Quality: time for the re-emergence of the client?

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1. Overview

This paper provides an overview of the legal position on effective rights for suspects and defendants in the EU.[1] It has been produced as a working paper for a project, funded by the European Commission and the Open Society Justice Initiative (OSJI), which includes reports on the position in relation to effective defence rights in nine countries in, or close to, the European Union. The project is a collaboration between the Universities of Maastricht and the West of England as well as OSJI and JUSTICE. The research is being conducted in three waves – England, Belgium and Hungary; then Finland, Germany and Poland; finally, Turkey, France and Italy. All are now in the course of production. The final report, which will be published through the University of Maastricht, should be available in the summer of 2010. The interesting question for ILAG members is whether the human rights approach underlying this research challenges the approach to quality assurance that has been adopted in a number of jurisdictions. It is certainly notable that many recent descriptions of quality assurance methodology omit any, or much, overt consideration of the degree to which a lawyer acts as a zealous advocate for the interests of their client in favour of more procedurally oriented methods of assessment and evaluation. The research, not yet complete, may raise the question of whether this is unavoidable in any methodology which is essentially based on 'transaction criteria' – tending to the mechanistic and formulaic - rather than qualitative evaluation based

[1] The opening and last paragraphs have been amended for the conference and the reference to Salduz v Turkey inserted. Otherwise, the paper is that published as 'The Nature and Scope of the Right to Defence of indigent defendants in the EU' for a conference in Maastricht in December 2008. More details of the project are available at http://www.unimaas.nl/default.asp?template=werkveld.htm&id=2FU733SN1NG53C6JS7D5&taal=en.

on informed judgement and acceptance of the centrality of the client's need for a fair trial.

The project examines the right to fair trial of those accused of a criminal offence. Such a right is guaranteed by the constitution, criminal code or common law of almost every country in the world.[2] As both a consequence and a cause, the right is safeguarded in all major human rights treaties.[3] Thus, those countries that are signatories to the European Convention on Human Rights ('the Convention') find their obligations to ensure fair trial predominantly in Article 6 as well as in any domestic provision. This paper sets out the detailed requirements that we consider states must meet to provide suspects and defendants with effective rights of defence that meet their obligations under Article 6.

We begin Article 6 itself.[4] We end with the examination of compliance against the implication of its provisions by a representative number of countries that are bound by the Convention through membership of the Council of Europe. We have chosen three counties in the first phase of the project and nine in total (of which eight are also members of the European Union). To make the progression from consideration of the Convention to assessment of the performance of individual countries, our methodology moves through the following intermediate steps:

- The case law of the European Court of Human Rights that expands Article 6 of the Convention;
- International standards which are consistent with Article 6 and which indicates how it should be implemented (major sources are set out in Appendix 1 [to be added in the final vesion and included at the end of Ed's original paper);
- A set of monitoring indicators inferred from the above which facilitate examination of compliance by states which, in the first place, are members of the Council of Europe but, more widely, may be used to measure the compliance with fair trial principles of any state anywhere in the world. [I think we should publish these as a separate paper together perhaps of the source of each indicator.]

[2] See P10, Cape, Hodgson, Prakken, Spronken *Suspects in Europe,* Intersentia, 2007; Spronken, Attinger, *Procedural Rights in Criminal Proceedings: existing levels of safeguards in the European Union* DG Justice and Home Affairs, 2005 and, for a recent affirmation of common law rights in the United Kingdom, *R v Davis* [2008] UKHL 36.

[3] Eg Article 14 International Covenant on Civil and Political Rights, Article 10 and 11 Universal Declaration of Human Rights

[4] Though other articles are sometimes relevant, particularly Article 5.

At the heart of our examination stand those accused or suspected of having committed a crime. We have paid particular attention to the following four crucial pre-conditions for them to receive a fair trial:

- The right to information about the prosecution's case;
- The right to legal assistance;
- Rights that protect procedures, such that to be presumed innocent;
- Rights that promote effective defence, such as adequate facilities and time to prepare a defence or the right to secure the attendance of witnesses.

This research combines theoretical analysis with empirical examination and, as such, has involved both a central core of researchers concerned with the whole project and individual researchers who looked at the position in their own countries. The process has been iterative in the sense of the individual research feeding back into the fundamental conceptualisation. It continues to be so and this paper is produced for discussion at a conference in Maastricht in November 2008. We want our ideas to be debated: we open to revising them.

However, we also have practical concerns that we hope the project will address.

First, we are concerned that a number of countries, among them the United Kingdom, defeated, at least temporarily, the attempt of the European Commission for greater protection of procedural safeguards for suspects and defendants. We believe that our research will prove that there remain issues throughout the European Union which are precisely about making Convention rights 'real and effective' rather than 'theoretical and illusory'.

Second, we want to take the debate about the quality of defence services beyond the issues raised regret by the predominant literature. This has been over-dominated by the necessarily limited perspective of the funder of such services and largely led by the concerns of the Scottish Legal Aid Board and the Legal Services Commission of England and Wales. A striking, though perhaps unsurprising, defect emerges in much of the work funded by these two bodies. Measures of quality assurance have been developed from which the interests, concerns and instructions of the client are completely absent, emerging only generically in some systems as among a variety of 'ethical' considerations.[5] Our approach places

[5] See eg Masson and Sherr 'Practising lawyers and professional legal competence – an articulation episode', delivered to the 7th International Legal Services

the client at the centre of the obligations of the lawyer – albeit that the lawyer must meet certain knowledge and transactional standards.

Third, we are concerned that the bias of legal aid funders has been to concentrate only on those parts of the criminal justice system in which legally aided lawyers play a part. Thus, there is a tendency to see only part of the defendant or suspect's experience and not to consider the experience in totality from the perspective of equality of arms, effective representation and effective participation that we wish to advocate – we want to look from the suspect or defendant's position.

We are aware that all comparative research is difficult, and particularly so that which seeks to compare the real performance of procedural safeguards within individual jurisdictions of very different theoretical structures with universal norms. Following earlier work, we divided countries into three broad categories: common law, inquisitorial and post state-socialist.[6] There are formidable problems of comparison even on such a fundamental matter as when someone is 'charged with a criminal offence', an act which triggers various defence rights under Article 6 (see below).[7] However, we believe that - with care - valid comparisons and assessment of compliance can be made.

2. The European Convention on Human Rights

The European Convention contains two references to court determinations in criminal cases. The first is in relation to bail:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[8]

But, the main provision is in relation to the main hearing of the case:

> 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 …[9]

Research Centre conference 2008, *Reaching further: new approaches to the delivery of legal services.*

[6] See P4, Cape et al, above.

[7] These have received some definition from the European Court of Human Rights eg in *Foti v Italy* (1990) 5 EHRR 313.

[8] Article 5(4)

[9] Article 6(1)

The latter is followed by a set of more specific requirements:

- 'To be presumed innocent until proved guilty'.[10]
- 'To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.'[11]
- 'To have adequate time and facilities for the preparation of his defence.'[12]
- 'To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.'[13] We might note, at this stage, however, that the right to legal advice and representation is based on, and arises out of, the right of an accused person to defend themselves. Thus, the right to legal assistance is not the legal foundation of defence rights 'but a *prerequisite* for the effective exercise of these rights'.[14]
- 'To examine and have examined witnesses against him and to obtain the attendance and examination on his behalf under the same conditions as witnesses against him.'[15]
- 'To have the free assistance of an interpreter if he cannot understand or speak the language used in court.'[16]
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However, these provisions are very general and require further articulation to derive practical assessment requirements from them.

3. Caselaw of the European Court of Human Rights

Convention rights have been expanded by principles to be found in the jurisprudence of the European Court of Human Rights (EctHR). Chief among these are that:

- 'whether the proceedings considered as a whole … were fair';[17]
- There should be 'equality of arms' as between prosecution and defence;[18]
- The provision of legal representation should be 'real' or 'practical' and 'effective' not 'theoretical and illusory';[19]

[10] Article 6(2)
[11] Article 6(3)(a)
[12] Article 6(3)(b)
[13] Article 6(3)(c)
[14] T. Spronken, (2003) *A Place of Greater Safety*, Kluwer, 2003, p. 53. See Appendix for art. 6(3)(c), and also for other relevant international conventions and agreements.
[15] Article 6(3)(d)
[16] Article 6(3)(e)
[17] Para 39, Kostovski v The Netherlands 12 EHRR 434, *Bartbera and others v Spain* 11 EHRR 360.
[18] *X v Germany* (1963) 6 Yearbook 520

- The accused should be able to exercise 'effective participation' in criminal proceedings.[20]
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Clear as these major principles are, it is perhaps unsurprisingly that the ECtHR has been less precise on some detail, for example the moment at which the right to legal assistance arises. The court has recently accepted that:

> in order for the right to a fair trial under Article 6 .1 to remain sufficiently "practical and effective", access to a lawyer should be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated in the light of the particular circumstances of a given case that there had been compelling reasons to restrict this right. Even where compelling reasons might exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not have unduly prejudiced the rights of the accused under Article 6. The rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction.[21]

There had been a number of cases that related to the exclusion of lawyers for periods in Northern Ireland in which the court had made helpful comments prior to the more recent case. For example:

- Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be severely prejudiced by an initial failure to comply with its provisions.[22]
- Under such circumstances [inferences from statements in police interviews where a lawyer was not present] the concept of fairness in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stage of police interrogations.[23]
- The question, in each case, is whether the restriction [of a right to see a solicitor] in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.[24]
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A similar level of ambiguity currently surrounds the issue of the quality of representation. The European Court has been reluctant to

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[19] *Artico v Italy* (1981) 3 EHRR 1, *Airey v Ireland* 91979) 2 EHRR 305
[20] *Ekbetani v Sweden* (1991) 13 EHRR 504; *Stanford v UK* A/282 (1994)
[21] Salduz v Turkey, application no. 36391/02, press release from registrar, 28 November 2008
[22] *Magee v UK* 31 EHRR 35 28135/95, 6th June 2000
[23] *Murray v UK* 22 EHRR 29, 18731/91, 8th Feb 1996
[24] *Brennan v UK* (2002) 34 EHRR 18 39846/98, 6th October 2001

hold states liable for the failures of lawyers who, as members of independent liberal professions, should regulate themselves. Thus, the court ruled that:

> A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes … [States are only] required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention.[25]

The court has not yet had a chance to consider whether a failure to provide effective representation could be brought to a state's attention in relation to a collective criticism of a national bar rather than through an individual complaint against an individual lawyer by an individual client.

Thus, the open texture of Article 6 means that a number of essential issues have not been directly addressed either by its drafting or subsequent jurisprudence of the court. We need to look further for sources of guidance.

4. Other sources

There are at least three sources that have sufficient general acceptance among the United Nations or the member states of the European Union that they can be validly used as further guidance of widely accepted standards that flesh out further Article 6 of the Convention. They are:

- The Havana Declaration on the Role of Lawyers ('the Havana Declaration'). This was agreed at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba in 1990. It expands the entitlement of the offender to a lawyer present in Article 14 of the International Covenant on Civil and Political Rights (effectively, the equivalent of Article 6 of the European Convention' by indicating what states must do to make such entitlement a reality e.g.

  > Governments shall ensure the provision of sufficient funding and other resources for the poor and, as necessary, to other disadvantaged persons.[26]

- The Rome Statute of the International Criminal Court (ICC) ('the Rome Statute'). Agreed in July 1998, this established the ICC with provisions which were regarded by the signatory countries as reflecting the kind of safeguards which they considered necessary eg a right to be informed 'prior to

[25] *Imbriosca v Switzerland* 17 EHRR 441 A275 24 Nov 1993, see also *Kamasinksi v Austria* 13 EHRR 36 17/168

[26] Article 1.3

questioning' of the grounds to believe that a person has committed an offence within the jurisdiction of the ICC'.[27]

- Proposals from the European Commission for procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union which passed through various stage before ultimately failing to obtain consensus from green paper ('green paper') issued in 2003[28] to draft proposals in 2004[29] ('draft framework decision') and a German Presidency draft in 2007 ('German Presidency draft').[30] This was founded on the increasing concern with human rights seen by the European Union since the Maastricht Treaty in 1992, the Amsterdam Treaty of 1997 and the subsequent Conclusions of the Council of Minister meeting in Tampere, Finland in 1990, generally known as the Tampere Conclusions.[31] These endorsed proposals of the Commission for an 'area of freedom, security and justice, on the basis of 'judicial co-operation' and 'mutual recognition' of judicial decisions. The proposals to be balanced between the needs of facilitating 'co-operation between authorities and *the judicial protection of human rights.'*[32] Of prime concern to the commission were two rights that are at the centre of the concerns of this project. As the Commission put it in its Green Paper:

> … Some rights are so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their rights and therefore to have those rights accepted. The Commission sees this right as the foundation of all other rights. Next, the suspect or defendant must understand what he is accused of and the nature of the proceedings so it is vital for those who do not understand the language of the proceedings to be provided with interpretation of what is said and translation of essential documents. The consultation showed a high level of support for the "Letter of Rights" by which a suspect would be given information regarding his fundamental rights in writing and in a language that he understands.[33]

[27] Article 55
[28] COM(2003) 75 final
[29] COM/2004/0328 final
[30] Of 5th June 2007 10287/07
[31] Green Paper, paras 1.1-5
[32] Underlining and italics as in the Green Paper, para 1.5
[33] Green Paper, para 2.5

To rights to legal aid, translation and interpretation and information the Commission added a right to consular assistance and special protection for vulnerable suspects. 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.[34]

In evidence to a UK Parliamentary enquiry, the European Commission confirmed that its aim with the draft framework decision was 'not to fix new standards but to make the standards of the European Convention on Human Rights more efficient, more concrete, making them more transparent and providing the tools for them to be effectively protected'.[35] The Commission had said in its draft framework decision that its intention was 'not to duplicate what is in the ECHR but rather to promote compliance at a consistent standard'.[36] Eurojust agreed that the issue was not the standards themselves but 'compliance'.[37]

Regrettably, in the event, there proved insufficient consensus for these proposals to proceed. However, the issue on which they failed was not their relevance or need but, as the press release for the relevant meeting of the Justice and Home Affairs Council put it, 'The dividing line was the question whether the Union was competent to legislate on purely domestic proceedings (at least 21 member states share this view) or whether the legislation should be devoted solely to cross-border cases'.[38] In other words, no state was recorded as disagreeing with the content of the draft framework decision: the issue was a technical one of jurisdiction.

For the purposes of this research, we adopt the provisions of the three documents above as explanatory of the requirements of Article 6 of the Convention. However, there remain issues which need further discussion which is set out below:

- When rights to legal advice and information arise (para 5);
- The choice and free provision of a lawyer (para 6);
- Rights of private consultation and to information about the case (para 7).

[34] *Ibid*., para 2.6.
[35] Para 16, House of Lords European Union Committee *Procedural Rights in Criminal Proceedings* HL Paper 28, 1st Report of Session 2004-5
[36] *Draft Council Framework Decision, Explanatory Memorandum*, para 9.
[37] Para 17, as above.
[38] Press Notice, Justice and Home Affairs Council, 12-13 June 2007.

5. When do rights arise? The meaning of 'charge'

The Convention refers to the right of defence applying to a person 'charged with a criminal offence'.[39] This reflects the International Covenant on Civil and Political Rights (ICCPR), although the Havana Principles indicate that the right should arise on 'arrest or detention' as well as when a person is charged with a criminal offence, and that a person should then have 'prompt access' to a lawyer, 'and in any case not later than forty-eight hours from the time of arrest or detention'.[40]

The draft framework decision stated that its rights (including the right to legal advice) were to apply to 'any person suspected of having committed a criminal offence ('a suspected person') from the time when he is informed by the competent authorities… that he is suspected of having committed a criminal offence until finally judged'.[41] It specifically provided that a suspected person was to have a right to receive legal advice 'before answering questions in relation to a charge'.[42]

The draft also required member states to ensure that legal advice be available to any suspected person in certain situations, eg where they were formally accused of having committed a criminal offence which involves a complex factual or legal situation or which is subject to severe punishment.[43] In explaining the provisions, the framework decision document made it clear that the right to legal advice was intended to apply from the moment of arrest 'or when the suspected person is no longer free to leave police custody'.[44] The document also states that 'it is important that a suspect benefits from legal advice before answering any questions in the course of which he may say something he later regrets without understanding the legal implications'.[45] The draft also explicitly stated it is important that member states 'ensure that every effort is made so that those persons in particular receive legal advice'.[46]

It has come to be accepted in the jurisprudence of the ECtHR that Article 6(3)(c) is to be interpreted as meaning that an arrested person has a right to legal advice following arrest where their attitude during interrogation may be decisive for the prospects of

[39] Article 6(3)(c)
[40] Para 5-7
[41] Article 1(2)
[42] Article 2
[43] Article 3
[44] Para 54
[45] para 55
[46] Para 56

the defence in subsequent proceedings (eg., where the court may take into account any confession made by the suspect, or that they refused to say anything, during interrogation), although it may be subject to restriction for good cause.[47] Whilst the laws of a number of member states of the EU do give a right to a suspected person to legal advice (and the physical presence of their lawyer) during interrogation by the police, the ECtHR has taken the view that this cannot be derived from Article 6(3)(c).[48] However, this general approach has been qualified in a number of cases:

- access to a lawyer during interrogation may provide a necessary counterweight to a deliberately intimidating atmosphere and coercive conditions during detention and interrogation;[49]
- denial of access to legal advice prior to interrogation, or during interrogation, where the suspect has to make decisions that may be decisive in determining the course of further proceedings may breach the right to fair trial.[50]

It should be noted that the International Criminal Court for the former Yugoslavia acknowledges the right to have a lawyer present during interrogation,[51] and if the right is violated evidence obtained should be excluded at trial.[52] 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.[53] This is reflected in the Rome Statute of the International Criminal Court, which gives the right to a person in respect of whom there are grounds to suspect that they have committed a crime within the jurisdiction of the court to have their lawyer present when they are being questioned.[54]

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[47] *John Murray v UK* [1996] ECHR 3 (8 February 1996). This section relies heavily on the analysis in T. Spronken and M. Attinger, (2005) *Procedural rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, DG Justice and Home Affairs, Brussels.

[48] *Dougan v UK* (ECtHR 14 December 1999, no. 44738/98).

[49] *Magee v UK* (ECtHR 6 June 2000, no. 28135/95).

[50] *Averill v UK* (ECtHR 6 June 2000, no. 36408/97). In *Condron v UK* (ECtHR 2 May 2000, no. 35718/97), in a context where adverse inferences may be drawn at trial from 'silence' of the accused under police questioning, the ECtHR stated '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…'.

[51] Statute of the International Tribunal for the former Yugoslavia, art. 18(3).

[52] 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.

[53] See 2nd General Report (CPT/Inf (92)(3), sections 36-38.

[54] Article 55.

We take the view, therefore, Article 6(3)(c) of the European Convention requires that an accused person has the right to legal assistance once criminal proceedings have formally been instituted (ie.charged) and that a country's provision may be judged on such a basis.

6. The choice, and free provision, of a lawyer

Article 6(3)(c) makes it clear that the accused person has a right to choose their lawyer if they are paying for the lawyer's services privately, but is ambiguous when legal assistance is to be provided free of charge. The draft framework decision was silent on this point. The German Presidency draft repeats Article 6(3)(c) in respect of persons who have been charged but, as noted, in respect of arrested persons states that 'generally' the person is entitled to a lawyer of their own choosing. This is not further explained, but would seem to permit choice to be restricted in certain (unspecified) circumstances. It may be that this is intended to permit counsel to be assigned in certain cases of 'compulsory defence', but also may permit counsel to be assigned where legal advice is paid for by the state. Many EU states do not allow choice where a lawyer is provided to indigent persons[55] although some, such as England and Wales, do.[56]

Information about, and appointment of, a lawyer

The draft framework decisions required that an arrested person be informed promptly, in a language that they understand, of the relevant procedural rights which should include the right to contact a lawyer.[57] Whilst the German Presidency draft stated that member states must ensure that such a person is able to have a lawyer contacted, it did not prescribe how this is to be done, eg., whether by enabling the detained person to contact a lawyer directly, or by requiring the police to contact a lawyer. It is also silent on the issue of how this right is to be given effect where the detained person does not know of a lawyer.

In England and Wales, for example, the relevant code of practice requires a custody officer to inform a detained suspect that they have a right to free legal advice, both orally and in writing, and if the suspect asks for legal advice, places responsibility on the custody officer to 'act without delay to secure the provision of such

[55] T. Spronken, (2003) *A Place of Greater Safety*, Kluwer, p. 60.
[56] Although the lawyer's firm must have a contract with the Legal Services Commission, and choice is also limited to a certain extent by a new Criminal Defence Service Direct scheme.
[57] Draft Framework Decision, para 14; German Presidency draft, paras 2 and 2a.

advice'.[58] They must be permitted to consult a lawyer of their choice, and must be told of the availability of a duty solicitor if they do not know of one. The code also provides that, subject to exceptions, a suspect who wants legal advice must not be interviewed until they have received legal advice. The position in England and Wales is less clear in respect of a person who has been charged and who is then detained in custody, but a court would normally adjourn a case where a detained person appears unrepresented in order to enable legal advice and representation to be arranged. In legally aided cases, the defendant may still choose their lawyer (although choice is restricted by the fact that the lawyer's firm must have a contract for the provision of legal aid services with the Legal Services Commission).

In the case of indigent suspects and defendants, a number of related questions arise: does the right to free legal assistance apply at the same time that the right to legal assistance applies; who has responsibility for determining whether the accused person does not have sufficient means to pay for legal assistance, and whether it is in the interests of justice for free legal assistance to be provided; where the conditions are satisfied, who has responsibility for appointing a state funded defence lawyer; and whether a state funded defence lawyer has the same professional obligations as one who is instructed and/or paid privately.

Both the ECHR and the German Presidency draft[59] imply that the right to free legal assistance arises at the same time as the right to legal assistance for a person who instructs a lawyer privately. Therefore, the method of appointing a state funded defence lawyer, and the method of determining whether the conditions for free legal assistance are satisfied, should be such that access to legal assistance is not delayed.

Clearly the conditions for the appointment of a state funded defence lawyer – that the accused person does not have sufficient means to pay for legal assistance and that the interests of justice require it to be given free of charge – are open to a wide degree of interpretation. The ECtHR has indicated that in determining whether these conditions are satisfied, three factors should be taken into account: the seriousness of the offence and the severity of the potential penalty; the complexity of the case; and the social and personal situation of the accused.[60] Legal aid should be provided

[58] Code C para 6.5
[59] Article 3
[60] *Quaranta* (ECtHR, 24 May 1991, A, 205). This section relies heavily on Spronken and Attinger, n. 8, p. 10.

where liberty is at stake,[61] and it has been held that denying legal aid for a period during which procedural acts, including questioning and medical examination, are carried out is unacceptable.[62] The accused does not have to prove 'beyond reasonable doubt' that they lack the means to pay for their defence.[63]

There is wide variation in practice across member states. In some states, certain forms of legal assistance are always provided free of charge (eg., in England and Wales, free legal assistance at the police station is available irrespective of means), and in others it is always provided free to certain categories of suspect/defendant (eg juveniles), but in some jurisdictions only at certain stages of the criminal process. Responsibility for determining eligibility is placed on a variety of institutions, but where responsibility is placed on the court this creates particular practical difficulty in terms of facilitating free legal assistance at the investigative stage.

The ECHR makes no specific provision for vulnerable suspects or defendants. The draft framework decision did require that such people should have a right to the presence of a 'third person' during questioning by the police of judicial authorities 'where appropriate', but this does not appear in the German presidency draft.

7. The rights of private consultation with a lawyer and the right to information about the case

There are two further issues of particular concern: the right of the client to consult their lawyer in private, free from state or other interference; and the right to information about the case – either of the lawyer or of the client direct. Whilst the Havana Principles provide that 'Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential', the ECHR and the German Presidency draft are silent on this point. However, it was held in *S v Switzerland*[64] that Article 6(3)(c) should be interpreted so as to guarantee that lawyer/client communications are confidential. Intercepting such communications was held to violate 'one of the basic requirements of a fair trial in a democratic society', a decision reflected in the English case of *R v Grant.*[65] Article 3(1) of the German Presidency draft states that the right of an arrested person to consult with their lawyer includes the right to do so 'out of hearing of third parties and without the content of this

[61] *Benham v UK* (ECtHR, 10 June 1996, Reports 1996-III).
[62] *Berlinski* (ECtHR, 20 June 2002, no. 27715/95 and 30209/96).
[63] *Pakelli* (ECtHR, 25 April 1983, A, 64).
[64] (1992) 14 EHRR 670.
[65] [2005] EWCA Crim 1089

consultation being monitored by any other means unless in special circumstances the interests of justice so require'. No indication is given of what may amount to special circumstances, and some member states have provisions enabling lawyer/client consultations to be intercepted or listened to, although this is normally restricted, eg in terrorist cases.[66]

With regard to information relating to the case against the accused, Article 6(3)(a) states that everyone charged with a criminal offence has a right to be' informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him', and 6(3)(b) refers to a right 'to have adequate time and facilities for the preparation of [the] defence'. The latter, but not the former, is repeated in the German Presidency draft in relation to persons charged with a criminal offence, but not in relation to persons who have been arrested. Practice varies widely across member states. In particular, in most states neither defence lawyers nor their clients are given a right to information about the evidence relating to the alleged offence at the investigative stage. However, most member states do give a right to the accused (or their lawyer) at the trial or trial preparation stage to information about the evidence, although the precise formulation of the right varies enormously and, in particular, depends upon whether the jurisdiction has an inquisitorial or adversarial tradition.

8. Effective criminal defence

Neither the ECHR or the German Presidency draft say anything explicit about the role, or standards, of criminal defence lawyers except that both state that a person charged with a criminal offence (and by implication, their lawyer) has a right to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' (Article 6(3)(d)). In examining the effectiveness of criminal defence, it is necessary to consider: the independence of defence lawyers; their duties to the client, the court, and/or the administration of justice; and obligations and mechanisms for assuring appropriate standards of legal assistance.

Independence of criminal defence lawyers

Independence of criminal defence lawyers has a number of dimensions. First, there is the question of formal independence from state (or other) interference or pressure. This is not explicitly

[66] Although in *Brennan v UK* (2001) 34 EHRR 507 it was held that the presence of a police officer in the first consultation of a client with his lawyer at the police station violated his rights under art. 6(3)(c).

mentioned in either the ECtHR or in the German Presidency draft. However, the Havana Principles provide that governments must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference (Article16) and also provides that lawyers must not be identified with their clients or their clients' causes (Article18). It was held in *Nikula v Finland*[67] 'the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings [the prosecutor] is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously'.

However, there are other ways in which the independence of criminal defence lawyers may be compromised, for which current international norms do not adequately cater: for example, by requiring defence lawyers to pay costs where their actions are deemed to have wasted the time of the court or of the prosecution.[68] An issue which is probably of greater significance is whether state funded lawyers are at risk of pressure being placed upon them. This is most obvious in the case of public defenders who are directly or indirectly employed by the state, but less obviously, independence may be compromised by fee structures or levels which limit the work that defence lawyers can do on behalf of clients, or by reporting or quality assurance mechanisms that impose certain obligations on defence lawyers. Independence may also be compromised by court rules that require defence lawyers to, for example, provide information to the court or to the prosecutor which the defence lawyer believes is not in the interests of their client to disclose.

The role and duties of the defence lawyer

It is relatively rare for the role of defence lawyers to be explicitly set out in legislative form. However, in England and Wales, following research which showed that the standard of legal advice provided by lawyers at police stations was often poor, the following description of the role of the defence lawyer at the investigative stage was set out in a statutory code of practice:

> the solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to their client or

[67] ECtHR, 21 March 2002, no. 31611/96.

[68] In England and Wales, for example, wasted costs orders can be made against defence lawyers, although the courts have generally been careful to limit their use.

> the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice…'[69]

ECtHR jurisprudence provides that one of the basic obligations of the defence lawyer is to assist their client both in relation to trial preparation and in respect of the legality of measures taken in the course of the criminal investigation.[70] Furthermore, the state is under an obligation to ensure that the lawyer has the information necessary to conduct a proper defence.[71] The ECtHR has held that if legal assistance is ineffective, the state has an obligation to provide the accused with another lawyer.[72] However, the extent of the state's obligation is limited by the notion of independence, so that 'contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention'.[73] However, the accused does not have to prove that they have been prejudiced by the lack of effective legal assistance.[74]

The professional obligations of clients are normally dealt with by professional conduct codes, which normally provide that the principle obligation of the defence lawyer is to the client. A useful source here is the Council of Bars and Law Societies of Europe (CCBE) *Code of Conduct for Lawyers in the European Union*. This provides that a lawyer 'must always act in the best interests of his client and must put those interests before his own interests or those of fellow members of the legal profession' (para. 2.7). However, the obligation is normally made subject to any obligation to the court or to the administration of justice. Thus the CCBE *Code* provides that the obligation to the client is 'subject to due observance of all rules of law and professional conduct…' This form of conditional duty to the client has significant potential for restricting the obligation to the client, and therefore for effective defence. Another dimension to this is the question of whether there are legal rules governing 'legal professional privilege', by which a lawyer cannot be required to disclose to the court or prosecutor (or any other person) the content of any communication between the lawyer and the client (and, possibly, third parties such as expert witnesses) carried out for the purposes of litigation.

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[69] Code of Practice C Note for Guidance 6D
[70] *Can* (ECmHR, 12 July 1984, B79), *Ocalan v Turkey* (ECtHR, 4 March 2003, no. 63486/00).
[71] *Goddi* (ECtHR, 9 April 1984, A76), *Ocalan v Turkey* (ECtHR, 4 March 2003, no. 63486/00).
[72] *Artico v Italy* (ECtHR, 13 May 1980, A73).
[73] *Imbrioscia* (ECtHR, 24 November 1993, A275).
[74] *Artico v Italy*, *op. cit.*

Professional obligations relevant to the provision of effective defence, and which are commonly found in professional conduct rules or codes, include:

- a duty to keep confidential the affairs of the client;
- a duty not to act where there is a conflict of interests, either between the lawyer and the client, or between the client and another (existing or former) client;
- a duty of independence;
- a duty not to accept instructions unless the lawyer has both the competence and capacity to deal with the case.

Mechanisms for assuring competence defence

Mechanisms for assuring the quality of defence lawyers, and the quality of their work, may take a variety of forms, which will only be outlined here. Examples of some of them in the context of England and Wales:

- Initial training and qualification as a lawyer – in England and Wales, initial training is both knowledge and skills-based.
- Continuing professional development requirements.
- Accreditation schemes – in England and Wales there are accreditation schemes which are compulsory for legally aided lawyers providing advice at police stations, and for court duty solicitors. The schemes require lawyers to satisfy a number of knowledge and skills-based assessments, and integral part of which are detailed 'Standards of Competence' and 'Standards of Performance'. There is also an accreditation scheme (that applies to solicitors, but not barristers) which has to be satisfied in order for a lawyer to appear in the higher criminal courts.
- Professional and good practice guidance issued by bar associations. Examples in England and Wales include *The Guide to the Professional Conduct of Solicitors*, *Criminal Defence*, and *Active Defence*. In the USA the American Bar Association publishes national standards (*ABA Standards for Criminal Justice: Providing Defense Services* and *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*), and the National Legal Aid and Defender Association publishes *Performance Guidelines for Criminal Defense Representation*.
- Quality requirements imposed by legal aid funders – in England and Wales, all legal aid provision by solicitors is provided under contract with the Legal Services Commission, and the contract includes certain quality requirements, which are assured by a number of mechanisms, including peer review of case files.

9. Conclusion?

The project will examine the effectiveness of rights of fair trial in nine countries in, or near, the EU. It would seem likely that the findings of the project may well support the case for the European Commission's initiative in setting minimum standards and raise challenges for the quality assurance approach adopted to date.

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