

RECOMMENDATIONS TO BAR ASSOCIATIONS

On access to justice in detention

A paper based on comparative analysis and empirical studies in nine EU countries by the research project EUPRETRIALRIGHTS

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Lawyers naturally have an essential role to play in defending the fundamental rights of detainees and of those deprived of their liberty. Justice cannot be rendered without a lawyer. This is particularly true in prisons, where litigants suffer from a combination of drawbacks in their access to the judge: low economic, social and cultural resources, difficulties in writing and reading, very poor access to legal texts, etc. However, against this background, one of the main lessons of the research is that in a significant number of countries, but also at the level of the policies promoted by the Council of Europe – which is the main vehicle for reform in this area - access to justice is designed without taking into account the vital role of lawyers: detainees must file their applications before the courts on their own through supposedly simplified procedures. This assumption is very largely invalid.

In practice, the exercise of remedies without the support of a lawyer results in a massive rejection of proceedings as inadmissible or an expeditious treatment of them, in particular without taking into account the requirements of the International Convention on Human Rights. In other words, the lack of legal assistance results in a lower quality of justice, often largely bureaucratic, with lack of due respect for the law. It is therefore essential that the institutions representing lawyers make it clear to the domestic authorities that prisoners' access to the judge cannot be conceived without the assistance of a lawyer, and that the procedures in force must recognise the essential role of the latter.

The second observation is that, in the case of incarcerated defendants, national systems often rely on the lawyer appointed in the criminal case to take charge of protecting the fundamental rights of his/her client in detention. However, without taking into account the professional constraints of lawyers and the great practical and often legal complexity of handling complaints from detainees, this approach is unrealistic. The accomplishment of an adversarial procedure in prison matters requires multiple steps to be taken before the court is seised. There is the need to obtain documents from the administration, which is often reluctant in this respect, as well as the need to meet the client in detention, to obtain testimonies from fellow prisoners to support the clients' claims, etc.. Secondly, cases often involve issues from different legal disciplines (administrative law, criminal law, constitutional law, European law) which require significant legal research. In short, they represent a workload that can hardly be covered by the remuneration intended for the criminal case. Despite the now well-established fact that violations of fundamental rights in detention have a significant impact on the criminal trial and the ability to defend oneself adequately, the possibility of dealing with these issues separately from criminal proceedings is essential from the point of view of the effectiveness of the rights of detained persons. **It is therefore essential that adversarial proceedings aimed at protecting fundamental rights in detention give rise to adequate remuneration under the legal aid scheme and allow a lawyer other than the lawyer in charge of the criminal case to deal with it. Bar Associations should advocate for this claim.**

The third observation relates to a finding that is largely valid in the countries studied, namely that lawyers who handle prison litigation regularly carry out this activity in very precarious conditions. These lawyers are largely dependent on legal aid. The compensation received in this context is systematically lower than the real cost of the work provided. In most cases, the corresponding sums are paid at the very end of the procedure and with a great deal of delay, exposing the parties concerned to major cash flow difficulties. The conditions under which legal assistance is provided are more complicated than the practise of law outside the prison walls. Access to the client is often complicated. There is the need for prior authorization and booking visits in advance, distance from prisons to city centres, long and tedious security checks, and inability to use the telephone to communicate with the client. In addition, confidentiality between client and counsel is much more frequently ignored than in other

fields of legal practise. **In other words, this combination of unfavourable conditions makes the support of the bar all the more necessary to play the role of interlocutor with the authorities and, more broadly, to defend the interests of lawyers in the context of public policy-making.**

Fourth observation. the right to legal aid must include the right to 1°) information on the conditions required for the recognition of the right to legal aid: economic criteria, documents to be submitted, time limits, etc. 2°) Advice and guidance before the process is initiated, including an initial analysis of the viability of the claim. 3°) Assistance in the drafting of the application form for legal aid. 4°) Deliverance of a resolution, recognizing or temporarily refusing legal aid, with information of the consequences of the denial. 5°) The possibility to judicially challenge the decision on legal aid.

Fifth observation. The Bars should, in collaboration with the Administrations, establish legal-penitentiary counseling services for the provision to inmates of information, counsel and defense in the field of prison law or related to the execution of the sentence resulting from their stay in prison. Such defense of the rights of detainees includes the intervention of the lawyer in administrative or judicial proceedings that may be engaged in strictly penitentiary matters. The Service to be promoted, already existing in countries such as Spain, should also generally ensure the defense of the rights of detainees in a global way, not only through recourse to courts, but also through meetings or contacts with the prison administration, the prison supervisory authority or any other interlocutor useful for this purpose. Besides, the Service should facilitate the coordination between lawyers active in prison litigation and other Committees and Services offered by the Bar (training, defense, legal aid, technological services and others).

Moreover, since the early 2000s, under the influence of the case-law of the European Court of Human Rights, prison law has developed considerably. The procedural obligations of States have increased and been enriched. These requirements are gradually being incorporated into the national laws systems. In a growing number of States, prison issues are being included in academic programmes. The Bars are beginning to understand the specificity of this field through conferences and training. However, this process would need to be structured and systematized to adequately meet the technical needs of lawyers in this area. The lawyers interviewed in the empirical studies clearly expressed their expectations in this regard, often considering themselves insufficiently equipped. **Prison law should be a permanent component of the specialised training of lawyers. Given the importance of the case-law of the European Court of Human Rights in this field, the promotion of closer cooperation with the Council of Europe's HELP programme should be particularly encouraged.** Similarly, the gender perspective must be taken into account both in the defense and within the penitentiary institutions (particular circumstances of women since the beginning of the procedure, right to health/gynecology, two modules for women per prison, principle of equality in the access to activities, conditional release if dependent minors or other measures).

Furthermore, given the entanglement of sources of law, and the frequent fragmentation of domestic prison law rules, the creation of digital legal resources now seems highly desirable. Such resources are likely to significantly speed up lawyer's processing of proceedings by limiting the time devoted to legal research, when using for example the search engines of the European Court of Human Rights or the Court of Justice of the European Union. Bar Associations should encourage the development of thematic legal guides on the different aspects of imprisonment clearly identifying the different applicable domestic and

international standards. Similarly, **newsletters on this subject should be distributed to lawyers**, as is done in some Bar Associations in Spain.

Finally, it is advisable to offer communication and technological services adapted to the needs of detainees and lawyers such as electronic passes in prisons for lawyers (electronically signed by the Bar and the prison, which guarantee the status of lawyer and authorize the visit to the centre) or the switchboard, which allows the coordination of the various parties involved in the legal aid service connecting detention centres, courts, bar associations and lawyers through mobile devices. This link facilitates the processing of requests for legal aid as well as the monitoring of the quality and ethics of the legal services.

Recommendations:

Enabling lawyers to play their full role in judicial proceedings and, consequently, safeguarding the fundamental rights of detained persons:

1. Bar Associations should advocate for the remuneration under adequate conditions within the legal aid schemes of the procedures aiming at the protection of fundamental rights in prisons.
2. Beyond legal aid, Bar Associations, in cooperation with public authorities, should promote penitentiary legal assistance services.
3. The representative structures of the legal profession should include within their organisation charts, structures (committees, (sub-)commissions, working groups or other) specifically dedicated to prison issues. They will be entrusted with the defence of the rights of persons deprived of liberty and of the interests of lawyers regularly involved in prison litigation, in situations where they encounter particular difficulties in their practice and more generally in the context of public policy-making;
4. Similarly, they should organize annual events at the national level to enable the creation of networks of experts, enhance the influence of the Bar on the public administrations and the exchange of good practices.
5. Prison law should be systematically offered as part of the continuing training of lawyers, incorporating the European law dimension and the procedure before the European Court of Human Rights; as well as the gender perspective in the defense and penitentiary policies.
6. Bars should develop thematic digital resources to facilitate the argumentation of prison appeals, to keep lawyers informed of the developments in this field of law and to facilitate their professional practice with all the guarantees for the persons and administrations involved.