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OPEN SOCIETY JUSTICE INITIATIVE

JUSTICE

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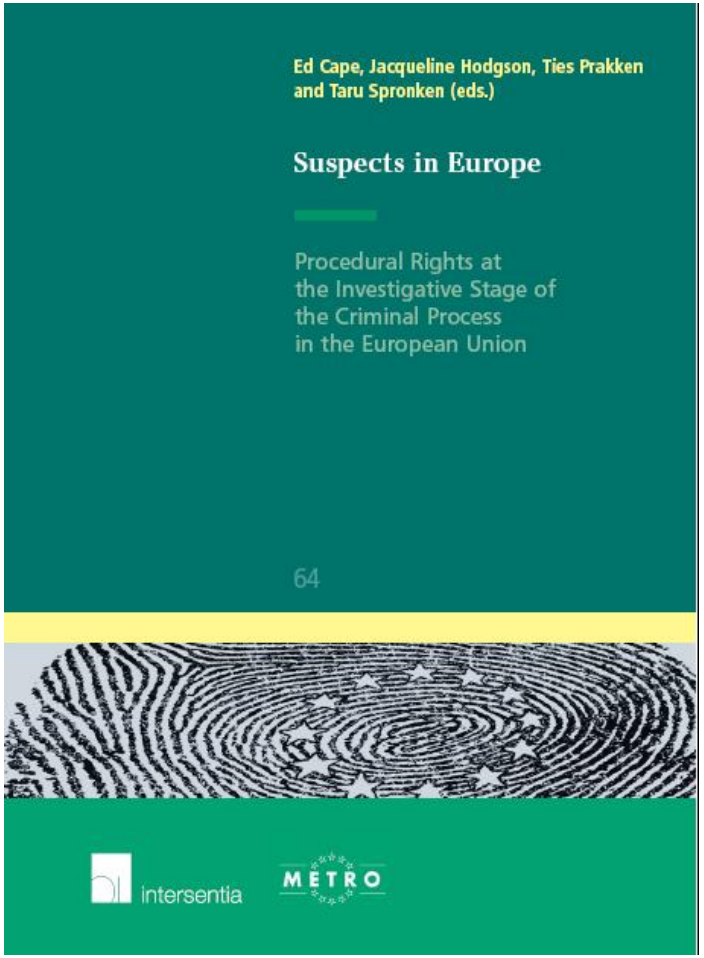
Previous study



- In practice, police often carry out interrogation without supervision
- The product of interrogation is normally included in the dossier
- Practice frequently departs from the formal legal position, to the detriment of suspects
- Lack of data or rigorous, scientific, evidence on how the investigative stage works in practice

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Countries in study and timetable

Preparation research	September 2007---	---January 2008
I	II	III
Feb 2008-Oct 2008	Nov 2008-May 2009	March 2009-September 2009
England & Wales	**Finland**	**Turkey**
Belgium	**Germany**	**France**
Hungary	**Poland**	**Italy**
Overall report by project team	October 2009----	---- June 2010

Four major research questions

1. What are the core procedural safeguards for effective defence in general and for indigent suspects in particular?

2. By which indicators can these procedural safeguards be monitored?

3. To what extent are the requirements for an effective defence met in practice in a range of selected European countries?

4. To what extent (if at all) is the regulatory regime deficient in ensuring access to effective criminal defence, and what role might be played by the EU?

Our approach to effective criminal defence

A human rights approach that focuses on the suspect/accused

- equality of arms
- effective representation, and
- effective participation

Article 6(1) – the substantive right

In the determination of… any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(2) – the specific requirements

- Adequate time and facilities to prepare defence
- Right to defend in person or through legal assistance
- Free legal aid where accused has insufficient means and it is in the interests of justice
- Examination of witnesses
- Free use of interpreter if required

ECHR – some unanswered questions

- When does the right to legal assistance arise (the meaning of ‘charge’)?
- At what point does the right to state funding arise?
- What information should be given to the accused about their rights, and about legal aid – when and in what form?
- Who should appoint the defence lawyer?
- What is the role of the defence lawyer?
- What quality of legal assistance is required?
- What is the relationship between fair trial, procedural rights and criminal defence?

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Some preliminary findings

Translation and interpretation

- No mandatory written translation of key documents (Germany: reasons of the judgment not translated; Italy: only documents addressed to a defendant; etc.)
- Summary oral translation by a court interpreter/defence lawyer of documentary evidence deemed sufficient (e.g. Germany)
- No right to *free* interpretation of client-lawyer communications (Hungary)
- In Italy, court must ascertain that the defendant does NOT neither speak or understands Italian
- Poor quality of translation & interpretation due to lack of professional certification and training requirements; low payment; no mechanisms to verify quality, e.g. recording (Turkey, Hungary, Belgium, Poland)
- Questionable independence when interpreters are appointed by investigative authorities (Turkey, Hungary)
- Lack of effective remedies against inadequate translation/interpretation, e.g. replacement of interpreter/translator (Poland: only if influences case outcome)

Rights to information about the suspicion and procedural rights

- No general obligation to inform persons interrogated of nature and cause of accusation (Belgium; Hungary in relation to persons in “short-term” arrest)
- No obligation to provide a written ‘letter of rights’ (Finland, Belgium, England – only at investigative stage)
- Persons questioned with regard to a criminal offence but are not formally “suspects” not informed about their rights (Hungary; Poland; Belgium)
- No obligation to inform suspects in provisional detention about the right to silence (France) or the consequences of its waiver (Turkey)
- Formalistic approach to informing defendants about their rights/no obligation to explain rights and verify whether they are understood (Poland; Turkey; Hungary; Germany)
- Evidence obtained in breach of the obligation to inform is used by courts (Poland; Hungary)

Access to a criminal file

- No general statutory right of access to the file at the investigative stage (Belgium, France, Poland)
- Serious limitations on access for suspects that are not detained (Germany)
- Discretion of prosecutor/investigative authorities to restrict access too broad (ex: interests of investigation understood as “convenience of investigation” – Turkey)
- Use of secret investigative measures impeding lawyer’s access to a file (Finland)
- At the same time: Increasing obligations on accused and their lawyers to provide information to the prosecution (England and Wales)

Early access to legal assistance

❖ Moment of access delayed by law in all (24 hours – Belgium; 12 hours – Hungary; up to 5 days - Italy) or certain categories of cases (drug, terrorist offences – up to 3 days in France)

❖ No statutory right to *free* legal assistance during provisional detention (Poland; Germany – only after 3 months' of detention)

❖ Lawyers' participation in police custody/pre-trial proceedings very rare (7.3% in Turkey; Finland – only 9 cases in 2007):

- Appointment depends on suspects' explicit request (and suspects do not request for various reasons, including police ploys –Hungary, Turkey)
- Authorities are not obliged to facilitate appointment of a lawyer; late notifications of counsel
- No effective mechanisms to ensure timely appointment
- No effective safeguards against non-voluntary/uninformed waiver (e.g. exclusion of evidence)
- Lawyers are not obliged to participate in pretrial proceedings and sometimes do not recognize value of such participation

Lawyers' continuous access to client and privacy of communications

- Lawyers have no right to be present during police interrogations (Germany; France; Belgium)
- Statutory limitations on the duration of lawyer-client consultations during police detention (30 min during GAV in France)
- Lawyer-client communications may be supervised during the first 14 days of investigation (Poland)
- In terrorist cases, written communication between a lawyer and his/her client may be supervised (Germany, Turkey)
- Practical impediments on access when a suspect is in detention:

  - limited visiting hours in detention facilities (Belgium)
  - travel to a detention facility not covered by legal aid (Hungary)

The right to free legal assistance

- Additional factors delaying the moment of lawyers' entry as compared to private lawyers:
  - complex and lengthy eligibility determination process
  - no (institutionalized) emergency legal aid schemes (everywhere except England and Wales)
  - attendance at police stations/participation in pretrial proceedings is paid at lower rates than attendance in court

- Inadequate or unclear scope of the right to free legal aid (e.g. financial threshold too low – Finland; no merits test – Poland)

- Poor quality of free legal assistance:
  - low fees/fixed payment schemes do not motivate legal aid lawyers to perform
  - no certification requirements or quality assurance mechanisms
  - Bar disciplinary mechanisms inadequate

Wider limitations on effective criminal defense

- "Managerialist" approach to criminal justice which emphasizes efficiency, often at the expense of procedural safeguards of defendants' rights, is becoming popular.
- In some countries, populist "crime control" policies are on the rise in response to increased public feelings of insecurity and fear of crime exacerbated by media
- In most countries, pretrial detention is still used by default, often for the convenience of access to a suspect/as a means to secure an admission of guilt
- Police discretionary powers to investigate and prevent crime are increasing, and as a result the boundaries of permissible interference into the individual freedom are being redefined
- In post-inquisitorial systems, judicial control over investigations is growing less effective; ample examples of judicial bias towards the interests of investigation
- In post-inquisitorial systems, lawyers often choose a passive/reactive approach (especially during pretrial stages of the proceedings) as – allegedly – the best defense strategy

Some emerging conclusions

- There is a great degree of variance between the examined countries in the way they ensure effective criminal defence rights

- Issues arise at three levels:

  - Major contradictions with the (object and purpose) of ECHR, or gaps, in the individual countries' general legislation
  - Deficient implementation of legislation in regulatory acts and over stringent interpretation by courts
  - Deficient practices of rights' implementation

- These issues must and can be addressed by the European Union through:

  - Adoption of binding legislative instruments to ensure that general legislative norms comply with fair trial rights' standards
  - Development of an implementation framework which would flesh out the general principles enshrined in binding legislative instruments
  - Development of mechanisms to evaluate compliance with effective defence rights in law as well as in practice