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From the domestic to the European: an empirical approach to comparative custodial legal advice

Jacqueline S. Hodgson

1. INTRODUCTION

Comparative criminal justice has much to teach us, not only in our relative understanding of the criminal procedures of national jurisdictions, but also in the critical analysis of wider European norms of the European Convention on Human Rights (ECHR) and most recently, the European Union (EU). Drawing on the findings of an empirical and comparative study of the suspect's right to legal counsel, together with earlier empirical research, this chapter analyses the scope and effectiveness of the standards set by the European Court of Human Rights (ECtHR) in its interpretation of the ECHR and the recent EU provisions setting out procedural safeguards for suspects detained and interrogated in EU countries.

The chapter begins by setting out the recent changes in the European legal landscape relating to suspects' access to legal counsel whilst detained for questioning in police custody. Starting with the landmark ECtHR case *Salduz v Turkey* (36391/02 [2008] ECHR 1542), it identifies the more robust protection provided to suspects through Article 6 of the ECHR in relation to the right to legal counsel, but also the limitations of the Convention approach in terms of practical application and enforcement. It then examines recent EU legislative measures for the procedural protection of suspects. In contrast to the more serendipitous case-by-case nature of the ECtHR jurisprudence, the EU provisions have been produced after several years of discussion and negotiation, including detailed studies on the likely impact of the new measures in Member States. They include greater levels of detail on how legal

assistance should be provided, and all Member States are required to transpose the protections into national law.

However, legislating for the criminal processes of 28 different jurisdictions is not without its problems. The different procedural traditions in place pose a real challenge to the idea of a single piece of legislation fitting into, and working effectively within, all European jurisdictions. Using the findings from a recent empirical study (Blackstock et al., 2014), funded by the European Commission and carried out with colleagues in the UK and the Netherlands, this chapter goes on to examine comparatively the suspect's right to legal counsel as understood through the practices of police detention and interrogation of suspects in four European countries.¹ By placing researchers alongside police and lawyers as they go about their daily work, we were able to understand the functioning of custodial legal advice in practice and to identify both good practices and the kinds of factors that inhibited effective legal counsel. As well as having different provisions in place for the detention and questioning of suspects, the four jurisdictions were at different stages in the protections they offered suspects, allowing us to compare the reception of defence rights across time as well as procedures. When applied to the jurisprudence of the ECtHR and the recent EU provisions, the empirical data highlights some of the limitations of these pan-European protections and suggests important ways in which they might be made more effective.

2. CUSTODIAL LEGAL ADVICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The right to counsel for those accused of criminal offenses is enshrined within Article 6 of the ECHR, which guarantees the right to a fair trial to accused persons.² The Convention applies to all 47 member countries of the Council of Europe and so covers a range of criminal

legal procedural traditions. The right to counsel is necessarily set out in very broad terms in the Convention, leaving the mode of implementation to individual states. This is known as the margin of appreciation doctrine and allows for a range of different practices and arrangements in different jurisdictions, provided that overall, the accused's Convention rights have been respected.³ In this way the Convention is not a 'one size fits all' model.

Ensuring that Convention rights are implemented, and implemented effectively, is policed to a large extent by the ECtHR in Strasbourg. Citizens of a signatory state who believe that a Convention right has been breached may bring their case before the ECtHR. The Court's approach is a practical one. In determining whether the applicant's rights under the Convention have been breached, the Court has made clear that the ECHR is designed to guarantee not rights that are 'theoretical and illusory' but rights that are 'practical and effective' (*Artico v Italy*, No. 6694/74, para 33). The existence of rights on paper, but which are routinely denied or are unenforceable, will not satisfy the Court.

However, there are also limitations in the Court's approach. Whilst the margin of appreciation doctrine is designed to enable Convention rights to be applied in appropriate and effective ways across a wide variety of criminal procedures, it can also have the effect of undermining Convention safeguards and creating broad differences between the protections provided in different countries. This is further compounded by the holistic approach taken by the ECtHR in evaluating Convention breaches. When determining whether an applicant has received a fair trial under Article 6 ECHR, a breach of the Convention early on in the procedure will not necessarily amount to a breach of Article 6, if the application of subsequent safeguards has resulted in a fair trial overall. This is because the right to a fair trial consists of a bundle of rights, but these constituent rights are not freestanding; the breach of one may in effect be remedied by subsequent procedures and guarantees and so will not

necessarily result in a finding that the applicant has been denied their right to a fair trial overall.

Although expressed as the right to a fair trial, the scope of Article 6 ECHR covers the investigation phase as well as court proceedings; the guarantees, including the right to legal counsel, therefore apply to pre-trial procedure as well as to the trial itself. The ECtHR has reasoned that the fairness of the trial is likely to be prejudiced by a pre-trial failure to comply with the provisions of Article 6 (e.g. *Imbrioscia v Switzerland* 13972/88 [1993] ECHR 56, para 36). The right to counsel in particular, or in the language of European instruments, the right to legal assistance, is important not only in the preparation of the accused's case, but also in the effective assertion and enforcement of her other legal rights. This is especially true for suspects held in police custody for interrogation, who may not know or understand the nature of the charges in connection with which they are being held, how long they can be detained, the consequences of consenting to certain investigative measures or of failing to cooperate with the police. In England and Wales, for example, if a suspect is silent under police questioning, adverse evidential inferences may be drawn from this at trial (Section 34, Criminal Justice and Public Order Act 1994). The ECtHR has recognised the value of the lawyer at this early stage and has held that the right to legal assistance arises immediately upon arrest (*John Murray v United Kingdom* 18731/91 [1996] ECHR 3), and where the suspect's decisions during police interrogation may be decisive in future proceedings, she must be allowed to consult with a lawyer prior to police interrogation.⁴

3. THE DECISION IN *SALDUZ V TURKEY*

The landmark case of *Salduz v Turkey* went further than earlier case law and Article 6 was held to guarantee the suspect the right to have a lawyer present during her police

interrogation as well as beforehand; before this, the Court had stopped short of saying that Article 6 required that the suspect must be permitted to have her lawyer present during questioning (*Brennan v United Kingdom* 39846/98 [2001] ECHR), even though this right had been recognised elsewhere as a fundamental safeguard against the ill treatment of detainees.⁵ *Salduz* was an important case, guaranteeing in the strongest terms the suspect's right to custodial legal advice before and during police interrogation.

... the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' ... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.</quotation>

Some countries, such as the Netherlands, denied that this required lawyers to be present during interrogation, but subsequent cases have made it quite clear that compliance with Article 6 requires the suspect to be permitted to have her lawyer physically present during the police interrogation (see *Mader v Croatia* 56185/07 [2011] ECHR; *Sebalj v Croatia* 4429/09 [2011] ECHR).

The *Salduz* decision is also significant in making it clear that depriving suspects of access to custodial legal advice is not something that can be remedied by later measures: 'Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody' (para 58). If no lawyer is permitted, the rights of the defence will be 'irretrievably prejudiced' (para 55). *Salduz* places particular emphasis on the danger of admissions made in the absence of a lawyer, but it is not limited to the exclusion of confession evidence. Article 6 was

breached in the same way in subsequent cases where there were no admissions and where the accused had remained silent (*Dayanan v Turkey* 7377/03 [2009] ECHR).

The decisions of the ECtHR apply to 47 countries, and so the level of prescriptive detail that can be set out in its judgments is necessarily limited. On the other hand, the Court does not wish to set standards that are too broad and open to interpretation. When considering the appropriate role of the criminal defence lawyer, this can be controversial. Historically, systems rooted in a more inquisitorial model have assigned a relatively restricted role to the defence, especially during the police investigation stage, which was considered to be preliminary and of little evidentiary significance (Hodgson, 2005). In France, for example, the defence lawyer has been able to participate in the investigation carried out by the *juge d'instruction*, including having access to the case file and being present during the questioning of the accused, since 1897. But during the police phase of the investigation, when the suspect is very much more vulnerable, lawyers have only been present since 1993 – and then for 30 minutes, 20 hours into detention. In 2000 suspects were permitted a half-hour consultation from the start of detention, and from 2011, as a result of *Salduz*, lawyers have been allowed into the interrogation room.

However, the role that lawyers can play in practice remains restricted. Lawyers are now present in the police interrogation in France, but they are not permitted to interrupt, to challenge police questions, or to ask questions or seek clarifications until the end of the interrogation. They do not have access to the case file and are provided with minimal information concerning the charges against the suspect, but no material concerning any substantive evidence. This contrasts with the position during the *instruction* phase, when those accused of the most serious offences are investigated under the authority of the *juge d'instruction*, during which time the accused and her lawyer have access to the case file. When cases are likely to go before the *juge d'instruction*, the lawyer may well advise silence,

knowing that more information will be available within the next day or so and there is nothing to be gained by speaking at this early point. In other cases – which constitute the overwhelming majority – silence is rarely advised. Lawyers are still growing accustomed to their role and coupled with the poor light in which failure to co-operate is viewed in court (this is a process in which even simple witnesses may be detained in custody for up to four hours to provide information to the investigation), this makes silence an unlikely strategy.

In the Netherlands, lawyers were not present during the police detention and interrogation of suspects at the time of *Salduz*, and post-*Salduz* they are permitted only a 30-minute consultation with the suspect, prior to interrogation. They also receive only a scant outline of the charges against the suspect. This is typical of the response to *Salduz* by many countries: to allow the suspect the minimum opportunity for legal assistance that (they believe) the law allows, and, where lawyers are permitted to be present during the police interrogation, to restrict their role. Here too, silence is not a strategy with which lawyers are comfortable. They are relative newcomers to the investigation phase and have yet to develop the more adversarial reflexes of a profession that is confident in challenging the investigation and in asserting the rights of the accused.

This contrasts with the case law of the ECtHR, which sets out a more proactive role than that allowed for in many jurisdictions. Whilst assistance during interrogation is important, there are many other ways in which the lawyer can assist the suspect and ensure the lawfulness of her detention. Finding a clear breach of Article 6 ECHR, the Court in *Dayanan v Turkey* (7377/03 [2009] ECHR) stated:

... an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned ... Indeed the fairness of the proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal counsel. In this regard, counsel has to be able to

secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of their conditions of detention. (Para 32)</quotation>

As we will see in the subsequent discussion of custodial legal advice in practice, there are a number of obstacles preventing lawyers from providing this level of assistance.

4. CUSTODIAL LEGAL ADVICE AND EUROPEAN UNION LEGISLATION

In addition to the important developments that have taken place through the case law of the ECtHR, the procedural rights of suspects have also been the focus of attention in the EU. Over the last decade, a range of EU co-operation measures have been introduced, the most prominent being the European Arrest Warrant – a fast-track judicial (rather than political) extradition procedure. Until recently, the focus of these measures has tended to be on the promotion of mechanisms of co-operation in the investigation, prosecution and sentencing of crime, with no real attention paid to the need for corresponding safeguards for those subject to these measures (Hodgson, 2011). The first attempt to introduce procedural safeguards was the European Commission's Green Paper in 2003,⁶ followed by a draft Framework Decision setting out key safeguards for suspects in a single measure in 2004.⁷ These attempts were, ultimately, unsuccessful. In July 2009, the Swedish Presidency of the EU presented a 'roadmap' for strengthening procedural safeguards for suspects and accused persons. These protections were explained as being necessary in the context of increased cross-border criminality, as well as the activities of the EU itself in legislating measures for police and judicial co-operation. The idea was to adopt a step-by-step approach, rather than trying to agree on all of the safeguards in a single measure as before.

The first, and perhaps the least controversial measure to be agreed was that on the right to interpretation and translation in criminal proceedings, which was adopted by the European Parliament in October 2010, to be implemented in all Member States by October 2013 (Directive 2010/64/EU). The second measure, on the right to information in criminal proceedings was adopted in May 2012 and must be implemented at the national level by June 2014.⁸ Both of these measures are important in enabling suspects to access and rely upon their defence rights, by providing them with information about the charges, about their rights (including to a lawyer) and ensuring that they can understand the proceedings if conducted in a language that the suspect does not understand. The most recent measure to be adopted is the Directive on the right of access to a lawyer (Directive 2013/48 EU).

In the light of the ECtHR case law described above, in which the suspect's rights to custodial legal advice are guaranteed in some detail, it may not be immediately obvious why the EU has also considered it necessary to legislate in this area. With 28 Member States, membership of the EU is smaller than that of the Council of Europe. The answer is that EU measures are more normative, prescriptive and enforceable. Whilst states have considerable latitude in how they implement the judgments of the ECtHR, and there are few sanctions for non-compliance, the position regarding EU legislation is very different.

First, Directives are transposed into national law by states themselves, but if they fail to do this, or if they are not faithful to the original instrument, in most instances an EU citizen can rely directly on the EU instrument to enforce a right in the national court. For example, Article 4 of the Directive on translation and interpretation makes clear that these services must be provided free of charge in all cases. If a Member State of the EU did not transpose this provision into national law and charged a suspect for an interpreter, the suspect (provided they were an EU citizen) could rely directly on the provisions of the Directive. Second, the jurisprudence of the ECtHR is the result of cases brought before it, alleging breaches of the

ECHR. EU instruments, in contrast, are negotiated by representatives of the Member States and are not a minimum threshold below which states should not fall, but positive standards to apply in uniform and consistent ways. Third, the Directives contain much more detail on how the measures will work in practice and are preceded by impact assessments in order to ensure that the measures are workable. Finally, whilst the ECtHR reviews whether there has been a breach of a Convention right post conviction, EU standards must be built into criminal procedures and so have a much wider impact.

The Directive on legal assistance was always going to be the most challenging piece of legislation on which to reach agreement. It took more than 28 months and a record number of eight trilogue discussions before agreement was finally reached.⁹ The Directive sets out the extent of the accused's right to legal assistance and is preceded by a detailed 'recital' explaining the articles of the Directive in more detail. Its provisions are consistent with ECtHR decisions emphasising the suspect's right to legal assistance from the point at which there is any curtailment of the suspect's freedom of action. But it also goes further in making provision for access to a lawyer during other investigative acts, such as house searches, and setting out the importance of enabling suspects to make contact with a lawyer.

In relation to the suspect's right to legal advice (whether or not they are detained by the police for questioning), Article 3 states that the suspect is entitled to a private consultation with a lawyer prior to any police or judicial questioning; and that the suspect has the right for a lawyer to be present and to participate effectively during questioning. The lawyer's participation is in accordance with national law, but must not prevent the suspect from exercising their rights of defence practically and effectively. Paragraph 25 of the recital explains that the lawyer 'may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements'. Although the reference to national law risks maintaining national differences and so undermining the strength of the provision as a

universal norm, arguably the Directive goes further than *Salduz* in its more detailed emphasis on practical and effective defence participation. If the suspect is permitted or required to be present at identity parades, confrontations or reconstructions of the scene of the crime, they may also have a lawyer present during these actions. Paragraph 4 requires that information be made available to the suspect to enable them to obtain the services of a lawyer. This may be through a website or leaflet available at the police station (Recital 27). Suspects may only be denied access to a lawyer in exceptional circumstances, as set out in paragraph 6: ‘where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person’ or ‘where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings’.

5. COMPARING DOMESTIC LEGAL REGIMES

Although several jurisdictions have now made provision for custodial legal assistance following the ECtHR decisions, this has not been an easy path. Reform has generally been precipitated by the judgments of the appellate and constitutional courts, the result of concerted strategies of litigation.¹⁰ This has been effective in bringing about change, but the speed of reform has meant that there has been little or no training of police and lawyers, proper financial arrangements have not been put in place, and the full implications of an expanded defence role in many procedures are not yet fully understood. The EU Directive now requires countries to ensure that their reforms are not simply a sticking plaster to appease any potential litigants to the ECtHR, but that they make full and proper provision for suspects detained and interrogated by the police to have access to effective legal counsel. As set out above, the EU Directive contains a greater level of detail setting out how the right to counsel should be provided.

The legal provisions currently in place vary across European jurisdictions, as one would expect given their different legal histories and traditions (Blackstock et al., 2014: chapter 3), and significant differences remain even after *Salduz*-driven reforms have been instituted. England and Wales, as an adversarially rooted procedure, has a fairly well established defence role. The defence is, after all, responsible not only for representing the interests of the accused, but, by investigating, selecting and presenting evidence for the defence case, she is also responsible for bringing relevant evidence before the court. Custodial legal advice has been on a statutory footing since the Police and Criminal Evidence Act 1984 (PACE), which provides for custodial legal advice for all suspects throughout their period of detention. This means that suspects may consult privately with their lawyer at any time (and no specific time limitation is placed on this), as well as having them present during police interrogation. The suspect is told of the reason for arrest, has information provided on the range of rights available during the period of police custody (for example, to call a lawyer, to remain silent, to have a third party informed of their detention, to have reasonable access to food, drink and rest, as well as information on the standards of conduct of police interrogation that might be expected). Detention is generally for a maximum of 36 hours.¹¹ Juveniles and those who are especially vulnerable through mental illness or learning disability must also have an appropriate adult present before and during interrogation.¹² There is no provision for access to the police case file. Although advice is free for all suspects, at least half of all suspects do not request a lawyer (Pleasence et al., 2011; Skinns, 2011 and research discussed therein).

Scotland is a mixed system with influences from both England and Wales and its more ancient alliance with France. Until the recent reform, suspects could be detained for only six hours and were permitted to have a lawyer informed of their detention (the so-called right of intimation), in order that the lawyer could be present when the suspect was later

brought before the court. Following the Supreme Court decision in *Cadder*, those arrested and detained for questioning are now permitted to consult with a lawyer in private and to have a lawyer present during the police interrogation, but the period of detention has doubled, to twelve hours. They are also told that they may have a third party, rather than a lawyer, informed of their detention. Like England and Wales, vulnerable suspects are entitled to an appropriate adult.

In France, the picture is rather different. As part of an inquisitorially rooted criminal procedure, the defence has historically occupied a different space within the criminal process. Procedures such as those found in France, Belgium and the Netherlands are, in theory, characterised by a centralised and broad-based judicial enquiry into the offence, rather than into an individual accused. In contrast to England and Wales' reliance on two opposing parties to bring all the relevant evidence before the court, the prosecution case is understood as the product of a judicial enquiry that encompasses both inculcating and exculcating evidence. And as judicial officers, those responsible for the investigation also have a role in protecting the rights and freedoms of the accused.

The defence role has evolved over time and is beginning to catch up with the reality of police-centred investigations, in which judicial supervision is extremely light touch and largely retrospective, carried out by the public prosecutor rather than through the prolonged investigation by the *juge d'instruction* (Hodgson, 2005, 2013). Those held in police custody may be detained for 48 hours¹³ and must be informed of the reasons for detention and of their basic rights during detention. There is no access to the case file. As noted above, in 1993, suspects detained for police questioning were first permitted a half-hour private consultation with a lawyer, 20 hours into the detention period. Since 2011, following *Salduz* and a challenge in the Constitutional Council, the adviser may be present throughout the period of detention and interrogation, though private consultation remains limited to 30 minutes and

the lawyer is not permitted to take a proactive or interventionist role during the interrogation. In the Netherlands, also an inquisitorially rooted procedure, the so-called ‘*Salduz* reform’ allows the suspect a half-hour consultation with a lawyer, but counsel is still not permitted to be present during interrogation, save in the case of juveniles and the most serious offenses.¹⁴ The public prosecutor is in charge of the investigation and prosecution of suspects, who may be detained for up to 72 hours.

The different approaches to provision for legal counsel to suspects in police custody arise in part because of the very different roles of legal personnel across jurisdictions and, in particular, differences in the balance of power and responsibility between legal actors. In France and the Netherlands, the prosecutor is responsible for the supervision of the detention of suspects as part of her pre-trial judicial oversight role, and this is considered an important additional protection and form of police accountability. In England and Wales, the public prosecutor has no responsibility for either the investigation or the conduct of the detention period: responsibility for the detention of suspects, including access to key defence rights such as legal counsel, rests with the custody officer. The defence is an important guarantor of due process rights as well as being responsible for investigating the defence case.¹⁵ One of the barriers to the acceptance of some ECtHR Article 6 jurisprudence and to the new EU provisions, is the fact that the safeguards are regarded by many countries, such as France, as more reflective of adversarial (often described as Anglo-Saxon) procedures.

The interaction of different rights and procedures is also an important factor in comparative evaluations of custodial legal advice: we are comparing the same right, but that right operates in a different context. There may be different structures of detention supervision or different weight attached to pre-trial evidence; there may be different rights available to suspects and these rights may be administered in quite different ways; there may be different police custody time limits. So, for example, the suspect in Scotland may have a

lawyer present before and during police interrogation, and detention may last a maximum of 12 hours. In the Netherlands, suspects are permitted only a 30-minute consultation, but detention may be very much longer than in Scotland – lasting up to 72 hours.

In all four jurisdictions, suspects must be informed of their right to silence and their right to consult with a lawyer free of charge, prior to the first interrogation by the police. However, the point at which suspects are informed of these rights is not the same, and so their likelihood of exercising these rights will vary. In France, when she arrives at the police station, the suspect will be told of her right to speak, be silent or make a written statement, along with her other rights. She will not be informed of this right again – this is seen as inappropriate and to risk encouraging the suspect to exercise her right to silence. In England and Wales, this ‘caution’ must be repeated at the start of every interrogation. Without this, the evidence obtained will not be admissible. The manner in which suspects are informed of their rights also varies. For example, England and Wales was the only one of the four jurisdictions to require that information on rights be provided to suspects in a standardised written format (Blackstock et al., 2014: chapter 5). Aside from the core function of the protection of the suspect’s interests and deciding on a strategy in response to interrogation, the defence has an important role in explaining procedure (in some instances making good the gap in police information) and the wider context in which the suspect must determine whether and how to exercise her rights.

6. THE EMPIRICAL STUDY

In our recently completed empirical study of England and Wales, France, the Netherlands and Scotland, we were able to observe first-hand the daily practices of police and lawyers in different sites in each jurisdiction. The study consisted of some 78 weeks of observation of

police and lawyers, together with 84 interviews, and the collection of information on 384 case records (Blackstock et al., 2014: chapter 2 and the related annexes). For the police observation phase, researchers were based at police stations to observe the police as they ‘booked in’ suspects, informed them of their rights and interrogated them. This also enabled them to chat with officers and to observe their interactions with other personnel such as lawyers, prosecutors and interpreters.

Lawyer observations were organised in two principal ways, reflecting the different arrangements in place for the provision of custodial legal advice. In England and Wales, there are specialist firms of lawyers handling criminal work, and the tendering process for public legal aid funding also requires specialisation and a certain degree of economy of scale. This means that firms specialising in criminal work will have a high number of police station call outs and so the researcher was able to gather a sufficient case sample by being stationed with one or two firms of lawyers and accompanying them to the police station as the calls came in to the office. In France and the Netherlands, there is much less specialism in criminal work; being attached to a single firm would not generate sufficient cases. So, researchers contacted the lawyers on the duty rota and arranged to be called by whichever lawyer was called out to the police station. This generated a good case sample and also involved a wider cross-section of lawyers. In Scotland, lawyers were reluctant to co-operate and we observed very few cases. In addition, their overwhelming preference for the provision of telephone, rather than face-to-face advice, also made observations difficult.

Police station observations were more straightforward, with researchers being based in the custody area and gaining access to interrogations in many instances. The exception was France, where the police hierarchy refused us permission to be based at police stations. We were not, therefore, able to observe the French police informing the suspect of her rights on

arrival at the police station – though we did attend interrogations and private consultations when accompanying French lawyers.

7. COMPARING THE PROVISION OF CUSTODIAL LEGAL ADVICE

Having explored some of the challenges in legislating rights across jurisdictions, and some broad differences in domestic arrangements, I want to focus on the ways in which empirical findings can help us to understand the key features of a universal and effective right to legal counsel for suspects held in police custody for questioning. By examining practices across jurisdictions, we can identify drivers of success and good practice, as well as the kinds of factors that inhibit the effectiveness of rights in practice. The *Inside Police Custody* study had the advantage of allowing us to draw on the differences in legal procedural tradition, as well as to examine the right to custodial legal advice at different stages in its development. This allows for comparison of the reception of the newly expanded right to counsel for suspects in police custody in Scotland, the Netherlands and France, with the more established procedure in England and Wales, examining in particular whether the behaviour of police, prosecutors and lawyers is jurisdiction-specific or indicative of broader organisational features.

The right to legal counsel for suspects held for questioning in police custody is not provided for in the same way in each country: the legal space assigned to the defence lawyer differs between jurisdictions, as set out above. These differences in legislative provision reflect broader differences in understanding of the defence role – whether the defence is the primary guarantor of defence rights, as in England and Wales, or plays a more diminished part, complementing that of the judicial officer responsible for the investigation, as in France and the Netherlands. These differences are reflected in the readiness of countries to embrace a new or expanded defence function.

The lawyer is permitted to be present during the police interrogation of the suspect in England and Wales, France and Scotland, but not the Netherlands. But even where present, the lawyer does not participate in the same way in each jurisdiction. In England and Wales and in Scotland, the lawyer may seek clarification of questions, object to inappropriate or overbearing questions and, if necessary, stop the interview. In France, however, the lawyer is present, but must remain passive. She may not interrupt the police interrogation – only once it is finished may she pose questions or seek clarifications. As one lawyer explained: ‘We’re just allowed to breathe and that’s it ... in terms of defence rights, it’s useless: we are just decorative, like a vase on the table’ (iFranCityLaw3 – interview with lawyer in large field site in France, see Blackstock et al., 2014: 50). French lawyers understand the role that has been assigned to them as providing minimal benefit to the suspect, whilst serving to legitimate the police investigation procedure: ‘We are defenders but mostly we guarantee the integrity of the process’ (iFranCityLaw2).

The arrangements in place for legal assistance prior to questioning are also very much more restrictive in France and the Netherlands, where consultation is limited to 30 minutes. This does not anticipate detailed preparation for interview or the possibility of engaging in the kinds of defence tasks set out in *Dayanan v Turkey*. The expectation is that the lawyer will ascertain some basic case facts from the suspect (there is little disclosure to the suspect or lawyer of the evidence held by the police) and provide largely generic advice on rights and procedure – there simply is not the time or the information to allow for much more than this. It should also be remembered that, in part because of lower levels of specialisation, most suspects in France and the Netherlands are seen by a duty lawyer, rather than their ‘own’ lawyer; there is no existing professional relationship. In addition to getting the suspect’s version of events therefore, the lawyer must also gather some basic biographical information and establish a degree of professional trust – all within half an hour.

However, it is not only different legal provisions that reflect different understandings of the lawyer's role. The ways in which lawyers organise the provision of legal assistance – from the local bar down to the individuals on duty rotas – also reflect different conceptions of the lawyer's role. In the first years following the introduction of a statutory right to custodial legal advice in England and Wales, lawyers were found to delegate this work routinely and systematically to untrained, unqualified and often inexperienced staff (McConville and Hodgson, 1993; McConville et al., 1994). Quite simply, they failed to grasp the opportunity presented by this new role, preferring instead to regard it as a way to maximise their income by delegating tasks to lower paid staff whilst claiming full solicitor legal aid rates. This resulted in a national programme of training and accreditation, ensuring that solicitors and their representatives are fully trained and qualified in the provision of advice to suspects in police custody.

In our recent empirical study, we observed some lawyers providing the best quality advice that they could manage within the constraints of little time and case-related information. However, these lawyers were in the minority. In Scotland, lawyers preferred to speak to suspects by telephone, rather than attending the police station in person. Lawyers told us that they would nearly always advise silence and this could be done as well by telephone as in person.¹⁶ Most significantly, this meant that they were routinely absent from the interrogation of the suspect, but advising a person by telephone rather than face-to-face is unsatisfactory in many ways. Apart from issues of privacy and confidentiality, it is much harder to assess the state of the suspect and their ability to withstand police questioning.

In France and the Netherlands, there is less criminal specialism within the local bar. As a result, duty lawyer schemes employed lawyers from all areas of practice in order to have sufficient numbers to meet demand. This is perhaps a pragmatic solution to a practical problem. However, this resulted in suspects being advised by lawyers working in family or

commercial practice, with little experience or knowledge of criminal procedure. Training was minimal or non-existent and the profession was effectively allowing those with little or no knowledge of criminal procedure to fulfil a key role in advising an accused person when they are most vulnerable and most in need of informed explanation in order to respond properly to police questions.

Another consequence of the relatively low numbers of specialist criminal lawyers is that duty lawyers provide the bulk of both police station and court work. There is no professional continuity in these cases. The advice and representation provided at each phase is a one-off transaction; the lawyer attending the suspect at the police station is unlikely to represent her at court. This defines the suspect–lawyer encounter differently from a private consultation attended by the suspect’s ‘own’ lawyer: it means that there is little investment in the case or in an ongoing professional lawyer–client relationship. This contrasts sharply with England and Wales, where the expectation is that the firm attending the suspect at the police station will go on to represent her at court – incentivising lawyers to follow cases through, negotiate on bail and charges, and so on.

8. POLICE ADMINISTRATION OF SUSPECTS’ RIGHTS

Those who believe that reforms are likely to operate against their interests perhaps have the greatest incentive to try to undermine them. The police often regard the presence of lawyers as likely to undermine the investigation and to reduce the likelihood of suspects co-operating during interrogation. This argument has been put forward time and again – from the introduction of the lawyer during the French *instruction* in 1897, to the 30-minute consultation 20 hours into detention in France in 1993, and the introduction of a statutory right to custodial legal advice under s. 58 PACE in 1985 in England and Wales. In all of

these cases, police fears have proved to be unfounded – indeed research shows that defence lawyers are often co-operative and insufficiently adversarial, rather than hindering the investigation (Field and West, 2003; Hodgson, 2005; McConville et al., 1994). But it is clear that the professional ideologies and occupational cultures of all legal actors have the potential to enhance or constrain the effectiveness of legal reform.

The police varied in their response to lawyers' presence at the police station. More experienced officers were more accepting of the lawyer's role, understanding that defence rights have a place in criminal procedure. These officers had also seen that suspects who received legal advice were not necessarily more obstructive or more likely to remain silent. The police in England and Wales had the most experience of lawyers assisting suspects before and during interrogation and, interestingly, across the four jurisdictions, they were the most accepting of the lawyer's role. Some officers were still resentful of the suspect's right to a lawyer and others thought that having a lawyer there complicated their work. French police were not enthusiastic about having lawyers present during the detention period, but they recognised that there was little that the lawyer could do and therefore little impact that they would have on the investigation. Whilst lawyers in the Netherlands have the most limited role during the suspect's detention, Dutch officers were the most hostile to the presence of the lawyer. They felt that lawyers delayed investigations, complicated cases and made suspects less likely to co-operate. The arrival of defence counsel is a very recent phenomenon in the Netherlands and it may be that once officers become accustomed to the lawyer's presence, as they have in England and Wales and to an extent in France, they will become less hostile to the idea. In Scotland, the position was rather different. It was not the presence of lawyers that officers found difficult (probably because most do not attend), but, rather, the process of informing suspects of their right to a lawyer, which required the police to administer a long, poorly worded and repetitious form (Blackstock et al., 2014: 230–234).

An aspect of police occupational culture that we observed across all jurisdictions was the practice of implementing due process or defence rights in ways that served police interests rather than those of the suspect. For example, in France and the Netherlands, the decision to appoint an interpreter was often not based on the suspect's need, but on the police's view of whether they could progress the investigation sufficiently without an interpreter. For example, in order to avoid calling in a professional interpreter, police officers themselves would act as interpreters if they had some knowledge of the relevant language; or they would reformulate questions in very simple terms so that they might be better understood by the suspect. This ignored the suspect's impaired understanding of the process and the charges, and took no account of the desirability of having an interpreter during the lawyer–client consultation.

This illustrates the wider point that where the police perceived due process rights to hinder or to be of no benefit to their own investigation, they were more likely to engage in rights avoidance strategies. This was often the case with the right to legal counsel, which was generally regarded as assisting the suspect and potentially delaying or obstructing the police enquiry. This view appears to be almost universal and has been observed across different criminal procedures: by researchers in England and Wales after the implementation of PACE (Sanders and Bridges, 1990); in France in my own earlier empirical studies (Hodgson, 2005); and in *Inside Police Custody*, in particular in the Netherlands, where the right has most recently been introduced. It appears to be most pronounced when the right to legal counsel for suspects is first introduced.

The police employ a range of strategies. The primary concern of most suspects is to get out of the police station as soon as possible, making the most effective ploy that of suggesting that contacting a lawyer would delay things and prolong the period of detention. Sometimes this is done overtly and directly, other times it is more subtle, with officers failing

to disabuse suspects who fear that a lawyer will delay things, or that the charges are insufficiently serious to merit calling a lawyer. Given that more suspects waive their right to counsel during police custody than ask to see a lawyer, it is important to ensure that procedures are in place to ensure that any waiver is voluntary and fully informed. Typically, on arrival at the police station, as part of the ‘booking-in’ process, the suspect is asked whether she would like to take up her right to legal assistance. At this point, she has very little to go on. She may know that she has been arrested for theft, assault or a public order offence, but she is unlikely to know the precise extent and gravity of the charges, or of the evidence against her. It may seem unnecessary to call a lawyer at the outset of detention, but very much more desirable once the police case is revealed during interrogation. Of the four jurisdictions in our study, only in England and Wales were suspects told that the right to a lawyer was a continuing right and that the suspect could change her mind at any point. In the other three jurisdictions, once the decision to waive the right to counsel had been made, suspects were unaware of their continuing right and so unlikely to change their mind. This is an important gap in legal provision.

The availability of legal aid is another key factor in the suspect’s decision-making process. Repeat players in the system know what they are entitled to and how to get it, but for those experiencing the process for the first time the situation is very different. Both police and lawyers in all four jurisdictions made this distinction to us, explaining that they would tend to be more thorough with someone who was being arrested and detained for the first time. If a first-time suspect is informed of her right to counsel, she may be concerned that she cannot afford a lawyer and so decline legal assistance on grounds of cost. In England and Wales, shortly after the right to custodial legal advice was introduced, research found that officers frequently omitted to tell suspects that legal assistance was free at the point of delivery. Many worried that they could not afford a lawyer and so waived their right to

counsel. This resulted in changes to the Code of Practice, and the custody officer, who is responsible for the suspect's welfare, must now tell the suspect that she has the right to a lawyer and that this is available free of charge. In France, when legislation was first passed permitting the lawyer access to the police station (for a 30-minute consultation with the suspect, 20 hours into detention), the first things that lawyers did was to go on strike!

Unfortunately, no provision for legal aid had been made, leaving lawyers unable to claim any state funding for custodial legal advice work. Proper provision for payment was then put in place, but this serves as a useful reminder of the importance of making rights effective in practice.

9. CONCLUSION: MAKING DEFENCE RIGHTS UNIVERSAL AND EFFECTIVE

The ECtHR and the EU have made important advances in setting out universal standards of legal assistance for suspects detained and questioned by the police. From a comparative law perspective, it is interesting to investigate the extent to which these kinds of pan-European measures are able to result in a degree of consensus over fair trial standards, which reaches across different procedural traditions. There are limitations on the extent to which the ECHR and the jurisprudence of the ECtHR can or should exact uniformity of standards. This is a model that sets broad standards of the requirements of a fair trial, leaving states with a margin of appreciation in how this might be achieved. It is also clear that ECHR standards are diluted through different interpretations at the national level, and through uneven modes of transposition into domestic legislation. The EU regime is more normative and demands higher levels of uniformity. Member States that do not comply can be challenged by defendants directly in national courts and ultimately in the Court of Justice of the European Union. In this way, an EU Directive sets a clearer standard that must be complied with in the same way across all Member States. However, the legal measures themselves allow

variations in line with existing provisions within Member States, building in layers of difference in implementation.

An empirical examination of the daily practices of police and lawyers as they implement the right to legal counsel demonstrates the depth of difference that exists in legal provisions across jurisdictions, but also the very different perceptions that legal actors have of the role of lawyers in police custody. Some of these differences can be attributed to different criminal procedural traditions and the place that the lawyer has come to occupy in the criminal process; others reflect practical arrangements such as levels of legal aid.¹⁷ But it is important that we recognise the agency of police and lawyers even within the legal and practical constraints within which they work. Their views of the value of legal assistance are often crucial in the success or otherwise of legal reform. Police officers who regard the presence of the lawyer as antithetical to the interests of an effective investigation will engage in a range of rights avoidance strategies: encouraging the suspect not to exercise their right to counsel, claiming that they will have to wait a long time for the lawyer to arrive and that this will delay the case and so the suspect's release from custody; failing to inform the suspect that the lawyer is free of charge; and allowing the suspect to think that the case is very straightforward and so no lawyer is necessary. It was clear in our own observations that for some suspects, this served to dissuade them from taking up the right to counsel.

For their part, lawyers must also value the opportunity that custodial legal advice represents – an opportunity to influence the case at the most crucial stage of the investigation, when suspects are at their most vulnerable. This requires adequate training in practical skills as well as law and procedure. Police station advice is not like court work or proof taking in the office. It is often tense and even confrontational; the lawyer must be able to think on her feet, assessing law and welfare issues and making representations where necessary – not to a

judge in the public setting of a courtroom, but to a senior police officer in the closed environment of the police station.

Much of what we observed across the three jurisdictions where custodial legal advice has only recently been introduced or strengthened, was similar to my own findings in England and Wales in the early post-PACE years and my French empirical study published in 2005 (Hodgson, 2005; McConville and Hodgson, 1993; McConville et al., 1994). This is of particular interest to the comparativist as it suggests institutional and process drivers that cut across legal procedural differences. It underlines, in particular, the need for a more comprehensive understanding of the role of legal counsel for suspects, of the benefits in terms of procedural fairness and so evidential reliability, and the importance of equality of arms. This understanding is lacking not only from those whose interests might be seen as in opposition to those of the suspects, but also from lawyers themselves, who fail to grasp the significant influence that their assistance might have. Scottish lawyers, for example, remain content to provide telephone advice, perhaps not realising the importance of face-to-face meetings in assessing the suspect's ability to deal with police interrogation, and the difficulties of remaining silent when facing the police alone. What we observe is that it is less the procedural tradition of a criminal process that determines the lawyer's response than the way lawyers acclimatise to their new role. The law alone can be a blunt instrument of change. If police and lawyers are to 'buy in' to these legal reforms, they also need training to understand their value beyond the narrow interests of police, prosecutors or defense lawyers, to the good functioning of the wider criminal justice process.

NOTES

¹ The study ‘Procedural rights of suspects in police detention in the EU: empirical investigation and promoting best practice’ JUST/2010/JPEN/AG/1578 was funded by the European Commission. Alongside the right to legal assistance at the police station, the study also examines the suspect’s right to information, to interpretation and translation, and to silence.

² See also *Poitrimol v France* (1993) A 277-A, 18 EHRR 130.

³ As the ECtHR explained in *Imbrioscia v Switzerland* 13972/88 [1993] ECHR 56, para 38: ‘While it confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, Article 6 para. 3 (c) (art. 6-3-c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial’.

⁴ *Averill v United Kingdom* 36408/97 [2000] ECHR, which involved inferences from silence under the 1988 Order in place in Northern Ireland at that time: ‘...an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation ... The situation in which the accused finds himself during that 24hour period is one where the rights of the defence may well be irretrievably prejudiced...’ (paras 59–60).

⁵ E.g. International Criminal Tribunal for the former Yugoslavia; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁶ Recognised as a ‘necessary counterbalance to judicial co-operation measures that [have] enhanced the powers of prosecutors, courts and investigating officers’, Brussels, 19.2.2003, COM(2003) 75f para 1.4.

⁷ COM/2004/0328 final. These included: legal advice and assistance; the provision of interpreters; special protection for vulnerable suspects; consular assistance; and knowledge of the existence of rights.

⁸ Directive 2012/13/EU. This requires Member States to inform suspects and accused persons of their right to legal assistance, including the conditions under which it is available free of charge; the right to be informed of the accusation; the right to interpretation and translation; and the right to remain silent. On arrest, it requires suspects to be provided with a Letter of Rights, setting out the right to access case materials; to have consular authorities and one person informed of their detention; to be given access to urgent medical assistance; to know how long you can be detained before being brought before a judge; and information on challenging the lawfulness of arrest, reviewing detention and requesting release.

⁹ Trilogues refer to discussion between members of the three EU institutions: Parliament, Council and the Commission.

¹⁰ For example in France, the *Conseil Constitutionnel* Decision 2010-14/22 QPC of 30 July 2010 and the *Cour de Cassation* Cass. ass. plén., 15 April 2011, Nos. 10-30.316, 10-30.313, 10-30.242 and 10-17.049; for the Netherlands, see the HR 30 June 2009, *NJ* 2009, 349; and for Scotland, see the UK Supreme Court decision in *Cadder v HM Advocate* [2010] UKSC 43. Most recently, see the Irish Supreme Court Decision *DPP v Gormley*; *DPP v White* [2014] IESC 17.

¹¹ This can be extended on application to the court, or in terrorism cases.

¹² PACE COP C. The appropriate adult role is to act as an additional safeguard for vulnerable individuals and to assist communication. The appropriate adult role is not to provide legal advice.

¹³ This can be extended by a judge in cases of terrorism, serious organised crime and drug trafficking.

¹⁴ In juvenile cases, the suspect may choose to have either an appropriate adult or a lawyer present – but not both.

¹⁵ This is a senior police officer who is wholly unconnected with the investigation.

¹⁶ Silence was the preferred advice because any confession must be corroborated by other evidence in Scotland.

¹⁷ For information on rates and mechanisms of payment for ‘own’ and duty lawyers, see Blackstock et al. (2014) pp. 82–83 (England and Wales); p. 98 (France); pp. 116–118 (Netherlands); pp. 135–136 (Scotland); and more generally pp. 388–389.

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