

2021 Rule of Law Report - targeted stakeholder consultation Fair Trials

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About you

I am giving my contribution as: civil society organisation/NGO

Organisation name: Fair Trials

Main area of work: Justice system

Describe your organisation briefly: 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. In Europe, Fair Trials coordinate the Legal Experts Advisory Panel (LEAP) – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organisations. More information can be found on www.fairtrials.org.

Transparency register: 302540016347-29

Submission

Questions on horizontal developments

In a legal order based on the rule of law, criminal justice systems must be fair and effective and respect the fundamental human right to a fair trial. This implies fairness for the person accused, because criminal prosecutions and convictions have severe implications for the person concerned. This also means that, while States have legitimate reasons to give law enforcement authorities (LEAs) legal powers to investigate and prosecute crimes, one of the functions of a fair and open criminal justice system is to uphold the rule of law by exposing where LEAs have exceeded their legal powers.

Assessing the legality and proportionality of the use of law enforcement powers is a key element of a fair criminal justice system. A criminal justice system that emphasises the rule of law must therefore ensure that meaningful safeguards are in place to enable access to courts for individuals who are subject to LEA measures, through effective judicial review mechanisms, which uphold respect for fundamental rights and equality before the law. The courts ensuring oversight must be impartial, independent and sufficiently well resourced, funded, staffed and equipped to carry out this key function.

Pre-trial detention (depriving suspects and accused people of their liberty before the conclusion of a criminal case) can be said to be the harshest measure states can take against a person. As such, it is intended to be an exceptional measure, only to be used as necessary and proportionate and in compliance with the presumption of innocence and the right to liberty. Its use is only acceptable as a measure of last resort, in very limited circumstances. Unfortunately, in the EU as around the world, these strict limitations are not always respected (<https://www.fairtrials.org/publication/measure-last-resort>).

Where pre-trial detention is not used as a measure of last resort within the confines of the legal framework that enables states to use such power, it indicates a failure of the mechanisms in place to uphold the rule of law and protect individuals from the unlawful use of state power.

In general, pre-trial detention rates have gradually increased in Member States over the last years. Taking by way of example the following Member States:

- In France
(http://www.justice.gouv.fr/art_pix/stat_etab_decembre_2020.pdf):
 - 18.158 on 1st of January 2016
 - 19.498 on 1st of January 2017
 - 19.815 on 1st of January 2018
 - 20.343 on 1st of January 2019
 - 20.075 on 1st of January 2020
- In Hungary
(the National Penitentiary Administration's response to HHC's FOI request (no. 30500/14282- /2020.ált., 2 February 2021):
 - 2.694 on 31 December 2018
 - 2.709 on 31 December 2019
 - 3.389 on 15 December 2020
- In Poland
(https://www.hfhr.pl/wp-content/uploads/2021/02/02_Situation-of-persons-in-pretrial-detention_15022021.pdf):
 - 5.396 on 31 December 2016
 - 7.239 on 31 December 2017
 - 7.360 on 31 December 2018
 - 8.520 on 31 December 2019
 - 8.692 on 31 December 2020

These numbers continued to rise throughout the first year of the pandemic despite the risk to health and life of placing a person in detention, particularly in overcrowded facilities. The risk of contagion in detention facilities led states to take exceptional measures to release prisoners to prevent the spread of the virus, but these generalised measures did not affect pre-trial detainees (<https://www.fairtrials.org/publication/beyond-emergency-covid-19-pandemic>). States even considered measures to further restrict people's access to courts to review the continued need for pre-trial detention. For instance, in France, where the number of persons in pre-trial detention reached a peak of 23.324 in the beginning of March 2020, before decreasing to 19.138 in May (only to increase again to reach 20.213 in December), the government issued an order n. 2020-303 of 25 March 2020 (later ruled unconstitutional by the Constitutional Council) to automatically extend the maximum time limits for pre-trial detention up to 6 months in certain cases, without judicial review.

The gradual increase of pre-trial detention rates in the last five years and the peaks reached over this last year, at a time where incarceration poses serious and immediate health risks, should be taken as a key indicator of the erosion to the rule of law. The Commission should query the robustness of applicable legal frameworks to ensure effective access to defence rights, to impartial courts and meaningful judicial review. We urge the Commission to include in dialogues with all Member States a thorough review of the reasons for any increases in pre-trial detention rates in 2020 and to ask Member States: Were measures were adopted/considered to reduce the number of persons in pre-trial detention and if none, why not? How regularly are people given access to court to challenge pre-trial detention (remote or in person)? What was the average length of pre-trial detention? How was access to defence rights secured?

Developments in Member States

1. POLAND

Quality of justice

Digitalisation

Due to the COVID-19 pandemic, access to police stations and courts has been severely restricted in Member States, and many court hearings were postponed or moved online. Within this general trend, Poland introduced remote trials and pre-trial detention hearings by means of a legislative amendment that entered in force in June 2020. What was supposed to be an emergency measure became permanent by way of Articles 250 and 347 of the Criminal Code of Procedure and is therefore set to remain in force even after the pandemic. We are concerned that the use of remote hearings as a substitute to physical presence has been introduced without understanding the impact that this may have on defence rights, with serious implications on people's access to courts, including to seek review of pre-trial detention measures.

Because pre-trial detention is intended as an exceptional measure, countries should provide regular reviews of detention to ensure that it is still justified. But it is not clear whether sufficient oversight is ensured where remote technology is used, and defendants and/or their lawyers are prevented from being physically present at review hearings. As a result, decisions to detain may be less likely to be overturned or seriously questioned on review, and detention extended for unnecessarily long periods of time.

There is limited information available on the use of remote hearings. According to the data made available to the Helsinki Foundation for Human Rights (HFHR), the Regional Court in Wrocław remotely heard 249 civil cases and 33 criminal cases between March and December 2020. The same data also suggests that remote pre-trial hearings are already being held in two Warsaw-based courts.

As access to an independent court and judicial review, including respect for fundamental rights is a fundamental element of the rule of law, this situation raises serious human rights concerns (see p. 28 of <https://www.hfhr.pl/wp-content/uploads/2021/02/Human-Rights-in-the-Times-of-a-Pandemic-FIN-2.pdf>) with regard to quality and effective legal assistance, effective participation to the hearing, impact of the defendant's appearance as a "prisoner" on the presumption of innocence, and increased vulnerability for defendants with special needs (interpretation needs, mental impairment,...). As provided by the 2013/48/EU Directive on the right of access to a lawyer in criminal proceedings, **it is essential to ensure that defendants are able to exercise their rights of defence practically and effectively, even when they are not physically present in court** and are unable to meet their lawyers in person.

It is even more crucial in a national context where the overuse of pre-trial detention already is a structural issue highlighted numerous times by the European Court of Human Rights, without effective measures taken to address it (<https://www.hfhr.pl/en/publication/the-trials-of-pre-trial-detention-report/>)

Other institutional issues

Other

As reported by the Helsinki Foundation for Human Rights (HFHR) in its recent brief (https://www.hfhr.pl/wp-content/uploads/2021/02/03_Brief_Freedom_of_Assembly_240221.pdf) and report (<https://www.hfhr.pl/wp-content/uploads/2021/02/Human-Rights-in-the-Times-of-a-Pandemic-FIN-2.pdf>), the outbreak of the pandemic coincided with key events - presidential elections, severe curtailment of the rights of LGBTQIA persons and on the right to abortion. But any public demonstration in response to these developments was prevented, stifling public opposition. First introduced by Regulation of 13 March 2020 alongside the state of emergency, the prohibition of assemblies of more than 50 persons was replaced by a total ban in 2020, which was lifted in May. In December 2020, the maximum number of participants was reduced to 5 persons, de facto depriving the right to assembly of its essence.

The police relied on the restrictions to repress any assemblies, with people facing administrative fines of several thousand zloty, issuing tickets and filing criminal citations (for example, see p. 18 of HFHR's report). Moreover, the initiation of criminal proceedings against protesters was also encouraged by the National Prosecutor, who considered that holding protests constituted the offence of posing a threat to the life and health. In some cases, motions for pre-trial detention were even made (p.18 of HFHR's report)

During police interventions, tear gas and pepper sprays were used in a disproportionate and unjustified manner (see p. 19 of HFHR's report). In a report describing the situation of persons arrested during protests on 7 August 2020, the National Mechanism for the Prevention of Torture (NMPT) drew attention to the recurring accounts of beatings by police officers, flagrant abuses of direct coercive measures, in particular physical force and handcuffs, the demeaning, homophobic or transphobic treatment of detainees, excessive use of body searches and the performance of body searches in a manner violating the dignity of arrested persons. Following the protest of 26 October, the NMPT received a complaint from an arrested person who had signs of injury and reported that he had been beaten in a police car by police officers (for other examples, see p. 20 of HFHR's report).

The pandemic emergency does not release police officers from the obligation to act in a proportionate manner and respect dignity and human rights in the process, including the freedom from torture and inhuman and degrading treatment. Fair Trials shares this concern that abuse of police new extended powers undermine the rule of law. Judicial control over the legality and proportionality of police action by independent and impartial Courts is a key element of a fair criminal justice system, which raises deep concerns regarding the above-mentioned shortcomings in terms of access to courts and fair trial guarantees, further undermining the rule of law.

2. HUNGARY

Quality of justice

Digitalisation

The COVID-19 pandemic, and responses to it, have had an unprecedented impact on criminal justice across Europe. Access to police stations and courts has been severely restricted, and many court hearings were postponed or moved online.

In Hungary, pursuant to Article 120-126 of the Code of Criminal Procedure, which was already in force before the pandemic, remote hearings might be ordered by courts, prosecutors or investigating authorities ex officio, or upon request of the person obliged to participate personally or who has a right to participate in the criminal proceedings.

In response to the outspread of COVID-19, the Government Decree 74/2020 on Procedural Measures Applied in the State of Danger was issued on 31 March 2020 (http://njt.hu/translated/doc/J2020R0074K_20200331_FIN.pdf) and introduced the following rules: if the person's presence would violate the rules of isolation or quarantine, the procedural act must be postponed. If the procedural act cannot be postponed, and even if personal participation would not violate the rules of isolation or quarantine, the authorities are required, as a main rule, to conduct remote hearings. In practice, this means that hearings are conducted e.g. through Skype.

According to the data made available to the Hungarian Helsinki Committee (HHC), lawyers have expressed concerns that no technical solution can entirely replace physical presence and non-verbal information conveyed during physical hearings. Lawyers also expressed the view that remote hearings are problematic for pre-trial detainees, who are attending remotely, and on their own, from prison. This set up may have detrimental effects on the defendant's trust in his/her lawyer, and removes the ability of lawyers to assess whether any undue pressure (including from the guards who are present during the hearing) is applied on the defendant.

Fair Trials shares HHC's concerns in that respect, and **produced** guidelines **setting out practical recommendations for States** that are either implementing or considering to implement the use of remote hearings in criminal justice proceedings (<https://www.fairtrials.org/news/safeguarding-right-fair-trial-during-coronavirus-pandemic-remote-criminal-justice-proceedings>).

Other institutional issues

Other

In response to the threat of COVID-19, Member States have imposed major - and sometimes total - restrictions to people's right to peaceful assembly. These measures, which must be placed in the context of a general increase of police powers in Member States throughout the crisis, have been rushed in with little or no democratic scrutiny and no sunset clauses, which means that they may remain in force long after the COVID-19 pandemic comes to an end. These new and often vaguely defined police powers have resulted in excessive policing and widespread criminalisation, with unlawful arrests, excessive fining, and prosecutions for alleged COVID-19 related offences, in particular in the exercise of the right to peaceful assembly. See <https://www.fairtrials.org/policing-covid-19>.

This was the case notably in Hungary, as reported by the Hungarian Helsinki Committee (HHC) to the UN Special Rapporteur on the rights to freedom and peaceful assembly (<https://www.helsinki.hu/en/hhc-submission-to-the-un-special-rapporteur-on-the-rights-to-freedom-of-peaceful-assembly-and-of-association/>). One of the first measures adopted by the Government when it declared the state of danger in March 2020 was to impose a blanket ban on assemblies, without any possibility to consider the individual circumstances of each case. Citizens have nonetheless held spontaneous protests in innovative ways. "Car demonstrations" were for example organised to express disapproval of governmental measures, by driving around and honking in the centre of Budapest. As a result, many protestors were fined, either for violating the rules for honking when driving or for violating the ban on attending demonstrations and leaving their homes despite the lockdown. A full prohibition was imposed again during the second wave of the pandemic, during which the government increased penalties (organising a protest became punishable up to approximately EUR 2800) and authorised military forces to monitor the enforcement of the restrictions to prevent spontaneous physical protests.

Excessive punitive measures create a strong chilling effect on citizens, and de facto prevent the exercise of freedom of assembly. Moreover, legal representation before courts in freedom assembly law cases became compulsory as of 1 January 2018 (Act I of 2017 on the Administrative Court Procedure), which creates a significant administrative obstacle to obtaining judicial remedy against bans and restrictions on assemblies. It may be difficult for organisers to find a legal representative within the very short time necessitated by the fast-track assembly court procedure, especially if legal aid is required.

This is yet another blow to the Hungarian civic space, which had already shrunk alarmingly in the past decade (see https://www.helsinki.hu/wp-content/uploads/HHC_State_of_RoL_in_Hungary_2020.pdf), and an indicator that new extended police powers adopted during the pandemic are being used to further undermine the rule of law.