

Suspects in Europe: Towards a Real Commitment to Minimum Standards?

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1. Introduction

During the past decade or so the European Union (EU) has become increasingly concerned with crime and criminal justice. The Maastricht Treaty (the Treaty on the European Union, TEU), which came into force in 1993, established police and judicial cooperation in relation to terrorism and serious crime. This was subsequently enhanced by the Amsterdam Treaty in 1997, which created an EU area of freedom, security and justice, and by the Hague Programme in 2004. Whilst, perhaps, the most publicly visible manifestation of EU criminal justice policies has been the European Arrest Warrant,² other outcomes include Europol,³ Eurojust,⁴ the European Prosecutor,⁵ framework decisions on the execution of orders freezing property and on mutual recognition of confiscation orders and, in the near future, a framework decision on the European Evidence Warrant.⁶

Despite the fact that one of the underlying principles of EU criminal justice policies is to 'guarantee fundamental rights, minimum procedural safeguards and access to justice'⁷ the emphasis has largely been on law enforcement and mutual recognition of judicial institutions and decisions, at the expense of rights and safeguards for suspects and defendants. As the House of Commons Home Affairs Committee recognised, in something of an understatement, 'It is probably fair to say that, overall, there has been less focus on ways of safeguarding or enhancing the defence rights of individuals suspected of or charged with criminal

¹ This paper is based on research by E. Cape, J. Hodgson, T. Prakken and T. Spronken, funded under the EU AGIS Programme 2005, and published as E. Cape, J. Hodgson, T. Prakken and T. Spronken, (2005) *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerp: Intersentia. The research project involved academic and practising lawyers from Belgium, England and Wales, Germany, Greece, Italy, the Netherlands and Poland.

² Which came into force in January 2004. See Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between member states (2002/584/JHA). It was given effect in the UK by the Extradition Act 2003.

³ Providing a structure for police cooperation in relation to serious international crime.

⁴ Which assists investigators, prosecutors and judges to co-ordinate activity in cross-border cases.

⁵ See COM(2001)715 final.

⁶ There have been many other outcomes relevant to crime and criminal procedure, especially those concerning combating terrorism and data sharing.

⁷ The Hague Programme, 16054/04/JAI559. p. 3.

offences.’⁸ In fact, the only significant evidence of concern for those suspected of or accused of crime has been the attempt to agree a framework decision on minimum procedural rights which, as will be seen later, has now been abandoned.

2. Minimum rights for suspects and defendants

In 2003 the European Commission (EC) issued a Green Paper, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*⁹ with a view to setting minimum safeguards for suspects and defendants in the EU. Establishing minimum safeguards was described as a ‘necessary counterbalance to judicial co-operation measures that [have] enhanced the powers of prosecutors, courts and investigating officers’.¹⁰ This was regarded as an essential element of the policy of mutual recognition since, for mutual recognition to be effective, there has to be mutual trust, not only between member states, but also on the part of legal personnel making decisions in pursuance of mutual recognition policies and legislation. Minimum standards would, in turn, ‘highlight the degree of harmonisation’¹¹ between the criminal justice systems of member states and reinforce the overall policy objective of freedom of movement within the EU.

The key areas identified in the Green Paper as being appropriate for action to create minimum standards were legal advice and assistance; the provision of interpreters; special protection for vulnerable suspects; consular assistance; and knowledge of the existence of rights. Whilst other rights were considered for inclusion, the rights identified were regarded by the Commission as being so fundamental that they should be given priority. Other fair trial rights, specifically those concerning bail and fair procedures for handling evidence, were reserved for separate treatment, the former because it was already the subject-matter of a measure in the mutual recognition programme, and the latter because the subject-matter was so large that it should be covered by a separate programme.¹²

Whilst there was strong support for the proposals from many lawyers and non-governmental organisations, a number of governments objected to the draft framework decision on the grounds that it breached the principle of subsidiarity, was outside the scope of Article 31, could result in the lowering of standards (which, it was said, had already been set by the European Convention on Human Rights (ECHR)), and that implementing common standards would be technically difficult. In 2004 the Commission issued a draft *Council Framework Decision on*

⁸ *Justice and Home Affairs Issues at European Union Level*, Third Report of Session 2006-07 Volume 1, HC 76-1, p. 57.

⁹ Brussels, 19 February 2003, COM(2003) 75f.

¹⁰ *Ibid.*, para. 1.4.

¹¹ *Ibid.*, para 1.7.

¹² *Ibid.*, para 2.6.

certain procedural rights in criminal proceedings throughout the European Union. In an attempt to forestall objections, the Commission made it clear that its intention was 'not to duplicate what is in the ECHR but rather to promote compliance at a consistent standard'.¹³

The objections reflected, in part at least, the fact that national criminal justice systems within the EU are very diverse, and so too are the ways in which member states consider themselves to have satisfied their obligations to guarantee fair trial rights generally, and to protect the rights of those suspected or accused of crime in particular. The significance and impact of the different legal traditions in the EU cannot be ignored. They are regarded by many as emblematic of national identity, provide the foundation for a range of strongly entrenched institutional and professional functions and aspirations, and create a prism through which any pan-European criminal justice policies will be refracted. The objections also reflected an unease about importing policies and processes perceived as 'foreign' and, in particular, a tension between different cultural and historical understandings of the criminal process exemplified by the terms 'inquisitorial' and 'adversarial.'

3. The significance of the investigative stage

Whilst comparative studies and popular accounts of criminal justice systems often concentrate on the trial as the most public, and so most apparent, manifestation of the criminal process, there is increasing recognition that an understanding of pre-trial procedures, and particularly the investigative stage, is essential for a proper understanding and evaluation of criminal justice processes. Of particular importance in assessing the value and credibility of evidence produced at trial is an awareness of the processes by which that evidence was created or established – by whom, under what conditions and with what safeguards to ensure reliability. It is also not without significance that in all jurisdictions many more people are subjected to investigative processes – involving arrest or other forms of detention, interrogation, surveillance and other forms of coercive evidence-gathering – than the number who ultimately face trial in a criminal court. Thus for many, the criminal investigation constitutes their experience of the criminal justice system, and serves to inform their own view, and that of their relatives and friends, of whether they have been dealt with fairly and justly.

For the purposes of the research study, the working hypothesis was that whatever legal tradition underlies the criminal justice system of a particular jurisdiction, and irrespective of the formal legal position, there is a *de facto continuum* from investigation to trial. In this context regulation of the investigative stage of the criminal process is a fundamental part of the regulation of the trial process itself. On this view, it is not possible to say, in respect of any particular jurisdiction, that the trial satisfies human rights norms unless the investigative

¹³ *Draft Council Framework Decision, Explanatory Memorandum*, para 9.

stage is also conducted in accordance with those norms. This was implicitly recognised in the draft framework decision on minimum procedural rights, in which a number of the proposed rights, such as the right to legal advice and the special provisions applicable to persons 'entitled to specific attention',¹⁴ were to apply before or during any initial interrogation by the police.

This can be contrasted with the ECHR and the approach of the European Court of Human Rights (ECtHR). The principle focus of article 6 is the trial. Thus article 6(1) gives a right to 'a fair and public hearing'. Article 6(3) does confer certain rights that apply pre-trial, such as the right to have adequate time and facilities to prepare a defence, but such rights are essentially ancillary to fair trial, as opposed to establishing norms that are of value in themselves. Furthermore, they are expressed as applying to a person 'charged with a criminal offence', a limitation which has not only caused the ECtHR some difficulty in interpretation, but also provides a great deal of latitude to member states in terms of complying with their obligations. Thus whilst the ECtHR has accepted that a fair trial, as guaranteed by Article 6, may be vitiated by lack of fairness or by illegality at the investigative stage, this depends on the nature of the unfairness or illegality and its impact on the trial. The fairness of the trial is to be judged by reference to the procedure as a whole, so that if unfairness or illegality at the investigative stage can be adequately compensated for at trial, the procedure as a whole may nevertheless be regarded as fair.¹⁵

This may be illustrated by the approach of the court to the right to legal advice. Article 6(3) of the ECHR states that a person 'charged' with a criminal offence is entitled, *inter alia*, to legal assistance. The ECtHR noted in its judgement in *Murray v. UK*¹⁶ that it was not disputed that Article 6 applied 'even at the stage of the preliminary investigation into an offence by the police',¹⁷ and that whilst the right to legal advice was not an unequivocal right, it does normally apply where 'the attitude of an accused at the initial stages of police interrogation... [is] decisive for the prospects of the defence in any subsequent criminal proceedings.'¹⁸ Where it does apply, the right to legal representation arises immediately upon arrest, although a reasonable time is allowed for the lawyer to arrive.¹⁹ However, according to the ECtHR the right to have a lawyer present during police interrogation cannot in general be derived from Article 6 (3)

¹⁴ Defined in article 10(1) of the draft framework decision as persons who cannot understand or follow the content of meaning of the proceedings as a result of their age, mental, physical or emotional condition.

¹⁵ See, e.g., *Khan v. the United Kingdom*, No. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, No. 44787/98, § 76, ECHR 2001-IX; *Allan v. the United Kingdom*, No. 48539/99, § 42, ECHR 2002-IX; *Jalloh v. Germany* ECtHR 11 July 2006, No. 54810/00, at § 95 and *Hermi v. Italy* ECtHR 18 October 2006, No. 18114/02, at § 60.

¹⁶ (1996) 22 EHRR 29.

¹⁷ At § 62.

¹⁸ At § 63. See also *Averill v. UK* (2001) 21 EHRR 36.

¹⁹ ECtHR 8 February 1996, *John Murray* (Reports 1996-I) at § 63.

ECHR,²⁰ although in certain circumstances the physical presence of a lawyer can provide the necessary counterbalance against pressure used by the police during interviews.²¹

Such a nuanced exposition of the right to legal advice at the investigative stage is not conducive to clear and comparable national regulations or practices, a fact that was demonstrated by Spronken and Attinger's study *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*.²² They found that all EU states said that provisions exist guaranteeing the right to a lawyer to those accused of crime, and for the appointment of a lawyer where the suspect does not know of one or cannot afford to pay them (although in the latter situation the choice of the suspect is usually restricted), and that this right normally applied at all stages of criminal proceedings. However, there was considerable variation concerning the point in the proceedings at which access to a lawyer is granted, and there was substantial scope for differences in practice across different jurisdictions. For example, nine states responded saying that the right to a lawyer arose 'from the beginning of the proceedings,' or 'from the moment the person is charged,' or 'after the police interview,' responses which, in themselves, reflect widely different approaches to the right to legal advice. The authors concluded that, on the basis of information supplied by the states themselves, it was difficult to draw conclusions as to whether legal advice is provided 'as soon as possible,' which was the phrase used in the draft framework decision article 2, and even more difficult to establish whether suspects were

²⁰ In *Dougan* (ECtHR 14 December 1999, No. 44738/98) the ECtHR held: 'Before the Court of Appeal they argued for the first time that the statements made by the applicant to the police should have been declared inadmissible on account of the absence of a solicitor during interview. However the merits of that argument must be tested against the circumstances of the case. Quite apart from the consideration that this line of defence should have been used at first instance, the Court considers that an applicant cannot rely on Article 6 to claim the right to have a solicitor physically present during interview.' See also ECtHR 16 October 2001, *Brennan* (No. 39846/98).

²¹ ECtHR 6 June 2000, *Magee* (No. 28135/95) and ECtHR 2 May 2000, *Condrón* (No. 35718/97): 'The fact that an accused person who is questioned under caution is assured access to legal advice, and in the applicants' case the physical presence of a solicitor during police interview must be considered a particularly important safeguard for dispelling any compulsion to speak which may be inherent in the terms of the caution. For the court, particular caution is required when a domestic court seeks to attach weight to the fact that a person who is arrested in connection with a criminal offence and who has not been given access to a lawyer does not provide detailed responses when confronted with questions the answers to which may be incriminating.' (§ 60). It should be noted that the Yugoslavia Tribunal acknowledges the right to have a lawyer present during interrogation (Statute of the International Tribunal for the former Yugoslavia art 18(3)) and if the right is violated evidence obtained should be excluded at trial (Decision on the Defence Motion to Exclude Evidence van het Joegoslavie Tribunal in Zdravko Mucic, 2 September 1997, Case No. IT-96-21-T, Trial Chamber II). Further, according to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the right to have a lawyer present during police interrogation is one of the fundamental safeguards against ill-treatment of detained persons. See 2nd General Report (CPT/Inf (92)(3), sections 36-38).

²² (2005) Brussels: EC DG Justice and Home Affairs, available at <<http://arno.unimaas.nl/show.cgi?fid=3891>>.

entitled to legal advice before answering questions in relation to the alleged offence(s).

4. The research project

Against this background, the research project,²³ which was conducted during 2005 and 2006, set out to examine the nature of the legal protections provided to persons suspected of crime in a range of EU countries, from both a theoretical and a practice-based perspective. There is a wealth of evidence that practice, and particularly the experience of suspects and their lawyers, is often at variance to the formal legal norms and laws.²⁴ We were, therefore, particularly concerned to understand not only the formal regulation of the investigative process, but also the ordinary experience of that formal legal position. The decision as to the countries chosen as subjects for the research was informed by a number of considerations. We wished to reflect the position and dynamics of the two major western European legal traditions, inquisitorial and adversarial (England and Wales, as the prototype of the adversarial tradition), but also those of recent accession states that had formerly been heavily influenced by a state-socialist (and specifically USSR) approach to law and legal regulation (Poland). We also wanted to explore some of the important dissimilarities within the inquisitorial tradition, and particularly the differences in practice between the Napoleonic systems (Belgium and Greece) and others (Germany and the Netherlands), and to investigate the implications for day-to-day practice when an 'adversarial experiment' is conducted in a jurisdiction with an inquisitorial tradition (Italy). The desire to understand the 'lived experience' of criminal justice regulation and processes meant that we wished to include not only academic lawyers in the project, but also lawyers with experience of acting for those suspected or accused of crime.

There were three distinct phases to the research project: preparation of overviews and case studies; an experts' conference; and reflection and revision. In the first, an academic and a practicing criminal lawyer (the experts) in each of the jurisdictions were identified, and they were asked to prepare an overview of the investigative stage of the criminal process in their country, and to prepare a response to a case study. Whilst in some countries, particularly England and Wales, there is a body of empirical research on investigative stage processes and on legal personnel,²⁵ in most jurisdictions included in this project little, if any,

²³ See n.1.

²⁴ See, for example, M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence*, London, HMSO, 1993; M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford, Clarendon Press, 1994; J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, Oxford, Hart Publishing, 2005; S. Field and A. West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process,' 14 *Criminal Law Forum*, 3 2003, p. 261-316.

²⁵ Although much of it was conducted in the late 1980s and early to mid 1990s. See in particular, D. Brown, *PACE Ten Years On: A Review of Research*, Research Study No. 155, London, Home Office,

such research is available. Neither time nor funds permitted empirical research to be conducted and thus many of the experts, particularly the professional lawyers, had to rely on their own experiences and those of their professional colleagues in describing practice supplemented, where available, by empirical research and other data. In addition, since criminal justice processes are not static, but dynamic, the experts were asked to provide a sense of how those processes are changing.

The case study question, prepared by the research team, was designed to explore the ways in which suspects are dealt with at the investigative stage, and to provide a nuanced understanding of how investigative stage processes work in practice. The subject matter of the case study was deliberately relatively mundane, involving a violent incident at a football match in Country A (the experts' own country), in which three different suspects were implicated, one of them being a citizen of another EU country.

The experts' conference was held in Amsterdam, Netherlands, in September 2005. The overviews and case study responses were prepared and circulated in advance of the conference. For each jurisdiction a *rapporteur* from another country was appointed from amongst the experts attending the conference, and they were asked to give a short presentation which, in effect, interrogated the overview and case study response of their assigned jurisdiction, making critical comment and raising questions. In this way, the *rapporteurs* were able to question and expose the assumptions and taken-for-granted meanings that often impede understanding across jurisdictions. The experts from the jurisdiction in question were then able to respond in order to clarify, explain and, sometimes to defend their description and analysis. This exchange led to lively, and sometimes heated, debate which we believe enhanced the process of understanding.

The third phase of the project, that took place after the conference, was one of reflection upon and revision of the overviews and case study responses. Building upon the comments from the *rapporteurs* and the ensuing discussion amongst the experts at the conference, the research team provided the experts with feedback and comments in order to develop their critical descriptions and analyses.

1997 and M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution*, London, Routledge, 1991. See also the references in note 24.

5. Emerging Themes

Some of the major themes emerging from the project are set out below.

Theory and practice

As noted earlier, conceptions of the investigative process, and of the respective roles of the judiciary, prosecution, police and suspect (and their lawyers), differ widely as between the different legal traditions represented in this study. However, although the formal structures governing the conduct and supervision of investigations are very different, in practice the differences are often much less pronounced. In most of the inquisitorial jurisdictions in the sample it is assumed that the prosecutor conducts or leads the criminal investigation; the role of the investigating judge in crime investigation has either largely been replaced by the prosecutor, or the position has been abolished altogether. In practice, however, the police often have significant investigative powers, particularly in the case of flagrant or less serious offences, and they often carry out (at least an initial) interrogation of the suspect without the supervision of, or immediate reference to, the prosecutor.²⁶ Furthermore, the product of such interrogation is normally included in the file, and thus becomes evidence at any subsequent trial. In this respect practice is similar to that in common law, adversarial, jurisdictions in which investigation and interrogation, unsupervised by a prosecutor or judge, is understood to be a police function. Important differences do, however, remain. In the adversarial tradition, once a person has been charged with an offence (which is normally relatively shortly after their arrest and detention by the police), no further interrogation is permitted.²⁷ In inquisitorial systems, on the other hand, the prosecuting authorities (often, in practice, the police) can continue to interrogate the suspect after charge and continue to do so during the entire period of pre-trial detention, until the decision is made as to whether or not to bring the case to trial.

In many of the jurisdictions there are clear rules governing the rights of suspects (e.g., to legal advice),²⁸ the conduct of interrogations, and other investigative powers of the police or prosecutor. However, whether they are observed in practice depends, to a large extent, on there being systematic and effective enforcement mechanisms, and in particular the exclusion of evidence obtained in consequence of a breach. Some of the jurisdictions start from the position that illegally obtained evidence is not admissible in evidence (e.g., Italy, Belgium, Germany), whilst others start from the opposite premise (e.g., England and Wales). A third set of jurisdictions distinguish between serious illegality, which should result in exclusion or 'nullity,' and less serious breaches, which do not (e.g., the Netherlands, Greece). However, this is normally tempered either by

²⁶ Even in Belgium, where the Napoleonic model is more strictly adhered to, it is the police who normally conduct interviews, with interviews being conducted personally by a prosecutor or investigating judge only in exceptional cases.

²⁷ Although the British government is currently considering whether to permit post-charge interrogation.

²⁸ Although in some, the right does not apply during the course of an initial police interrogation or there is lack of clarity about whether it does apply at this stage.

specific statutory provisions or by the attitude of the courts. Thus in England and Wales, for example, the admissibility of illegally obtained evidence is subject to provisions which prohibit the admission of evidence of confessions which may have been obtained by oppression or in circumstances likely to render them unreliable, and judges have a discretion to exclude other prosecution evidence if it would be unfair to admit it. On the other hand, jurisprudential developments in countries such as Belgium, Germany and the Netherlands have made it less likely that illegally obtained evidence will be excluded, the courts privileging their role in truth-finding over the protection of the rights of the individual.²⁹ It would be dangerous, therefore, to assume that the formal position regarding the admissibility of illegally obtained evidence reflects practice.

To observe that there is a gap between theory and practice, that is, between the law as it appears in constitutions, criminal codes and legislation, and as it is interpreted by the courts, is practised by investigative and prosecution agencies and is experienced by suspects and their lawyers, is hardly novel. Yet this truth, and its implications, is central to comparative understandings of criminal procedure and, importantly in the context of this study, to any policy which aims to establish and assure minimum procedural rights that are applicable across jurisdictions. Any instrument for establishing minimum procedural rights that is directed only at formal rights and legal procedure, or in the interpretation of which priority is given to 'respect for the different legal systems and traditions of the Member States',³⁰ is unlikely to be successful.

Problems of definition

Even allowing for the problems of translation, different terms may be used to apply to similar factual situations, and similar terms may have different meanings across jurisdictions. In a different but related context, Melossi has argued that translation of criminal policies is impossible since 'generally speaking any term, even the simplest, is embedded within a cultural context, or milieu, that gives it its meaning.'³¹ Such difficulties have been placed in stark relief by implementation, and interpretation, of the Framework Decision on the European Arrest Warrant (EAW). Article 1(1) of the framework decision provides that a EAW is a judicial decision issued 'by a Member State with a view to the arrest and surrender by another Member State of a requested person, *for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*' (emphasis added). In England and Wales this was given domestic effect by the

²⁹ In the Netherlands the discretion of the courts to exclude evidence that has been illegally obtained was formalized in the Code of Criminal Procedure, art. 359a in 1995.

³⁰ As stated in Article 1(2) of the Finnish Presidency proposal for the text of a compromise instrument on procedural rights in criminal proceedings..

³¹ D. Melossi, 'The cultural embeddedness of social control: reflections on the comparison of Italian and North-American cultures concerning punishment,' in T. Newburn and R. Sparks (eds), *Criminal Justice and Political Cultures*, Cullompton, Willan, 2004, quoted in T. Jones and T. Newburn, *Policy Transfer and Criminal Justice*, Maidenhead, Open University Press, 2007, p. 162.

Extradition Act 2003, section 2 of which provides that a warrant must be given effect where, *inter alia*, it is issued with a view to a person's arrest and extradition 'for the purpose of being prosecuted for the offence.' The question that had to be considered in *Vey v. Office of the Public Prosecutor of the County Court of Montluçon*³² was whether a warrant issued by a French examining judge for the purpose of conducting a judicial examination satisfied that purpose, or was (in contrast) for the purpose of investigation. If the latter, the EAW procedure would not be available. Despite receiving expert evidence on the issue, the court had considerable difficulty in translating French criminal procedure into the English law context, and in determining for which of the two reasons the warrant had been issued.³³

The present study demonstrates that establishing minimum procedural rights at the investigative stage of the criminal process would face similar difficulties. In England and Wales, there is no legal definition of the term 'suspect.' The police have wide discretionary powers to arrest persons suspected of committing a crime, although the word 'arrest' itself is said to be a factual situation involving the denial of liberty rather than a legal term.³⁴ If the police have decided to arrest a suspect they must normally take them to a police station before interviewing them. Once at the police station, under national law the procedural rights, such as the right to legal advice, and the regulatory requirements, such as the obligation to tape-record interviews, then apply. However, the suspect is not 'charged' (i.e., criminal proceedings are not commenced) until the police have decided that there is sufficient evidence for there to be a successful prosecution, which is normally after they have been interviewed. Once they have been charged, they cannot normally be further interviewed (although the police can continue to carry out other forms of investigation).

Compare this with the position in Poland, where a person does not have the status of 'suspect' until they are officially charged. A person suspected of a criminal offence can be arrested and detained by police for up to 48 hours without being formally charged, and although they cannot be interviewed during that period, they can be 'heard' (i.e., make a 'voluntary' statement), and the police can carry out other investigative acts such as taking fingerprints and samples. However, although they have a right to remain silent during this period, since they have not been charged the police do not have to inform them of this right and nor, in practice, do they have a right to a legally-aided lawyer. In Germany and the Netherlands there is no fixed point at which proceedings are deemed to have commenced. A person should be treated as a suspect if there is strong suspicion that they may have committed an offence, at which point they should be informed of their right to legal advice and their right to remain silent,

³² [2006] EWHC 760 (Admin).

³³ In the event, the court was able to avoid taking a final view on the question because it found the warrant to be defective for other reasons. See also the Supreme Court of Ireland decision in *The Minister for Justice, Equality and Law Reform v. McArdle* [2005] IESC 76.

³⁴ *Lewis v. Chief Constable of South Wales Constabulary* [1991] 1 All ER 206.

but the police have a degree of discretion in determining at what point the evidence is sufficiently strong to treat them as a suspect and an interest in delaying the notification of rights. In Italy, on the other hand, whilst the police have the power to question suspects (although not if they are under arrest), this cannot be done in the absence of a lawyer and if the suspect has not instructed a lawyer the police are under a duty to appoint a duty lawyer.

If, according to the ECHR Article 6 or any EU instrument that is developed, the procedural rights or regulatory requirements are expressed not to apply until a person is 'charged' with a criminal offence, and if this is to be interpreted in accordance with national laws, the effect will be different across different jurisdictions. Using another stage of the process as the trigger, such as 'arrest,' would not provide an adequate solution if the intention is, as we would suggest it should be, to ensure the provision of minimum rights to persons who are at risk of prosecution and of having their response to police interrogation (or interrogation by prosecutors or judges) used as evidence at any trial. We have seen, for example, that in a number of jurisdictions persons suspected of a crime may be detained without this being regarded as an 'arrest.' It may be that the trigger for procedural rights should be expressed in a more purposive way, so that it is determined by the consequences that may flow from the action rather than the label applied to it. For example, the right to legal advice could be expressed to apply whenever a person is questioned (or asked to make a voluntary statement) in circumstances where this may lead to criminal proceedings being taken against them and their response or non-response (or their statement) could be used against them in the criminal proceedings.

Understanding roles and functions

The key legal professionals in the investigative stage of the criminal process are the police (or other law enforcement agency), prosecutor, defence lawyer and, where the role exists, the examining judge. Although sharing the same or similar names, their functions, status, professional relationships and training differ considerably between jurisdictions and so our understandings of their comparable roles must be sensitive to this. This is perhaps clearest when considering the role of the public prosecutor.

In continental legal systems the prosecutor was originally conceived of as a member of the judiciary, albeit one with a special role. As such, the prosecutor was independent of the executive, and irremovable. In some of the jurisdictions included in the study, such as Italy, this is still largely the case although the hierarchical relationships and career structures within ministries of justice are not unimportant in relation to the question of how far individual prosecutors are truly independent. However, in other jurisdictions, such as the Netherlands, justice ministries are increasingly taking responsibility for criminal policy and, in this context, whilst prosecutors remain formally independent, they are coming under increasing pressure to implement criminal policy, placing at risk both their

independence and the principle of legality. In England and Wales, where the role of Crown Prosecutor is a relatively modern creation, there has been little formal concern about their independence from the executive, but here too they are increasingly used as an instrument of the government's criminal policies.

Prosecutors in England and Wales have never been conceived of as being part of the judiciary, and until recently have had little or no role in the investigation of crime or the collection of evidence, which in modern times has been regarded as a police function. This is currently undergoing significant change, with prosecutors increasingly advising the police on the course of investigations and taking the decision to commence criminal proceedings. As noted earlier, in many continental jurisdictions the prosecutor has come to replace the investigating judge in having primary responsibility for crime investigation. Whilst in principle their role is a neutral one of 'discovering the truth' there is clear evidence in a number of countries of severe tension between impartial fact-finding and prosecutorial values, and this is particularly so where they are subject to influence from the executive. Poland provides an exception to the general picture of an increasingly strong role for prosecutors, which may be understood in the context of a reaction to its state-socialist history in which prosecutors played an important role in serving the interests of the state. Thus here judicial protection has been strengthened in recent years, and the powers of the prosecutor restricted.³⁵

When the role of the Crown Prosecutor was created in England and Wales in the mid- 1980s the government's principle concern was to establish their independence from the police.³⁶ A clear division of labour between the two was created, with the police investigating crime and taking the decision to commence criminal proceedings, and the prosecutor taking over only once the charge decision had been made. Prosecutors had no supervisory role in respect of the police, and neither did the judiciary. The current developments in the prosecutorial role are likely to cause tensions in relations with the police, and will challenge the professional independence of prosecutors.³⁷ In jurisdictions with an inquisitorial tradition the role of the police in investigating crime was regarded as being subordinate to that of the prosecutor (or examining judge). However, in those jurisdictions where there is judicial or prosecutorial responsibility for crime investigation, there is now widespread delegation of both investigation and supervisory responsibility to the police (for example, in the Netherlands and Greece), and senior police officers are often deemed to be deputy prosecutors.³⁸

³⁵ As discussed below, this runs counter to the trend to move away from a pre-trial judicial role to a greater part for prosecutors in most other European countries. This is unsurprising given the somewhat extreme powers of the Polish prosecutor under communism.

³⁶ Until then prosecutors had normally been employed by the police.

³⁷ See J. Jackson, 'The Ethical Implications of the Enhanced role of the Public Prosecutor,' 9 *Legal Ethics*, 1 2006, p. 35-55.

³⁸ Such developments, however, are always subject to local circumstances. In the Netherlands, for example, the supervisory function of the prosecutor has recently been strengthened in response to a high profile scandal involving misuse by police of their investigative powers, *Evaluatieonderzoek*

Such developments provide a particular challenge to those who argue that the judicial role in crime investigation renders unnecessary mechanisms designed to protect the position of the accused.

We were particularly interested in this study in the role of the criminal defence lawyer. At one level it is fairly easy to define the role of the defence lawyer in a way which applies to any of the jurisdictions we examined: to act in the best interests of the client. Although in many jurisdictions the role goes back much further, it is possible to locate this conception of the role in the ECHR Article 6 right of a person charged with a criminal offence to defend themselves 'in person or through legal assistance of his own choosing' (Art. 6(3)(c)).³⁹ However, once subjected to scrutiny, this apparently simple conception soon becomes much more complex. In some jurisdictions (e.g., the Netherlands, and England and Wales) the role of the lawyer is directly derived from the right of the accused to defend themselves. As the professional guide for solicitors in England and Wales states, a solicitor 'is under a duty to say on behalf of the client what the client should properly say for himself or herself if the client possessed the requisite skill and knowledge.'⁴⁰ In Germany, on the other hand, the defence lawyer is not the defendant's spokesperson, but has an independent role speaking and acting in support of their client. One consequence is that statements of the lawyer are not automatically assumed to be those of the client. Also in Germany, there is disagreement as to whether the lawyer's 'organ of justice' role takes precedence over their role derived from the contractual relationship with the client, a debate which reflects an unresolved tension in many of the jurisdictions in the study and which has many practical implications.

The wider context in which the lawyer operates is also important to their proper role. The right to the assistance of a lawyer at the investigative stage, and particularly to legal advice prior to or during police interrogation, is restricted in many of the jurisdictions (although not in England and Wales or, to a large extent, Italy). Beyond this basic limitation, there are further relevant questions. What right does the lawyer have to information secured during the investigation? To what extent can the lawyer investigate independently and what, if any, investigative powers do they have? Is the lawyer subjected to restrictions regarding to whom they may speak? To what extent, if at all, can the lawyer influence the investigation by the police, prosecutor or judge? In England and Wales, and more recently in Italy, the lawyer is responsible for assembling the defence case independently from the prosecution but has few, if any, powers in this respect and, in legal aid cases, limited resources for doing so. In Germany, the defence may suggest lines of enquiry to the prosecutor or pre-trial judge, but

Schiedammer Parkmoord, TK 2004–2005, 29 800 VI, No. 168 and *Programma versterking opsporing en vervolging*, TK 2004–2005, 30 300 VI, No. 32.

³⁹ Although the point at which this right crystallises is, of course, contested. See text to note 18, *supra*.

⁴⁰ *The Guide to the Professional Conduct of Solicitors*, London, Law Society, 1999, p. 382.

such requests may be refused without reason and with no right of appeal.⁴¹ Where they are granted, neither the suspect nor the lawyer is permitted to be present at any witness interview, whereas in the Netherlands their presence is permitted provided that it is not contrary to the interests of the investigation, and in Italy the defence lawyer may be present at all formal acts of investigation. Whilst in some jurisdictions a lawyer would be failing in their professional obligation to their client if they did not interview a potential defence witness, in Belgium the lawyer contravenes professional rules if they do so.

The importance of police interrogation

Whatever the formal position regarding responsibility for the investigation of crime, in most, if not all, of the jurisdictions examined the initial police interrogation is crucial. In England and Wales, it will normally form the backbone of the case against the accused. In countries with an inquisitorial tradition, the rhetoric of the law tends to describe the police investigation as being preliminary, with the more evidentially significant investigation being that conducted by a judge or quasi-judicial officer such as the prosecutor. In most jurisdictions this is wholly at odds with practice, with the majority of cases being dealt with exclusively by the police, either on their own initiative or under the broad supervision of a judge or prosecutor.

Interviews by the police of persons suspected of crime thus provide the key evidence in most cases other than those that are serious or complex. In inquisitorial jurisdictions the record of the interview is included in the file, and in most such jurisdictions the absence (or abolition) of a hearsay rule enables evidence of police interrogation, including the response (or non-response) of the accused, to be put before the trial court either in documentary form or through the evidence of the interviewing officer. This is also the case in the common law jurisdiction of England and Wales, despite the existence of a hearsay rule. This, of course, has serious implications for the ways in which the suspect is (not) protected during police interviews. In inquisitorial jurisdictions such as Belgium and the Netherlands the suspect enjoys very few safeguards during police interrogation. Yet the evidence secured at this stage is as crucial as that produced by the police in England and Wales where there are safeguards during police interviews such as the right to legal advice, tape-recording, and appropriate adults for vulnerable suspects.

Protecting the rights of the suspect

Given the significance of the investigative stage of the criminal process in general, and interrogation of suspects in particular, it is important to understand the ways in which the rights and interests of suspects are protected. Protective mechanisms can operate in different ways. First, there are what may be termed

⁴¹ Cf. the position in France. See Hodgson (2005) note 24 *supra*.

procedural rights, that is, rights that are directed at empowering the suspect during the investigative process such as access to legal advice, and to information about the reason for the detention and to the material available to the police or other investigative authority. A second form of protective mechanism is that directed at regulating the process, which may include provisions concerning the length and conditions of detention, measures designed to protect the evidential integrity of the product of the detention, and special measures concerning vulnerable suspects. Thirdly, there are mechanisms that provide protection by opening up the process to persons other than those directly conducting a particular investigation, such as supervision and various forms of accountability.

Most jurisdictions employ some degree of mix although in theory, at least, inquisitorial jurisdictions tend to emphasise the importance of supervision and subsequent review of the legality of the investigative process at the expense of procedural rights. It was noted earlier that in most inquisitorially based systems the right to legal advice is limited during the entire preliminary proceedings, and particularly before and during police interrogations. The right of a person to be informed promptly of the reason for their arrest (and of any charge against them) is guaranteed by Article 5(2) of the ECHR, but the effect of this is limited to an extent by the fact that in some jurisdictions various forms of detention are not classified as arrests. In none of the jurisdictions does the suspect, or their lawyer, have a right of access to investigative material (or the file) during the initial police investigation, although in some (such as Greece) such a right does apply once examination by an investigative judge commences, although in others (such as Belgium) an apparent right to such information at this stage is often denied 'in the interests of the investigation.'

Regulation of the investigation process varies widely. In Belgium, for example, there is no primary legislation governing the detention of suspects, but only a 'complex tangle of secondary legislation, circular letters and internal documents.' In England and Wales, by contrast, most aspects of the investigative process involving the detention of the suspect at the police station are closely regulated by primary legislation and associated codes of practice. The period for which a suspect may be detained by the police on their own authority also varies to a considerable extent. In England and Wales, a suspect may be detained for up to 36 hours without being produced before a court. In Germany, a person may be detained for a maximum of 48 hours,⁴² if held under provisional (i.e. non-judicially authorised) arrest, before being produced before a judge. In the Netherlands the equivalent period, amounting to 87 hours, is even longer. In Italy, the police must inform the prosecutor of any detention within 24 hours and the prosecutor must, within the following 24 hours, request a judge to validate the detention. Perhaps surprisingly, given the importance of police interrogation and the developments in technology, in most jurisdictions police interrogations are recorded in writing and normally a verbatim record is not made (although in some jurisdictions the

⁴² In fact 47 hours and 59 minutes is the maximum.

suspect has a right to request this). Only in England and Wales are police interviews routinely tape-recorded, as is prosecutorial questioning in Italy.

As we have seen, and as the various chapters amply demonstrate, supervision by prosecutors and examining magistrates, and accountability to the courts, also varies considerably. How effective are such mechanisms? The independence and effectiveness of prosecutors and judges is affected by a variety of factors including caseload levels, case seriousness, understandings within legal and occupational cultures of what is meant by supervision, the extent of mutual dependency between police and prosecutors/judges, understandings of how investigations should be conducted and what it should achieve (truth, proof, or confession above all else?), and the professional hierarchies within which these personnel operate. In many jurisdictions, although prior authority is required for a wide range of coercive or intrusive investigative measures, such as arrest, search and seizure, the taking of samples, and various forms of surveillance, in practice the police are often able to rely on 'flagrant offence' and 'danger in delay' exceptions that allow them to dispense with authorisation. Even when such exceptions do not apply, and where authorisation is sought, it is rarely refused because the powers are often widely drawn, and the prosecutor or judge will normally base their decisions on information provided exclusively by the police (or prosecutor). This calls into question the efficacy of judicial oversight that is often regarded as a sufficient protection in respect of investigative methods.

A further particular concern in this study has been to understand the operation and meaning of the 'right to silence' of the suspect which, although not explicitly part of the Article 6 guarantees, has been regarded as a fundamental corollary of the privilege against self-incrimination. All member states claim to respect the right and, furthermore, it is often argued that its existence renders other forms of protection either less important or even unnecessary. In England and Wales, whilst the right continues to exist in principle, its impact as a protective device has been considerably curtailed by legislation that permits a court to draw inferences (amounting, in effect if not in law, to an inference of guilt) from the failure of an accused to tell the police what their defence is during the course of police interrogation. Other jurisdictions do not have similar legislative provisions, and it is often insisted that the right to silence continues to exist. However, in many jurisdictions it is clear, in practice, that if a suspect refuses to co-operate in the investigative process by answering questions or by providing an explanation concerning the allegation, this may well have adverse consequences not only in respect of whether they are found guilty, but also in relation to decisions such as release pending trial. This does not appear to be the case in Italy, but in Belgium, for example, whilst it is legally impermissible for a judge to draw inferences from silence, it appears to be agreed that it will inevitably have some effect on the judge's '*intime conviction*.' A further indication of the ambivalent attitude to the right to silence is the fact that in some jurisdictions (e.g. Poland), whilst the right is said to exist there is no obligation on the police to inform the suspect of it, at least at the initial stage. In others, such as the Netherlands and Germany (and

formerly in Greece), although the police are under an obligation to tell the suspect of their right to silence, they have devised mechanisms for circumventing this requirement.

Resourcing legal assistance

A right to the assistance of a lawyer has little meaning if the right cannot be exercised because the suspect cannot afford the lawyer's fees. Article 5 of the draft framework decision,⁴³ broadly reflecting Article 6(3)(c) of the ECHR, provided that the costs of legal advice should be borne by the state in whole or in part if it would otherwise cause undue financial hardship. Cross-jurisdictional comparisons of legal aid provision are difficult for a variety of reasons, and comparison of state expenditure on legal aid is hampered by the difficulties of obtaining comparable data.⁴⁴ Similarly, obtaining data on and making meaningful comparison between rates of remuneration for criminal defence lawyers acting in publicly funded cases requires an understanding of the structure of legal professions and of the legal 'market,' as well as of the role of criminal defence lawyers across jurisdictions. Although we present some data on this, and on the ways in which legal professions and professional standards are regulated, we were concerned, in particular, to establish the point in the investigative process (if at all) at which state funded legal advice is available.

In some jurisdictions, the provision of state funding coincides with a right to legal advice during the whole of the investigative stage. This is most obvious in England and Wales where the right to legal advice from the time that an arrested person is first detained in a police station is matched by a free legal aid scheme that is not dependent on the financial resources of the suspect. Similarly, in Italy state funding is available where a person had a right to legal advice, although both the financial limits, and rates of remuneration, are low. However, such arrangements exist in only a minority of the jurisdictions we examined. As we have seen, in many jurisdictions a right to legal advice does not arise during (at least) initial interrogation by the police and applies only at some later stage. For example, in Belgium a suspect only has a right to legal advice after they have been interviewed by the investigating judge. At that point there is a presumption that the arrested person is entitled to legal aid, but only if they are without sufficient means to pay the lawyer, and the financial threshold is strict. Low financial thresholds are also to be found in Greece and the Netherlands. In Germany there is no system of public funding for persons suspected of crime,

⁴³ See note 13 *supra*.

⁴⁴ But see Spronken and Attinger, note 22 *supra*. For consideration of the issues, see C. Tata, 'Comparing Legal Aid Spending: The Promise and Perils of a Jurisdiction-Centred Approach to (International) Legal Aid Research,' in F. Regan, A. Paterson, T. Goriely and D. Fleming, *The Transformation of Legal Aid*, Oxford, Oxford University Press, 1999. See also T. Goriely, C. Tata and A. Paterson, *Expenditure on Criminal Legal Aid: Report on a Comparative Pilot Study of Scotland, England and Wales, and the Netherlands*, Glasgow, University of Strathclyde, 1997.

and the 'compulsory defence' arrangements mean that although an accused may be required to have a lawyer, they must normally pay for their services.

Challenges to the defence lawyer's role

We saw earlier that conceptions of the proper role of the defence lawyer, when considered at other than a superficial level, is both complex and contested. There is a particular tension between the duty of the lawyer to their client and their obligation to the proper administration of justice, a tension that remains unresolved in most jurisdictions. A theme that emerged during the conference discussion and analysis is the extent to which measures understood to be in the interests of the investigation or the proper administrations of justice can undermine the lawyer-client relationship in a number of different ways. In England and Wales, the legislation permitting inferences to be drawn from the suspect's 'silence' under police interrogation has impacted upon the nature of the relationship and the advice given, causing many lawyers to adopt a more defensive posture when giving advice at the police station, concerned that their professional advice will be subjected to the scrutiny of the court.⁴⁵ The subsidiary role of the defence lawyer in inquisitorial jurisdictions, when compared to that of the prosecutor or examining judge, coupled with the 'real' (as opposed to the theoretical) consequences of 'silence' of the suspect means that the advice and assistance that they can give to their client is severely circumscribed.

There is also evidence of a large degree of distrust of defence lawyers. The Belgian authorities insist on videotaping lawyer-client consultations for the 'protection' of the lawyer, and in Poland the police can be present during all lawyer-client meetings during the first two weeks of the investigation and can listen to and read all communications between them.⁴⁶ In Germany, written communication between a terrorist suspect and their lawyer may be monitored, and the Netherlands has witnessed a number of cases where legally privileged communications between lawyers and their clients have been intercepted by the use of electronic surveillance.⁴⁷ In Italy, someone other than the lawyer can determine whether there is a conflict of interest where the lawyer is representing more than one accused. Conversely, in England and Wales the Legal Services Commission, driven by financial considerations, can determine that a number of legally-aided defendants be represented by one lawyer. Thus whilst it has been agreed internationally that lawyers should not be identified with their clients or

⁴⁵ For an examination of this see E. Cape, 'Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers,' 9 *Legal Ethics*, 1 2006, p. 56-79.

⁴⁶ Although since prior to 1997 there was only a discretionary right to a lawyer, the current position is regarded as an improvement.

⁴⁷ By contrast, in the English case of *R v. Grant* [2005] EWCA Crim 1089 covert surveillance of consultations between defence lawyers and their clients at the police station was held to be 'categorically unlawful,' amounting to an abuse of process.

their clients' causes as a result of discharging their functions as lawyers,⁴⁸ in many European jurisdictions defence lawyers, as compared to prosecutors, are not regarded or treated with parity.

Towards minimum standards?

The EU project to establish minimum procedural rights for suspects and defendants is now officially dead. The EU Council decided at its meeting on 12 and 13 June 2007 that it was not possible to achieve a consensus either on the draft framework decision or on an alternative, non-binding, agreement.⁴⁹ Whilst ostensibly the objection of the (crucial) minority of states was that the EU lacks competence to legislate on purely domestic proceedings, it exposes an attitude to 'freedom, security and justice' which is informed by the concerns and interests of law enforcement and prosecution agencies rather than those of citizens who may be 'caught up' in the legal processes of other EU jurisdictions.

It is evident from this project that whilst laws, practices, attitudes and cultures relating to the investigative stage of the criminal process vary widely across jurisdictions within the EU there has been, and continues to be, a general trend in jurisdictions with an inquisitorial tradition to move crime investigation away from the more costly and time consuming process of judicial enquiry towards police investigations supervised instead by the public prosecutor. This has been the case in Germany, the Netherlands, Italy (and France) and although the position of the investigative judge in Belgium continues to be invested with great importance, their case-loads mean that most investigative work is delegated to the police.⁵⁰ This has significant implications for the protection of suspects in the criminal process, but most jurisdictions have failed adequately to reflect this, in particular, by changing the point at which their rights crystallise to the beginning of the period when a suspect is identified and subjected to some form of detention and/or compulsory examination.⁵¹ This is particularly the case in respect of a right to legal advice supported, where necessary, by an adequate legal aid scheme. In England and Wales, the police are being given increasing powers over suspects, and whilst prosecutors are increasingly being brought into the investigative process little, if anything, has been done to reinforce their independence or to develop a 'quasi-judicial' professional culture.

It is also evident that the ECHR, and in particular article 6, is ineffective in establishing a common understanding of and commitment to minimum rights for

⁴⁸ UN Declaration on the Basic Principles on the Role of Lawyers, § 18, adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, 7 September 1990 and welcomed by the UN General Assembly in Resolution 45/121 on 14 December 1990.

⁴⁹ Which, in any case, was a much watered-down version of the draft framework agreement.

⁵⁰ It is less clear whether this is the case in Greece. Poland, with its very different recent history, is going through a period of transition which means that it is difficult to detect clearly how its criminal justice process will develop.

⁵¹ In France the defence enjoys extensive rights during the enquiry conducted by the *juge d'instruction*, but plays almost no part in the vast majority that are the responsibility of the public prosecutor.

suspects of crime. Given that in most, if not all, EU jurisdictions the police routinely detain and interrogate suspects and carry out other coercive methods of investigation, a mechanism must be found for ensuring that protective provisions apply from the first moment that a person is subjected to investigation involving either detention or compulsory questioning or examination.

With the increasing movement of persons within the EU, both for employment and other purposes such as leisure, a significant minority of them will increasingly experience the criminal justice systems of other EU jurisdictions as suspects, defendants and as victims of crime. If the creation of an area of freedom, security and justice is to be meaningful and successful it is imperative that mutual trust and recognition, which has been described as ‘the cornerstone of judicial co-operation,’⁵² is something that is also perceived and experienced by ordinary citizens.

⁵² Point 33 – Presidency Conclusions – Tampere European Council 15-16 October 1999.