

Summary

Research questions and methods

In a draft legislative bill which the Dutch government sent to various institutions for advice on 13 February 2014, a provision was included that, in the future, suspects will have the right to be represented by counsel during police questioning in all cases. The bill is a consequence of case law by the European Court of Human Rights on the right to legal representation before and during interrogations (with the Court's ruling in the *Salduz* case being the most well-known decision in this area). To already assess the potential effects of the proposed law to some extent, researchers at Maastricht University's Faculty of Law were commissioned by the Ministry of Security and Justice to carry out a study in 2013. The purpose of the study was to ascertain the degree to which and manner in which the presence of a lawyer before and/or during police interviewing can affect the dynamics, results and significance of the interrogation in the criminal investigation. The study centred on four issues:

- A. How willing are suspects to make a statement during the investigation phase, and which factors influence this willingness?
- B. Can the presence of a lawyer (before and/or during the questioning) be expected to affect the suspect's willingness to make a statement?
- C. What does this mean for the investigation and furnishing of evidence in cases where a lawyer is present?
- D. How might the consequences of this be addressed in the investigation in these criminal cases?

To answer these questions, the researchers studied the international academic literature, conducted six focus group interviews in three countries, and convened an expert meeting. The researchers felt that, for a study on the possible consequences of allowing lawyers to be present during police questioning, it would be instructive to look at countries where this possibility already exists. Thus, after a literature study, the researchers concentrated on the situation in Belgium (more specifically, Dutch-speaking Belgium), England and Wales. In Belgium, the *Salduz* law took effect on 1 January 2012, providing for the right to counsel before and during interrogation. In England, the right to counsel prior to and during interrogation has a long tradition, going back to the introduction of the Police and Criminal Evidence Act (PACE) in 1984.

The literature study encompassed many countries, focusing on both the legal and social-scientific literature. Based on the legal literature, the researchers described the legal context within which police interviewing occurs in the three countries. This picture was then supplemented with an outline of the cultural and organisational developments related to the legal context. This analysis was a prelude to the social-scientific analysis concerning the implementation of and experience with the right to counsel (both in the Netherlands and abroad). Added to this knowledge were the insights of police officers and lawyers which had been shared during focus group interviews in the Netherlands, Belgium, England and Wales. At the conclusion of the data collection phase, the provisional findings from the literature study and focus group interviews were submitted to an international group of experts for their reflection.

Willingness to make a statement

The willingness of suspects to make a statement is generally referred to in terms of silence, denial and confession. Most academic research is still only aimed at the last-mentioned scenario: How many suspects confess, and why do they confess? More than 50% of all suspects provide a partial or full confession. Only in a small number of cases do suspects continue invoking their right to remain silent during all the interrogations. If suspects do not confess, they are therefore more inclined to deny involvement in the crime. Moreover, as a rule, just a tiny group of suspects changes the initial procedural position and switches from silence or denial during the questioning to confession.

Regarding the factors cited in the literature, three categories can be distinguished in relation to the willingness to make a statement: background characteristics (of the case and of the suspect), characteristics of the method of interviewing and contextual characteristics. Although the research into these characteristics suffers from various methodological limitations – so that caution is called for in interpreting the results – three factors seem to particularly correlate with confessions: the suspect's age, the interrogation style and working relationship, and the strength of the evidence. With respect to age as a crucial background characteristic of the suspect, it is notable that minors, by and large, confess more often than adults. In addition, the younger the minor, the higher the number of confessions. This reasoning also applies to false confessions. A second correlation was discovered with two characteristics of the interrogation method, which were highly correlated with one another as well. The more humane the interrogation style is, the more often the suspects confess. The number of confessions likewise appears to increase in proportion to how good suspects deem the working relationship. The third correlation has to do with one of the contextual characteristics, specifically, the strength of the evidence as perceived by the suspect and the interrogator. From the research pointing to this connection, it is not possible to conclude whether and in what percentage of these cases a lawyer was present during the interrogation. The lawyer's presence might, after all, have also affected the time that and the manner in which the evidence was brought up during the questioning. The history in England with unlocking the evidence before the interrogation in the form of a pre-interview disclosure shows, for example, that this can change the dynamic of the interrogation.

Impact of legal representation on the willingness to make a statement

The results of the literature study suggest that the presence of a lawyer only affects to a limited degree the suspect's willingness to make a statement. How the lawyer's presence specifically affects this willingness has, however, changed over the years. The experience in England and Wales in this respect is especially interesting. In particular, lawyers there have been able to exert their influence for decades through the consultation and the representation during questioning. Several English studies showed that, in the first few years after PACE was introduced, persons accused of serious crimes were less likely to confess if they had legal representation. They invoked their right to silence more often, too, upon the advice of the lawyer in the prior consultation. Interestingly, this was observed in Belgium and the Netherlands as well. The right to counsel before and during interrogation is still in its infancy in these countries. The conclusion which can be drawn from the insights from the three countries is that lawyers have more of a tendency in the early years to advise their clients to remain silent. This fact cannot be viewed separately from the imperfect knowledge about the lawyer's own role, the

procedures and the content of the file. At the same time, the lack of trust between the two parties during this stage is sometimes enormous.

It is important to recognise that the existence of a 'resistance phase' shortly after a new law or policy measure takes effect is hardly unique to the subject of legal representation. Yet, usually, a second phase follows the 'resistance phase', in which the realisation grows that helping to solve the social problem will not only be in society's interest, but in the interest of performing one's own duties as well. The police and lawyers in England and Wales have now put the 'resistance phase' behind them. Resistance towards the statutory obligation and towards each other has diminished and given way to repositioning and a more strategic attitude towards the other party. While lawyers have moved from mainly advising their clients to keep silent to providing more differentiated advice, the police have become more amenable to furnishing information about the file to the lawyer prior to the interview. Accordingly, the trends mentioned have led to greater professionalisation among both lawyers and interrogators, which has made the interrogations qualitatively better. The research indicates that the quality of the interview has also improved in interrogations where no lawyer is present. Of course, conflicts still occasionally arise between the two parties in England and Wales, but both the police and the lawyers have come to understand the necessity of acting thoughtfully and adopting a strategic attitude towards one another. The police, for example, must decide which information may be made available to the lawyer, and the lawyer must carefully weigh which advice is most appropriate, with a view to the long term as well.

The developments in Belgium are also intriguing, all the more so because the legal system there is related to the Dutch one and the *Salduz* law has been in place in Belgium for two years now. The experience in Belgium implies that the resistance phase has not completely passed yet there, but, at the same time, there are undeniably traces of a repositioning of lawyers and police officers towards each other in the context of interrogations. This process is subject to another dynamic than transpired in England and can be expected in the Netherlands. Specifically, there have not been any fundamental change processes initiated in Belgium in criminal investigations (and in interrogations in particular) during the past several years. This has been different in England and the Netherlands, particularly because of a number of serious miscarriages of justice. These circumstances perhaps explain the fact that both the police and lawyers in Belgium sense that the right to counsel has had a bigger effect on the criminal investigation work. Both professional groups also seem to anticipate this presumed change in the criminal investigation work. To cite one example, the police seem more inclined after the *Salduz* law to *invite* certain categories of suspects (minors, for instance) to talk to them than to *arrest* these suspects. The police thus avoid having to organise the legal representation at the police station. The reverse is true, too, though; some police officers opt for an arrest, so that the suspect can exercise the right to counsel at the police station, with the lawyer thereby also being present during the questioning.

Effects of legal representation on the criminal investigation and furnishing of evidence

The assumption that the introduction of legal representation has fundamentally altered the value and significance of interrogations in the criminal investigation seems to rest on a myth. There is no empirical basis for expecting the value of a statement to decrease as a result of a major increase in the number of suspects who choose to remain silent. Rather, it is more likely that the police and lawyers will become more professional and reposition themselves towards each other, so as to better be able to commence a strategic game with one another during and in

connection with the interviewing of the suspect. The notion that, to further their goals here, the police will move the interrogation to a later point in the investigation does not have much empirical support. Only in Belgium does the interrogation seem to be preceded by more investigative acts now than was previously the case. In England and the Netherlands, the interrogation, especially with serious crimes, already took place later in the investigation and was preceded by other investigative acts, due to earlier incidents and reforms. Other factors and trends which are unrelated to the presence of a lawyer – including the increased quality of forensic and digital investigation, better training, professionalisation of the interviewing process and audio-video recording of the interrogations – have probably been more influential in terms of the organisation of the investigation.

For now, the extent to which courts actually accord more weight to a statement obtained in the presence of a lawyer is unclear. The fact that, in trying cases, courts in England and Wales sometimes explicitly ask whether a lawyer was present during the interview appears to imply that courts do accord a certain weight to this. Still, the results of American research and the observations by the experts interviewed in this research show the other side of the coin. In assessing the evidence obtained through interrogations, courts are said to already implicitly assume that such evidence was procured lawfully and not to pay much attention to this aspect.

Addressing the consequences for the criminal investigation

As this research progressed, the question as to how the consequences of legal representation for the criminal investigation might be addressed gradually shifted to how this dynamic development might best be supported and facilitated. The history in foreign countries – England, Wales and Belgium specifically – demonstrates that interrogation situations (especially those which are part of complex investigations into serious crimes) have evolved into a strategic game of wits between interrogators and lawyers. This development can be expected to boost the professionalism of both sides, which will also positively affect the quality of the interview and criminal investigation. There is no reason whatsoever to assume that interrogations will become a less important tool in future criminal investigations. From a policy standpoint, then, the development process should not so much be addressed and remedied, but rather, supported and facilitated. By working to facilitate the process, the parties concerned can gain a better understanding of each other's position and role in the investigative process.

The type of case and investigative act should be differentiated, though, in monitoring developments. The seriousness of the crime and the complexity of the case appear to affect the degree to which and manner in which lawyers can play a role in the process. With less serious crimes, for example, suspects are more apt to waive their right to counsel. Hence, there can be no strategic game-playing with this category of crimes, because a lawyer is typically not in the picture. As regards the complexity of the case, the nature of the advice which the lawyer gives his/her client will depend on the perceived strength of the evidence. In so-called 'verification' cases, in which the facts of the case and identity of the suspect are already known at the start of the investigation, the police may have put rather little effort into the investigation before the interrogation, and there may not be very much evidence incriminating the suspect. In such cases, the interrogation will in fact be extremely important. It seems reasonable here, for example, that the lawyer will advise the client to keep quiet. Yet if the case also includes another, less serious crime, the chance that the lawyer will offer such advice or be present at all is relatively small. Furthermore, such cases do not afford much latitude for calling on a lawyer for subsequent interrogations, in that a single interrogation is ordinarily sufficient in such simple cases. All

things considered, suspects in non-complex cases involving less serious crimes may therefore be regarded as the most vulnerable category of suspects. This type of suspect will benefit the least from the dynamic trend delineated above.

Besides the special attention warranted for the vulnerable position of suspects in less serious verification cases, the decision-making concerning the arrest (and timing thereof) needs to be analysed properly. The research makes clear that, except for the Belgian situation, this topic is not specifically being examined anywhere. Nevertheless, there is every reason for examining this topic, as the research shows that the consequences of inviting suspects to talk or arresting them are quite different. The time of day also appears to determine in part whether the suspect wishes to waive the right to counsel. Suspects appear to waive this right more often in the evening and during the night.