

The Right of Early Access to a Lawyer in Criminal Proceedings in Europe

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The Right to Early Access to a Lawyer in Criminal Proceedings in Europe

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Zaza Namoradze
Director of the Budapest Office
Open Society Justice Initiative

Anna Ogorodova
Associate Legal Officer
Open Society Justice Initiative

Summary

This paper analyses laws and practices in the selected European countries, as well as the regional and international standards, pertaining to access to a lawyer and legal aid in police custody. It concludes that, notwithstanding the importance of an early access to legal advice for the fair trial and despite the most recent trend in the international standards expanding the right to counsel onto the stage of police detention, in none of the examined European jurisdictions, with the exception of England and Wales, criminal suspects routinely benefit from legal aid while in police custody. The paper further refers to the ongoing experiments in a number of the European countries with legal aid at police stations (Austria, Bulgaria and the Netherlands) and encourages other European countries to learn from these efforts in ensuring that suspects could benefit from legal advice from the very beginning of the criminal proceedings.

I. The significance of access to a lawyer in police custody for a fair trial

The importance of access to a lawyer in police custody for the fairness of the subsequent criminal proceedings against the detained person can not be overestimated. The information obtained by the prosecuting authorities in the first few days of police custody is often decisive to determine whether a detained person will be charged, and with what crime(s), and whether (s)he will be detained on remand. If no attorney is appointed at this stage, defendants have no opportunity to collect

evidence to contest the charges and grounds of arrest and to argue for pre-trial release. It is not uncommon that pre-trial detention is treated as an indication of guilt. Testimonies given by defendants during the first police interrogations often form the basis of a criminal case against them. If suspects retract their self-incriminating statements later in the course of the proceedings, the judge would usually assume that they lie to avoid a conviction. This becomes especially problematic if no lawyer was present during police custody to ascertain whether or not the statements made to police were obtained through coercion.

For illustration, in Bulgaria, within the 24 hours of police arrest, a detained person would normally be asked to produce a written statement about the circumstances of her arrest. The detainee may in principle refuse to provide such a statement;¹ however, police is not obliged to explain this fact to the suspect and/or to give a caution that it may be used against her. On the contrary, police would "use all sort of techniques to influence suspects into writing, implying that this is a requirement to get released, that this is a way to "get out of trouble"". ² Also, the detained person will be searched,³ and normally fingerprints and other samples will be taken from her⁴. In addition, police may examine the crime scene or interview witnesses.⁵

The suspect's statement, along with any other materials collected by the police during the 24-hour period, are formally inadmissible in evidence, meaning that they can not be read out and referred to during the trial, nor can they be mentioned in the text of the judgment. However, they are included into the criminal case file; and the case file is available not only to the parties and their representatives, but also to the trial judge, who would usually read it before the trial. Moreover, the effect of the inadmissibility rule can easily be overcome by the prosecutor asking police to repeat the same actions (e.g. examination of the crime scene,

¹ The consequences of a refusal to provide a statement are unclear. Bulgarian law does not explicitly mention the possibility of drawing inferences of guilt from the suspect's failure to provide explanations to police as, for example, the English law does. At the same time, it does not prohibit such inferences.

² Interview with Yonko Grozev, Director of the Legal Defense Program of the Bulgarian Helsinki Committee, 15 May 2008. Similar findings were made during the visit of the Council of Europe's Committee for the Prevention of Torture delegation to Bulgaria in 2006, *infra* 15 and are reflected in the Final Report of the Civilian Oversight in District Police Stations in Sofia Project, by Open Society Institute –Sofia (2006), *infra* 31.

³ Article 68 (1) of the Law on the Ministry of Interior.

⁴ Article 62, *ibid.*

⁵ These are called "materials of the operative-investigative activity" of the police, to distinguish them from evidence collected during the formal police investigation. The former, unlike the latter, are formally inadmissible as evidence (i.e. their procedural regime is the same as of the suspect's written statement).

defendant interrogation) in the course of the official criminal investigation; or by calling a police officer to testify at the trial. More important for the outcome of the case than the formal admissibility of evidence though, often is the fact the information obtained by police during the 24-hour arrest is used as the starting point and the basis for the further criminal investigation⁶.

Even though in some jurisdictions rules have been introduced to ensure that statements made to the police without the presence of a lawyer will not have evidentiary value,⁷ they arguably have a limited effect as a guarantee against ill-treatment. After a confession has been made to police, suspects (especially if not represented by a lawyer) may voluntarily admit guilt during further interrogations,⁸ either wrongly believing that their previous statement would be used in evidence, or out of fear of reprisals for "non-cooperating" with the investigation process.

It is universally recognized that suspects are most vulnerable to physical abuse and coercion while in police custody. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment⁹ has consistently stated that access to a lawyer in police custody constitutes a foremost guarantee against torture and ill-treatment of the arrested persons in police custody. Thus guarantee becomes especially important where there are no effective mechanisms of reporting and investigation of cases of police ill-treatment, like in many countries in Central and Eastern Europe.¹⁰ In these countries, prosecutors are obliged by law to perform *ex officio* investigations of cases of police abuse, and for this purpose to conduct unannounced

⁶ The "fruits of the poisonous tree" doctrine, according to which evidence obtained through the use of evidence obtained illegally, is not known in Bulgarian law.

⁷ E.g. in countries with reformed post-Soviet criminal justice systems, such as Ukraine, Georgia and Russia. Also the similar rule was recently introduced in Italy as part of a comprehensive criminal justice reform. See S. Thaman. *Miranda in Comparative Law*, 45 St Louis Law Journal (2001), p. 581.

⁸ In most countries of Central and Eastern Europe and former USSR, first interrogations (or "interviews") of potential suspects are made by police; if the initial suspicion is confirmed, they are transferred under the jurisdiction of the investigative authorities.

⁹ See European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT), *The CPT Standards: Substantive Sections of the CPT Reports*, CPT/Inf/E (2002) 1 - Rev. 2006, p. 6, available at <http://www.cpt.coe.int/en/documents/eng-standards.doc>.

¹⁰ See e.g. para. 18 of the 2008 CPT Report on its visit to Bulgaria on 10-21 September 2006. Published on 28 February 2008. The Report is available at <http://www.cpt.coe.int/documents/bgr/2008-11-inf-eng.htm>.

visits to police detention cells. However, prosecutorial investigations of police ill-treatment, especially initiated *ex officio*, are very rare.¹¹

II. The international and European standards

None of the major international and regional human rights conventions, which were all adopted back in 1950-60s,¹² set out expressly the right to access a lawyer in pre-trial proceedings or in police custody. However, the more recent European and international standards, as well as and the latest jurisprudence of the European Court of Human Rights have increasingly recognized the suspects' right to legal advice while in police detention and particularly during police interrogations. One may speak therefore of a certain trend, at least on the European level, towards expanding the right of access to a lawyer to the very first moments of the criminal proceedings.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), for instance, considers the right to access a lawyer for suspects under police custody as one of the "fundamental safeguards" for the prevention of torture and ill-treatment. The CPT recommended that the right of access to a lawyer was guaranteed from the *very outset of police custody*, because "the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest."¹³ The UN Committee against Torture stressed in its recently adopted General Comment No.2 that the right of detainees to promptly receive independent legal assistance is one of the basic guarantees against torture and ill-treatment of persons deprived of their liberty.¹⁴ In a similar vein, the Inter-American Commission for Human Rights recommended that "all persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family or provided by the state; they shall have the right to communicate with their counsel, without

¹¹ In Bulgaria, for example, in 2005 the Prosecutor's Office conducted 269 preliminary inquiries into allegations of police abuse. However, 94% of the cases of police violence into which the Military Prosecutor's Office has carried out preliminary inquiries have been notified by the victims or their relatives. See paras. 14, 17 of the *2008 CPT Report*.

¹² With the exception of the African [Banjul] Charter on Human and Peoples' Rights which was adopted on June 27, 1981.

¹³ The other two safeguards for defendants are the right to notify a close relative or third party of its choice and the right to medical examination by a doctor of their choice. See The CPT Standards, CPT/Inf/E (2002) 1, Rev. 2006, "Extract from the 12th General Report [CPT/Inf (2002) 15]" at p. 12.

¹⁴ See para.13 of General Comment No.2. CAT/C/GC/2 published on 24 January 2008 at p. 4.

interference on censorship, without delays or unjustified time limits, *from the time of their capture and arrest, and necessarily before their first declaration before the competent authority.*"¹⁵

In the European context, the European Court of Human Rights does not recognize an automatic right of access to lawyer during the police investigation stage. The European Court of Human Rights recognizes that the fair trial guarantees should extend to preliminary stages. However, it should "in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it".¹⁶ Moreover, "the manner in which Article 6 ss. 1 and 3 (c) of the European Convention of Human Rights is applied during the investigation depends on the special features of the proceedings and the facts of the case".

Hence, and because the Convention does not foresees explicitly the right, the interpretation of article 6 allowing early access to lawyer sets out restrictions to the right as well.¹⁷ These restrictions are allowed as long as the restriction does not turn in a deprivation of fair hearing, looking at the entirety of the criminal proceedings.¹⁸

The reliance on the "fairness of the proceedings on the whole" principle, coupled with the ECtHR's reluctance to appear as the court of a fourth instance in the assessment of the evidence in a case heard by a domestic court "it is not, as a general rule, for the Court to decide on how domestic courts assessed the evidence before them."), led to the fact that the Court has arrived to different conclusions in deciding whether restrictions on the right to access a lawyer during the investigative stage resulted in a violation of the Convention. Normally, breaches of Art. 6 were found only in such cases where the confession made to police without the lawyer present was accompanied by other serious violations of suspects' rights: e.g. in *Ocalan v. Turkey* the applicant was held incommunicado for 7 days and his access to a lawyer during the pretrial proceedings was severely impaired; in *Magee v. UK* a suspect was interrogated in a coercive atmosphere; cf. *Brennan v. UK*, *Mamac & others v. Turkey*, *Salduz v. Turkey (Chamber judgment)*. In other cases, e.g. *Sarikaya v. Turkey* the Court noted that despite the fact that the applicant did not have access to a lawyer in police custody, has been interrogated by police and made self-incriminating statements:

¹⁵ See Principle V, "Due Process of Law", Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, OEA/Ser/L/V/II. 131 doc. 26.

¹⁶ *Imbrioscia v. Switzerland*, para. 36.

¹⁷ *Ocalan v. Turkey*, para. 116.

¹⁸ *John Murray v. United Kingdom*, para. 63.

"...the applicant had had the opportunity to discuss the veracity of the statements and evidence obtained while he was in police custody. He had been represented by a lawyer who had helped him to prepare his defence, even though he had not been willing to rely fully and entirely on his assistance. Although the applicant had not been able to consult a lawyer as soon as he was taken into police custody, the Court considered that the fairness of the proceedings had not been impaired in substance and that the defendant's rights had not been irreparably prejudiced in a manner incompatible with the guarantees of Article 6. It accordingly held unanimously that there had been no violation of Article 6 §§1 and 3 (c)."¹⁹

In its most recent case law, however, the European Court of Human Rights (ECtHR) has reversed its previous approach to access to a lawyer *during the first police interrogation* by recognizing its crucial importance for a fair trial. In its recent Grand Chamber judgment *Salduz v. Turkey*,²⁰ the ECtHR ruled 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, unless it is demonstrated in the light of the particular circumstances of each case that there are *compelling reasons* to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The ECtHR also stated that "*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.*" Effectively, the *Salduz* judgment calls on the Council of Europe states to introduce an evidentiary rule that the testimonies obtained from the suspect during police interrogation without the presence of a lawyer should be inadmissible as evidence of guilt, and to take measures to guarantee that each suspect benefited from access to a lawyer from the moment of first police interrogation.

The concurring judges however criticized the majority in *Salduz* for not going sufficiently far in establishing the moment from which access to a lawyer should be granted: i.e. not from the outset of police custody but only from the moment of the first police interrogation.²¹ They argued

¹⁹ Press release available at <http://www.echr.coe.int/eng/Press/2004/April/Chamberjudgments22404.htm> (The full version of the judgment is available only in French).

²⁰ Judgment of 27 November 2008, application no. 36391/02 [Grand Chamber].

²¹ See the concurring opinion of judges Zagrebelsky, Casadevali and Turmen. *op.cit.*

that the majority Court concentrated only on the use of evidence given to the police during interrogation at the expense of other reasons which may necessitate early access to legal assistance, such as the necessary time and facilities for the preparation of the defense.²²

Finally, the draft proposal for a European Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union²³ provides in Article 2 that access to legal advice for a person suspected of a crime was provided as soon as possible, and the explanatory memorandum to the proposal specifically notes that "it is important that a suspect benefits from legal advice before answering any questions in the course of which he may say something that he later regrets without understanding the legal implications."

III. The selected European practices

The CPT stated in its general 2002 report that "in many States, steps have been taken to introduce or reinforce these rights, in the light of the CPT's recommendations. More specifically, the right of access to a lawyer during police custody is now widely recognized in countries visited by the CPT."²⁴ Indeed, many European countries, especially the "new democracies" bound by the EU and Council of Europe accession criteria introduced quite detailed sets of safeguards aimed to guarantee the right to access to a lawyer during police detention. In Bulgaria, for instance, the recently adopted Legal Aid Act (LAA)²⁵ expanded the scope of free legal aid to include representation upon police arrest to every detainee who is unable to secure representation on her own. Pursuant to that law, legal aid may be provided to persons detained by the police under Section 63 (1) of the Law on the Ministry of Interior (i.e. during the 24 hours of police custody).²⁶ The law stipulates that detained persons should be informed of their right of access to an ex officio lawyer immediately after their detention, and that the appointed lawyer

²² "Fairness of the proceedings against an accused person in custody also requires that he be able to obtain...the whole wide range of services specifically associated with legal assistance, including discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking the conditions of detention and so on". See *ibid*.

²³ Presented by the European Commission on 28 April 2004. COM (2004) 328 final. This draft of the proposal is no longer valid, but the Commission plans to present another draft in 2009.

²⁴ Op.cit.

²⁵ Attorney on duty shall be nominated under the order of Para 1 also for the detained person in the cases under Art. 63 (1) of the Ministry of Interior Act, whereas he/she cannot empower attorney by him/herself. Article 28 (2) Law on Legal Aid.

²⁶ Prom. SG. 17/24 Feb. 2006, amend. SG. 30/11 Apr. 2006.

should take up his duties without delay. A list of duty lawyers, available around the clock, should be drawn up periodically from the National register of legal aid attorneys. In addition, subsidiary legislation²⁷ was adopted, which specified the duty of the police to inform the person about the right to ask for appointment of a legal aid lawyer, to provide a suspect with a phone to secure appointment of an attorney from the list of police station duty lawyers maintained by the local Bar, and the obligation of the appointed counsel to provide legal assistance.

A study²⁸ from 2005 on "Procedural Safeguards in Criminal Proceedings: Existing Level of Safeguards in the European Union" found that in Austria it is not clear whether the lawyer may be consulted prior to the police interview and is not allowed being present during the police interrogation; in Poland the police has the authority to supervise the conversations between lawyer and suspect during the investigation.²⁹ The practice regarding the moment at which defense lawyer is granted access to the suspect and/or the moment a lawyer is assigned to the suspect are also very different in different European countries. In the same study, the following have been found in this respect. Only Estonia (within 24 hours of detention), Latvia (within 24 hours) and Malta (within 48 hours after arrest) mention specific time limits; 9 states mention time limits such as "from the beginning of the proceedings" or "from the moment the person is charged" or "after the police interview", without specifying the exact time period. The other EU member states do not mention a time limit at all. Emergency schemes for providing legal assistance on a 24 hour basis exist only in 7 member states.³⁰ The study concluded that the information given by the ministries of justice of all EU member states was not sufficient to draw a clear conclusion about all the states as to: when lawyers are granted access and/or appointed

²⁷ Instruction I3-2451 on the Procedure for Detention by Police Authorities of Persons at Ministry of Interior Structural Units, on the Equipment of Facilities for Placing Detainees, and the Order Therein to adopted on 29 December 2006.

²⁸ The Study on "Procedural Safeguards in Criminal Proceedings: Existing Level of Safeguards in the European Union", 12 December 2005, conducted by Professor Taru Spronken, Faculty of Law, University of Maastricht, for the European Commission, assessing the level of provision of procedural rights afforded to suspected persons in criminal proceedings throughout the EU with the aim of drawing up conclusions about existing levels of safeguards and provisions of rights in the EU. The study analyzed answers to questionnaires on the five safeguards in the draft EU framework decision on procedural safeguards: the right to legal advice including the level of legal aid; the right to interpretation and translation for non-native defendants; the right to specific attention for persons who cannot understand or follow the proceedings; the right to communication and/or consular assistance, and the way in which the suspect/defendant is notified of his rights (Letter of rights).

²⁹ Ibid, pp 62 and 74.

³⁰ Ibid, p. 80

to the suspect³¹; whether the suspects have the right to receive legal advice before answering questions related to their charge³²; whether the defense counsel is allowed to be present during police interview³³, and whether confessions made without the presence of a defense counsel are inadmissible in evidence³⁴.

In Turkey, the right of access to a lawyer from the outset of the police custody is formally guaranteed by the Code of Criminal Procedure.³⁵ The appointment of a lawyer is mandatory for all persons detained who are suspected of an offence punishable by a maximum sentence of at least five years imprisonment.³⁶

In Ukraine, the law stipulates that a lawyer should be involved in the case from the moment that a person is officially detained, i.e. a record of detention is drawn by police.³⁷ However, informal questioning an apprehended person before the moment of official detention is a norm. In a recent prisoners survey,³⁸ respondents were offered to answer the question about the term that expired from the moment of their actual detention to the moment of drawing up of the report. In 24.4 % of cases such report was drawn up immediately after detention; in 14.5 % - during 6 hours after detention; in 10.6 % - during 7-12 hours after detention; in 9.2 % - during 13-24 hours after detention. In 41.3 % of respondents, report on detention was drawn up more than 24 hours after the moment of detention.

Additionally, practices are widespread where persons are invited to a police station to testify as witnesses of a crime, while they are in fact

³¹ See examples on this above.

³² Only Germany's response showed that if the suspects wishes to speak first with a defense counsel, then the intended questioning, must, pursuant to Supreme Court practice, be postponed (p.80).

³³ From the responses included in the above-mentioned study, only 16 member states provide for such a right, namely: Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Latvia, Luxembourg, Lithuania, Poland, Portugal, Spain, Sweden and England.

³⁴ Only Czech Republic, Estonia, Italy and Spain had mentioned clear provisions on excluding such confessions.

³⁵ Article 150 of the Criminal Procedure Code.

³⁶ Ibid.

³⁷ Part 2 of Article 21 of the Code of Criminal Procedure; Article 5 of the Law of Ukraine "On Militia".

³⁸ Kharkiv Institute for Social Researches and International Renaissance Foundation, "Monitoring of the System of Free Legal Aid in the Kharkiv Region: Results of the Sociological Research" (2007), on file with the Open Society Justice Initiative, at p. 45-50.

suspected of having committed an offence. Under the Ukrainian law, witnesses do not enjoy the right to remain silent and the right of access a lawyer; therefore, police uses these tactics to go round the formal requirements of the law to ensure that every suspect is provided access to a lawyer.

According to the same survey, only 7.9 % of respondents received such possibility between the moment of detention and the first interrogation. The analysis of criminal case files conducted in parallel with the prisoners survey to validate the findings showed that only in 12 % of cases a lawyer was involved in the case prior to the first interrogation, but even in this case this was after the agencies in charge of preliminary investigation had taken explanations (informal questioning). In 9 % of cases, a lawyer was involved in the criminal process already at judicial examination stages that is when the court (judge) had already decreed on commencement of the judicial investigation.

In addition, in its last report on a visit to Ukraine in 2005, the CPT noted that access to a lawyer has been a constant area of concern for the Committee since its first visit seven years ago.³⁹ Very few criminal suspects interviewed by the delegation actually had access to a lawyer. A large number of them claimed that access was denied and that they were forced to sign a statement renouncing this right, or were told that they did not need one. Persons detained under the Code of Administrative Offences still did not have any access to a lawyer during their detention by the Militia.

In Hungary, the right of access to lawyer from the moment of arrest and before the first interrogation is guaranteed by law, but according to the draft report produced under the project on Effective Criminal Defense Rights in Europe⁴⁰ it works better for those who had retained counsel. For those who request a legal aid lawyer, decision on appointment is made by the investigative authority and practice indicated that majority of appointed counsels did not attend the first interrogations. A survey carried out by the Crime Investigation Department of the National Police Headquarters involving the 23 regional investigation units⁴¹ of the

³⁹ See Report to the Ukrainian Government on the Visit to Ukraine carried out from 9 to 21 October 2005. Published on 20 June 2007. Available at <http://www.cpt.coe.int/documents/ukr/2007-22-inf-eng.pdf>.

⁴⁰ A. Kadar, *Draft Country Report on Hungary*, Effective Criminal Defence Rights in the EU project (2008), available at <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=2AIUB6NUPBF5J6J72IGX&taal=EN>

⁴¹The county headquarters, the Budapest headquarters, the National Investigation Office, the Highway Police and the Airport Security Service

National Police and based on targeted data collection carried out during June and July 2006⁴² showed that in 14 out of the 23 regional units, less than 50% of first interrogations were attended by the appointed counsel. In one county only 4.54% of the first interrogations took place in the presence of the appointed counsel (the average percentage was 34.9, meaning that almost two thirds of indigent defendants face their first interrogation without professional legal assistance).⁴³

Unlike the Central and Eastern European countries where the right of access to a lawyer is contained in the legislation but is not properly implemented, some countries of the "old Europe" failed to formally recognize the right altogether. In Belgium and in the Netherlands for instance, no right of access to a lawyer exists until after the first police interrogation. In Germany, detained persons may consult with a lawyer while in police detention, but the latter can not be present at the interrogations.

A notable exception from the European practice is England and Wales where legal aid in police custody was introduced following the adoption of the Police and Criminal Evidence Act in 1984.

IV. Police station legal advice pilot projects

Some European jurisdictions, building on the example of England and Wales, have started experimentation with police station legal advice schemes.

In Austria, new legal norms regulation the pre-trial procedure that required that suspects have immediate access to a lawyer after having been arrested, could have a lawyer present during the interview and consult with the lawyer in private before the first interrogation, entered into force in 2008.⁴⁴ To implement the new legal provision, the Austrian Ministry of Justice and the Austrian Bar developed a 4-months experimental project that introduced emergency legal aid on the entire territory of Austria that ran between July 1 and October 31, 2008. The Bar Association project installed a phone line which persons detained at

⁴²The results of the survey are presented by: Zsolt Szabó - Sándor Szomor: Fegyveregyenlőség (Equality of Arms). In: *Rendészeti szemle* (Law Enforcement Review), issue 2007/3., pp. 19-41. (hereafter: Equality of Arms)

⁴³Equality of Arms, p. 36.

⁴⁴ Section 164 Strafprozessordnung. This and all subsequent citations are made from R. Soyer, *The new Austrian legal aid emergency service: First experiences*, Paper presented at the European Criminal Bar Association Conference in Bratislava on October 4, 2008.

the police station could use to call a lawyer 24 hours a day 7 days a week. The use of this service was voluntary for the suspects; it was possible to waive the right to be assisted during police detention (the initial plan was that lawyer would attend in *each* case of detention at police station; but this was not accepted). Service could be provided on the phone or in person. The users of the service has to pay for it as a general rule; if they did not have sufficient means the lawyer's fee was paid from the legal aid budget by the Ministry of Justice. A not-entirely-unexpected result of this experiment was that the number of contacts of detained suspects with lawyers was extremely low. In July 2008, there were only 39 cases of legal aid provided under the new arrangements, in August and in September only 33, while the total monthly rate of arrests in Austria is approximately 1200. Undoubtedly, the fact that the provision of information about the right to have a lawyer and about the newly-introduced service was left entirely to the discretion of the police contributed to such low levels of legal aid provided at police stations.

In Bulgaria, a pilot police station duty lawyer project was introduced in October 2008 in a town of Veliko Tarnovo is the northwest of the country. The project is run by the Open Society Institute-Sofia and the Open Society Justice Initiative in cooperation with the National Legal Aid Bureau, the Supreme Bar Council and the Ministry of Justice. The partners attempted to take account of the likely implementation risks in the project design. Firstly, non-cooperation from police - not informing detained persons about the right to legal aid, or influencing the suspects in their decision to exercise the right - was a real challenge that had to be addressed. Secondly, there was a high risk that either those lawyers who have developed close relationship with police and therefore whose independence is questionable, or only very inexperienced (trainee) attorneys would accept appointments at police stations. Thus, the project was designed in such a way that on-duty lawyers would attend a police station and personally meet with the suspect in every case of police arrest to ascertain whether he/she wishes to be assisted by a lawyer, and if not - whether her desire to waive the right to be represented is well-informed. The local Bar Association developed a roster of on-duty attorneys to attend police stations, according to which each lawyer who signed up for the provision of the service was allocated a similar number of time slots for being on-call to attend a police station. These arrangements were discussed with, and approved by the local Project Committee consisting of the heads/representatives of the local Bar, police, prosecution and the judiciary. Despite the expectations of the project team, the response from the local attorneys was surprisingly good: the majority of members of the Veliko Tarnovo Bar signed up to provide the service. The reason for this was probably the

low amount of criminal work in Veliko Tarnovo which boasts an extremely low rate of approximately 20 police arrests monthly per about 100.000 inhabitants. The level of police cooperation, on the other hand, turned out to be lower than expected: notwithstanding the requirement that lawyers should be invited to police station in each case of police detention, in the first two months of the project's operation only a handful cases of legal assistance at police station was registered. This has changed dramatically in the third month when lawyers were called in all 11 cases of police arrest. It is still very early to make conclusions about the specific implementation problems and trends because of the short period that the project has been operating. The data related to the experiment are however carefully monitored, and will be evaluated after one year of the pilot. In January 2009, the Bulgarian Ministry of Justice pledged to replicate the Veliko Tarnovo pilot project on a nation-wide basis.

In the Netherlands, a 2-year experiment with pilot police station duty lawyer project was launched in two police stations in Amsterdam and Rotterdam in July 2008. The project was introduced in response to a parliamentary inquiry about several instances of miscarriages of justice in serious criminal cases caused by defendants' confessions which turned out to be false. The scope of the project is limited however to cases of murder and manslaughter; and the communication between a lawyer and a suspect is limited to 30 minutes prior to the police interrogation. An attorney may be present during police interview, but any kind of communication between him/her and the suspect during the interview, including eye contact, is prohibited. The pilot project is accompanied with an evaluation and monitoring program, which aims *inter alia* to ascertain whether the pilot project would reduce the instances of miscarriages of justice by preventing false confessions obtained from suspects by the application of physical force or other forms of illegal pressure.

V. Conclusion

In order to ensure genuine compliance with the domestic legislation and international standards that require the states' authorities to ensure access to a lawyer for persons in police custody, which is crucial for the fairness of the trial, the European states must follow the example of England and Wales and a number of other jurisdictions currently experimenting with police station legal advice and representation schemes.

The first crucial step would be to clearly recognize the right to early access in the national legislation, followed by designing effective implementation mechanisms. This mechanism should ensure access, quality and assessment of the emergency/police station duty counsel schemes. The national legal aid institutions, in those European countries where they exist, should play a leading role in the implementation of such schemes and in overseeing lawyers' compliance. Where such institutions do not exist, this function could be entrusted to the Ministry of Justice, Judicial Council or a similar neutral institution that can provide competent coordination and oversight. The Bar Association may play an important role in organizing the legal profession to provide assistance at police stations and in training lawyers to deliver good quality service, but there must be an external mechanism in place to oversee whether the service is provided expediently and effectively. National legal aid institutions are in the best position to provide such oversight; failing that a collective body (commission) comprised of the representatives from the relevant institutions – the executive (Ministry of Justice), Bar, judiciary, police and prosecution – and the civil society may be created. There are a number of advantages of a commission comprising various actors in the criminal justice spectrum – most notably, police and prosecution – managing the police station legal assistance schemes. Most importantly, such composition may help resolve some of the tensions that will inevitably occur between the lawyers and the other criminal justice system actors, particularly the police, in the course of the implementation process. Secondly, involvement of the investigation/prosecution authorities in the design and implementation of the scheme may help to establish an appropriate scope and modalities for the provision of legal advice taking into account the situations where, e.g. lawyer's personal attendance may be unpractical, where legal assistance may be superfluous, where access to a lawyer may be delayed because of the interests of investigation, etc.

An important function of the entity managing the provision of police station legal assistance should be the collection of the data in order to continuously monitor the performance of the scheme. Continuous monitoring of the provision of legal assistance at police stations is especially important because of the institutional incentives involved that may hinder its effective performance: the investigation authorities may be incentivized to discourage suspects from engaging lawyers; lawyers may tend not to personally attend police stations during the inconvenient hours; etc. An evaluation program must capture whether such (dis)incentives have a negative effect on the effective and timely provision of legal assistance at police station.

In addition, an important goal of research into the functioning of police station legal advice schemes could be to supply additional arguments for policymakers in favor of early access to legal assistance in criminal proceedings. Furthermore, early access to a lawyer may have a positive impact beyond the area of criminal defense *per se*, on other elements of criminal justice. To date, there has not been any comprehensive research of possible impact of early intervention of a lawyer on other aspects of criminal justice systems. However, one may hypothesize that early intervention of a lawyer may help to improve substantive justice (achieve fairer outcomes of cases) by stimulating the exclusion of illegally obtained false confessions. It may also improve procedural justice by creating a perception of a fairer criminal justice system by those involved in the proceedings and ensure effective enjoinderment of procedural safeguards to criminal suspects and defendants. Furthermore, the presence of a lawyer at the police station may contribute to police accountability and transparency. For example, anecdotal evidence from the project of the Open Society Justice Initiative in Ukraine which aimed to test a model of US-style public defender offices in three locations of the country, as a cost-effective way of providing high quality criminal legal aid, showed that the number of police arrests in these locations has decreased since the establishment of the PDO, while the number of registered crimes remained at the same level.⁴⁵

Moreover, early involvement of a lawyer may help to reduce the application of pre-trial detention where it is excessive, and help rationalize its use where there are irregularities in the pre-trial detention regime. In particular, in the countries of the Soviet bloc,⁴⁶ as well as in some jurisdictions with the inquisitorial tradition,⁴⁷ the fact of whether the suspect has confessed to committing a crime may play an important role in a decision on his/her detention. The defendant's early confession and full account of the circumstances of the alleged crime may lead to a favorable decision on his/her pretrial detention – and vice versa – because it is presumed that when the suspect admits guilt (“cooperates fully with the investigation”) it is less likely that he/she would escape prosecution or tamper with evidence. The early involvement of a lawyer

⁴⁶ E.g. in Hungary. See A. Kadar, *Draft Country Report on Hungary*, Effective Criminal Defence Rights in the EU project (2008), available at <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=2AIUB6NUPBF5J6J72IGX&taal=EN>, at p. 19

⁴⁷ For instance, in Germany. See E. Cape, J. Hodgson, T. Prakken and T. Spronken, “Suspects in Europe: Procedural Rights at the Investigation Stage of the Criminal Process in the European Union” (Intersentia, Antwerpen-Oxford: 2007), at p. 82-83.

may help to expose and challenge these illegal practices thereby contributing to a more lawful regime of pre-trial remand in custody.

There is also a need to improve the European and international standards on the matter. Although recent jurisprudence of the European Court of Human Rights has raised a standard on early access to counsel in police custody, it has not yet recognized such right to be available from the moment of the actual restriction of liberty and before the first police interrogation. There is no comprehensive research to date to examine the scale and extent of impact of limitations on this right on the fairness of the proceedings in national practices which the ECtHR has been using under the "global formula" by assessing its impact on the outcome. A Green Paper from the European Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union prepared in 2003⁴⁸ for initial consultations among member states and later issued as a draft Framework Decision until it failed to be adopted in 2007 had an aspiration to recognize that "whilst all the rights that make up the concept of "fair trial rights" were important, some rights were so fundamental that they should be given priority at this stage. The first 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 other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights."⁴⁹

⁴⁸ Com/2003/0075/final.

⁴⁹ Ibid. Section 2.5.