Innocent until proven guilty:
the use of restraints and its impact on the presumtion of innocence

comparative study

aditus accessing rights

Fair Trials

Hungarian Helsinki Committee

DESET GODINA KUĆE LJUDSKIH PRAVA

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This publication has been produced with the financial support of the Criminal Justice Program of the European Union. The contents of this publication are the sole responsibility of the Hungarian Helsinki Committee and can in no way be taken to reflect the views of the European Commission.

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Hungarian Helsinki Committee [HHC]

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

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

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

Fair Trials Europe [FTE]

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

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

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

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

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

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

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

Human Rights House Zagreb

Human Rights House Zagreb is a human rights watchdog and advocacy organisation founded in 2008 as a network of civil society organisations, with a goal to protect and promote human rights and fundamental freedoms. The House's vision is to build a democratic, pluralistic and inclusive society based on the values of human rights, the rule of law, social justice and solidarity.

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

Aditus Foundation

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

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

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Background

The presumption of innocence is the legal principle that any person accused of having committed a crime is to be presumed innocent until they are proven guilty according to law. This fundamental principle of criminal law sets numerous requirements for state authorities in terms of how they shall conduct criminal procedures, but it also has important implications concerning their obligation to protect the suspected or accused persons from harms that might stem from the criminal procedure way before a final judgment is reached. Perception of guilt by the wider public or even those who are vested with the task of deciding on the charges might be the most devastating of such potential – and potentially irreparable – harms.

The European Court of Human Rights has emphasised on several occasions that appearances around a criminal case do matter in a democratic society. Realising the fundamental truth of this stance, the European Parliament and the Council of the European Union adopted *Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, which obliges Member States 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.

While this provision may be simple in form, its application in practice is far from straightforward. The use of physical restraints in the courtroom can be necessary under certain circumstances. The need for a case-by-case assessment of the circumstances underlying each decision on the use of physical restraint means that, with few clear exceptions, bright-line rules on issues related to the presentation of suspects and accused persons by public authorities in court and to the public are not easily derived. In addition, the experience of legal professionals shows that in the day-to-day practice of authorities these dilemmas are more often than not decided to the detriment of suspects and accused persons, their dignity and the presumption of their innocence being sacrificed for the sake of the convenience offered by the exclusion of even the most minimal (often fully illusory) risk or in order to show a "tough" response to alleged crime.

With the aim of exploring common challenges and identifying transferrable good practices in the application of measures of restraint in public and the courts, the Hungarian Helsinki Committee, in partnership with Aditus, Fair Trials Europe, Human Rights House Zagreb, and Rights International Spain, has carried out a comparative research in five Members States (Croatia, France, Hungary, Malta and Spain). In addition to a thorough desk review (drawing on legislation, policy guidance, jurisprudence and statistical data), the research has relied on semi-structured interviews and online surveys with criminal justice practitioners, including judges, prosecutors, police officers and defence counsels, as well as persons who experienced the use of restraints as defendants. The present report provides a high-level overview of the research and analysis from an EU regional perspective.

Findings

Legal framework

Presumption of innocence and the use of restraints: The research has found that while all of the participating countries' legal frameworks stipulate the presumption of innocence, as far as this principle's relation to the means of restraint is concerned, there are significant differences. Some legal systems (e.g. that of France) expressly refer to the use of restraints in the context of the presumption

of innocence. Others (e.g. the Hungarian legal system) do not directly invoke this relationship, and aim to achieve that restraints be used only when necessary through general rules of proportionality and through determining the risks which may justify the use of restraints (e.g. the risk of an attack or absconding). Making the link between the presumption of innocence and the use of restraints clear may have a positive influence on the practice, so this difference might be significant.

Taking photographs of persons in restraints: Significant differences have been identified between France, where there is a blanket prohibition on taking photos and recording visual images of people in restraints, and all other researched countries, where no such ban exists. The difference is important, since based on the research it seems obvious that any solution other than a straightforward general ban has limited efficiency in preventing the recording and dissemination of images that undermine the presumption of innocence.

Vulnerable groups: Members of vulnerable groups (pregnant women, elderly people, persons with disabilities and children) were mentioned as frequent exceptions to the default practice of applying restraints when defendants are transported. However, in most jurisdictions there is no legislation that would expressly state that in the case of persons belonging to these groups the main rule shall be to refrain from using means of restraints on them, and that all exceptions to this rule should be subject to close scrutiny and solid justification.

Remedies: There is a great degree of divergence of remedial routes against the violation of the presumption of innocence in the researched jurisdictions, ranging from rather informal complaints against the use of restraints by the police to damages granted for the violation of the dignity of the suspect or accused person by the law enforcement agencies and/or the media. One important finding of the larger international research carried out in the framework of the same project was that the different remedies reflect different underlying rationales and philosophies. The remedy is partly determined by what it aims to protect or what the presumption of innocence is seen as aiming to protect. Where the concept is regarded as being tied more to individual dignity, damages are seen as an appropriate form of redress, whereas in jurisdictions where the integrity of the justice system is considered to be in the centre of the concept, even the dropping of criminal charges or quashing a conviction are considered to be appropriate sanctions for severe violations of the presumption of innocence.

Practice

One of the most important findings of the research has been how much institutional culture and societal pressures impact the enforcement (or rather its absence) of the provisions which are in place to guarantee that the presumption of innocence would prevail.

There is huge public appetite for sensational stories concerning crime, there is an almost atavistic public sentiment that wishes to see justice done – often before a final judicial decision could be handed down on whether the concerned defendant is guilty or not. This puts a pressure on both the media and the law enforcement bodies with the latter feeling the need to demonstrate their efficiency and toughness of crime through enabling journalists to capture images of persons arrested and in restraints instead of trying to preserve the presumption of innocence and the defendant's dignity and reputation. The other factor working against the presumption of innocence is the law enforcement personnel's innate preference for resolving the conflict between the protection of the defendant's rights and security to the detriment of the former, which is to some degree understandable on both the personal and the institutional level, but can have irreversibly damaging impacts on the defendant's life.

Due to these external and internal institutional pressures, the practice of the use of restraints is often very different from what should result from the written norms. In some cases, the actual instances are clearly unlawful: for example, some practitioners complained about the police leaking information to the press about arrests that are about to take place at the suspects' home, and in two of the researched countries examples were shared about the law enforcement personnel taking the acquitted defendant in handcuffs back to the prison to gather his or her belongings. In other cases, the violation is less obvious due to the large margin of appreciation that must be allowed to law enforcement and judicial officials when they decide on whether means of restraint should be used or not.

The research has also shown that that remedies are rarely used in practice, partly because the concerned persons and legal practitioners regard them as not really meaningful, but also partly because – due to the existing general culture around the issue – even they sometimes regard the use of restraints as a more or less natural element of the procedure.

Conclusions

The authors of the research report have concluded that these issues can be addressed in three – combinable – ways.

a) Trainings and codes of conduct can be useful tools in changing the culture of the concerned professions, including journalists. These trainings should include encounters with former defendants who can share their personal experience on how the coverage of their trial impacted their lives during and after the proceeding. It could also be considered to make it mandatory for journalists covering criminal cases to undergo such trainings.

b) There are some aspects of the issue that can be addressed through legislation. On the one hand, legislation can contribute to culture change. By way of example, a legal framework which declares that there shall be no handcuffing in the case of certain vulnerable groups (such as persons with disabilities or pregnant women), unless there are very pressing grounds to apply restraints, could go a long way in changing the mind-set of law enforcement personnel.

On the other hand, reducing or excluding personal discretion with regard to certain matters may improve the defendant's chances of getting a trial where the presumption of innocence is respected to a greater extent than what appears to be the norm in a number of Member States. The most obvious example for this is the blanket prohibition of taking photographs of persons when they are in restraints, which the authors have identified as a good practice compared to other solutions which in practice fail to achieve a sufficient protection of the presumption of innocence. A measure of similar nature would be to create the law enforcement personnel's or unit's quasi-objective liability for leaks on arrests (e.g. through a rebuttable assumption that the media has acquired information on the planned action from them).

c) Finally, an efficient way to minimise the chances of a breach of the presumption of innocence and the dignity of the suspect or accused person is the creation of (both court and detention) infrastructure that reduces the likelihood of the defendant being seen in restraints by the public, the media and also the actors of the proceeding including the judge or the jury. One such example is the creation of dedicated paths and entrances where the defendant can enter the courthouse unseen by others.

1. Introduction

This report[1] has been developed in the context of the project titled *"Suspects in Restraints: the importance of appearances: how suspects and accused persons are presented in the courtroom, in public and in the media — SIR"*. The SIR project is a European research project carried out in five Member States of the European Union (Croatia, France, Hungary Malta and Spain), under the coordination of the Hungarian Helsinki Committee based in Hungary, in partnership with Aditus, Fair Trials Europe, Human Rights House Zagreb and Rights International Spain.

The main objective of the SIR project is to contribute to the proper application of Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereafter: the Directive), reducing the number of instances in which suspected and accused persons are presented to the courts and the public, including as through the media, in ways that create a perception of guilt.

By carrying out the project activities, the specific objectives are to: (i) provide a general overview of the application of restraining measures on suspected and accused persons in Member States and the extent to which public officials respect the presumption of innocence in their public communications; (ii) collect best practices and innovative ideas, and provide concrete guidance on how to apply physical restrictions to suspected and accused persons in court and in public and how to communicate with the media about ongoing investigations and prosecutions; (iii) to raise awareness among public authorities and the media regarding the importance of how a suspected or accused person is presented in court or in the media and highlight the ways in which different practices can increase or decrease perceptions of guilt; and (iv) strengthen the exchange and cooperation between judicial and media experts across the EU on the application of physical restraints and on communication between public authorities and the media.

The research is comprised of two pillars: one is the presentation of the suspected or accused persons before the courts, placing particular emphasis on the use of measures of physical restraint (legal research), and the other addresses the manner in which suspected and accused persons are presented to the public in general by the media (media research). This report addresses exclusively the presentation in court (legal research) and has been developed using a common research methodology used by all partner organisations.

In the SIR project a practical toolkit on the use of restraints for police and judicial officers was also developed, based on the examples and best practices compiled in the different countries during the research.

1.1. Problem statement and aim of the project

As the European Court of Human Rights (ECtHR) has repeatedly underlined in its case law on the presumption of innocence: the manner in which suspects and accused persons are presented by the

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

authorities to the public or in the courts can have adverse consequences on the fairness of proceedings.

The Directive provides two key safeguards how suspects and accused persons are presented in the courts and the public:

- Article 4 of the Directive obliges Member States to ensure that the **public statements** made by the public authorities do not refer to a person as being guilty; and,
- Article 5 of the Directive obliges Member States to ensure that suspected and accused persons are not presented as being guilty, before the courts or the public, by means of the use of **measures of physical coercion**.

The application of these two provisions, while simple in form, is not straightforward in practice. Effective communication with the public on public safety matters is of vital importance in building public trust and in conducting certain types of investigations. Meanwhile, the use of physical restraints can be necessary in certain circumstances. The need for a case-by-case assessment of the circumstances underlying each instance of communication with the media and each instance of use of physical restraints means that, with a few clear exceptions, there are no bright-line rules on issues of presentation of suspects and accused persons by public authorities in court and to the public.

The Directive on the Presumption of Innocence recognises this tension. Recital 19 states that "Member States should inform public authorities of the importance of having due regard to the presumption of innocence when providing or divulging information to the media. This should be without prejudice to national law protecting the freedom of press and other media." According to Recital 20: "The competent authorities should abstain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons, unless the use of such measures is required for **case-specific reasons** (…)."

Therefore, the key issue of the study will be examining the application of Articles 4 and 5 of the Directive[2] in order to determine how Member States address the manner in which suspected and accused persons are presented before the courts and the public, placing special emphasis on the use of measures of restraint, with a view to solving the existing deficiencies and identifying best practices that can be applied EU-wide.

1.2. Methodology of the project

The research was carried out using a common methodology. First of all, there was extensive desk research covering the partner countries' procedural legislation, instructions, circulars and official documents on the use of restraining measures, national statistics and reports. This desk research was completed with a review of case law and legal scholars' opinions. Second, semi-structured interviews were carried out with practitioners involved in criminal proceedings, and online surveys were conducted.

The interviews were carried out on the basis of questionnaires prepared by the regional coordinator and provided to all the partner organisations.

[2] On 18 April 2018, the term for completing the transposition of the Directive expired. By that date, Member States were to have transposed this Directive in their domestic judicial systems via the adoption of laws, regulations and administrative provisions in accordance with the standards set out in said instrument.

The research was guided by the following ethical principles: (i) informed consent: all persons interviewed were informed of the content of the project and of the processing of the information obtained via the interviews, giving prior, written authorisation for the same; (ii) protection of data: the data obtained in the course of the research was treated confidentially, stored securely and the anonymity of participants vis-à-vis third parties was guaranteed in relation to the statements given in the course of the interviews; (iii) use of data: the data obtained during the interviews for this research will only be used in the context of this project.

In France FTE conducted stakeholder interviews with a cross-section of the criminal justice community in France, including judges, prosecutors and a lawyer (2 public officials from the Ministry of Justice (one who is responsible for the judicial police and the other who is part of the penitentiary administration), 4 judges, 2 prosecutors, 1 criminal defence lawyer from the Paris Bar).

In Malta Aditus conducted interviews with 3 lawyers and 47 stakeholdwers responded to the online survey (6 lawyers, 38 police officers).

In Spain 19 stakeholders were interviewed (5 police officers: *1 from the National Police Force, 1 from the Guardia Civil, 2 from the Ertzaintza, the Basque regional police and the Mossos d'Esquadra and 1 from the Catalonian regional police,* 4 judges, 4 prosecutors, 2 civil servants in the Justice Administration (in Madrid), 1 ministerial official (in Madrid), 2 lawyers (in Madrid), 1 arrested person (in Madrid in 2015), who was held in pre-trial detention for around a year and a half and who was ultimately acquitted (2018). Moreover, RIS received 1 written reply to the questionnaire and 13 replies to the online survey for lawyers (54% with 20 years' experience or more).

In Croatia, also 19 stakeholders interviews were conducted (3 attorneys, 2 deputies of the county state attorney, 2 professors from the Police Academy, 1 professor from the Faculty of Law, 1 representative of senior police officials, 1 police unit commander, 2 criminal police investigators, two prison directors, 2 Heads of Security Departments in a penitentiary or prison, 2 judicial police officers and 1 accused person).

In Hungary 14 lawyers from different regions of the country responded to the HHC's online survey. Furthermore 13 interviews were conducted, including 2 judges, 9 lawyers, 1 officer from the Ombudsperson's office and 1 member of the Independant Police Complaint Board.

1.3. International Standards concerning the presumption of innocence

The defendant's right to be presumed innocent is an essential part of fair trials guarantees. This legal principle is contained by several international human right instruments, such as the Universal Declaration of Human Rights (**UDHR**) ("no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed"), the International Covenant on Civil and Political Rights (**ICCPR**) ("everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law") and the European Convention of Human Rights (**ECHR**) ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law").

In addition, it has also been incorporated into secondary EU law, namely into the **EU Charter of Fundamental Rights**[3] and the **Directive**.

[3] Article 48 – Presumption of innocence and right to defence

The Directive was required to be transposed by all EU Member States by April 2018. The ECtHR had already a wealth of **case law regarding standards on the presumption of innocence**, and has crystallised several of the key standards relevant to our research that are now communicated in the Directive:[4]

Media coverage: The ECtHR expressly provided that "a virulent press campaign can […] adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused".[5] For non-adversarial systems, the ECtHR holds 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."[6]

Presentation of the defendant: The ECtHR emphasises that while the presumption of innocence is one of the elements of a fair criminal trial, it is not limited to a procedural safeguard in criminal matters: its scope is broader, and requires that no representative of the State should say that a person is guilty of an offence before his or her guilt has been established by a court. "*This is because the presumption of innocence, as a procedural right, serves mainly to guarantee the rights of the defence and* ***at the same time helps to preserve the honour and dignity of the accused***."[7]

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

The complainant of *Jiga v Romania* was Director General of the Economic and Budgetary Directorate at the Ministry of Agriculture and Food. He and his co-defendant working in the same ministry were charged with trading in influence, accepting or soliciting bribes, and abuse of office to the detriment of public interests in connection with a privatisation procedure. He was placed in pre-trial detention and taken from the remand house to court during the proceeding which lasted for two years. On these occasions, he was regularly taken to court in handcuffs and dressed in the prison clothing usually worn by convicts. The ECtHR concluded that the applicant's public appearance in prison clothing had not been justified by the authorities. His damage had been increased by the fact that his co-accused appeared at the hearings in civilian clothing, such difference being likely to reinforce the impression that the applicant was guilty.[8] The ECtHR therefore found that there had been a violation of the right to be presumed innocent.

In *Ramishvili and Kokhreidze v Georgia*, the ECtHR found that the use of metal cages, as well as armed guards and the live broadcast of the proceedings was 'humiliating' and a violation of Article 3. The case

[4] The summary of case law below is largely based on: Fair Trials: Innocent until proven guilty? The presentation of suspects in criminal proceedings, p. 6. Available at: https://www.fairtrials.org/publication/innocent-until-proven-guilty

[5] Guide on Article 6 of the European Convention on Human Rights (criminal limb), European Court of Human Rights, Strasbourg, 2013, p. 45. Available at: https://echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

[6] Ibid.

[7] European Court of Human Rights, Konstas v Greece, 53466/07, § 32. basis for the summary is the legal summary prepared by the Council of Europe/European Court of Human Rights as available at http://hudoc.echr.coe.int/eng?i=002-531

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

concerned the co-founders and shareholders of a television channel, one of whom was the anchor of a popular TV talk-show. They were on trial for the offence of extortion for allegedly demanding payment in exchange for not disclosing an embarrassing documentary about an allegedly corrupt parliamentarian. The oral hearing on their appeal against the ordering of their pre-trial detention took place in an extremely overcrowded hearing room, where the applicants were kept in a barred dock, surrounded by several guards. The ECtHR concluded the following: "During the judicial review of the issue of their detention, the public had seen [the applicants] in a barred dock which looked very much like a metal cage, separated from the rest of the court room. Heavily armed guards wearing black hood-like masks had been present in the courtroom. The hearing had been broadcast live throughout the country. Such a harsh and hostile appearance of judicial proceedings could have led an average observer to believe that 'extremely dangerous criminals' had been on trial. **Apart from undermining the principle of the presumption of innocence, the disputed treatment in the courtroom had humiliated the applicants in their own eyes, if not in those of the public** [emphasis from author]. The special forces in the courthouse had aroused in them feelings of fear, anguish and inferiority. Nothing in the case file suggested that there had been the slightest risk that the applicants, who were well known and apparently quite harmless, might have absconded or resorted to violence. The Government had failed to provide any justification for such stringent and humiliating measures." [9]

In Gorodnitchev v Russia, the applicant arrested on suspicion of theft and two assaults was forced to appear in handcuffs at the public hearings and made several requests for them to be removed, but to no avail. The ECtHR concluded that none of the evidence in the file suggested that had the applicant not worn handcuffs when appearing before the court there might have been a risk of violence or damage, or of his absconding or hindering the proper administration of justice. Although it had not been shown that the handcuffing had been aimed at debasing or humiliating the applicant, it was disproportionate to the security requirements, and therefore the applicant's appearance in handcuffs at the public hearings amounted to degrading treatment.[10]

The EU Directive goes a step further than the ECtHR and clarifies that measures of physical restraint run counter to the presumption of innocence, not just Article 3 of the ECHR. The Directive gives examples for such means of restraint, including handcuffs, glass boxes, cages and leg irons,[11] and also explains that where possible, States should abstain from presenting suspects in court or in public while wearing prison clothes, to avoid giving the impression that those persons are guilty.[12]

1.4. National standards concerning the presumption of innocence

In all the surveyed Member States the legal provisions, using different wordings, explicitly guarantee the protection of the presumption of innocence.

In **Croatia** Article 28 of the Constitution[13] and Article 3 of Criminal Procedure Act[14] (hereinafter 'CPA') stipulates that "everyone is presumed innocent and may not be held guilty of a criminal offence until such guilt is proven by a binding court judgement."

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

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

[11] Recital 20.

[12] Recital 21.

[13] Constitution of the Republic of Croatia ('*Ustav Republike Hrvatske'*)

[14] Act on Amendments to the Criminal Procedure Act (OG 70/17)

The **Hungarian** Fundamental Law as well as the Code of Criminal Procedure (CCP)[15] incorporates this fair trial principle stating that "no person shall be considered guilty until convicted by a final and binding judgment of the court".[16] Although the Hungarian Fundamental Law allows for the restriction of fundamental rights to allow the effective exercise of another fundamental right or to protect a constitutional value, provided that the limitation is absolutely necessary and proportionate to its legitimate objective, the Hungarian Constitutional Court established that the necessity and proportionality test shall not be used in relation to the presumption of innocence.[17] However, since the Hungarian Constitutional Court does not consider the use of restrains within the context of the presumption of innocence (as it will be explained below), the use of restraining measures (e.g. handcuffs) can be justified if carried out in accordance with the conditions laid down by law and the principle of proportionality.

Article 24 of the **Spanish** Constitution does also not refer to the use of restraining measures in the context of the presumption of innocence, but states that "all persons have the right [...] to a public trial without undue delays and with full guarantees and to be presumed innocent".

In **France** and **Malta**, the legislators took a different approach. The laws establishing the principle of presumption of innocence, unlike in the aforementioned countries, directly connect this main principle with the use of restraining measures. Article 366D of the Maltese Criminal Code[18] provides that "suspects and accused persons shall not be presented as being guilty, through the use of measures of physical restraint". In France, Article 9 of the Declaration of Human Citizens' Rights of 1789[19], which has a constitutional rank in the French legal system, states that "everyone is innocent until declared *guilty and that if it deemed necessary to arrest a person, the use of restraining measures that is not necessary must be severely punished by law*".

2. Legal framework concerning the use of restraining measures with special focus on Croatia, France, Hungary, Malta and Spain

2.1. General prohibition to use of restraining measures and its exceptions

Article 5 of the Directive establishes the following:

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.*

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

Whilst the first paragraph of the Article introduces the **general prohibition** of the use of measures of physical restraints, the second paragraph, for logical reasons, provides **possible derogations** from the main rule. In general, we can state that all surveyed EU countries' legal systems contain the basic

[15] Act XC of 2017 on the Criminal Procedure

[16] Artice XXVIII(2) of Hungarian Fundamental Law and Article 1 of Code of Criminal Procedure

[17] Decision of the Constitutional Court No 11-1992. (III.5.)

[18] Criminal Code CAP. 9 of the Laws of Malta

[19] The Declaration of the Rights of Man and of the Citizen of 1789

principle of avoiding the use of restraining measures if possible and mention situations in which the use of handcuffs or other measures of physical restraint can be justified.

Another commonality in the countries covered by the project is that the use of handcuffs, shackles or other restraining measures on suspects and accused persons is regulated in legal norms of various levels, such as constitutions, acts of Parliament and regulations. Relevant provisions are also contained by non-legal sources, e.g. instructions, internal prison rules or guidelines.

The **French legislation seems to provide the strongest protection** of the presumption of innocence in the context of the Directive. In addition to the Declaration of Human Citizens' Rights invoked above, Article 803 of the Criminal Procedure Code[20] states that "no one shall be handcuffed or submitted to other physical restraint" except when it is necessary to prevent the person from absconding or if the concerned person is considered to be a danger to others or to himself/herself.

As it was mentioned earlier, **Maltese legislation** also explicitly refers to the prohibition of the use of measures of physical restraint in the context of the presumption of innocence. Article 366D of the Maltese Criminal Code[21] allows for a derogation from that main rule by stating that nothing shall prevent the police or any court from applying measures of physical restraint that may be required for reasons relating to security or to the prevention of suspects or accused persons from absconding or from having contact with other persons.

The **other countries'** legislation also implies the general prohibition, but **less directly**.

In **Hungary**, the CCP, the Police Act,[22] the Service Regulation of the Police,[23] and the Act on the Penitentiary System[24] contain the most important rules on the application of the measures of physical restraint.

Unlike the old law on criminal procedures, the new CCP which entered into force in 1 July 2018 prescribes the requirement of proportionality by stating in Article 2 that everyone's dignity shall be respected and that a fundamental right may only be restricted in criminal proceedings for reasons, in the manner and to the extent set out in this law, provided that the objective pursued cannot be achieved by any other, less restrictive measure.

Article 48 of the Police Act contains a closed list of the situations in which suspects and accused persons can be handcuffed. This is an exhaustive list stating that police officers may apply handcuffs to prevent the concerned person (i) from absconding, (ii) self-harm, (iii) attacking, as well as (iv) to end disobedience or resistance. Moreover, the Act adds that there are no grounds for handcuffing if the disobedience ended or the goal of a police operation can be achieved without it.[25] Furthermore, the Police Act also contains the general requirements of necessity and proportionality.[26] It provides that any measures taken must be proportionate to the objectives pursued and they must be the least restrictive among those provided by law. With respect to the restraining measures, including handcuffs, it establishes that the police officers can only use handcuffs or other coercive measures if

[20] 'Code de procédure pénale'

[21] Criminal Code CAP. 9 of the Laws of Malta

[22] Act XXXIV of 1994 on the Police

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

[24] Act CVII of 1995 on the Penitentiary System

[25] Article 16 of Act XXXIV of 1994 on the Police

[26] Articles 15 and 16 of Act XXXIV of 1994 on the Police

the conditions laid down by law are met. In addition, while using them, the officer must have due regard to the principle of proportionality and the measure taken cannot cause disproportionate harm to the person concerned.

Similarly, the Act on the Penitentiary System prescribes[27] handcuffs can only be applied to prevent the detainee from attacking someone, absconding, leaving without permission or inflicting self-harm, or to put an end to disobedience against a lawful measure. The law also sets for the principle of necessity and proportionality.[28]

So although the Hungarian laws do not contain the main rule of avoiding the use of restraining measures in the context of the presumption of innocence as explicitly as the French provisions, it has to be noted that a similar conclusion as to the guiding principles results from the combined reading of the aforementioned rules.

Spain and **Croatia** use similar legislative solutions as Hungary by focusing on the exceptions i.e. on the cases where the use of restraining measures can be justified. According to the **Spanish procedural legislation**, extraordinary security measures (including handcuffs) "will only be applied in the event of disobedience, violence or rebellion, or when preparations or attempts to escape have been made".[29] It also contains that handcuffs can be used in order to immobilize a person to avoid escape, self-harm or attacks on others.[30] In addition, according to Article 5.2 c) of Organic Law 2/1986, Police are bound by the principle of proportionality concerning the use of measures of restraints.

With respect to the use of measures of physical restraint, the **Croatian provisions**[31] **seem to be somewhat more permissive.** The police officers are empowered to use different means of force. As the use of force also limits fundamental rights, it is necessary to respect the principle of proportionality when force is applied. That means that police officers need to use the least coercive means of achieving the goal if possible.

However, in Croatia, the language concerning the general requirement to avoid the use of restraining measures unless absolutely necessary is not as clear as in the other researched jurisdictions. According to the rules concerned, in general, while arresting someone or while bringing the person to the police station, detention unit, investigative prison, investigative judge or state attorney, police officers are not obliged to use measure of restraints if there is no risk of escaping, resisting or attacking the police officers, or self-injury or injuring another person. If the above mentioned risk does exist, they are entitled to use measures of restraints or other means of force in order to prevent resistance or attack. Thus, the formulation of the provisions seems to guarantee a power that is more discretionary to the police than the regulation in place in the other Member States. (It must be mentioned that previous regulation made it mandatory for law enforcement personnel to handcuff the concerned person while bringing him or her to the police station or to the state attorney or investigative judge, but it has been amended to allow more discretion for officers and to avoid handcuffing when deemed unnecessary by the personnel carrying out the task, so in this regard there has been improvement in the Croatian system).

[27] Article 19.

[28] Article 15.

[29] Article 525 of the Criminal Procedure Act

[30] Instruction 12/2017 of 14 September from the Secretary of State for Security, sections 2 and 3.

[31] Act on Police Affairs and Authorities, Code of Practice for Police Officers, Ordinance on Reception and Treatment of Arrested Person and Detainee with the Records of Detainees

In light of the above, we can conclude that the relevant provisions, **in general**, are very similar in **all scrutinized countries**. Moreover, the rules provided by the different legislative frameworks seem to follow the purpose of the Directive. However, it has to be noted that even if the legal provisions are mostly in accordance with the Directive, they do not ensure full compliance. Thus, full implementation of the Directive demands improvements in practice and institutional culture.

2.2. Arrest, transfer and escorting suspects and accused persons

First, it has to be noted that there are two typical situations in which there is a danger that people appear to be guilty due to the disproportionate use of restraining measures: (i) the moment of the arrest and (ii) when people are transported/escorted to the authorities/courts, since these are the situations in which the person concerned can meet the public, can be seen in handcuffs by their neighbours or relatives or can appear in the media.

(i) Arrest

In **France**, pursuant to Article R434-17 §4 of the French internal security code (Code de la sécurité intérieure), the rules provided for by Article 803 §1 of the criminal procedure code apply to persons under arrest i.e. "The use of handcuffs or shackles is justified only when the person under arrest is considered to be dangerous for others or for him/herself, or likely to abscond".

In **Malta**, the Criminal Code[32] also prohibits the use of "harshness, bond or other means of restraint unless indispensably required to secure" the arrest of a person.[33] However, the **Police Act**[34] states that "Police officers may use such moderate and proportionate force as may be necessary to ensure the observance of the law".[35]

Moreover, the Police Code of Ethics[36], which is presented to all members of the Police Force, states that the presumption of innocence is one of the principles guiding the police force and should be protected and respected. However, no further details are provided on how this presumption should be protected or what behaviour should be avoided in order to avoid a breach. The same Code of Ethics mentions that a police officer is allowed to use force only when strictly necessary and to the extent required for the performance of their duty.[37] It should be noted that the Code of Ethics does not provide any guidelines on the use of measures of restraint or whether the use of such restraint is considered a use of force.

The **Hungarian** Police Act provides an exhaustive list of cases in which a person can be subject to arrest.[38] A classic example is when the court orders someone's detention or when a person gets caught in the act of committing an intentional crime (in which case arrest is mandatory) or when a simple suspicion of having committed a criminal offence arises with regard to someone (in which case the

[32] Criminal Code CAP. 9 of the Laws of Malta http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574 (last accessed on 10 September 2018)

[33] Article 355AB of the Criminal Code, CAP. 9 of the laws of Malta

[34] Police Act (Cap. 164)

[35] Article 75 of the Police Act, CAP. 164 of the Laws of Malta, (last accessed on 10 September 2018)

[36] Police Code of Ethics, 2002, https://pulizija.gov.mt/en/police-force/Pages/Code-of-Ethics.aspx (last accessed on 10 September 2018)

[37] Ibid.

[38] Article 33 of the Police Act

police officer has discretion as to whether arrest the person or simply record his/her data so that he/she can be summoned for an interrogation later on.

To implement the arrest, police officers may use coercive measures ranging from simple physical force to more severe forms of coercion, including batons, tear gas spray, a service dog or fire arms. The most often applied means of restraint is handcuffs. As it is stated above, handcuffs may be used only for preventing escape, self-harm, attack, or in order to end disobedience, and the Police Act also states that police officers must pay attention to the principle of proportionality when taking any measure.

In **Croatia,** the CPA[39] prescribes the powers of the police[40], to undertake arrests. While arresting, police officers are authorized to use force (means of force) if it is probable that alert measures and orders are not sufficient.[41] Generally, a police officer will handcuff the arrested person if there is a risk of self-injury or escaping, resisting or attacking the police officers or other persons.

In addition, even if the person does not resist arrest, police officers can still decide to handcuff a person for safety reasons based on the circumstances of the criminal offense, the body type of the person and his or her earlier conviction. This is an example of using measures of restraint **preventively**. Using handcuffs in such cases is not considered as an instance of using force under the Croatian law. Even though the Act on Police Officers and Authorities does not define situations in which measures of restraint can be used preventively, the Code of Practice for Police Officers does.

It is important to note that this differentiation **affects the reporting obligation** on the use of restraining measures: if handcuffs are applied as a use of force, there is extensive reporting obligation, if however they are applied preventively, there is no separate obligation on the officers to provide a detailed report to their superiors.

Apart from handcuffs, police officers can use belts, rope or other means of binding in some cases. The hands are tied to the back or the front (if under the supervision of at least two police officers). The legs can be tied only in exceptional cases. When using handcuffs, police officers must ensure that the handcuffs do not cause unnecessary bodily pain or injury to the person concerned.[42]

Regarding the **Spanish procedural legislation,** it has to be noted that it also defines four cases in which the use of handcuffs or other security measures can be justified: disobedience, rebellion, violence and when an attempt to escape has been made. Handcuffs should be used only as long as is strictly necessary.[43]

Furthermore, Instruction 12/2007 of 14 September from the Secretary of State for Security establishes guidelines of conduct that officers should follow during arrest and while the arrested person is being held at the police station. With respect to the arrest, it establishes that, to the extent possible, "use of techniques or instruments of direct coercion should be avoided, and if this is not possible, the amount of harm done to the arrested person and the officers involved should be kept to a minimum".[44] As for

[39] Act on Amendments to the Criminal Procedure Act (OG 70/17)

[40] Article 106 of Criminal Procedure Act

[41] Article 82 paragraph 1 of the Law on Police Affairs and Authorities

[42] Article 133 paragraph 1-4 of the Code of Practice for Police Officers (Croatia)

[43] Article 525 of Criminal Procedure Act

[44] Instruction one, 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.

the **use of handcuffs**,[45] the arresting[46] may **consider** whether or not to use handcuffs, taking into account, in general, **factors** such as the characteristics of the offence or the attitude of the arrested person,[47] as well as exceptional circumstances (e.g. pregnancy).

The Spanish provisions specifically provide for the protection of honour and human dignity of a person in relation to the arrest.[48] According to the Criminal Procedure Act it should be carried out in a manner which is the least harmful for the arrested person. This means that the arrest must be as discreet as possible in order to protect the honour, image, dignity and privacy of person.[49] For this purpose, he/she shall not be exposed to the public unless it is necessary and unavoidable.[50] Moreover, officers of the State Security Forces shall be governed by the principles of consistency, appropriateness and proportionality in the exercise of their duties and the use of the means at their disposal.[51]

The Prosecution Service has also adopted guidelines to be considered by prosecutors when giving instructions to the General Police, particularly during the investigation stage. According to "Instruction 3/2009 on controlling how arrests are carried out", dated 23 December 2009, "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." During arrests, 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."[52]

(ii) Escorting and transferring the suspects, accused and detained persons

Concerning escorting and transferring suspects, accused and detained persons, the **French provisions provide a high level of procedural safeguards**. First, it has to be noted that due to strict regulation concerning restraining measures,[53] "the use of handcuffs is, in principle, strictly limited regardless of whether the person concerned is being held in police custody, being brought to court, detained pending trial or detained following conviction. The public officials accompanying the person shall assess whether there is evidence of any danger which alone may justify the use of handcuffs or other measures of restraint, taking into account the circumstances of the case, the age of the person concerned and any information obtained regarding his character."[54]

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[45] The officers receive the necessary training, on a regular basis, on operative intervention techniques, including the means to immobilise and/or arrest, use of handcuffs, transfer and stewarding, etc.

[46] During transfers "the material and human resources deemed advisable depending on the circumstances of each case will be used, taking into account the dangerousness of the arrested person, the facts of which he/she is accused, the duration of the transfer and any other circumstance that may exist", instruction ten, section 1 of Instruction12/2007.

[47] Instruction nine, section 1 of Instruction 12/2007.

[48] In particular, the Organic Law 2/1986 on Security Forces

[49] 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 Diligenciaspor 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.

[50]Instruction nine, section 4 of Instruction12/2007, 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.

[51] Article 5.2.c of Organic Law 2/1986 on Security Forces and Instruction seven, section 3 of Instruction 12/2007.

[52] Conclusion three, Instruction 3/2009.

[53] Article 803 of the criminal procedure code.

[54] Country Report: France, point 1.2.2.

With regard to the transfer of detainees from prison, handcuffs or other measures of physical restraint are allowed to be used to prevent escape or other incidents during the transfer.[55] Based on the circumstances and the information given by the prison director, or his/her delegate, on whether the detainee is **dangerous**, the senior escorting officer is responsible for deciding whether the detainee should be handcuffed or subject to other measures of restraint. The same applies to the transfer from the court to the Police Station in case of pre-trail detention. The senior escorting officer is either a police officer or an officer of the prison where the person is being detained.[56] In high security cases (e.g. terrorism), a member of the security forces (e.g. ERIS) may escort the detainee.

The **level of security** (1 to 4) of the transfer defines which restraining measure should be used. Level 1 and 2 refers to detainees who qualify as less dangerous or cases in which there is low risk of absconding, while levels 3 and 4 apply to more dangerous people and cases in which the risk of absconding is high. There are two electronic systems, called Romeo and Genesis, in place helping to assess the risk a detainee may pose and to plan the transfer accordingly. Genesis contains data on previous incidents and/or the behaviour and attitude of the detainees. In addition, as set out in the law,[57]the escorting public officials have to take into account other factors as well, such as the circumstances of the case, the age, or physical characteristics of the detainee when deciding which measure of restraint should be applied.

In Hungary, as mentioned earlier, the Police Act states that **handcuffs can only be used** in order to end disobedience or to prevent self-harm, an attack and to prevent the person from absconding. In principle, this should also apply when a person is being escorted, however, lower ranking norms (an d especially their application) somewhat dilute this strict approach.

The Service Regulation of the Police refers back to the Police Act's provisions, but also adds examples of situations where such measures can be taken. This list covers the four specific cases in which handcuffs are allowed to be used according to the Police Act. However, it also states that "the use of restraining measures can be justified, in particular when the detained person is subject to an escorting order, when the person is guarded outside of the detention facility or when only one police officer escorts the person to the competent authority".[58] Those rules raise some **serious concerns**. Under the principle of the hierarchy of norms, the Regulation's provisions shall not contradict legal acts of a higher status, i.e. provisions of the Police Act. Therefore, the Regulation should not go beyond the Police Act in terms of allowing for the use of restraining measures. Thus, an escorting order or the guarding outside of the detention facility should not in itself justify the use of handcuffs. While in principle, this provision of the Regulation could be interpreted in accordance with the Police Act, in practice, it leads to an almost automatic handcuffing when a person is escorted by the police to court or another authority.

The Regulation makes a distinction between an 'ordinary escort' and a 'strengthened escort'. Ordinary escort is carried out in cases in which, based on the already available information, there is no reason to believe that the person would try to escape or attack. In situations where the aforementioned risks exist or escorting the person is carried out under difficult circumstances, a strengthened escort is applied. Moreover, the Regulation also establishes the obligation to give instructions to the accused concerning their expected behaviour while being escorted and a warning that restraining measures will be applied in case of escape, attack or disobedience.[59] In addition, it states that „the escorted

[55] Article D294 of criminal procedure code

[56] Article D.315 of the criminal procedure code

[57] Article 803 of the criminal procedure code

[58] Article 76 (4) of the Regulation on Police Service

[59] Article 76 (5) of the Service Regulation of the Police

person must be handcuffed when the person's **dangerousness** justifies it." The use of the general term "dangerousness" again carries in itself the possibility of a wider interpretation that would be allowed by the strictly exhaustive list of the Police Act (although it can be argued that the term coincides with the risk of those behaviours – escape, attack, resistance, self-harm – that the Police Act lists as potential grounds for applying handcuffs).

Escorting prisoners is subject to a different legal regime, although the principles and the framework are similar. According to the Act on the Penitentiary System,[60] coercive measures may only be applied to the extent necessary in order to achieve the legitimate goal of that measure. Regarding the use of handcuffs, the law stipulates that handcuffs may be applied to prevent absconding/leaving without permission, attack, self-harm, and to end disobedience.

The internal prison guide concerning the escorting of inmates outside the prison (Prison Escort Guidelines)[61] stipulates the rules for escorting prisoners outside the detention facility. Point 3 of the Prison Escort Guidelines states that transferring and escorting prisoners to ensure their appearance before the authorities (usually the court) is the most risky and demanding task among the duties and therefore qualifies as a high priority task.

Point 14 of the Guidelines list the factors that must be taken into account while organising the transfer and escorting of prisoners. These factors include, for example, the severity of the alleged or committed offence, and the background, attitude, body type and the security regime of the concerned person. In addition, it also refers to the person's **dangerousness** as the basis of the application of restraining measures.

While the Guidelines suggest that the use of handcuffs and other restraining measures is subject to individual assessment, in reality this is actually never the case. It stems from the approach (mentioned in Point 3 of the Guidelines) that the risk of incidents is assessed to increase significantly during escorting, therefore handcuffs, shackles and other restraining measures play a crucial role in providing security. Therefore, the use of restraining measures, especially handcuffs, is practically automatic (detailed in point 4.).

Unlike in France, the Hungarian system does not provide for a separate, dedicated path to the courtroom, which would enable the escorted person to avoid being seen in public. Nevertheless, the Guidelines set out that the accused and the guards should first wait in a separate room, away from other people or in the transport vehicle.

Spanish legal and non-legal provisions concerning escort and transportation overlap with those regarding arrest. Notably, during transfers the detainees' dignity and their fundamental rights must be respected with due consideration to the safety of driving.

According to Instruction 12/2007, it is for the escorting officer to decide on the use of handcuffs.[62] Apart from the general rules (mentioned with respect to arrest), it also provides additional guidelines for the transfer of prisoners. It lists the factors which need to be considered during the assessment, e.g. attitude, characteristics of the person, the seriousness of the crime, as well as special

[60] Article 15 of Act on the Penitentiary System

[61] Instruction 26/2018. (V.15.) OP on Escorting Inmates outside the Penitentiary Institution;

[62] Instruction ten, section 1 of Instruction 12/2007

circumstances "that suggest the reduction or adjustment of the means" (for example physical impediment).[63]

The rules of the Prosecution Service's guidelines apply to the transfer as well, namely it will be necessary to adopt "appropriate precautions to protect persons who are escorted by police officers from the curiosity of the public and from every kind of publicity, as well as to avoid, to the extent possible, that they appear handcuffed before photographers and television cameras."[64]

In Croatia, three typical situations can be distinguished with regard to escorting suspects or accused persons:

a) When the defendant is subpoenaed, but fails to appear in front of the competent authority and fails to justify their absence, a warrant for compulsory appearance can be issued by the court and is executed by the police.

Police officers serve the warrant to the defendant who has to follow them. If the defendant refuses to comply with the warrant, the police officers are entitled to use force,[65] including restraining measures. It is for the police to decide on the means of force to be applied. It has to be noted that, before bringing the person to the authority that issued the warrant, the police officer in charge of carrying out the escorting verifies whether there is any information suggesting the necessity of the use of restraining measures, i.e. any data indicating the risk of escape, resistance or attack. If so, the officer in charge will prepare a 'plan for compulsory appearance', which is approved by the superior officer. In such a case, the police will normally handcuff the person and bring him/her with an official police vehicle that has a separate space for the person concerned.

b) After arrest, when escorting a person by the police from the police station or detention unit to the State Attorney, the following rules apply.

As it was mentioned before, after arresting a person, the police are allowed to use restraining measures in case a risk of absconding, attack, or self-injury is in place or if the person resists.

In cases where there are grounds for the suspicion that the arrested person has committed a criminal offense, the state attorney may order the person's detention in order to be able to establish identities, check alibis and collect evidence. After the state attorney has examined the case, he/she may order the police to bring the detainee in front of the investigating judge who decides on investigative detention.[66] If the detainee needs to be brought before an investigating judge or state attorney, he/she will be escorted out by at least two police officers using the safety measures ordered by the detention supervisor. The escorting can be carried out on foot or in a special police vehicle. If the defendant was handcuffed during the transportation from the police station or detention to the court or state attorney's office, the investigative judge or the state attorney interrogating the person can decide to have the handcuffs removed from the defendant. Usually, handcuffs are not used during the course of questioning, except for security reasons. After the interrogation, the escorting police officers can decide whether to handcuff the accused again.

[63] Instruction nine, section 3 of Instruction 12/2007

[64] Conclusion three of Instruction 3/2009.

[65] Article 97 of Criminal Procedure Act

[66] Article 112 of Criminal Procedure Act (Croatia)

c) Escorting/transferring suspects from the investigative prison to their trial hearing is conducted by the judicial police (officers entrusted with keeping the penitentiary and prison system in order).

Under the provisions of CPA, judicial police officers are allowed to use special measures to maintain security and order, such as handcuffs or, if necessary, shackles with handcuffs or straps. If the detainee needs to be transported to the court, the need for applying special measures of maintaining the security and order, including the use of handcuffs, could be considered.[67] The escorting is carried out by judicial police officers on the basis of an execution order for transportation issued by Head of Security Department from the Penitentiary Centre or Prison. The order contains information on the prisoner (name, surname, identification number) and other data, such as the time, place and route of the transfer as well as a risk evaluation (risk of escaping, attacking a judicial officer or other person, risk of self-harm), the need for weapons and other equipment, including handcuffs or other means of restraint and the number of police officers carrying out the transportation.[68]

In the **Maltese legal provisions** with regard to escorting suspects or accused persons, we **can hardly find** any specific rules on the use of restraining measures. This suggests that the general rules must be applied, i.e. the general prohibition of the use of restraining measures with the exceptions of security reasons taking into account other safeguards, such as the principle of proportionality and necessity.

The only source that specifically covers the use of restraining measures during transfer is the **Prisons Regulations,**[69] which apply "to prisons and to any other place that has been declared to be a prison under the Prisons Act,[70] including the police headquarters and the cells in the Courts' building in Valletta.[71] Regulation 69 of the Prisons Regulations prohibits the use of chains and irons as well as the use of handcuffs, restraining jackets and other body restraints as a punishment.[72] They should not be used except when the Director of Prisons deems it necessary as a precautionary measure to avoid escape. However, **they shall be removed when the prisoner appears before a judicial or administrative authority** unless that authority orders otherwise.[73] The particulars of every case under Regulation 69 must be recorded by the Director in a register kept for this purpose.[74] However, it should be noted that under Regulation 69, the Director may also put in place restraints based on medical grounds and in order to prevent a prisoner from injuring himself/herself or others."[75]

2.3. Provisions concerning vulnerable groups

In general, we can state that legislation in the surveyed countries, with the exception of certain provisions, does not place special emphasis on the protection of vulnerable groups. Generally, the provisions state that all circumstances, including special factors, such as health, pregnancy, injury or other physical impediment as well as age or social conditions, must be considered when deciding on the use of restraining measures.

[67] Article 30 paragraph 1 of Ordinance of House Rules in Investigative Jail

[68] Article 23 -26 of the Ordinance on the manner of conducting insurance of the departments in penitentiaries and prisons

[69] Prisons Regulations, S.L. 260.03 of the Laws of Malta

[70] Prisons Act, CAP. 260 of the Laws of Malta

[71] Designation of Places as Prisons Order, S.L. 260.02 of the Laws of Malta

[72] Regulation 69(1) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta

[73] Regulation 69(1)(a) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta

[74] Regulation 73 of the Prisons Regulations, S.L. 260.03 of the Laws of Malta

[75] Country report: Malta, point 2. ('Restraining measures in prisons or during transfers')

The **Maltese Criminal Code** provides a definition for vulnerable groups according to which any person qualifies as vulnerable who is under the age of 15; suffering from a physical or mental infirmity or any other person who is particularly at risk of being forced to cooperate with the offender or surrender to the offender's will when taking into account the person's age, maturity, health, pregnancy, disability, social or other conditions including any situation of dependence, as well as the physical or psychological consequence of the offence on that person.[76] The definition relied on in Malta seems to be very specific in a sense that it also includes people who can be particularly impressionable by the offender. The police or the judicial authorities carry out the assessment based on the specific circumstances of the case.

Regarding the use of force, including restraining measures, the Code of Practice for Interrogation of Arrested persons[77] states that during interrogation, the investigating officer "must keep in mind the particular circumstances of individual detainees and must take special care with particularly timid or frail persons that nothing is done that puts the voluntariness of the statement into doubt."[78]

In Croatia, the Police Act[79] and the Code of Practice for Police Officers[80] do not define the term 'vulnerable group', but both lay down that force (including handcuffs) must be used with special attention with regard to minors, persons with disabilities or whose mobility is significantly reduced, women in a visible state of pregnancy and people obviously ill. "Article 133 Paragraph 7 directly refers to handcuffs and states police officers will not handcuff minors, persons with disability, a person whose mobility is significantly hampered, pregnant women in a visible state of pregnancy and a person who is obviously ill unless such person directly endangers the life of the police officer or another person or his/her own."[81]

Particular attention is given to **minors and juveniles** in relation to their transfer. The official vehicles for escorting juveniles cannot bear any marks indicating 'Police' and juveniles are only exceptionally handcuffed. Furthermore, police officers must wear civilian clothes while bringing juveniles before the competent authority.[82] However, juvenile prisoners are handcuffed during transportation. The transfer is carried out by the judicial police officers in civilian clothes and a vehicle without official marks, unless the juvenile was sentenced to at least ten years of imprisonment.[83] As soon as they arrive to the Court, the handcuffs are removed.

In Spain, Instruction 12/2007 contains provisions concerning vulnerable groups providing that the arresting or escorting officer[84]may decide on whether to use handcuffs, taking into account general factors such as the characteristics of the offence or the attitude of the arrested person[85] and special

[76] Article 208 AC (2) of the Criminal Code, CAP. 9 of the laws of Malta

[77] Third Schedule of the Police Act, CAP. 164 of the Laws of Malta

[78] Paragraph 16 of the Third Schedule of the Police Act, CAP. 164 of the Laws of Malta

[79] Article 82 (2) of Law on Police Authorities

[80] Article 133 (7) of Code of Practice for Police Officers

[81] Article 133. Paragraph 7 of Code of Practice for Police Officers (Croatia)

[82] Article 292 paragraph 3 of Criminal Procedure Act, Article 70 of Code of Practice for Police Officers and Article 47 of Ordinance on Reception and Treatment with Arrested person and Detainee with the Records of Detainees

[83] Article 30 paragraph 3 of Ordinance of House Rules in Investigative Jail

[84] During transfers "the material and human resources deemed advisable depending on the circumstances of each case will be used, taking into account the dangerousness of the arrested person, the facts of which he/she is accused, the duration of the transfer and any other circumstance that may exist", instruction ten, section 1 of Instruction12/2007.

[85] Instruction nine, section 1 of Instruction 12/2007.

circumstances as well, e.g. latter stage of pregnancy or any kind of malformation or physical impediment.[86]

The **French provisions** explicitly prohibit the use of restraining measures where a person's mobility is impaired on the account of their age or health and therefore they do not pose security risks, including the risk of absconding.[87]

In Hungary, the Police Act only states that in general coercive measures shall not be applied against minors and women whose pregnancy is visible, but the use of handcuffs and physical force are allowed as exceptions to this rule.

The Act on the Penitentiary System and the Prison Escort Guidelines provide instructions with respect to the application of coercive measures against detainees belonging to vulnerable groups. The Act stipulates that:[88]

(i) incapacitated persons shall not be subject to any coercive measures,
(ii) minors and pregnant women cannot be subject to coercive measures, except for the use of physical force or handcuffs,
(iii) persons who do not follow orders but do not exert physical resistance (passive resistance) can only be subjected to the use of physical force as a measure of restraint,
(iv) persons under compulsory medical treatment or who are mentally ill can only be subjected to the use of physical force (grasping or holding down).

The Act also adds that the use of restraints shall be discontinued if the disobedience/resistance ends or if the goal of the measure can be achieved without it.

The rules on the use of handcuffs with regard to vulnerable groups, set out in the Prison Escort Guidelines clearly demonstrate the general practice of systematic handcuffing while escorting prisoners. Point 55 of the Guidelines explain how to install handcuffs, shackles and leading straps before escorting a prisoner. Even if the person's hand or arm is injured, the handcuffs must still be used on his other hand/arm. Moreover, Point 56 – rather absurdly – prescribes that „a person using a walking cane or walking frame must be handcuffed in a way that it does not hinder his movements". These provisions are illustrative of the **automatism and the lack of discretion over the use handcuffs** (or other restraining measures) during the detainees' transfer and escorting.

2.4. Protection of the presumption of innocence in the Courtroom

In general, we can state that greater attention is paid to the protection of the presumption of innocence during trial hearings. First, even if the accused is handcuffed during the transport or escorting, he/she appears free in court in most of the surveyed countries. Furthermore, pursuant to the general provisions that set out the principle of the presumption of innocence and of the use of restraining measures being a last resort, the main rule of avoiding the use of handcuffs or other restraint is usually respected during trials. Second, all the researched jurisdictions have rules concerning the media in order to protect the dignity and integrity of the accused.

[86] These exceptional circumstances "that advise the reduction or adjustment of the means", instruction nine, section 3 of Instruction 12/2007.

[87] Country Report: France, point 1.2.2.

[88] Article 16 of Act on the Penitentiary System

(i) Avoidance of the use of handcuffs (and other means of physical restraint) in the courtroom

The **French provisions** explicitly extend the general prohibition of the use of restraining measures to the courtroom. According to Article 318 of the French criminal procedure code, the accused must **appear free** in court, and **guards are only there to prevent** him/her from absconding. Nonetheless, French legislation[89] provides the option of using the so-called "**secured docks**" (glass boxes) established in the courtrooms for ensuring security without the use of any restraint. These provisions were challenged before the Court of Cassation. In 1985, the court argued that the Regulation was in harmony with the main rule as the accused was still free in his movements and could freely communicate with his lawyer. Over time, however the mind-set has changed and recently (in 2018), the *Défenseur des Droits* (the French ombudsman) upheld a complaint brought by several French Bar Associations against the use of glass boxes. The ombudsman founded the decision on the explicit basis that such practices violate the defendant's right to be presumed innocent and on the Directive. The Ombudsman also ruled that the indiscriminate use of glass boxes is not proportionate to alleged security concerns, as no individual risk assessment is carried out before the hearings, and made several recommendations to the Minister of Justice and the Minister of the Interior, including that they: (a) repeal the current regulations that provide for the systematic installation of secure boxes in courtrooms; (b) limit the appearance of defendants in secured boxes to cases where there is a serious risk to the safety of the hearing and where alternative measures would be insufficient; and (c) develop boxes that respect the fundamental rights of defendants.[90]

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.[91] It remains to be seen whether emphasising the role of judicial discretion will be sufficient to stop glass boxes being used routinely. Lawyers continue to engage in protests against the use of glass boxes in courtrooms across the country, and the Paris Bar Association has prepared template pleadings for lawyers to use to apply to have their client removed from a glass box.[92]

In Malta, the legislators transposed the relevant text of the Directive almost word by word. Article 366D of the Criminal Code establishes 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." Article 443 reinforces this **general prohibition** by adding: "in the day and at the time appointed for the hearing of the cause or of any question incidental thereto, the accused shall be put, without any restraint, in the place appointed for the purpose." The second part of Article 366D contains the **exceptions**, namely that the police and courts are allowed to apply measures of physical restraint if it is necessary for security reasons or to prevent suspects or accused persons from absconding or from having contact with other people.

[89] Point 5.1.3.2.6 of Regulation of 18 August 2016

[90] 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.

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

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

In **Hungary, Croatia** and **Spain,** there are **no specific legal provisions** detailing the prohibition of using handcuffs or other restraints in the courtroom.

However, the **Hungarian CCP**, for instance, states that, while conducting the hearing, the presiding judge is responsible for ensuring (i) compliance with the laws and (ii) that parties can properly exercise their rights.[93]Accordingly, the judge is bound to act in pursuance of the objectives of fair trial guarantees, which implies making sure that the use of restraining measures in the courtroom is avoided unless they are inevitably necessary. The express authorisation for judges to order the removal is provided by Decree 16/2014 (XII. 9.) of the Minister of Justice, which stipulates[94] that the prosecutor or the judge acting in the criminal proceeding may order the removal of the means of restraint and the member of the penitentiary personnel escorting the defendant shall be obliged to comply with this order. However, the provision also sets forth that not even upon the order of the prosecutor or the judge may the escorting officer remove the ankle-cuffs.

In Spain, even in the buildings of the court, the Police are responsible for everyone's safety, therefore they decide on the use of handcuffs in this context as well. Nevertheless, the Head of Court in each judicial district can adopt **internal guidelines** on how to present suspects and accused persons in the court building.[95] For example, they can require the removal of the handcuffs prior to escorting the accused to the courtroom. In addition, in the courtroom it is the judge can decide about the handcuffs' removal.

In **Croatia**, "the presiding judge maintains order during the trial hearings. Therefore, he/she can take appropriate measures to ensure security and order. That means that the defendant can be handcuffed at his trial or may appear with police escort when considered necessary."[96]

In practice, the suspects and accused persons usually do not wear handcuffs during their trial hearings in any of the researched countries (further specified in point 4.).

(ii) Rules on the presentation of the accused persons in the courtroom by the media

In Hungary, the provisions related to the presentation of the accused persons in the courtroom are set out in the CCP and Act V of 2013 on the Civil Code. The CCP states that every person has the right to be informed about trials through the media. Audio and video recordings of the trial are subject to the permission of the presiding judge.[97] Moreover, sound or video recordings of persons present at the hearing – with the exception of the members of the court, the keeper of the minutes, the prosecutor and the defence counsel – are subject to the consent of the person concerned.[98] Furthermore, the Hungarian Civil Code prohibits taking photographs, video and audio recordings without the permission of the subject.[99] If the person concerned does not give his/her consent, the press is not allowed to take pictures or video recordings in which the accused can be identified. Furthermore, under Article 14 of the Media Law,[100] media service providers are obliged to respect human dignity in the media contents

[93] Article 439 (2) Code of Criminal Proceedings

[94] Article 54(4)

[95] Country report: Spain, point 4.2.2.

[96] Country report: Croatia, point 2.4.

[97] CCP Section 108, paragraph 1.

[98] CCP Section 108, paragraph 2.

[99] Article 2:48 of Act V of 2013 on the Civil Code

[100] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules Concerning Media Contents

they publish, and it is forbidden to present people in humiliating and helpless situations in a manner that is self-serving and injurious.

The presiding judge almost always grants permission, however, in specific cases laid down by law,[101] he/she may refuse to grant it, e.g. in cases where the presence of the press and/or the disclosure of information would violate classified data, would jeopardise the successful conclusion of the proceedings, or could be a threat to the life or integrity of the accused.

For a long time, the Hungarian jurisprudence was consistent in that defendants could only be photographed and their pictures could only be publicised with their consent even in the case of those who are regarded as public figures under the Civil Code. (The images of public figures can otherwise be publicised freely with little restrictions, but there was an exception when they appeared as defendants in criminal cases.) This practice was however changed by decision IV/1507/2016 of the Constitutional Court.

Two online portals used an image of the defendant – a former mayor of a Budapest district facing charges of corruption allegedly committed while he was a mayor – where he was shown in the corridor of the court, escorted on a lead rope, wearing handcuffs and being surrounded by two escorting guards from the detention facility. The courts of the first and second instance upheld the defendant's claim, that the online news portals had violated his inherent personality rights by publishing the abovementioned images without his consent. The courts argued – in accordance with the judicial practice – that the status of a public figure ceases during criminal proceedings, even in cases in which the proceedings have been initiated in connection with the defendant's public official position. Therefore, the media would have been obliged to get the mayor's consent prior to the use of his image. In addition, the courts emphasised that it is a proven fact and public knowledge that visual images have much more influence on the readers than unillustrated written texts.

The Curia (Hungary's Supreme Court) quashed the judgements and dismissed the defendant's claim on the basis that the defendant was a public figure and that the criminal procedure was related to his position as a mayor. Since the coverage was objective, allowed the mayor's stance on the case appear and did not portray him in a humiliating way (the defendant was wearing a suit and the handcuffs and the lead rope were not noticeable at first sight), therefore, no violation occurred.

The Constitutional Court confirmed this approach. It emphasised that (i) the pre-trial detention of the accused was well known (public knowledge); (ii) reporting on criminal proceedings triggering wide public interest falls under the scope of the freedom of the press; (iii) the use of means of restraint is a well-established practice when a defendant is in pre-trial detention; (iv) portraying pre-trial detainees in means of restraint when covering remand hearings is also usual in the media; (v) applying pre-trial detention is not a violation of the presumption of innocence; and (vi) it cannot be concluded that the authorities applied handcuffs to present the defendant as guilty. For these reasons the judgment of the Curia is in line with the Fundamental law.

This means that as far as public figures on trial for acts allegedly committed in relation to their public positions are concerned, the Hungarian legislative framework as interpreted by the Constitutional Court does not allow protection from being presented by the media in means of restraint.

[101] CCP Section 109.

In Spain, the general rule is that the trial is public (open sessions) and exceptionally may take place in camera[102] when necessary for security reasons, to maintain public order, or out of respect for the victim or his/her family.[103] The same rules apply to the audio-visual recordings. Generally, it is permitted, however, Article 682 of the Criminal Procedure Act establishes that audio-visual recordings may be restricted and that the recording of sessions may be prohibited based on similar reasons, i.e. when it is necessary to maintain public order, to protect the parties' fundamental rights, or out of respect for the victim or his/her family. We therefore conclude that the permission of audio-visual recordings depends on individual assessment and the circumstances of the particular case.

As for the footage of the cameras in the corridors, the governing board and the chief judges are in charge of the regulation concerning access to it. The Constitutional Court emphasised that "the corridors or other parts of the building are not sources of information for general access".[104] The issue of sound or video recordings at the hearing is not regulated. However, according to the established case law, it is also subject to the presiding judge's permission, in accordance with the principle of proportionality and in a form of a reasoned ruling.[105]

In **Malta**, the Court regulations prohibit people from taking any photograph or film during the hearing of any case in any hall, unless authorised. Journalists are allowed to be present and report online during the court hearings.

In **Croatia**, audio-visual recordings are generally prohibited in the courtroom. In exceptional cases where public interest requires so (e.g. high profile cases), the president of the upper court may permit audio-visual recordings and the president of the court may permit the taking of photographs during the trial.

Contrary to all other examined countries, **French legislation** provides provisions concerning the media with special references to restraining measures. The Law on the protection of presumption of innocence and victims' rights prohibits taking pictures of persons subject to means of physical restraint. It states that "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".[106] Moreover, the law on the freedom of the press penalises the distribution of any image of the suspect or the accused person without his/her consent showing him/her with handcuffs or other restraints with a fine of 15.000 EUR. Furthermore, French case law also establishes the prohibition of the dispersion of images in which a person is shown in pre-trial detention without his consent, "regardless of the comments that accompany the publication of the image and regardless of whether another newspaper published an identical photograph with the consent of the person concerned".[107]

With respect to court hearings, the law on the freedom of the press prohibits the use of any device allowing audio or audio-visual recordings, and the transmission of speeches or any images taken in the courtroom during hearings. In case of violation, the presiding judge will order the confiscation of the device. However, if it is requested before the hearing, the president may authorise taking pictures before (or after) the hearing starts, but only if the parties or their representatives and the public

[102] Article 681 of the Criminal Procedure Act

[103] Articles 680, 681 and 682 were reformed by the Crime Victim's Statute (*Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito*).

[104] Constitutional Court Judgment no. 56/2004, of 19 April 2004

[105] Constitutional Court Judgments nos. 56/2004, of 19 April and 57/2004, of 19 April

[106] Article 93 of the Law n°2000-516 of 15 June 2000 on the protection of presumption of innocence and victims' rights

[107] Court of Cassation: Chambre criminelle – 7 décembre 2004 – n° 04-80.088.

prosecutor have given their consent.[108] Confiscation of the devices and/or fines up to 4500 EUR can be imposed in case of infringements. Those prohibitions were adopted in order to ensure the respect of the dignity of the court. It is noteworthy to mention that these provisions are deeply rooted in France's legal culture. The prohibition of taking pictures during trials was already introduced in the 50's due to several cases in which the journalists' attitude kept disturbing the hearings.[109]It was argued that the trial is not a 'show' and the principle of publicity is sufficiently guaranteed by allowing the audience to be present at the hearings.

Nevertheless, there are two exemptions from the general prohibition. First, public hearings can be subject to audio or audio-visual recordings if there is a historical interesting archiving it.[110] The historical interest is determined by the first presiding judge of the court of appeal.[111] Second, according to Article 308 of the criminal procedure code, hearings of the court d'assise, a court with original jurisdiction (first instance) and with limited appellate jurisdiction dealing with serious crimes, e.g. homicide and rape, must be audio recorded when ruling on an appeal, except when all the accused expressly waive the right to a recording. The president of the court may order such recording on his/her own initiative or at the request of the prosecutor or the parties. In addition, he/she may order, at the victim's request that their hearings and testimony be subject to audio visual recording. The recordings are not for public use.

In sum, we can state that all jurisdictions provide certain restrictions on the media in order to protect the dignity of the accused and the court. However, the level of protection granted in the surveyed member states' differs. While France is close to absolute protection, the other countries apply it more relatively, and the court has greater discretion in deciding the extent to which the media can attend the hearing.

3. Remedies against the application of measures of restraint

Based on the research results, it seems justified to say that the regulation and/or the practice concerning remedies are mostly **inefficient**, **incomplete** and **rarely used**.

In Spain, for instance, the Police mentioned in interviews that there are books and systems for registering complaints, suggestions as well as acknowledgments concerning the treatment received from the police. According to Mosso d´Esquadra (the autonomous police force of Catalonia), "this enables them to have an outside perspective on how they do their job and what citizens think, so that they can improve and modify things". However, they do not have specific data on complaints with respect to the used restraining measures as they "would have to examine the complaints one by one in order to see how many relate to the measures of physical restraints". The Ertzaintza (the autonomous police force for the Basque Country) carries out satisfaction surveys on police treatment. The arrested person and his/her lawyer fill them out at the police station. However, they had no record of complaints concerning the use of handcuffs or other restraining measures from the period of 2013 to 2017.

Based on the interviews, complaints against the use of handcuffs are rare, but in case of violence, the corresponding doctor's report, the police report and the lawyer's complaint will contain the abuse.

[108] Article 38ter of the Law of 28 July 1881 on Freedom of Press

[109] Case of Marie Besnard (1952,1954) and the case of Gaston Dominici (1954)

[110] Article L. 221-1 of the code on national heritage

[111] Article L. 221-2 c) of the code on national heritage

Finally, the Ombudsman's Report (National Torture Prevention Mechanism) from 2016 states the following: "eight complaints were received for alleged police mistreatment and 64 for improper treatment",[112] which, taken "in perspective with the number of persons arrested that year, are very few". Nevertheless, it has to be noted that these reports do not particularly refer to complaints against the use of means of restraint.

There is a serious **lack of information and transparency** regarding the **Maltese system of remedies.** In principle, reviewing the conduct of the police and the officers of the Corradino Correctional Facility falls under the competence of Independent Police Complaints Board ('Police Complaints Board') and the Corradino Correctional Facility Monitoring Board ('Monitoring Board') respectively.

The latter is responsible for carrying out the tasks of the National Preventive Mechanism for the prevention of torture, as provided for in the Optional Protocol to the United Nations Convention against Torture.[113] The Monitoring Board visits the prison on a monthly basis in order to survey prison conditions and investigate ill-treatment. In this context, they have an obligation to ask the detainees whether they want to lodge a complaint. They also must submit a report of their findings to the Minister (Ministry for Justice and Home Affairs). It has to be emphasised that neither the report nor the contact details of the Monitoring Board are publicly available. An information request had to be filed in order to receive the contact details of the Board, which were provided. However, they never complied with the information request sent to the Board. According to a recent (2018) international report,[114] the Board did not receive any complaints concerning mistreatment or torture.

The same applies to the Police Complaint Board. There is no publicly available information on how to lodge a formal complaint or any data on the contact details, work and findings of the Board. An official request for information was submitted in th framework of the research, but it has remained unanswered. The lack of transparency and information in the Maltese system makes the remedies 'efficiency highly questionable.

Based on the interviews in France, we can conclude that complaints lodged explicitly against the use of restraining measures are relatively rare. The Ministry of Justice indicated that it is usually implied in complaints against certain security measures taken or against police brutality during arrest where the use of restraining measures may have been involved. Regarding the security measures, for example, detainees usually argue against being registered as "a specifically flagged detainee" ('DPS', détenu particulierement signalé). When a detainee is on the DPS-list, stricter security rules apply, including systematic handcuffing during transfers from prisons to the court and vice versa.

The French case law concerning complaints reaffirms that security measures imposed during the transfer should be consistent and in proportion with the dangerousness of the detainee and the risk of absconding of each particular case.[115] Moreover, it also reiterates that in case of unjustified handcuffing, the person concerned can make a claim for compensation.[116]

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[112] 2016 Annual report on the National Torture Prevention Mechanism (Ombudsman's office), page 161, para. 228.

[113] Regulation 104(f) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta

[114] Caruana S., *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus*, Report to the Winston Churchill Memorial Trust of Australia showcasing learing from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 2018 https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_Inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf

[115] Cour administrative d'appel de Nancy, 1re chambre, 18 May 2017, case n°: 16NC00481

[116] Cour de cassation, Chambrecriminelle, 9 January 2018, case n°: 17-82.052, ECLI:FR:CCASS:2018:CR03140

In Hungary, there are a number of ways to contest unjustified handcuffing by the Police.

On the one hand, the person can file a complaint to the head of the police office (Police Chief),[117] whose subordinate has taken a measure against the complainant. This complaint has to be filed within 30 days after the alleged violation. The Police Chief will decide on the lawfulness and appropriateness of the use of the restraining measures. If he/she rejects the complaint, the decision can be challenged before the superior police unit. If this body also rejects it, as a last resort, the decision can be subject to administrative judicial review.

On the other hand, the person concerned can lodge a complaint with the Independent Police Complaints Board (hereinafter 'Board') within 30 days after the date of the incident.[118] The Board investigates the police measure taken and decides whether it was lawful, necessary, justified, proportionate, and whether the concerned person's fundamental rights have been violated. The Board in its decision can establish that (i) there was no violation of a fundamental right, or (ii) the infringement of a fundamental right cannot be decided because of the contradiction between the statements of the complainant and the police, or (iii) there was an infringement of a fundamental right (insignificant or severe). If the Board establishes the lack of fundamental right violations or finds that there has been one, but it does not reach a certain level of severity, the Board refers the case to the head of the police unit concerned and the procedure continues the way described above. In case of establishing a serious violation of fundamental rights, the Board refers the case to the National Police Headquarters. The decision of the latter body can also be challenged before the competent administrative court.

If the police complaint procedure is successful from the complainant's point of view, he/she can make a **claim for compensation** before the civil court based.

Attorneys interviewed during the research claim that police officers often deny their actions and because of the lack of sufficient evidence, complaints submitted directly with the police can remain ineffective. Moreover, with respect to the use of physical force and handcuffs, it can be generally stated that the Police Chiefs' investigation and his/her adopted opinion shows a certain degree of automatism, i.e. almost all actions taken by the Police are found lawful and appropriate at the end.[119]

In contrast, the Board has **concluded in numerous cases** that the application of handcuffs was unlawful and consequently established breach of the right to human dignity, integrity or of personal freedom.[120]Even though the complaint procedure of the Board shows more efficiency, its opinions are not legally binding, and the National Police Headquarters rarely accepts its conclusions. As a result, in these cases too, more often than not a judicial review must be sought eventually. Since the administrative courts can only quash the police decisions and send the case back for retrial, therefore these **proceedings tend to be very lengthy**, which often deters complainants.

In Croatia, there are internal and external reviews concerning the justification and lawfulness of the used means of force applied by police officers. Internal reviews are conducted within the police department. In situations where the police officers use handcuffs, the person brought to the police station must declare at the station whether he/she has any objections to the police treatment. If so,

[117] Art. 93 of the the Police Act

[118] Art. 92. Par. 1 of the Police Act

[119] Rendészet és emberi jogok 2012/1-2 http://epa.oszk.hu/02200/02222/00005/pdf/EPA_02218_ReEJ_2012_01-02_023-107.pdf

[120] Ibid.

the head of unit immediately collects all necessary information about the circumstances of the applied means of force and submits it together with his written report and opinion to the Head of the police department. The head of the police department must decide within 24 hours on the lawfulness of the use of means of force.[121] Based on the country report, if the Head of Department finds the use of handcuffs justified, the victim can still file criminal charges against the police officer (external control) to the State Attorney's Office. If the State Attorney dismisses those charges, the person concerned can still take over the place of the prosecution as subsidiary private prosecutors.

Moreover, if a person finds that a police officers violated his or hers rights, he/she can file a complaint to the Ministry of Interior Affairs within 30 days. The complaint is assessed by the head of the organisational unit of the Ministry directly superior to the police officer concerned. If the person does not agree with the assessment, he/she can file a complaint to the organisational unit of the Ministry responsible for the internal control within a further period of 15 days. Then, if the person is dissatisfied with the response given by the Ministry, the case must immediately be filed to the Commission responsible for handling complaints[122].

It must be underlined that the aforementioned remedies only apply to the means of force used by the Police in reaction to individual incidents and not when handcuffs are used preventively. Prisoners also have no efficient legal remedies available against the use of physical restraint used by the judicial police in order to prevent risks.

4. Practice – the extent of compliance with the written norms

One of the most important findings of the research has been how much institutional culture and societal pressures impact the enforcement (or rather its absence) of the provisions which are in place to guarantee that the presumption of innocence would prevail.

There is huge public appetite for sensational stories concerning crime, there is an almost atavistic public sentiment that wishes to see justice done – often before a final judicial decision could be handed down on whether the concerned defendant is guilty or not. This puts a pressure on both the media and the law enforcement bodies with the latter feeling the need to demonstrate their efficiency and toughness of crime through enabling journalists to capture images of persons arrested and in restraints instead of trying to preserve the presumption of innocence and the defendant's dignity and reputation. The other factor working against the presumption of innocence is the law enforcement personnel's innate preference for resolving the conflict between the protection of the defendant's rights and security to the detriment of the former, which is to some degree understandable on both the personal and the institutional level, but can have irreversibly damaging impacts on the defendant's life.

Due to these external and internal institutional pressures, the practice of the use of restraints is often very different from what should result from the written norms. In some cases, the actual instances are clearly unlawful, in others, the violation is less obvious due to the large margin of appreciation that must be allowed to law enforcement and judicial officials when they decide on whether means of restraint should be used or not.

[121] Article 152-155 of the Code of Practice for Police Officers

[122] Article 5-5f of the Police Act (Croatia) - *Zakon o policiji*(OG 34/11, 130/12, 89/14, 151/14, 33/15, 121/16)

4.1. Arrest, transfer and escort of the suspects and accused persons

(i) Arrest

First, it needs to be mentioned that **in Malta**, the relevant authorities have not provided any data on the use of restraining measures. They confirmed that **no relevant statistical data** are kept either at the Ministry of Home Affairs, or at National Security or the Malta Police Force. In addition, no relevant case law was identified. Therefore, the national report based its findings concerning practices on the interviews carried out during the research.

The police officers who were interviewed are split on the question as to whether the use of handcuffs was usually justified and whether it was assessed on a **case-by-case basis**. Almost half of them felt that the decision on the use of restraining measures was rarely based on an individual assessment. 48.2% of the officers said that it was always justified by a case-by-case assessment, but 2.7% of the interviewees told that the use of handcuffs was **never justified by case specific reasons**. Attorneys unanimously agreed with the latter statement i.e. with the total lack of case-by-case assessment with respect to the use of handcuffs.

It also should be noted that there are **no police guidelines** or any other internal rules issued by the Ministry of Home Affairs or the National Forces regarding the application of restraining measures. It stems from the interviews that there was **no clear consensus** on who had the right to decide on the use of restraining measures and which type of restraint to use. The **majority** (about 70%) of the police officers believe that they **have the discretion to decide** on the use of handcuffs. However, some thought that they have no discretion at all, or they have to decide together with their particular police department.

Respondents listed **various factors** that influence which type of restraint they use: attitude (e.g. aggressive, violent or cooperative) or criminal history of the suspect and the nature of the offence. Only one respondent mentioned that it has to be necessary and proportional and that police officers should choose the least restrictive measure. Nevertheless, he underlined that in 99% of the cases in which they use restraining measures, handcuffs are the chosen means of restraint.

Unfortunately, due to the insufficient information, no clear conclusion regarding the general practice of the police could be drawn. Nevertheless, the interviews indicate that the **use of handcuffs can be considered usual**.

In **Spain,** stakeholders agreed that the application of handcuffs during the arrest is not automatic, however, it is **common**. Interviewees from the police stated that “when it is not necessary, they do not use handcuffs”, but they added as well that it is not possible to carry out an individual assessment in each and every case. Another police officer explained the frequency of the use of handcuffs in cases of repeat offenders: “you usually arrest people who repeat offences, who have already broken the law and, therefore, a minimum guarantee of safety is required”. According to the interviewed officers, there are several **factors which** need to be considered by the police in order to determine whether to use handcuffs. Interviewees mentioned that the police officer is the only one who is able to take this decision, as he/she is the one ‘in action’ and is able to assess what is happening. Normally, every circumstance should be taken into account, such as the state of a person or the seriousness of the alleged offence or the ambiance of the situation.

The picture painted by defence counsels was different though. The interviewed lawyers unanimously stated that the handcuffs are never or hardly ever justified on a case-by-case basis. They also highlighted that **social status** can be an influencing factor when a decision on the use of handcuffs is made; the higher one's social status is, the lower the chances of him/her being subjected to restraining measures will be.

The **complete lack of informing** the suspects and accused persons **of the reasons** of the use of measures, including handcuffs, is problematic, too. When asked, officers might give some explanation. However, based on the interviews, they usually vaguely refer to safety reasons and do not indicate explicitly the justifications provided by law (preventing self-harm, violence or ending disobedience). One officer said : "if they ask for reasons, they are told that the procedure is for their own safety or for the safety of third parties". Another stated that "if the accused person does not ask about it, this means that he/she will assume or **know that it is the procedure**".

Based on the above, we can generally conclude that **a real case by case assessment does not often take place** and that the police mostly consider the use of handcuffs as part of the **general procedure of the arrest**. It is not only the police who consider handcuffing an automatic part of the procedure, but the suspects and accused persons as well. One interview clearly demonstrates the attitude of the police and the accused persons' assumptions: "They knocked down the door, it was chaotic, they came in, striking, throwing me to the floor, and they handcuffed me with my hands behind my back. [...] I didn't receive any kind of explanation as to why they were using handcuffs, but I didn't ask either. The problem is that I had assumed that, because of the type of offence, anything goes, handcuffs, shouting. I assumed that was how it was. Was it justified? No, at no point did I resist. My first thought was "this is a mistake". [...] My attitude was to reply to everything they asked, I have nothing to hide, I never resisted, I didn't offer resistance. [...] I assumed the handcuffing was normal. What I found uncomfortable was travelling in the police car handcuffed from behind and with my head between my knees, you feel sick, you have the sensation of not knowing where you're going, how long is left."[123]

One problematic issue that was raised by Spanish practitioners is that media workers are sometimes notified by police officers in advance of arrests to be made. In these cases, the handcuffing of the suspects is likely to be publicised posing a threat to the perception of the suspect and undermining the presumption of innocence. One interviewee attributed this to the police's will to be seen doing a good job and being tough on crime: "the security forces have on numerous occasions exposed arrested persons to situations where journalists can take pictures or capture images. The police themselves, when carrying out operations, instead of preserving the presumption of innocence and doing what the criminal procedure act stipulates, in order to achieve greater impact, for political reasons, in an attempt to capitalise on the operation in terms of publicity, release images of the arrested person, sometimes lying on the ground, in underwear, in humiliating fashion."

This is particularly interesting, since – as described above – in Spain, the legislation expressly prescribes that arrests must be carried out with the utmost discretion: in order to protect the honour, image, dignity and privacy of persons". Thus, it seems that provisions of general nature, placing a general obligation on law enforcement bodies to protect the dignity of suspects and accused persons and leaving even a narrow room for discretion are not effective enough, as they may be overridden by institutional culture and interests.

[123]Country report: Spain, interviewee SIR17

In **Hungary**, stakeholders were of the view that although there have been improvement in the past years, the practice of the use of restraints still leaves room for improvement. An attorney said that previously "police officers handcuffed everybody without any discretion based on an order of the Chief of National Police Headquarters, but this order has been withdrawn" and the police practice with respect to the use of handcuffs has eased a bit in the recent years. Nonetheless, the interviewed stakeholders also added that the **obligatory handcuffing 'remained in the minds of the officers.**' This is confirmed by the fact the that Independent Police Complaints Board repeatedly establishes the violation of the right to integrity and human dignity when the police take unjustifiably rough or strict (coercive) measures against suspects or accused persons.[124] An example for that is the case of an elderly man. He was biking, but the road was too dangerous due to the heavy traffic, so he decided to use the pavement, which qualifies as a misdemeanour. The police stopped him and instead of giving him a fine, they wanted to take him to the police station. After some argument he turned to lean his bike against a fence. The police officers thought he wanted to abscond, so they jumped at and handcuffed him in a rough way, although it was obvious that they were physically superior to him and could prevent his escape without handcuffs. He lodged a complaint and won the case.

The courts and the Curia (Hungary's supreme court) also play an important role in improving and influencing existing practices. In relation to the police practice of applying measures of restraint, the Curia emphasised is one of its decisions that „it is **not sufficient to merely argue that there is a risk of absconding**, but it is also necessary to demonstrate **all specific circumstances** of a certain case **which can duly justify** the use of handcuffs." [125] Moreover, the Curia has examined on several occasions whether and when the **conduct and the behaviour of the accused** can justify the use of restraining measures. In one case, a person, was asked by the police to show his ID, but when he wanted to return to his apartment in order to get his papers, he was handcuffed based on the risk of absconding. The Police argued that as there was only one police officer on site, the risk of being able to escape was obvious. The Curia rejected this argument underlining that the person fully cooperated with the police and that there were no indications at all that he would escape. It also stated that "the use of handcuffs **cannot be justified merely by the remote possibility of absconding**" and that "the person's conduct must be such that it can only be prevented by using handcuffs". Moreover, the Curia highlighted that the application of restraining measures must be with a view to the principle of proportionality, therefore, the fact that there was only one police officer on site cannot be the mere ground of the use of handcuffs. The Curia also stressed the **significance of the case-by-case assessment of individual instances**.[126]

Besides the courts, one important factor in the improvement of the recent years seems to have been an amendment of the Service Regulation of the Police. Article 41 of was amended in December 2015. The original text ran as follows: "the use of handcuffs in the cases identified in Article 48 of the Act on the Police is especially justified vis a vis persons who…", while the amended text stipulates that "the use of handcuffs may be justified only in the cases identified in Article 48 of the Act on the Police, if the preconditions for using means of restraint as determined in the Act on Police and this Decree prevail, especially vis a vis persons who…". The interviewed practitioners are of the view that this simple amendment expressing more straightforwardly than the previous text that handcuffs can only be used under certain circumstances has induced a decrease in the use of handcuffs.

[124] Country report: Hungary

[125] Decision of the Curia: Kfv.III.37.713/2015

[126] Decisions of the Curia: Kfv.III.37.713/2015.; 2/2017.

As mentioned earlier, in **France**, complaints may be lodged against the police for brutality during the arrest, in which the use of handcuffs or other measures of restraint may have been involved. In addition, the above mentioned case law refers to **police abuse concerning the use of handcuffs** (unjustified handcuffing), however, according to the French country report, such complaints are **relatively rare**.

The Director of the national police issued an instruction on 9 June 2008 and a note on 8 October 2008 on the conditions under which restraining measures can be imposed. In addition, a note was also disseminated to the police, which required all police officers (including the gendarmerie) to **take all circumstances** of the case **into account** (e.g. the age of the person under arrest, and available information on their character) when deciding on the use of handcuffs. Therefore, there are indications for case-by-case assessment.

Finally, in case of **serious crimes**, the accused is **usually handcuffed** until he/she gets to the office of the investigating judge, but during the interrogation, the restraining measures are removed.

In **Croatia**, law enforcement officers also seem to look at handcuffs as a necessary measure to protect officials and to prevent suspects and accused persons from escaping or harming others. For them "there is **no concern for violating suspects' right because the person is deprived of liberty anyway**."[127]

An interviewed police officer emphasised that "it is always better to handcuff a defendant when it comes to criminal offenses and not misdemeanours, and also when the defendant is aggressive or a recidivist or accused of having committed a greater number of crimes." He also added the following: "I believe that with using handcuffs the suspects' rights are not violated. It is much easier for police officers when a person is handcuffed than when he is not." To support this argument, the officer listed several cases when law enforcement personnel did not handcuff the suspect and it resulted in an attack against the officers or an attempt to escape through the window during questioning.

As we mentioned in the section discussing the general legal provisions, the formulation of the Croatian legal framework seems to be the most permissive with regard to the use of restraining measures. Given this and the stakeholders' attitude, we can conclude that handcuffing during the arrest is **frequent.** In addition, the thorough case-by-case assessment seems to be missing from the practice as well.

This conclusion reflected in the **Annual Report of the Croatian Ombudsman**.[128] It states that citizens lodged several complaints against the use of means of force while being arrested. In addition, the Ombudsman **draws attention to the requirement of proportionality and necessity** as well as to the **reporting obligation**, which should be fulfilled when means of restraint are applied. The Ombudsman recalls that the reputation, honour and dignity of each person must be respected. He notes that if the use of handcuffs is excessive and unjustified it can qualify as inhuman and degrading treatment according to the well-established ECtHR case law.

In Croatia, the issue of the police notifying the media about planned arrests was also brought up. Croatian defence attorney claimed for instance that in high profile cases, the police sometimes give a hint to the media about an arrest and then the journalists appear at that person's house. The attorney gave an example, when the police arrested his client, an elderly woman at 5 a.m. in the morning. She opened the door in her nightwear, "with her hair all messy". When she opened the door, the press was

[127] Country report: Croatia, point 5.

[128] Annual Ombudsman's Report for 2017, page 208 and 209

behind the police. After the arrest, several newspapers and TV channels showed her picture and the video of the arrest.

The information given by one of the interviewed Croatian police officers seems to confirm that the police are well aware of the impact such media coverages may have on how the public perceives police work: "Especially if it comes to some high level criminals, shootings and so, then people are happy with the use of handcuffs. They think then that we are doing a good job."

(ii) Transfer and escort of the suspects and accused persons

The national reports reflect a **clear tendency for using handcuffs** and other **restraints during the transportation/escorting** of suspects and accused persons, especially when a person is already a detainee. We can state that it is common feature in all surveyed countries to bring a person to his/her trial hearing (or before other competent authorities) in handcuffs or other restraints. The defendants as a rule are transferred to the court, wait in the court building and are escorted to the courtroom in handcuffs, which are usually only removed from them once the court session starts.

One outstanding example from **Hungary** is that of a 53-year old, fragile gynaecologist who was on trial in Hungary for alleged professional negligence committed by assisting homebirths with a fatal outcome. She was in pre-trial detention for the risk of reoffending. Nevertheless, she was handcuffed, leg-cuffed and waist-cuffed too. The Hungarian Ombudsman concluded that the simultaneous use of three different restraining measures "against a woman of weak physique was disproportionate" even if the detaining institution had only few days to carry out a risk assessment before the transportation had to be carried out.[129] The degree of rigidity of the practice is also illustrated by the fact that the escorting guards do not have any discretion in deciding whether the handcuffs can be removed.

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

As described above, in **France**, there is an intricate system for assessing detained defendants on the basis of the security risk they pose, however, based on the national interviews along with the report of the French National preventive mechanism against torture and ill-treatment of 2016, we can state that the use of handcuffs during while escorting or transferring the accused is systematic. Detainees belonging to security levels 2 to 4 are usually shackled as well.

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

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

In this regard it is important that a major **difference between member states can be seen in how accused persons arrive** in the courtroom. While in France and Malta, suspects and accused persons always or most of the time arrive without wearing any restraining measures, in Hungary, Spain and Croatia, they very often arrive to the court and wait in front of the courtroom handcuffed.

In France, the accused enter the courtroom via a specific corridor, guaranteeing the protection of the presumption of innocence. In addition, this solution protects the public and the victim as well. Stakeholders stated that in the newly built court buildings, premises are constructed in such a way that the accused remains completely separated from the public.

Moreover, as was mentioned above, legal practitioners confirmed that the accused never appears in handcuffs or wearing other restraints before the judge or the investigative judge. An investigative judge interviewed during the research highlighted the significance of the removal of the handcuffs: "being freed from measures of restraint is crucial for the investigation as the person will express himself more freely." He also added that guards are sufficient to provide security and that violence happens very rarely in the judges' offices.

In **Malta**, interviewees agreed that in most of the cases handcuffs are removed before the accused person enters the courtroom. Nonetheless, with respect to bringing accused persons in front of the competent authority, especially the court, a potentially discriminative practice was identified.

Normally, there is a separate entrance ('back door') for bringing the accused persons to their court hearings. This back entrance is not for public use and serves for the protection of the presumption of innocence. However, it appears from the interviews that in high profile cases or in the case of foreign suspects, the authorities tend to use the front door of the Court.

A legal practitioner reported of a recent homicide that he found particularly worrying.[130]A prominent Maltese magnate was stabbed and died later in the hospital. The Police arrested a man in the evening of the stabbing. The next day, they brought the accused person to the Court, wearing a white forensic suit with his hands handcuffed behind his back. They escorted him through a busy pedestrian area and entered the Court through the front door. Therefore, journalists were able to take pictures, which were widely shown in the media.[131] Here again it can be assumed that the reason for exposing the accused to the media this way may have been the intention to prove the effectiveness of the police in a high profile case.

Moreover, several attorneys noted that the use of restraints in public and escorting prisoners through the front doors of the Court was more likely to happen to foreign defendants. One of the lawyers stated that "some defendants are taken directly from the secure area in the court building to the

[130] Male lawyer, aged 39, interviewed on the 2nd October, 2018

[131] Hugo Chetcuti was knifed twice, One News, 7 July 2018, https://www.youtube.com/watch?v=38Jv9_Gxfzg

courtroom. Other defendants, especially foreigners, and particularly black defendants, are 'paraded' around, outside of the court building. Regulations regarding the transportation of defendants to and from courtrooms should be more closely defined." The abovementioned statement clearly indicates the lack of appropriate provisions concerning this area. In addition, this difference in treatment could attribute to an increase in racism within society

In Croatia, legal practitioners stated that when the accused is handcuffed during transportation, which is usually the case, he/she would be wearing handcuffs in the corridor as well. It has to be noted that there is no dedicated corridor for the accused to enter the courtroom, as is the case in France. However, in may be mentioned as good practice that in some courts, there are special rooms for prisoners where they can wait for the judge to start the hearing. The rooms are used to avoid any contact of the defendant with the victim, witnesses and others. During the time spent in the specialised room, judicial police officers remove restraints from prisoners who thus enter the court room without handcuffs or shackles. After the hearing is over they go back to these room and only here do the judicial police officers handcuff them again before transporting them back to the prison.

In Spain, during transfers and escorting, the accused usually appear in handcuffs before the court. A law enforcement officer stated that "from the police van to the cells, and from the cells to the courtroom or hearing, it is standard practice that the arrested person arrives in handcuffs and that the judge decides what measures are to be adopted." Legal professionals emphasised the need for well-equipped courthouses "to avoid being paraded along corridors, to avoid that the arrested person being exposed to the public."

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

4.2. Treatment of vulnerable groups

Concerning vulnerable groups, **all surveyed countries** seem to have the similar practices with very few exceptions. Interviewees emphasised that, in practice, there is usually no difference in relation to the use of handcuffs between 'ordinary' suspects and accused persons or those belonging to vulnerable groups.

Minors and pregnant women were the most frequent examples given of when the authorities avoid the use of handcuffs. This also happens in case of severe and visible injuries. Based on the reports, emphasis is placed on the 'visibility' of the vulnerability e.g. final trimester of pregnancy.

In this context, the **Croatian practice** is worth mentioning. Juveniles are escorted with special vehicles that do not bear any official signs, and police and guards must also wear civilian clothes, which obviously can be considered as a good practice as it contributes to upholding the presumption of innocence. In addition, although juveniles are also handcuffed during transportation, the moment when the juvenile arrives in front of the court, the handcuffs are removed, so he/she is escorted to the court without handcuffs.

In **Malta**, pregnant women and people with disability (depending on the type of disability) were mentioned as exceptions to the general rule of handcuffing, while a respondent added that the age of the concerned person is also a factor to be taken into account.

In **Spain**, practitioners' views were not fully unanimous on the issue, but most of them confirmed that elderly, disabled or handicapped people, children (particularly those between 14 and 15 years of age), persons with obvious health problems or heavily pregnant women are rarely handcuffed. The same practice is followed in Spain. According to an interviewed juvenile judge, minors do not enter the courtroom in handcuffs, as a rule. In addition, when the minor is transported to the court from a closed centre, escorting police officers are not in uniform and they sit in the back of the courtroom so they cannot be identified as police.

In **France**, the criminal procedure code prescribes that extra-care is required for the assessment of the dangerousness of minors, and thus also for the need to use means of restraint on them. It is also understood that persons whose mobility is impaired on account of their age or health are unlikely to pose a danger that would substantiate the need to apply means of restraint to them.

With respect to detained persons, the **Hungarian practice** is generally problematic due to the automatism mentioned earlier. It is also problematic as even ill people are not exempted from this practice. An attorney reported that one of his detained clients – serving a sentence for a non-violent financial crime – was seriously ill and needed to be transferred to a hospital every two weeks in order to get his treatment (kidney dialysis). Although there was no reason to believe that he would or could abscond given the serious state of his illness, he was always handcuffed during the transfer and he was also handcuffed to his bed while getting the dialysis.

4.3. Protection of the presumption of innocence in the Courtroom

In **France** and **in Malta**, given the explicit legal prohibition of the use of handcuffs, restraints are never or rarely used in the courtroom.

In **Malta**, even though interviewees agreed that accused persons **usually appear free in court**, other measures applied could adversely influence the perception of the audience or the jurors. An attorney mentioned that in one case "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. There may be an element of precaution in certain cases, but usually it is exaggerated." The discriminative practice in case of foreign defendants seems to be present in relation to court hearings as well. Another attorney complained about the way in which foreign defendants were presented in court. They were not given a chance to change their clothes or wear a suit, which could also strengthen the perception of guilt.

As was mentioned, **in France**, accused persons are **always freed from the means of restraint** before the hearing. However, as it was mentioned above, the French system uses glass boxes (as 'secured docks') in which the accused are placed. These are widespread in courtrooms across France. The

approach for a long time was that this practice does not breach the main rule, as the defendant is still free in his/her movements and can communicate freely with the lawyer. It still neds to be seen whether the French Ombudsperson's intervention in this regard will yield a result and start to significantly reduce the use of glass boxes.

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Glass boxes (commonly referred to by the interviewees as "goldfish bowls") also exist in **Spain**, but only at the National Court in Madrid and their use is limited in practice to terrorism cases, so they are not part of the usual practice. Accused persons arrive to their trial hearings wearing handcuffs. According to an interviewee, "once the police bring the arrested person to the court room, they remove the handcuffs automatically, without asking". Another stated that "it has become less and less necessary for the judge to tell the police officer to remove them; it is more common for the police to remove them as soon as they enter into the courtroom". However, one respondent mentioned that "the judges leave it up to the police to decide whether or not to remove the handcuffs". It has to be highlighted that the **prosecutors' and the judges' view on this topic significantly differs from what attorneys experience.** The vast majority of lawyers said that **detainees usually wear handcuffs during the judicial procedure.** They also added that judges often reject the request for the handcuffs' removal. It happens, but very rarely.

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

In **Hungary**, as it has been said, one of the main issues is the **systemic handcuffing** of detained suspects and defendants while escorting them to their court hearings. Therefore, almost every accused person brought before the court wears handcuffs and/or other restraining measures. All interviewees agreed that in the majority of the cases, **judges, as they know about this automatism, also automatically order the handcuff's removal**. Stakeholders also agreed that even if a judge forgets about it, he/she will do so upon the lawyer's request.

While this is a fundamentally positive practice, it poses a risk too as shown by a recent Hungarian case.[132] An inmate serving his prison sentence was tried for a minor criminal offence (damage to property). He was escorted from the prison to the court in handcuffs. The judge ordered the removal of the handcuffs, and the trial took place without any incident, however, when the prison officer wanted to put back the handcuffs on the defendant after the verdict had been pronounced, the defendant started a fight with the guard, grabbed his handgun and absconded. He was eventually caught, but only after taking a security guard as hostage, carjacking a vehicle and forcing its driver into a car chase, trying to carjack another vehicle, getting into a fight with the driver, and finally a shoot out with the police, as a result of which the fugitive was severely wounded. It turned out only later that he had been serving a prison sentence for armed robbery. It is unclear whether this information was communicated to the judge by the escorting officer, and whether the court made the decision to remove the handcuffs knowing about the violent criminal past of the defendant. The penitentiary administration claims that when the judge orders the removal of the handcuffs, the penitentiary personnel is not in the position to debate the decision.

The case highlights some deficiencies of the Hungarian practice:

[132] The case happened on 15 February 2019

(i) The **disadvantages of automatic handcuffing**: when the law enforcement personnel use means of restraint indiscriminately (regardless of the seriousness of the crime, his/her personality or relevant other circumstances), this can put the judges' attention to rest and give them the impression that the application of restraints is almost always unnecessary.

(ii) The case also shows the **lack of appropriate cooperation between the court and other agencies**. The detention personnel does not always (properly) inform the judge about the accused person's dangerousness.

(iii) The **lack of enough and/or appropriately trained staff** is also a problem that has bearings on the use of restraints during escorting. According to the interviewed practitioners, due to a shortage of personnel, detention facilities sometimes send people who are not properly trained in escorting tasks, which may result in increased reliance on means of restraints that would otherwise be unnecessary.

The lack of personnel may manifest itself in other ways. According to an interviewee, a defendant who was obviously not dangerous and was charged with a non-serious offence, arrived escorted by staff of the counter terrorism unit. When the judge asked for the reasons, it was said that "there was no one else available."

In the **rare cases in which handcuffs are left on** the accused, this is normally done based on reasonable concerns, and often practical ones. A judge interviewed indicated that taking off and putting back the handcuffs can be difficult and time-consuming. Therefore, when the judge already sees that the accused will not (as he/she refuses to participate in the procedure) or cannot (being under the influence of drugs or alcohol) give statements, the judge might leave the handcuffs on, as "in those cases it would take more time to take them off and put them back on than the hearing itself".

In Croatia, it is also for the **presiding judge to decide** on the use of handcuffs during the hearing. The defendant can be handcuffed at his/her trial or may appear with police escort when considered necessary. **In most cases, the defendant is not handcuffed,** but he/she is under the supervision of the judicial police in a way that officers are usually sitting next to defendant, one on each side. Stakeholders unanimously stated that the accused only wear handcuffs at the trial hearings in **exceptional cases**.

According to an attorney, his clients **were never handcuffed during the hearings**. If they were, he would ask the judge to take the handcuffs off. Similarly to Hungary, judges almost always comply with the request. The attorney said: "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." A detainee also stated he has never been handcuffed during trial or during questioning, but he was handcuffed during transportation from prison to court.

Good practices eliminating some of these problems were identified in a number of countries.

For example, a **Spanish** law enforcement officer said that in the respective region the judge is always informed in advance of the risk involved with the person to be presented to the court so that the judge can consider the necessary measures in advance. If the information on the characteristics of the suspect or accused person is provided to the judge in advance, the kind of miscommunication that might have happened in the Hungarian case is less likely to occur.

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

4.4. Protection of the presumption of innocence in the media and its influence of perception

Generally speaking we can state that **media presentation of suspects and accused persons in restraints raises issues** in almost every country covered.

Stakeholders **in Malta** seem to be the **most dissatisfied with the media** and journalists' approach to criminal cases. Half of the respondents thought that in the majority of cases the media shows the defendants without their consent. They also stated that this can influence the jury's and the public's perception of the accused. In addition, all the respondents agreed on the fact that Maltese journalists do not aim to protect the presumption of innocence when reporting on suspects and accused persons. On the contrary: "all reports seem to provide an undertone of clear guilt".[133]

Not only legal practitioners but also police officers expressed their concerns regarding the journalists' attitude. One third of the respondents stated that they had already had problems with the media. Many lawyers and police officers underlined that the media often publish "exaggerated headlines with weak articles which contain false information" or that the reports are not only exaggerated but sometimes "totally wrong". An officer gave an example: "the suspects are described as monsters by the media while, in fact, the accused persons are the victims. Then, after the suspect is released when found not guilty, the media doesn't apologize for the wrongful report. Although the media is not allowed to take pictures during trial hearings in Malta, they have the right, however, to report online while the trial is taking place. Sometimes the manner of online reporting is highly questionable. In one particular case, for example, a journalist reported the following: "Cmelik enters the court, wearing navy blue shorts and a t-shirt. He is handcuffed and is wearing a bulletproof vest. He was accompanied into the court by six armed officers, also in bulletproof vests – and two are now standing on either side of him in the dock. This is a clear indication of how high-profile this case will be. Four more police officers enter the court, taking up the last few places."[134]

Moreover, "researchers found that reporters and journalists from all media types consistently made explicit reference to the ethnicity and nationality of the alleged perpetrators. Frequently, the headlines would use nationality to describe them, for example "a Serb", "two Syrians" or "a Russian with Maltese citizenship", whilst no such descriptions are used for Maltese suspects. To Maltese suspects they would simply refer for example, by saying: "double murder suspect still to be questioned"[135] without giving any more descriptive details.

[133] Interview with a legal practioner, Maltese national report

[134] 'Why did he do this to me? I didn't even know him' - Hugo Chetcuti before his death: https://www.timesofmalta.com/articles/view/20180718/local/live-court-hears-first-evidence-about-hugo-chetcutis-killing.684717

[135] Country Report: Malta, point 7.

As mentioned earlier in relation to escorting, it is often foreigners who are led by the police through pedestrian areas and into the Court buildings through the front doors. Therefore, suspects and accused persons are exposed to journalists in conditions which obviously violate the presumption of innocence. An attorney reported one particular case in which "the group of migrants were led into the court building tied together with plastic ties or handcuffs and some of them were barefoot.[136] They all had their names written on a piece of paper and stuck to their t-shirts in the courtroom."

Interviewees agreed that remedies for these types of violation of the presumption of innocence should be put into place.

In **Hungary**, with respect to the media we could say that, in theory, the legal provisions mostly match the aim of the Directive. However, they are not being applied particularly well.

For instance, when the person refuses to give his/her consent to being recorded or his/her picture taken, the press is not allowed to use any picture in which the person concerned is identifiable. In practice, it usually means that the face of the accused is blurred or the media only shows his/her hands or take pictures from behind. At first sight it might seem that this practice complies with the provisions, but certain circumstances can still adversely affect the presumption of innocence. For example, in a smaller city where people tend to know each other, showing a movement, the hands or nape of the person is sufficient to make the accused easily recognisable. A judge interviewed was of the view that "if the person did not give his consent, he should not be shown at all."

With respect to courtroom practice, the judge instructs the members of the media before the hearing starts. A publicly non-accessible opinion of the criminal judicial panel (Opinion) of Budapest-Capital Regional Court[137] provides guidelines for judges on protocols to follow when the media is present in the courtroom. According to the Opinion, the judge:

(i) informs the audience that they could be photographed or recorded (if anyone objects, the judge informs the person that he/she can leave room or should cover his/her face);
(ii) informs the journalists about the rules to follow, drawing attention to the obligation of acquiring consent from any person being filmed or photographed (which is the responsibility of the press); and
(iii) asks the accused, the victim or other people involved in the trial (e.g. witnesses) specifically whether they give their consent to use their images. If they refuse, the judge calls upon the media not to take any photographs or not to record them.

The Opinion also mentions that live recordings should be prohibited as judges do not have any influence on the content and it can easily violate people's right to privacy. Stakeholders agreed that experienced journalists usually know the rules and follow judges' instructions during trials. Nevertheless, there are sometimes conflicting situations when judges need to take stricter actions.

In addition, all respondents unanimously stated that the press has a huge impact on the public's perception of a case or an accused person. Several attorneys claimed that journalists do not pay attention to proper wording, which results in the use of words that could indicate guilt. Sometimes, however, this is due to the fact that journalists do not know the proper legal terms. Interviewees highlighted the same complaint, which appeared in the Maltese report. Namely, if the case seems to attract wider public attention, journalists tend to present the story in an exaggerated manner.

[136] http://www.independent.com.mt/articles/2011-08-18/local-news/Court:-Migrants-Charged-over-Safi-riot-297358. Video footage: https://www.youtube.com/watch?v=tBuesMwrbDQ

[137] 'Fővárosi Törvényszék Büntetőjogi Kollégiuma'

Moreover, if the case progresses towards the accused's acquittal, they sometimes stop reporting on it completely.

Legal practitioners interviewed **in Spain** emphasised another phenomenon (also touched upon above), namely "**the media arrest,**" which "has become a norm, with spectacular operations designed to show the efficiency of the police."[138] This practice particularly jeopardises the protection of the presumption of innocence and violates Spanish legal provisions that lay down the obligation of carrying out police operations as discreetly as possible. Often the police itself release images of the operations in order to achieve greater publicity. The released images regularly show the accused in a humiliating situation, e.g. lying on the ground in their underwear.

The manner in which the **police inform the media also raises concerns**. One Spanish respondent claimed that "police videos are highly incriminating." Another explained that "there has been a change in journalistic language and guilt is assumed." The underlying problem is the source of the news, i.e. the police: "the violation of the presumption of innocence comes from the police themselves; the press releases, the press conferences explaining how the arrest took place… why do we even need a trial? Journalists base their articles on the press releases of the Ministry of Interior. These press releases portray the arrested persons as guilty, therefore journalists also emphasise the guilt. Sometimes, they try to soften with the term 'alleged', but they only use it figuratively. The theme of the article remains 'the murderer'." A police officer interviewed during the research did not agree with the aforementioned statements: "we do not expose arrested persons to the public. […] we do not present anyone as an unquestionable perpetrator, but it is inevitable that people draw such conclusions." Another officer, however, stated that the police should not give any press releases or appear on press conferences, as it can indicate guilt.

As opposed to the police, **judges and prosecutors** usually remain silent when it comes to commenting on cases. Stakeholders underlined that the courts' press releases are insufficient. Many of the respondents consider that a more active involvement of judges and prosecutors in giving official statements in a professional manner would be important in order to avoid and/or balance out the automatic perception of guilt stressed by the news. As the statements of judicial communication officers are usually neutral, based on facts, more accurate and truthful, therefore they usually leave less room for rumors.

Concerning journalists, stakeholders emphasised the need to differentiate between court journalists and journalists who work for tabloid press or "celebrity news." According to legal professionals, court journalists provide better quality, are better trained, more knowledgeable about the relevant legal provisions and report neutrally on the cases. The latter group, however, are not thorough in their research, "sells scandals" and only care about the revenue or audience potential. They were vigorously criticized by stakeholders, stating "these are the journalists who look for images of the arrested persons coming out of the police car, in handcuffs and being "paraded" through the courthouse", "they do not deserve to be considered journalists, their business is entertainment" and "they have to fill up hours of programming with no real content."[139]

In spite of the broad consensus on this matter, the opinions on whether to **sanction** journalists differ among the stakeholders. The majority said that sanctions are not the answer to this issue. They consider it a breach of the freedom of expression, but stressed the importance of self-regulation as well as providing ethical codes and appropriate education and trainings for journalists. They also

[138] Country Report: Spain, point 4.4.1.

[139] Country Report: Spain, point 4.4.3.

proposed other solutions, such as "to train court reporters by holding meetings between judges, journalists, and lawyers in the context of self-regulation and the introduction of codes for professional journalism".

In the **Croatian report** similar problems were raised, yet **systematic problems were not identified**. An attorney reported that in high profile cases, the police sometimes give a hint about the arrest to the media; therefore, the press can appear on site. Several legal practitioners as well respondents from the police underlined the impact on the media, not only on the **perception of guilt**, but the severe **consequences which can arise** from reckless reporting. One officer mentioned a case in which the justified measure Slovenian police took in relation to a Croatian driver who violated the rules of highway traffic was portrayed in Croatian media as being discriminative on the basis of the driver's Croatian nationality: "as an act of retaliation, Croatian youth destroyed a couple of Slovenian cars that were on Croatian territory. If there had not been such a biased article, this would have simply not happened. I believe that media have a big impact on us, and politics influence our thinking and our perception through the media as well."

Due to the blanket ban on recording images of persons in restraints, the situation in **France** raises **less concern** than other countries. Judges seem to agree on having **very few criminal cases** concerning the violation of the prohibition of audio-visual recordings during trial (Article 38 of the Law on Freedom of the Press) and the prohibition of taking pictures of the accused while wearing handcuffs. They consider that **those rules are well accepted and complied with by the press.**

In addition, when deciding upon cases like this, judges carry out a **balancing exercise** with special attention to the principle of proportionality (whether it is proportionate to the aim pursued) and the necessity (whether it is necessary in a democratic society) regarding the concurring rights, i.e. the presumption of innocence concerning the accused and the public's right to be informed. The **Merah case**, for example, required such a balancing exercise. A journal published pictures of the accused taken in the court before the verdict was handed down in a high profile case. The editor did not deny that the pictures were taken and published in breach of the abovementioned provision, but argued that the public's right to be informed overrules the prohibition. "The tribunal of Paris rejected the defendant's argument that only pictures can illustrate the attitude of the accused (for example his detachment and disregard for the victims' family) in court, as this information can be reported in writing instead."[140]

Civil lawsuits concerning breaches committed by the press are also **rare** in France. One judge estimated that there are only 20-30 cases annually in which people claim compensation based on the attitude of the media.

Given the low number of complaints against the media in relation to breaches in this context, we can agree with the interviewed judge above, in particular that it seems that the media have the tendency to respect legal requirements, as it is probably grounded in their legal culture.

5. Conclusions and recommendations

Looking at the legislative framework, it might be concluded that Article 5 of the Directive has been transposed and implemented in the countries examined, in Croatia, France, Hungary, Malta and Spain. Most legal practitioners agree that the legal provisions generally comply with the Directive's requirements.

[140] Country Report: France, point 5.1.1.

The surveyed countries' legal provisions, albeit using different wordings, explicitly guarantee the protection of the **presumption of innocence,** i.e. the legal principle stipulating that anybody who has been accused of having committed a crime must be presumed innocent until they are proven guilty in accordance with the relevant laws. What it means in terms of appearances – i.e. how suspects are presented in public, what the content and tone of the press coverage of criminal cases are, and what means of restraint are applied on defendants in courtrooms or in public settings – can however vary between the different Members States. This is so despite the several commonalities, e.g. the cases in which handcuffs are allowed to (or must) be used (risk of absconding, harm to self or others, etc.), and the general principles guiding the use of restraints, such as the requirement of proportionality, appropriateness and individual assessment.

However, practitioners agree that the established practices and/or interpretations of the laws are frequently not in line with their purpose and can undermine the effective enforcement of the presumption of innocence. One of the most important findings of the research is exactly that institutional culture and societal pressures can and do greatly and negatively impact the enforcement of the provisions that are in place to guarantee that the presumption of innocence would prevail.

There is huge public appetite for sensational stories concerning crime, there is an almost atavistic public sentiment that wishes to see "justice" done even before a final judicial decision could be handed down on whether the concerned defendant is guilty or not. This puts a pressure on both the media and the law enforcement bodies with the latter feeling the need to demonstrate their efficiency and toughness of crime through enabling journalists to capture images of persons arrested and in restraints instead of trying to preserve the presumption of innocence and the defendant's dignity and reputation. The other factor working against the presumption of innocence is the law enforcement personnel's innate preference for resolving the conflict between the protection of the defendant's rights and security to the detriment of the former, which is to some degree understandable on both the personal and the institutional level, but can have irreversibly damaging impacts on the defendant's life.

Due to these external and internal institutional pressures, the practice of the use of restraints is often very different from what should result from the written norms. In some cases, the actual instances are clearly unlawful (c.f. the complaints about the police leaking information to the press about arrests at the suspects' home, and the practice of law enforcement personnel taking the acquitted defendant in handcuffs back to the prison to gather his belongings). In others, the violation is less obvious due to the large margin of appreciation that must be allowed to law enforcement and judicial officials when they decide on whether means of restraint should be used or not. In any case, the research shows that it is common practice for the law enforcement bodies to handcuff suspects and accused persons in all member states. The lack of an individual assessment when deciding on the use of handcuffs or other restraining measures was also reflected in all national reports. During the transfer of detainees, the use of handcuffs also seems to be common, as is the practice of escorting defendants in court buildings in restraints. The most common practice in the countries participating in the research is that the defendants are transferred to the court, wait in the court building and are escorted to the courtroom in handcuffs, which are usually only removed once the court session starts.

The research has also shown that that remedies for the violation of the presumption of innocence show a great degree of variety among the Member States, but are in most of them rarely used in practice, partly because the concerned persons and legal practitioners regard them as not really meaningful, but also partly because – due to the existing general culture around the issue – even they sometimes regard the use of restraints as a more or less natural element of the procedure.

Based on the above, we have identified three types of recommendations that may – especially in combination – address the gaps in implementation

a) Recommendations aimed at changing institutional and professional cultures

Trainings and the creation of codes of conduct can be useful tools in changing the culture of the concerned professions, including journalists. For this reason, we recommend the following.

- 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 also extend to the rules governing how suspects and accused persons are allowed to be presented in the media and also to the proper use of legal terms to avoid any negative impact on the perception of the public.
- Trainings should if applicable 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.
- Similar trainings based on personal encounters with former defendants should be offered to law enforcement and judicial officials.
- Only journalists who have undergone training on these issues should be allowed to cover criminal proceedings (c.f. the mandatory training for legal aid lawyers).
- The codes of conduct adopted by professional associations of journalists should contain a specific section on covering criminal proceedings.

b) Recommendations concerning the legal framework

There are some aspects of the issue that can be addressed through legislation. On the one hand, legislation can contribute to culture change. By way of example, a legal framework which declares that there shall be no handcuffing in the case of certain vulnerable groups (such as persons with disabilities or pregnant women), unless there are very pressing grounds to apply restraints could go distance long way in changing the mind-set of law enforcement personnel. On the other hand, reducing or excluding personal discretion with regard to certain matters may improve the defendant's chances of getting a trial where the presumption of innocence is respected to a greater extent than what appears to be the case in a number of Member States. The most obvious example for this is the blanket prohibition of taking photographs of persons when they are in restraints, which the authors have identified as a good practice compared to other solutions which in practice fail to achieve a sufficient protection of the presumption of innocence. On this basis, we put forth the following recommendations:

- The French example of a blanket prohibition on taking photos of people when they are in restraints should be followed. This should not mean a general ban on covering court cases, but since restraints are very strongly linked to perceptions of guilt and being dangerous to society, this kind of limitation of publicity seems to be a reasonable restriction.
- Special regulation for vulnerable groups of suspects (children, elderly people, pregnant women) should be put in place making it the default option that they are not restrained. The use of measures of restraint with regard to members of these groups should only be allowed if absolutely necessary and inevitable.
- 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.

- The French and Maltese example in legislating the relationship between the use of restraining measures and the presumption innocence more directly (i.e. by prescribing that suspects and accused persons shall not be presented as being guilty through the use of measures of physical restraint), should be followed in other Members States, and similar legislative solutions should be adopted, as reminding law enforcement personnel on the fair trial implications of the use of restraints may have a positive impact on the organisational culture.
- The law enforcement personnel's or unit's quasi-objective liability for leaks on planned arrests should be created (e.g. through a rebuttable assumption that the media has acquired information on the planned arrest from them).
- In general, adequate and effective remedies should be ensured for the violation of the presumption of innocence, including effective procedures for compensation.

c) Recommendations concerning technological and infrastructural solutions

Finally, an efficient way to minimise the chances of a breach of the presumption of innocence and the dignity of the suspects or accused person is the adopting of infrastructural and technological solutions that reduce the likelihood of the defendant being seen in restraints by the public, the media and also the actors of the proceeding including the judge or the jury. Such solutions may be the following:

- Where possible court infrastructure should be created to make sure that defendants are not exposed to public attention when they arrive and leave in restraints, and that this should be a requirement whenever a court building is constructed or renovated.
- The dock (whether cages or glass boxes) should be removed from all courtrooms. Free and easy communication between the defendant and the counsel should be guaranteed through their placement in and the outline of the courtroom.
- 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.