Legal Experts Advisory Panel

COMMUNIQUÉ

issued after the meeting of the

LEGAL EXPERTS ADVISORY PANEL

of 4 March 2014 in Brussels:

THE PRESUMPTION OF INNOCENCE

&

THE RIGHT TO BE PRESENT AT TRIAL

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INTRODUCTION

1. On 4 March 2014, Fair Trials International ('Fair Trials') brought together members of its Legal Experts Advisory Panel ('LEAP') in Brussels to discuss the presumption of innocence in law and in practice, in the context of the recent publication of the European Commission's proposal for a Directive on the presumption of innocence and the right to be present at trial[1] (a list of participants is supplied at Annex A.)

2. Prior to the meeting, participants were asked whether they thought the presumption was adequately protected in existing laws and what they thought, in broad terms, in relation to the Commission's Proposal. The discussion focused on the key areas covered by the proposal and this communiqué sets out the broad themes arising from the discussion.

3. This was a meeting established in order to begin seeking initial observations from expert lawyers within LEAP, based on the very early version of the text included in the Commission's proposal. Fair Trials will take this information into account when developing a position on the proposal.

PRESUMPTION OF INNOCENCE & RIGHT TO SILENCE

On the idea of strengthening the presumption of innocence

4. In general participants felt that it would be a welcome development to see an international institution underscore, through a binding instrument, things as fundamental to the right to a fair trial as the presumption of innocence and right to silence. It was recognised that, by and large, all countries have provisions in their national constitutions and laws which purport to protect these rights, in accordance with the principles developed by the European Court of Human Rights ('ECtHR'), but that, as with other areas covered by legislation adopted under the Stockholm Programme thus far, much of the problem lay in the manner of their implementation in daily practice.

5. Examples were given of specific areas where the presumption of innocence was not respected and these are discussed in context below. Because of the variety of issues discussed, participants generally felt that this was a potentially very broad topic, with many potential issues to tackle, such that there was plenty of scope for an EU legislative instrument to improve the situation.

Public pronouncements relating to guilt

6. It was noted that the issue was with public statements asserting the person was *guilty*, as opposed to asserting they had been *convicted*. Participants cited various cases of public statements by public authorities of this nature. One example was given of a prosecutor stating publicly, on the very same day as the acquittal of the accused, that 'no one can convince me that this person did not commit this act'. Several participants also stated that judicial and prosecutorial personnel often leaked information to the media during the preliminary stage of proceedings (which is supposed to be confidential) creating a public narrative about the case which undermined the presumption of innocence. It was even said that in some cases, divulgation of information created social alarm, which was then used to justify pre-trial detention.

7. It was however noted that public statements calling into doubt the presumption of innocence emanated not only from public authorities, but often from the media itself. Journalism was not always responsible in this regard. It was possible to conceive of the state's duty to preserve the presumption of innocence as extending to intervention in this area – an approach broader than that taken by the proposal and possibly at the limits of the legal basis concerned.[2]

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[1] Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013) 821 final).

[2] The ECtHR's approach under Article 6 is focused on public statements by state agents, judicial or otherwise, see *Gutsanovi v. Bulgaria* App. No 34529/10 (Judgment of 15 October 2013), paragraphs 191-193.

8. Conversely, however, participants acknowledged the need to ensure free debate of criminal justice. It was noted that in some contexts, laws designed to prevent leaks had the effect of placing justice further behind closed doors, such that a balance had to be struck between the presumption of innocence and the freedom of expression when determining what limits to place upon discussion of a criminal case.

Reverse burdens of proof

9. Participants were mindful of increasing recourse to reverse burdens of proof on the merits of cases and also pointed to general presumptions applying against the suspect or accused person prior to trial, such as the presumption that a flight risk exists, requiring the defence to seek evidence to the contrary.

Other relevant areas

10. Several participants pointed out certain other [issues/concerns?] which, whilst not covered expressly by the initial proposal, they felt fell within the ambit of the presumption of innocence:

    a. judicial decision-making in the area of pre-trial detention, which often involved strong and affirmative statements regarding the suspect's guilt, undermining the presumption of innocence;[3]

    b. the problem of judges or prosecutors highlighting the likely length of proceedings (and potentially detention), pressuring the accused to cooperate (with the result that in a case involving co-defendants, those who confessed were released while others were detained);

    c. the issue of trial length. It was said that if an acquittal comes after 10 years, this does little to clear the name of the accused if the initial arrest was the subject of public fanfare: the person is already by then categorised as a guilty person;

    d. the undermining of the presumption of innocence through the appearance of the accused in handcuffs, in prison clothes,[4] behind prison bars etc., areas where there would seem to be ample scope to adopt strong protections;

    e. the question of confrontation with witnesses, which if not possible may leave the accused unable effectively to challenge evidence levelled against them.

The right to silence

11. The right to silence, though it features in most countries' laws, is not always sufficiently protected. It was pointed out that notification of the right to suspects is not adequate everywhere. Attention was also drawn to the issue of peopled being asked or required to give statements or evidence as 'witnesses' when, objectively, they are already or may become suspects, leading to self-incrimination in breach of the right to silence. The pressure placed upon suspects to cooperate in order to avoid detention was also said to undermine the right to silence. The point was also made that, whatever the view of the ECtHR, the possibility of adverse inferences from silence, where this is possible under national law, places interrogators in a strong position to procure admissions of guilt.

Privilege against self-incrimination / the right not to cooperate

12. Several participants raised concerns about the use of compulsory powers to obtain material evidence which may fall within the category of 'evidence which has an existence independent of the will of the accused'[5] and so is not generally covered by the privilege against self-incrimination. It was said that in some jurisdictions, very broad use is made of administrative powers to compel the production of

[3] See, in this connection, *Garycki v. Poland* App. No 14348/02 (Judgment of 6 February 2007), paragraph 71; *Wojciechowski v. Poland* App. No 5422/04 (Judgment of 9 December 2008), paragraph 54.
[4] See, in this connection, *Jiga v. Romania* App. No 14352/04 (Judgment of 16 March 2010), paragraphs 98-103.
[5] See *Saunders v. United Kingdom* App. No 19187/91 (Judgment of 17 December 1996), paragraph 69.

information, which then becomes incriminatory evidence in criminal cases; some participants noted concerns about the use of invasive medical techniques, extending even to surgery, not being covered by the privilege against self-incrimination. It was felt that, in this area, EU law could go beyond the European Convention on Human Rights.

Remedies

13. Participants underlined that when a new measure is published, they hope to see rights which can be invoked in a useful manner. The nature of the proposed measure, dealing with abstract principles as opposed to the concrete organisation of criminal procedures, meant that its usefulness would turn partly on the form of remedy it required. In this context, participants were pleased to note the inclusion of a clear exclusionary rule for evidence obtained in breach of the rights to silence, the privilege against self-incrimination or the right not to cooperate, but noted with that the rule appeared to be qualified. The exclusion of adverse inferences from the exercise of the right to silence was well received.

RIGHT TO BE PRESENT AT TRIAL

Effective notification

14. Participants remarked that in several countries, the 'notification' of a trial date is formalistic in nature. Systems of notification included letters being sent to a last known address or legal 'domicile', and even publication of the case in the official state journal – which few citizens read. As a result, people who, legally speaking, are deemed to have been notified of a trial date may not in fact not have been aware of the trial, meaning their failure to appear cannot genuinely be regarded as an unequivocal waiver of the right to be present at trial. It was doubtful whether it was safe to rely on such forms of constructive notification. Given that prior notification of a trial date may exclude the possibility of a retrial (in both the proposed directive and the amendments to the European Arrest Warrant framework decision), this point was felt to be of the utmost importance.

15. The group also discussed the actual characteristics of 'retrial' procedures, which did not always allow full reconsideration of all material evidence and might in some jurisdictions be better characterised as simply appeal-level re-examinations of the case, in particular without the hearing of witnesses. Participants felt it elementary to say that if a person did not waive the right to all the guarantees of a fair trial, any review proceedings should ensure respect for all of those guarantees, not simply a legal redetermination of the merits of the case or consideration of new evidence, confrontation of witnesses being paramount.

Conclusion

16. LEAP Members present at the meeting recognised that the proposal was in its infancy but, at this stage, welcomed the initiative of the EU in seeking to strengthen the presumption. They felt that, in a community based on the rule of law such as the EU, further developing prosecution measures – either through judicial cooperation based on mutual recognition or at the supra-national level through a European Public Prosecutor's Office – could hardly be contemplated without further work to address the fundamentals of the right to a fair trial within the Member States.

17. Participants looked forward to working with Fair Trials International, which coordinates the Legal Experts Advisory Panel, to develop constructive contributions to the discussions on the content of the proposal once the initiative is taken forward by the new Commission and European Parliament.

LEGAL EXPERTS ADVISORY PANEL

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Annex A

Participants

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6	Marion Isobel	UK	OSJI
7	Dinko Kanchev	Bulgaria	Bulgarian Lawyers for Human Rights Foundation
8	Maciej Kuśmierczyk	Poland	Kuśmierczyk
9	Ondrej Laciak	Slovakia	Laciak Law Office □
10	Karolis Liutkevičius	Lithuania	HRMI
11	Kersty McCourt	UK/Belgium	OSJI
12	Ondrej Muka	Czech Republic	Advokatni Kancelar □
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