice in Europe. We were therefore pleased to see the new Commission highlight this as an urgent priority and have produced a detailed paper on regulating artificial intelligence for use in criminal justice systems.

DISCRIMINATION:

Criminal justice is not equal with discrimination operating directly and indirectly. Some groups require special protections for their right to a fair trial to be respected on equal terms with others. The EU has recognised this in the context of children and it has committed to

protections for a broader group of vulnerable suspects. This agenda should continue with one priority being people with mental health conditions and learning disabilities. In terms of indirect discrimination, while in principle there is a commitment to equal justice within EU Member States; in practice, certain racial and religious groups are disproportionately affected. The EU should work to increase recognition and understanding of this reality and should support practical initiatives to address it.

AUDIO-VISUAL RECORDING:

This could play a key role in preventing coercion during police interviews, mistreatment in places of detention and in assessing whether other pre-trial procedural rights are being respected in practice. This is recognised in the context of the Children’s Directive, but the reducing cost of audio-visual recording equipment (and the increasing number of global best practice examples) means it could be applied much more broadly. The Commission should encourage and support the roll-out of audio-visual recording across the EU.

Alessio Scandurra, Antigone (Italy): “Thanks to its work with Fair Trials, ANTIGONE has strengthened its expertise in the field of procedural rights and, above all, has expanded its network of contacts and interlocutors, strengthening its information and advocacy work.”

LEAP's initial response to COVID-19

The COVID-19 outbreak, and responses to it, are having an unprecedented impact on criminal justice systems across Europe and globally. Committed to ensuring that the rights of suspects and prisoners are not be forgotten in this time of crisis, Fair Trials and the LEAP network launched the *COVID-19 Justice Project*.

With daily updates from LEAP members and detailed blog posts, our aims are to:

- Give a voice to experts who are continuing to work on the front line of criminal justice;
- Expose unjustified curtailments of rights (whether intentional or inadvertent) in the name of tackling the pandemic;
- Share experience on how states can pursue appropriate, proportionate and workable responses to the many challenges to justice systems during this time of crisis and;
- Offer clear, constructive guidance on how to address these challenges in ways that respect rights.

Here are just three of the issues that are arising and an outline of what LEAP is starting to do to address them.

KEEPING PEOPLE OUT OF DETENTION

One of the most important public health measures to combat COVID-19 is the restriction of physical contact and proximity. But the very nature of prisons, often overcrowded, makes this impossible. Incarcerated people are some of the most vulnerable to infectious diseases due to prisons' poor provision of sanitation and health facilities. This makes prisons epicentres for the pandemic. Visitation suspensions have also increased tensions and violence, leading to further risks to the life and health of both residents and prison staff.

The only way to preserve public health and safety and protect the right to life is to reduce the number of people in detention facilities. We published urgent guidance on the public health need to keep people out of detention which has been translated into a number of EU languages and widely disseminated through LEAP. Many countries have started to release prisoners or to offer alternatives to detention to mostly low-risk offenders, pregnant women and elderly people.

With pre-trial detainees making up a third of the prison population in many countries, Fair Trials has produced recommendations for criminal justice actors to reduce the number of people held in pre-trial detention. Lawyers play a key role in resisting pre-trial detention orders by highlighting the risk to health and life of putting someone in detention during the pandemic. This is also a time to make urgent applications for the release of individuals who have been held in pre-trial detention since before the crisis started. Building on work done by French and Belgian LEAP members, we therefore developed template applications for the urgent release of persons held in pre-trial detention, based on the relevant human rights standards.

However, despite some positive steps to reduce prison populations, it is concerning to see some countries, like France, making it easier to detain people for longer in pre-trial detention. New coronavirus-related criminal offences can also lead to detention.

REMOTE JUSTICE

Access to courts and prisons has been severely restricted and many countries have temporarily postponed all non-urgent court hearings. Various jurisdictions have been seeking ways to keep the courts running through means of remote access, including via video-link or telephone hearings. It is essential, however, that states do not rush to adopt these measures without properly considering the human rights impact of remote justice procedures, and in particular, the implications for the right to a fair trial. Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person.

We have produced a guide which summarises the human rights concerns related to the use of remote justice procedures and provides practical recommendations for countries that are either considering adopting or expanding the use of remote communications systems in criminal justice proceedings, or that are in the process of implementing them.

EMERGENCY MEASURES AND THE RULE OF LAW

In response to the outbreak, some countries have passed new laws to extend their governments' powers. New laws in Hungary have given rise to serious concerns for the rule of law. LEAP member the Hungarian Helsinki Committee has explained how the government has introduced legislation allowing it to bypass parliament, without a sunset clause, meaning it could maintain its extended powers indefinitely. In addition, many are afraid that the legislation gives the Hungarian government the power to criminalise criticism of its actions.

Meanwhile, LEAP members have reported how Romania has increased sentences and created new offences amid the outbreak. For example, failure to respect quarantines or hospitalisation now carries a penalty of 6 months to 3 years imprisonment or a fine. Bulgaria has also amended its Criminal Code to introduce

severe penalties for violating the lockdown and spreading what the government dubs fake news. The initial reports of how these are being enforced are concerning. Two doctors are being prosecuted for speaking out about shortages of protective clothing and masks.

We've published a commentary piece written by LEAP lawyer, Nicola Canestrini, on the impact of emergency measures on the rule of law in Italy. In his article, he concludes:

"But any emergency legislation is always a risk to the rule of law, because it has to be kept in mind that once a precedent to any kind of derogation of a fundamental right has been set, who can rule out the possibility that the same restrictions on fundamental rights will be reactivated again in the future in the name of another supposed emergency? [...] (The) risk is that we get used to 'temporary' restrictions on fundamental rights, so that they become dangerously .. permanent."

Wouter van Ballegooij European Parliamentary Research Service (Netherlands):
"LEAP provides me with many practical insights that illustrate the day to day impact of EU policies including areas where EU integration still needs to progress, like the area of pre-trial detention."

LEAP beyond the EU

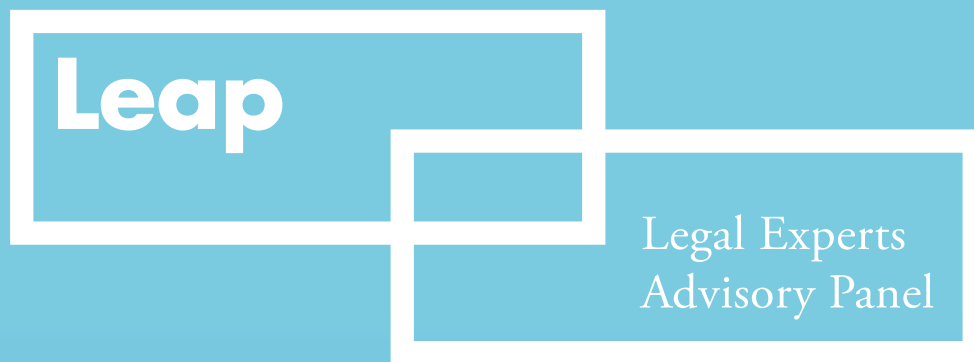
Last year LEAP continued to grow and to expand beyond the EU.

At the LEAP Annual Conference in 2019 Fair Trials presented its Transatlantic Bridge initiative, facilitating global knowledge-sharing on best practices in criminal justice. Since then, a number of LEAP members have engaged in this work, working with leaders in the US justice movement.

- As in Europe, over-incarceration is a pressing issue in the US and one of our first areas of focus was pre-trial detention. We worked with US bail reformers to learn from comparative examples from Europe to help reframe discussions in the US on reducing the use of pre-trial detention. We were delighted to have the opportunity to involve LEAP members from Italy, the UK, Ireland and Hungary in a high-level roundtable at Harvard.
- We have also worked with LEAP members on issues relating to plea bargaining. For example, we partnered with Fair and Just Prosecution (FJP) to facilitate a trip to Europe for elected American prosecutors, to obtain a fresh insight into alternatives to plea bargaining. Experiences from Europe have also been used to offer alternative approaches to fairer plea bargaining practices in work that Fair Trials has undertaken with the American Bar Association (ABA).

LEAP's work has also extended into Albania. Although Albania has been a party to the European Convention of Human Rights for over 20 years, there have been concerns raised by various human rights groups and international bodies about various aspects of its criminal justice system. These include shortcomings regarding the respect for the right of access to a lawyer, and flaws in its juvenile justice procedures. We believe that greater compliance with the standards set by EU law could help to address many of these challenges. LEAP members are working to train local lawyers and civil society organisations to raise awareness of these standards and help them to use them to strengthen the respect for fair trial rights in the country.

We have also been working in neighbouring Kosovo. Kosovo's criminal justice system has been repeatedly criticised for its failure to respect the basic rights of suspected and accused persons. LEAP in Kosovo will seek to respond to this, and to improve human rights compliance in the Kosovar criminal justice system through the promotion of EU criminal law in the area of access to justice. We hope that this will contribute to the development of respect for rule of law in Kosovo and towards EU integration.



A world where everyone's right
to a fair trial is respected

 @fairtrials

 @fairtrials

 Fair Trials