

EUROPEAN LAWYERS DAY 2019

- 25 October 2019 -

Your right to legal aid
in criminal matters
&
A focus on access
to a lawyer when
detained in prison



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Foreword

“The CCBE is delighted to celebrate the 2019 edition of European Lawyers’ Day. This year, we are focussing on “Your Right to Legal Aid in Criminal matters” with an added article on “Access to a lawyer when detained in prison”.

Legal aid is an essential tool in ensuring access to justice. Access to justice is a fundamental right and an essential part and instrument of human rights, stipulated and protected by Article 6 of the European Convention on Human Rights, i.e. free access to justice for any individual, regardless of his or her social status or economic position. It is considered to be one of the main pillars of the rule of law and individual dignity. It is the duty of States and governments to guarantee, organise and finance such legal aid systems, which permit those with the least means to obtain access to justice and which cover the cost of legal advice, defence and representation by legal professionals. It is essential that Member States have functioning legal aid systems. The CCBE appreciates the efforts and work of the Commission in this regard and urges Member States to fulfil their obligations under the recent EU Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

This handbook aims to assist readers in preparing for European Lawyers' Day. More materials are available on the CCBE’s website: <https://www.ccbe.eu/actions/european-lawyers-day/>. You are very welcome to contact us with any questions or comments you may have.

We look forward to following your events and celebrating a memorable European Lawyers' Day 2019!

José de Freitas
CCBE President

#2

About European Lawyer's Day

PURPOSE

European Lawyers' Day (ELD) is a day that highlights the essential role that lawyers play as actors in the judicial system and their contribution to the protection of the rule of law. ELD has been celebrated since 2014. Lawyers defend the rule of law by acting against unlawful situations and defending citizens' rights. The rule of law is, together with human rights, a cornerstone of European democracy.

DATE

ELD is celebrated on **25 October**, in conjunction with the **European Day of Justice**, which aims to inform citizens about their rights and strengthen confidence in judicial systems.

THEME

An annual theme is chosen to illustrate how a specific aspect of law affects citizens and their rights. The chosen theme for 2019 is **"Your right to legal aid in criminal matters & a focus on access to a lawyer when detained in prison"**.

The themes of previous years were as follows:

- » 2018: Why lawyers matter: Defending the defenders of the rule of law
- » 2017: E-volving lawyers: How digital transformation can enrich the relationship between the citizen and the lawyer
- » 2016: Access to justice
- » 2015: Freedom of speech
- » 2014: Lawyer-client confidentiality

ACTIVITIES

Bars and Law Societies are encouraged to organise events, publish educational materials and/or conduct other programmes to promote citizens' awareness of the European Lawyers' Day theme.



RESOURCES

An event poster, press releases, relevant position papers and other related online research resources will be available on the CCBE's website: <https://www.ccbe.eu/actions/european-lawyers-day/>

CONTACT

If you have questions or comments regarding the 2019 theme, please contact Peter McNamee (mcnamee@ccbe.eu)

#3

Information about the theme

LEGAL AID FOR SUSPECTS AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS AND FOR REQUESTED PERSONS IN EUROPEAN ARREST WARRANT PROCEEDINGS

by Ondrej Laciak, Chair of the CCBE Criminal Law Committee

I: INTRODUCTION

The CCBE has decided that European Lawyers' Day will be a good opportunity to focus on Directive 2016/1919/EU on legal aid for suspects or accused persons in criminal proceedings. This Directive had to be implemented in EU Member States by 25 May 2019. This is an important Directive and is part of a package of Directives that have been agreed over many years.

In order to understand the Directive, it is helpful to be acquainted with its background and to know where it fits within a broader picture.

The practical mechanism for the drafting of a Directive began as far back as 2009, when the Council of Ministers (which is composed of national government ministers from each EU country) adopted the so-called "*Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings*". This Roadmap provided an agreed framework, based upon a step-by-step approach, to harmonise certain criminal procedural standards within the EU in order to ensure the fairness of criminal proceedings and equivalent protection of citizens' rights across the EU.

These common minimum standards are necessary for judicial decisions taken by one EU Member State to be recognised by other EU Member States. The EU's area of justice is based on **mutual recognition** and **mutual trust** and, in order to achieve and maintain this, additional proposals are needed to ensure and strengthen the rights of citizens in criminal proceedings.

Pursuant to the Roadmap, three EU Directives were agreed between 2010 and 2012:

1. [Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings](#);
2. [Directive 2012/13/EU on the right to information in criminal proceedings](#);
3. [Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty](#).

Three further Directives were adopted between 2013 and 2016:

4. [Directive 2016/343/EU on the presumption of innocence and the right to be present at the trial in criminal proceedings](#);
5. [Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings](#);
6. [Directive 2016/1919/EU on legal aid for suspects or accused persons in criminal proceedings](#).

These Directives, while not perfect, promote the principle of equality of arms to provide all parties with the protection of a fair trial. They aim to strengthen mutual trust in the judicial systems of Member States, and therefore ensure the smooth functioning of the European Union's area of justice.

The CCBE was very active in contributing to the Directives at all stages of the legislative cycle. The CCBE engaged with the respective institutions with the aim of ensuring that proper safeguards are reflected in the final Directives that will set minimum standards across the EU.

Although they are the result of extensive compromises, the Directives are very important, and it is essential that they be applied correctly by Member States.

II: DIRECTIVE 2016/1919/EU ON LEGAL AID FOR SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

The Legal Aid Directive had to be implemented by EU Member States before 25 May 2019. For the purposes of this Directive, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer. The Directive establishes common minimum rules on the right to legal aid for:

- (a) suspects and accused persons in criminal proceedings; and
- (b) persons who are the subject of European arrest warrant (EAW) proceedings.

The Directive complements the existing Directives on access to a lawyer and the presumption of innocence (and should not be interpreted in a way that limits the rights provided for in these Directives). The Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer and who are:

- (a) deprived of liberty;
- (b) required to be assisted by a lawyer in accordance with Union or national law; or
- (c) required or permitted to attend an investigative or evidence-gathering act.

The Directive also applies to requested persons under an EAW who have the right to access a lawyer upon arrest by the executing State.

It should also be noted that the Directive also applies to persons who were not initially suspects or accused persons, but who become so during questioning.

The Directive also applies to minor offences in certain situations (see Article 2 (4)). In any event, the Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion.



Member States are under an obligation to ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require, and in this regard Member States may apply a means test, a merits test or both.

The Directive provides that legal aid must be granted without undue delay, and at the latest before questioning by the competent authority, or before any investigative or evidence-gathering acts are carried out.

Regarding legal aid in EAW cases, Article 5 of the Directive provides that the executing Member State must ensure that requested persons have a right to legal aid upon arrest under an EAW until they are surrendered, or until the decision not to surrender them becomes final. The issuing State must ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing member State, in so far as legal aid is necessary to ensure effective access to justice. The right to legal aid in EAW proceedings may be subject to a means test, which shall apply *mutatis mutandis*.

The Directive also provides that decisions on whether to grant legal aid and on the assignment of lawyers must be made, without undue delay, by a competent authority. Member States must also take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence. In addition, Member States must take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

It is important to note that Article 7 of the Directive contains measures regarding the quality of legal services and training. Under this Article, Member States are required to take the necessary measures, including with regard to funding, to ensure that:

- (a) there is an effective legal aid system that is of an adequate quality; and
- (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.

Member States shall also ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings, and in European arrest warrant proceedings.

The Directive provides that - with due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers - Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.

Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced where the specific circumstances so justify.

The Directive concludes with provisions on remedies and the treatment of vulnerable persons.

III: CONCLUSION

The CCBE has contributed to the discussions on the Directives. From a practitioner's point of view, these rights require intense examination by practitioners in order to familiarise oneself with the exact wording of these Directives, to familiarise oneself with the objectives underlying these Directives, and in order to be aware of whether the rights which flow from these Directives are being enforced and complied with at a national level – and, more specifically, within the courtroom.



Essentially, these rights have little value unless they are identified, enforced and defended. The EU institutions have done their work, and now it is time for individual Member States and practitioners to honour their side. It has not been easy to reach this point, and it has required courage, dedication, and persistence from all sides. From a practitioner's perspective - since it is highly unlikely that a client will be aware of any of their "new" rights - this adds to the practitioner's responsibility to be aware of the legislation.

As Chair of the Criminal Law Committee, I congratulate Bars and Law Societies and their individual members for their fundamental role and contributions towards ensuring the application of the principle of the equality of arms. I hope that the same determination that has been applied to past procedural safeguards will continue to ensure additional measures and safeguards for the period 2019-2024. The CCBE will continue to play its part in this respect.

A FOCUS ON ACCESS TO A LAWYER WHEN DETAINED IN PRISON

by Victoria Ortega Benito, President of the General Council of Spanish Lawyers;
and Marc Nève, President of the European Prison Litigation Network

Lawyers naturally have an essential role to play in defending the fundamental rights of detainees and persons 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 a judge: poor economic, social and cultural resources, difficulties in reading and writing, very poor access to legal texts, etc. In this context, a significant number of national and European policies do not take into account the vital role of lawyers in access to justice.

The General Council of Spanish Lawyers (*Consejo General de la Abogacía Española*), jointly with the **European Prison Litigation Network**, other NGOs and European universities (from France, Germany, Italy and the Netherlands) recently implemented a project funded by the European Union which focuses on this issue. For this reason, we are especially grateful that the CCBE has decided to devote the 2019 edition of European Lawyers' Day to the issue of "Your right to legal aid in criminal matters and a focus on access to a lawyer when detained in prison". Our thanks are extended to Vice-President Margarete von Galen for chairing a panel at the international conference of the main project held last December at the ECtHR premises in Strasbourg, and to the members of Criminal Law Committee for their contribution to the research through their responses to the questionnaire.

The final results of the research provide several conclusions. First, 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, often in breach of international human rights instruments. The lack of legal assistance results in a lower quality of justice which is often very bureaucratic, and lacks due respect for the law. It is therefore essential that the institutions representing lawyers make it clear to domestic authorities that prisoners' access to a judge is inconceivable without the assistance of a lawyer, and that the procedures in force must recognise the vital role of the latter.

In order for an adversarial procedure in prison matters to be carried out successfully, multiple steps need to be taken before the court is seized. Cases often involve issues from different legal disciplines (administrative, criminal, constitutional or European law) and different needs (meeting the client in prison, legal research, gathering evidence and testimonies). From the point of view of the effectiveness of the rights of detained persons, it is crucial that penitentiary issues can be dealt with separately from criminal proceedings. It is essential that adversarial proceedings relating to fundamental rights in detention are treated separately by legal aid schemes, since the compensation provided for in the main criminal file cannot cover the workload necessary to ensure an effective and real defence.

The right to legal aid must include the right to:

- 1°) Information on its conditions;
- 2°) Advice and guidance before the process is initiated;
- 3°) Assistance in the drafting of the application form;
- 4°) Deliverance of a resolution with information of its consequences;
- 5°) The possibility of judicial redress against that resolution.

Prison litigation lawyers work in very precarious conditions and are largely dependent on legal aid. Access to their client is often problematic and professional secrecy and confidentiality are frequently hindered. This combination of critical conditions makes the support of the Bar all the more necessary as an interlocutor with the authorities and, more broadly, to defend the interests of lawyers in the context of public policymaking.

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, promoting closer cooperation with the Council of Europe's HELP programme should be particularly encouraged. Given the situation of greater isolation and greater exposure to violations of women's rights, a gendered approach should be adopted.

Furthermore, the current entanglement of sources of law suggests that there is an opportunity to create digital legal resources, including thematic legal guides identifying the applicable domestic and international standards, as well as newsletters, websites or other tools.

In addition, it may be advisable to offer communication and technological services adapted to the needs of detainees and lawyers, such as e-passes for lawyers to access prisons or a switchboard that allows the various parties involved in the legal aid/assistance service to coordinate.

Finally, the establishment of legal-penitentiary counselling services to provide inmates with information, counsel and defence in the field of prison law and the execution of sentences would be a decisive step in bringing justice into prisons. This type of service already exists in some countries (such as Spain) and has the potential to generally ensure the defence of the rights of detainees in a global way, not only in terms of access to courts but also regarding internal administrative proceedings and relationships with supervisory/monitoring authorities or any other interlocutor. In addition, the creation of a Bar service line would facilitate coordination between lawyers who are active in prison litigation and also between other committees and services offered by the Bar (training, defence, legal aid, technological services and others).

Thank you again to the CCBE and to all European Bars for their work. We remain at your disposal to report on national events and send our best wishes for European Lawyers' Day 2019.

#4

Promoting your activities and events

Publicising your European Lawyers' Day events and activities is a key part of making them successful. Here are some ideas on how to promote your European Lawyers' Day events:

» **Send out press releases**

The CCBE will provide an official European Lawyers' Day poster for its members for their use and distribution.

» **Submit articles for publication**

See <http://www.ccbe.eu/actions/european-lawyers-day/> for resources that member Bars can use in their press coverage or communication of the event.

» **Address local groups**

Contact the organisers of upcoming meetings of community groups (e.g. school boards) and ask to be allotted time on the agenda to briefly discuss European Lawyers' Day. If this is not possible, ask the organiser if he or she would be willing to publicise your event.

» **Use social media**

Get the word out: Facebook, Twitter, and LinkedIn all provide excellent opportunities to advertise an event. For your tweets, please use the hashtag **#EuropeanLawyersDay** to give visibility among others looking for European Lawyers' Day-related communications. Provide a link to a page with more detailed information about your event.