International Journal of the Legal Profession

ISSN: 0969-5958 (Print) 1469-9257 (Online) Journal homepage: https://www.tandfonline.com/loi/cijl20

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To cite this article: Anna Pivaty, Miet Vanderhallen, Yvonne Daly & Vicky Conway (2020) Contemporary criminal defence practice: importance of active involvement at the investigative stage and related training requirements, International Journal of the Legal Profession, 27:1, 25-44, DOI: 10.1080/09695958.2019.1706528

To link to this article: https://doi.org/10.1080/09695958.2019.1706528

INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION
2020, VOL. 27, NO. 1, 25–44
https://doi.org/10.1080/09695958.2019.1706528

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Contemporary criminal defence practice: importance of active involvement at the investigative stage and related training requirements

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ABSTRACT

The shifting focus of criminal proceedings from the trial to the pre-trial stages leads to a changing role of criminal defence practitioners across Europe. European criminal defence lawyers are now expected to enter the proceedings earlier and exercise "active" and "participatory" defence as early as the investigative stage. Criminal lawyers, trained in the traditional trial-centred paradigm, are ill-prepared for this role, which results in an important skills gap. Legal representation at the investigative stage presents unique challenges, such as shortage of information, time pressures and the closed nature of pre-trial proceedings. It requires lawyers to operate in a more complex communication environment, than the one to which they have been accustomed. This article sets out the main elements of a professional training programme aiming to fill in the emerging skills gap. The training programme (SUPRALAT) was successfully implemented in Belgium, Hungary, Ireland and the Netherlands, and is being expanded further. The training focuses on effective communication skills, experiential learning and the development of reflective skills. It includes elements of interprofessional training and encourages the development of "communities of practice".

1. Introduction

The stereotypical image of a "good" criminal defence lawyer is that of a skilful and fearless combatant in an adversarial trial. Yet, the everyday working reality of defence lawyers is different. Most lawyers spend much less time on trial advocacy, as compared to client meetings or attending police interrogations. Moreover, the traditional belief that the decisive action happens in court is questionable. Criminal trials are vanishing in many European legal systems, with as much as ninety percent of cases being concluded in summary proceedings (Fair Trials International, 2017). As the consequence of managerialist reforms aimed at increasing "efficiency" and reducing costs, the centre of gravity increasingly shifts from the trial into the pre-trial or investigative stage (Crijns, 2017; Healy *et al.*, 2015). Consequently, the trial loses its significance as the main

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forum for (adversarial) evidence examination, but it increasingly merely serves to confirm the results of pre-trial investigations (Weigend, 2006).

The shifting focus of criminal proceedings leads to a growing emphasis on pre-trial defence rights, and increased significance of lawyers' actions during the investigative stage. Traditionally, because pre-trial proceedings were viewed as laying the groundwork for the trial, lawyers' activities during the pre-trial stage were seen as preparatory in nature. Nowadays, however, viewing lawyers' pre-trial work as merely preparatory to court representation is often misleading. Even where the case proceeds to court, lawyers' actions during the trial and their influence on the outcome are largely pre-determined by events during the investigative stage. If, for example, the defendant gives a statement at this stage upon lawyer's advice, modifying this statement in court is likely to be highly prejudicial to the defence (*A.T v. Luxembourg, 2015*). If the lawyer fails to raise timely objections concerning the lawfulness of investigative actions, this would limit the opportunities to have the resulting evidence excluded. If, moreover, the lawyer was present while the alleged irregularity took place, but did or said nothing, the likelihood of achieving exclusion of the evidence would be very low (Pivaty, 2018).

These developments change the working lives of defence lawyers. Compared with lawyers working ten or more years ago, contemporary practitioners are expected to enter the proceedings earlier, and to play an increasingly active, or participatory role (Jackson, 2016) during these early stages. In this regard, England and Wales is ahead of other European jurisdictions, as it had introduced extensive regulations facilitating access to legal assistance at the investigative stage over 30 years ago (*Police and Criminal Evidence Act*, 1984). This article, however, relates to the situation in (most) other European jurisdictions, where similar regulations were introduced only recently. In jurisdictions like Belgium, France, Scotland or the Netherlands, regulations envisaging an active role for defence lawyers at the early procedural stages were adopted under the influence of emerging European norms (Giannoulopoulos, 2016). One of the primary external influences on these domestic developments was the jurisprudence of the European Court of Human Rights (ECtHR). It passed a series of judgments effectively requiring national authorities to facilitate access to legal assistance for criminal suspects at the moment of their first interrogation, or shortly after their arrest (*Salduz v. Turkey*, 2008 and subsequent case law). Although the applicability of *Salduz* has been narrowed in recent ECtHR case law (*Ibrahim and others v. UK*, 2016 and its progeny) (Celiksoy, 2018), the standard developed in the *Salduz* jurisprudence had been endorsed and strengthened by the European Union (EU). Thus, the EU passed a Directive, which requires Member States to enable suspects to benefit from legal assistance from the earliest moments of criminal proceedings (*Council Directive 2013/48/EU*). It also obliges Member States' authorities to facilitate access to legal assistance during suspect interrogations and to enable lawyers to "participate effectively" in interrogations.

This article describes the unique challenges that European criminal defence lawyers face as the result of these new developments affecting their professional role. It argues that lawyers' traditional education and training do not adequately prepare them for this new role, resulting in a significant skills gap, and sets out the main elements of a professional training programme aiming to fill in this gap.

1.1. Methodology

The article draws on several sources. Firstly, it relies on the insights developed by two of its authors while carrying out empirical studies of criminal defence across several European jurisdictions (Blackstock *et al.*, 2014a; Vanderhallen *et al.*, 2014; Vanderhallen *et al.*, 2016; Maegherman & Vanderhallen, 2018a; Maegherman & Vanderhallen, 2018b). Secondly, it draws upon the proceedings and evaluation results[1] of the so-called "SUPRALAT" training for defence lawyers, developed to prepare them for their new role at the investigative stage. The training was designed by a multi-disciplinary team comprising lawyers, criminologists, psychologists and educational specialists, and was implemented in Belgium, Hungary, Ireland, the Netherlands and subsequently (in an abridged form) in Scotland.[2] Over 100 lawyers had been initially trained; after which the programme was continued in Belgium, Ireland and Scotland. At the time of writing (November 2019), 430 lawyers were trained in Belgium (in the course of 32 training sessions), about 100 lawyers in Ireland, and 24 lawyers in Scotland. The training programme is currently being rolled out in Lithuania, Poland and Spain.[3] Thus, the SUPRALAT training is becoming something of a standard across many European nations.

The goal of SUPRALAT training was to encourage the development of active, client-centered and reflective approach to criminal defence at the investigative stage. To achieve this goal, it focused on the development of necessary practical skills, and particularly communication skills. An "active" approach does not signify continuously intervening in police interrogations, but being fully engaged by listening actively, taking notes, supporting the client, intervening when necessary, and reflecting about the future procedural strategy. "Client-centeredness" means avoiding "stock" advice, but taking the time to build effective rapport and understand the client's individual situation and needs. "Reflexivity", as described in 3.2 below, aims at enhancing lawyers' decision-making abilities. The training combined elements of distance learning (e-learning modules) and an intensive two-day face-to-face session. These days were filled with practical tasks, such as roleplays, and other interactive learning moments. Equal time was devoted to the lawyer-client consultation and the participation in the police interrogation. The training ended with a follow-up session organised 4–6 weeks after the initial sessions to reflect on the application of the newly-developed skills. The training was given in small groups not exceeding 12 participants.

2. New role, new responsibilities, new challenges

Entering the proceedings during the investigative stage represents a set of unique challenges to European lawyers as compared with their traditional role. Accordingly it requires specific skills and knowledge, which may not have always been appreciated or respected in the same way as, for instance, trial-focused activities. This section will compare that traditional role with the new role, identifying many of the emerging challenges.

2.1. The traditional role of a criminal defence lawyer

Traditionally, lawyers would become actively involved in the criminal process towards or after the end of pre-trial investigation (Hodgson, 2005; Jackson, 2016). In common law systems, the lawyer's role involves, in addition to testing the prosecution case, assembling and presenting evidence favourable to their client (Hodgson, 2009), although in practice lawyers tend to rely on the disclosure received from the prosecution, and perform limited investigations themselves (McConville *et al.*, 1993; Cape *et al.*, 2009). In continental law countries, the lawyer's role is to review the case file assembled by the investigative authorities to identify contradictions, loopholes or irregularities, and, rarely, to request the collection of additional evidence (Field, 2003). Thus, the traditional role of defence lawyers is to build a counter-argument or to challenge the information already gathered by the prosecution. Thus, usually lawyers could access the information collected by the prosecution before undertaking any activity on the given case. They also had the time to process this information, and to formulate motions and arguments while preparing for the trial.

In both common law and continental law systems, the traditional representations of the defence lawyer's role are centred upon trial advocacy (McConville *et al.*, 1993; Field, 2003). This image is also perpetuated by the professional education systems. Most practical courses offered in law schools and in the framework of professional education are aimed at developing the skills related to trial preparation. These include, for instance, litigation skills; trial advocacy; moot court training; presentation skills; legal research; legal writing; witness examination; and so on. Thus, the new professional education curriculum for Dutch apprentice criminal lawyers includes subjects like "Defence strategy and trial" and "Witnesses and (court) motions", whilst representation during police interrogation constitutes a (smaller) part of the course on forensic evidence-gathering, appeal, cassation and police interrogations (NOVA, 2017).

Communication in the courtroom, however, occurs in a very specific context. First, it is highly structured and formalised, and therefore predictable: it follows the rules and routines determined in the law and the rules of procedure (Dahlberg, 2016). Secondly, it is overseen by a judge, who gives the floor to the participants in an established order, and sanctions attempts to violate such order

(Cotterill, 2013). The judge has the duty to provide equal communication space to both parties. Thus, lawyers usually experience no difficulty with taking their turn when communicating in court, and knowing when to do it: in fact, the floor is simply given to them. The language used in the courtroom is fairly standardised, and the content of lawyers' interventions is largely pre-determined by the law. Finally, lawyers have considerable power to define the content of courtroom communication due to *inter alia* their role as witness questioners (Walker, 1987).

2.2. The new role and the resulting challenges

As described in the Introduction, defence lawyers across Europe are now expected to enter the proceedings from the very beginning, and to play an active role at this stage. In this Section, we describe the challenges that these new responsibilities create for practitioners, as compared to their traditional role. We first discuss some general challenges, namely those related to the shortage of information, time pressures, and the "invisible" nature of lawyering at the early pre-trial stages. We then proceed to the specific challenges inherent in the new procedural contexts, namely those arising during lawyer-client consultations and suspect interrogations at the investigative stage. We demonstrate that these contexts represent a different and more complex communication environment, than the one in which lawyers have operated traditionally.

2.2.1. The informational deficit at the investigative stage

When entering the proceedings already at the investigative stage, lawyers are increasingly required to advise their clients, and to act or react vis-à-vis the authorities in the absence of (complete) information necessary to take informed decisions. This is certainly the situation that most European lawyers find themselves in, when attending their clients in the context of police interrogations. The EU Directive on the right to information (*Council Directive 2012/13/EU*) does not explicitly require disclosure of case-related information to lawyers or suspects at the investigative stage (Pivaty and Soo, 2019). The practice of "disclosure" of information about the existing evidence or about the course of the investigation to lawyers or suspects at this early stage does not exist in most European jurisdictions (Fair Trials International, 2015; FRA, 2016; Vanderhallen *et al.*, 2016; Cape, 2018). Lawyers are given as little information as possible: often, not more than the suspected criminal offence(s). In part this is understandable as police may wish to observe spontaneous reactions of suspects to evidence put to them at the police interrogation, but on the other hand, the paucity of pre-interview disclosure creates an additional difficulty for the defence in terms of advising the client. Good quality, detailed disclosure is needed to enable lawyers to be more confident in their advice, including for example, about which stance to adopt at the police interrogation (Blackstock *et al.*,

2014a). In the absence of pre-interview disclosure, deciding what advice to give becomes especially difficult. On the one hand, in many cases the safest course might be to advise the client to remain silent, as it is not yet clear what case there is to answer (Vanderhallen *et al.*, 2014). On the other hand, remaining silent may have adverse consequences, either due to eliminating the chance of obtaining a pre-trial settlement or release from detention, or resulting in the drawing of adverse inferences at trial (formally or implicitly, depending on the legal system) (Pivaty, 2018).

2.2.2. Time pressures and related challenges

Unlike within their traditional role, European defence lawyers are now often expected to engage with the authorities directly, without any time for reflection or for gathering additional information. Most suspects assisted by lawyers at the investigative stage are detained at the police station. Lawyers are expected to verify their health status and, if necessary, suggest that they are not fit for interrogation; protect their rights and interests during the interrogation; and argue for their release from detention (Blackstock *et al.*, 2014a). To be effective in their representations vis-à-vis the authorities, lawyers must be able to "think on their feet", and to demonstrate confidence and assertiveness, even if they have no time to gather complete information to substantiate their requests.

The detention suite of a police station is a place of heightened emotion, partly due to the inherent time pressures (Skinns, 2011; Wooff & Skinns, 2018). Clients may be stressed and urgently seeking release, police officers may be under pressure to carry out interrogations (and get results) within certain time limits, and lawyers, who are likely to have been called away from other duties or responsibilities elsewhere, may be stressed by the need to make important decisions and give essential advice within a relatively short time. Many lawyers, well-versed and experienced in advocating in court, cross-examining and responding to queries from the bench, may be anxious and unsure of themselves in their role within the police station (McConville *et al.*, 1993; Blackstock *et al.*, 2014a). This anxiety and lack of confidence might diminish the lawyers' ability to act or react immediately to assert their clients' rights, especially where both the police and the client might wish to "be done with it" as quickly as possible.

2.2.3. Invisible lawyering and lack of peer feedback

The individualistic nature of lawyers' work,[4] resulting *inter alia* in the lack of peer-to-peer learning or feedback, contributes to the challenges experienced by lawyers providing assistance at the investigative stage. Defence lawyers tend to work on their cases alone. Working on the same case file collectively as a "defence team" occurs only in more complex cases. Criminal defence practice is, furthermore, highly competitive. The competition is exacerbated by the

sweeping legal aid funding cuts across Europe (Preložnjak, 2017), as lawyers are required to secure greater numbers of incoming cases to sustain their businesses. The tendency towards working alone translates into a lack of opportunities to share knowledge and give and receive feedback (Apistola, 2006). At best, lawyers might benefit from feedback at the very outset of their careers during their apprenticeship, following which there are often no supervision or performance review measures in place (Barendrecht, 2014; Cape *et al.*, 2009).

The lack of peer-to-peer learning is especially pronounced with regard to pretrial work. In the courtroom, lawyers' performance is visible to other lawyers, who can thus learn from their peers' experiences. Possibilities for peer exchange exist when encountering colleagues in court: many court buildings have especially designated rooms for lawyers waiting around for their cases to be called (which may involve significant waiting times). However, the work that lawyers perform at the investigative stage is much less visible to other lawyers. The police custody suite, unlike the courtroom, is an invisible and isolated space (Skinns, 2011). Lawyers rarely encounter each other at police stations, and where they do, the environment is not conducive to discussing professional experiences, or they do not wish to expose their uncertainties to potential competitors. Consequently, SUPRALAT training participants reported feeling uncertain of whether they were doing their job at police stations "properly", because they had no opportunities to see other lawyers doing it, or discuss their mutual experiences.

2.2.4. Lawyer-client consultation: building rapport with an unknown client

The more specific challenges encountered by European lawyers at the early procedural stages are those that arise due to the new context, in which they must now operate. Thus, communication during the (first) lawyer-client consultation at the investigative stage raises numerous difficulties. More often than not, such consultations take place in the confines of the police station and involve the first encounter between a suspect and a lawyer (Blackstock *et al.*, 2014a). Those suspects who do not know a particular lawyer, are appointed an *ex officio* lawyer chosen or contacted by the authorities.

Communicating with an unknown client, especially as an *ex officio* lawyer, can be very challenging. Lawyers are expected to build rapport and establish initial trust with their clients in conditions, often far from conducive to developing trust (Vanderhallen *et al.*, 2016). Most suspects are likely to feel stress, anxiety, general apprehension and mistrust caused by the fact of being suspected of a crime and deprived of their liberty (Skinns, 2011). These feelings may project onto people they encounter in custody, including lawyers. Suspects might be unsure of their assigned lawyer's status or relationship with the police, or they might perceive *ex officio* lawyers as less dedicated and professional than privately-paid lawyers (Kemp, 2010; Peterson-Badali *et al.*, 2007; Vanderhallen *et al.*, 2016), which may further hinder trust- and rapport-building.

At the same time, building rapport and securing trust from the client is particularly important during the initial consultation, in order to obtain as much as possible information from the client to enable effective advice. The client is often the most important, if not the only source of such information for the lawyer. If the client distrusts the lawyer, they are less likely to disclose information that would enable the lawyer to consider the merits of advising any particular approach to the interrogation. This is even more important if the client is in custody for the first time, or is particularly agitated, or has any additional vulnerabilities such as learning difficulties, addiction, or psycho-social disability. Notably, there is relatively limited time for the lawyer to build rapport and trust, get the client's version of events, consider and advise on the best approach to the police interrogation, ensure the client understands the relevant legal implications of the situation, and prepare them for the practicalities of the interview.

2.2.5. Police interrogation: unregulated police-dominated environment

Communication during interrogations involves the following challenges for lawyers. Firstly, it is significantly less regulated and formalised than communication in the courtroom. There are usually few binding rules concerning the procedure and structure of suspects interrogations (Blackstock *et al.*, 2014a). For example, in most European jurisdictions, there are few or no rules concerning when and how lawyers or other persons can intervene. Where such rules exist, they usually limit the intervention grounds for lawyers, as for example in Belgium or the Netherlands (Mols, 2017). In Belgium, for example, the lawyer is not permitted to answer instead of the suspect nor to hinder the interview proceedings (art 47bis §6 sub 7 Sv.). In the Netherlands, the lawyer cannot intervene in the course of the interrogation (but only at the beginning and the end of it), unless for a limited number of reasons, such as when undue pressure is allegedly used against the suspect (ibid.) Although the interaction during interrogations is not entirely haphazard (police officers do tend to apply the same questioning patterns (Fisher *et al.*, 2010) and they are often trained to apply a certain structure and interrogation techniques), it is much less predictable for lawyers than courtroom interaction, because they are less familiar with it, and it is more dependent on interpersonal dynamics. The unfamiliarity with police interrogation practices compounds the uncertainty concerning whether, when and how to intervene reported by lawyers (Maegherman & Vanderhallen 2018a; Maegherman & Vanderhallen, 2018b). Thus, many lawyers encountered during SUPRALAT trainings were not certain of how often and when they could intervene in an interrogation, and some believed that they were not "entitled" to intervene at all. Lawyers were also often not aware of when or at which particular moment(s), the questioning transgressed the border between "appropriate" and "inappropriate."

Secondly, the content of communication during an interrogation is not guided by the law to the same degree as in the courtroom. It usually revolves around the

facts of the impugned offence and the alleged suspect's role in it, and not the interpretation of criminal law provisions. Each case is different, and every suspect potentially requires a different kind of assistance from the lawyer. Lawyers' representations at the police station can rarely be supported by references to the law to the same extent as their court pleadings. That is because the legal provisions concerning, for instance, police powers over (detained) suspects are often general, leaving much discretion to the authorities (Blackstock *et al.* 2014a). Thus, negotiations concerning, for example, the client's fitness to be interrogated, recognition of their special vulnerability, the need to pause or terminate the police interrogation, or disclosure of certain information, occur "in the shadow of the law." Good knowledge of the law is therefore only the starting requirement for an effective criminal defence during an interrogation.

Thirdly, communication in an interrogation occurs in the absence of a neutral "umpire" to channel lawyers' interventions and to create the space for lawyers to participate. The communicative context of police interrogation involves "the assymetrical discursive dynamic" (Haworth, 2017, p. 196), dominated by the questioner, who has control over the flow, structure and topics of the interaction, as well as the turns of other participants, including lawyers. The role of an interrogating officer is different from that of a judge, who must examine the arguments of both parties and ensure that they have equal opportunities to participate. Thus, they are not formally obliged to ensure that lawyers have space to intervene: on the contrary, the respective regulations usually envisage that police have full control in the interrogation room and are entitled to dismiss lawyers' interventions (Mols, 2017). Moreover, although police officers are expected to be open to alternative scenarios, research of police interrogation practices suggests that they are often biased towards narratives assuming the suspect's guilt (Wagenaar *et al.*, 1993; Leo, 2008). This might conflict with the lawyer's objectives to achieve the best evidentiary position for the client, or to put forward an alternative version exonerating the client. Furthermore, even where interrogating officers do not *per se* aim at securing incriminating evidence, the goal of any investigative interview is to obtain information (Vrij *et al.*, 2014) The lawyer's goal, however, might be to support the client in exercising the right to remain silent. As a result, research shows that (some) police officers continue to view lawyers as their professional adversaries, and there is a certain lack of professional trust between lawyers and police, particularly at a time when legal advice at the investigative stage of criminal proceedings is relatively novel (Blackstock *et al.*, 2014a). For these and other reasons (such as the need to adjust to the new actor in the interrogation room (Vanderhallen *et al.*, 2014) or the restrictive legal regulations discussed under 2.2.1 above), interrogating officers might be reluctant to accept lawyers' contributions during the interrogation (Blackstock *et al.*, 2014a; Cape, 2018). During the SUPRALAT trainings, lawyers from all jurisdictions said that their main challenge in this regard was the powerlessness they felt, when they did intervene, but their interventions

were dismissed by the officers. They reported needing additional tools and skills to take the floor and make themselves heard during an interrogation.

Finally, an important challenge encountered by lawyers in an interrogation but not in the courtroom, is deciding which actor to address at which moment, and in which form. Interaction in the courtroom is dialogical, the turns are supervised by the judge, and it usually follows a question-and-answer pattern (Cotterill, 2013). In the interrogation room, the interaction patterns are more fluid. Lawyers, for instance, may choose to address the client or the officer, and they may do so in the form of a question, request, remark, etc. The choice of which actor and in which form to address may not be immediately obvious. For instance, where the lawyer wishes to stop a certain line of questioning, they might address the officer directly (by making a request or a remark), or they might advise the client not to respond. In making the choice, the lawyer must consider whether the questioning was inappropriate, in which case it might be more efficient to address the officer directly (Edwards & Stokoe, 2011), but also the likely reaction of the officer (and of the client).

3. Addressing the challenges through professional training

As described in the preceding Section, the environment encountered by European lawyers when assisting suspects at the investigative stage is often new and unfamiliar to them. This environment is controlled by the police, who may perceive lawyers as their professional adversaries. Thus, lawyers might feel apprehensive or even intimidated, especially when they only begin to provide assistance at the investigative stage. The lack of familiarity with the surroundings, routines, and the persons encountered; the possible feeling of being unwelcome at police stations; the lack of legal clarity on the rules of engagement; and a general sense of needing to fulfil a very important role for which you are lacking experience, make it difficult for lawyers to assuredly carry out this contemporary aspect of their professional role.

These difficulties are compounded by the lack of appropriate professional training, which as noted in 2.1, is mostly focused on developing a traditional set of skills involved in trial advocacy and the preparation of cases for trial. The following paragraphs describe what we consider the main "pillars" of an effective training programme, aimed at addressing the "skills gap" preventing criminal defence lawyers across Europe from being effective during the pre-trial, investigative stage of proceedings.

3.1. Emphasis on effective communication skills

The traditional view of the lawyer's professional role is that of a technical, legal expert, or someone who uses their legal knowledge and expertise to advance their clients' rights and interests (Hutchinson, 1998). At the same time, there has been some attention, particularly in the US literature, to the importance

of strong communication and interpersonal skills for a "good" legal professional (Feldman & Wilson, 1981; Binder & Price, 1977; Rosenberg, 2004). Research into clients' perceptions of lawyers found that strong interpersonal and communication skills were perceived as being as important, if not more important, than the lawyer's legal expertise and skills (Bocaccini & Brodsky 2001; Bocaccini *et al.*, 2002; Peterson-Badali *et al.*, 2007). It was also argued that strong communication skills, such as showing empathy, help lawyers to achieve the desired "legal" outcomes for their clients (Barkai & Fine, 1983).

The lack of, and the need for, training to develop effective communication skills was often emphasised by the SUPRALAT participants. References to legal codes or court judgments may be persuasive in court, but they have less relevance at the police station. By contrast, effective communication and interpersonal skills, such as active listening, empathy, effective questioning and summarising skills, and positive confrontation skills are very important in this context. Thus, empathy and active listening are crucial to establish rapport and begin to develop the trusting relationship during the first lawyer-client encounters (Barkai & Fine, 1983). Active listening, effective questioning (the ability to ask good questions) and summarising skills are necessary to obtain as much information as possible from the client (Maughan & Webb, 2005; Cochran, 2018). The same skills may be employed to try and obtain more information from the police: often, informal possibilities exist to obtain such information, even if pre-interrogation disclosure to lawyers is not common practice in the given jurisdiction (Vanderhallen *et al.*, 2016; Maegherman & Vanderhallen, 2018b). More generally, building effective rapport with police might help lawyers to attain their objectives of securing officers' cooperation in the interest of their clients.

Good communication skills are also important for lawyers to effectively exercise their role during suspect interrogations. The manner in which interventions are made is arguably as important as their content, to ensure that they attain their intended goal. For instance, the lawyer might need to reassure, support and direct the client, which would require the effective use of empathy. In terms of the interrogating officer(s), the lawyer might need to request that they correct their behaviour, for example where the latter engage in inappropriate questioning or pose questions that are confusing or difficult for the client to answer. In such situations, the effective use of interpersonal confrontation and conflict management skills is especially important (Cahn & Abigail, 2014). The focus on effective communication skills in the context of police station attendances was considered the most useful aspect of the SUPRALAT training by its participants.[5]

3.2. Reflective practice

Reflexivity, defined as the "process of learning through and from experience towards greater insights of self or practice" (Finlay, 2008, p.1), is an important element of being professional. Reflective practitioners can learn from their and others' experiences by making explicit the tacit or taken-for-granted

professional knowledge (Rusanow, 2003; Raelin & Coghlan, 2006). Reflexivity is a particularly important skill when dealing with uncertainty and exercising professional discretion (Cruz *et al.*, 2007). This applies in particular to criminal defence at the investigative stage, which as described above, requires even more flexibility and is less regulated, than courtroom advocacy. A reflexive approach is also important when professionals acquire new roles, or begin to operate in new and unfamiliar environments, similar to those in which European lawyers find themselves when providing assistance at the investigative stage (McConville *et al.*, 1993; Vanderhallen *et al.*, 2014).

Reflective practice for legal practitioners was conceptualised as involving reflection on practice, and reflection on values or self-reflection (Leering, 2014). Reflection on practice involves the "ability to reflect on an action so as to engage in the process of continuous learning" (Schön, 1983, p. 3), or in the other words, the ability to critically assess what has and has not worked in the application of technical competences and skills. This type of professional reflection is of particular importance in a context which requires solving complex problems and more than the application of basic skills and routines (Saucerman *et al.*, 2017), such as legal assistance at the investigative stage, which demands flexible and simultaneous use of various communication and legal technical skills.

Another aspect of reflective practice involves reflection on the values, or "paying critical attention to the practical values and theories which inform everyday actions, by examining practice reflectively"(Bolton, 2010, p. xix). Reflection on one's professional, ethical and moral values is important in the context of criminal defence at the investigative stage, because the respective laws or ethical regulations do not provide sufficient guidance for most dilemmas encountered by lawyers (Mols, 2017). The existing regulations contain only general principles, such as, for instance, the lawyer's obligation to act "in the best interest of the client." Therefore, lawyers must reflect what the given ethical principles mean to them personally, and how they should best be applied in concrete situations.

The SUPRALAT training participants evaluated its emphasis on reflexivity very positively.[6] As one Irish participant noted: "I think the most beneficial thing the SUPRALAT training has done to me is to make me reflect more on my own way of doing things. I was a little rigid in my methods I think." It is therefore recommended that any professional training programme for criminal defence lawyers aiming to develop competences in a new area, should include teaching "reflective practice".[7]

3.3. Communities of practice

Professional training may help address the lack of learning opportunities stemming from peer review, discussions or feedback. This can be done by incorporating the principle of collaborative learning, and stimulating the development of "communities of practice" among defence lawyers.

Collaborative learning, or working on educational tasks in groups, typically leads to better learning outcomes, and results in social and psychological benefits, such as promoting cooperative behaviour and improving self-esteem (Laal & Ghodsi, 2012). Learning and acquisition of new skills is facilitated when participants ask questions, give explanations, observe others performing practical tasks, and provide feedback.

The concept of "communities of practice", in its turn, was developed to reflect the social nature of human learning (Wenger, 2010). "Communities of practice" were defined as "groups of people who share a concern, a set of problems, or a passion about a topic, and who deepen their knowledge and expertise in this area by interacting on an ongoing basis." (Wenger *et al.*, 2002, p. 4) For the reasons described in 2.2.3, these kinds of communities are often absent within the criminal defence profession. Professional training may contribute to the establishment of such communities in various ways, such as facilitating virtual interaction (online discussion groups), and providing ample time and opportunities for socialising outside of the classroom.[8]

To stimulate collaboration and the development of communities of practice, special effort must be made to develop a trusting relationship among training participants. Trust is important not only to encourage group bonding, but also to achieve an open discussion of the challenges, doubts and concerns related to representing clients at the investigative stage.[9] The possibility to exchange "war stories" and to (jointly) reflect on them, was described by the SUPRALAT participants as an important benefit of the training.

3.4. Joint interprofessional training

The concept of interprofessional education or training, defined as "those occasions where members … of two or more professions learn with, from and about one another" (Barr *et al.*, 2000, p.1) is well established in health care (WHO, 2010), but is novel for the area of criminal justice (Balcioglu *et al.*, 2015). Interprofessional training aims, *inter alia*, at enhancing collaboration between professions that need to cooperate, but are prevented from doing so by certain barriers, such as power conflicts, status differences, poor understanding of mutual roles and responsibilities, stereotyping, lack of trust (Baxter & Brumfitt, 2008; Hall, 2005), or simply constraints imposed by space and time (Oandasan *et al.*, 2009). Although robust evidence of positive impact of interprofessional training on improving (long-term) collaboration or the quality of care is lacking (Reeves *et al.*, 2010), systematic literature reviews confirm positive outcomes on other levels, such as e.g. participants' reactions, beliefs, knowledge and attitudes (Cooper *et al.*, 2001; Hammick *et al.*, 2007; Reeves *et al.*, 2008; Reeves *et al.*, 2010). Likewise, one evaluation study of an interagency training programme for mental health and criminal justice professionals has reported similar results: in this study, participants stressed the importance of face-to-face contact with members of the other profession(s) to improve trust and

develop empathic relationships; and they considered greater knowledge about the functioning and roles of other agencies the main benefit of the training (Hean *et al.*, 2012). Finally, a recent study has reported on a successful interprofessional training programme on the enforcement of suspects' rights in police custody, which involved joint training of lawyers and police officers (Blackstock *et al.*, 2014b).

Thus, we hypothesised that including police officers in (parts of the) training designed for criminal defence lawyers would result in a number of benefits. Firstly, it would increase lawyers' familiarity with police interrogation practices, which would in turn enhance their confidence when assisting clients at the investigative stage. Secondly, we hypothesised that joint training would help enhance collaboration and mutual trust between the two professional groups. In Ireland and the Netherlands, police officers participated in role plays of interrogations, often engaging in the reflective discussion afterwards. In Belgium, two police officers additionally participated as trainees.

Although the SUPRALAT trainings' evaluation did not measure its impact on the above-mentioned goals, participants' feedback corresponded to the findings concerning the benefits of interprofessional training described above. Participants viewed joint training with police as very positive ("good experience", "revelation", "indispensable", etc).[10] They mostly valued the opportunities for informal discussions about the mutual objectives and approaches in police interrogation, which would be inappropriate in the actual interrogation setting. At the same time, investing in the development of a safe and trusting environment, and careful selection of police officers in attendance, for instance, by ascertaining their attitudes towards (collaborating with) lawyers in advance, were considered important to achieve the above-mentioned goals.

4. Conclusion

Most criminal defence lawyers across Europe are steeped in the traditional experience wherein their involvement in criminal proceedings begins once the initial police investigative stage has concluded. Attendance at the police station, particularly during interrogation, is unfamiliar territory. A new understanding and an appreciation of the importance of communication and interpersonal skills are of the utmost importance to assist such lawyers in successfully fulfilling their professional role, and defending their client's rights, in pre-trial proceedings. This is a unique challenge for criminal defence lawyers in practice at this time.

Further investment into the professionalisation of criminal defence at the early procedural stages *inter alia* through training is necessary to enable lawyers to effectively overcome these challenges. Such investment is needed in view of the increasing importance of pre-trial proceedings, and consequently of the lawyers' input and activities during pre-trial investigations. Supporting

the development of training aimed at improving "early intervention" skills of criminal defence lawyers is particularly relevant in the era of managerialism and shrinking legal aid and training budgets. In this context, early and good quality professional involvement of lawyers may result in important "side benefits" for the entire criminal justice system, such as improving fairness (and effectiveness) of pre-trial resolutions or reducing costs of pre-trial detention (UNODC, 2014).

There are barriers to ensuring this training takes place, however. Differing views exist, for example, on the value of requiring mandatory training, accreditation or certification for specific areas of practice. While mandatory training would provide a baseline of skills for lawyers advising at the police station, thereby ensuring a base level of protection for suspects rights, lawyers, particularly those who are very experienced in other areas of criminal practice may not buy in to the notion that they need training. Additionally, questions of time and financial commitment arise. Criminal defence firms, particularly those operating as sole practitioners or in very small firms or partnerships, do not have an abundance of time or money to invest in upskilling. In Ireland, following the EU-funded portion of the SUPRALAT training scheme, the Law Society Finuas Skillnet, working in conjunction with Dublin City University, has continued to run this programme, subsidising its cost significantly in order to ensure that lawyers wishing to avail of the training have the option to do so (on the Irish experience see further Conway & Daly, 2019).[11]

Another path to ensuring buy-in from lawyers is by securing commitment from the Bar associations to require lawyers wishing to participate in the state-subsidised police station legal assistance scheme to undergo training for this purpose. The Flemish Bar Association (covering the Dutch-speaking part of Belgium), for example, now requires all lawyers wishing to enrol in the police station duty lawyer scheme to undergo SUPRALAT, or equivalent, training (*Verhoorbijstand Salduz in het kader van de permanentiedienst*). While local Bar associations can select the specific training programme to satisfy the requirements, the SUPRALAT training is strongly recommended by the Flemish Bar Association.

Finally, it is notable that section 3(1) of the EU Directive on the right of access to a lawyer in criminal proceedings, requires Member States to "ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively." In a similar vein, in the recent ECtHR case of *Doyle v Ireland*, it was clearly stated that the physical presence of a lawyer during police interviews with detained suspects "must enable the lawyer to provide assistance that is effective and practical rather than merely abstract" (para 74). In order to provide effective and practical assistance to a detained suspect, lawyers need to fully appreciate the nature of their role in the police station, and have the skills to communicate effectively in this new setting.

Notes

1. The SUPRALAT trainings evaluation report is available at www.salduzlawyer.eu.
2. The training was designed by a consortium of Maastricht University, Antwerp University, Dublin City University and Hungarian Helsinki Committee. It was funded by EU grant (JUST/2014/JTRA/AG/EJTR/6844; October 2015-September 2017). The training programme was given a shorthand title "SUPRALAT training" (SUPRALAT stands for: "[Strengthening] Suspects' rights in pre-trial proceedings through PRActice-oriented LAwyers' Training"). Following the "pilot" period, SUPRALAT training is being implemented in Belgium by the Flemish Bar Association as obligatory training for criminal lawyers participating in the duty lawyer scheme, and in Ireland by the Law Society of Ireland as part of its Finuas Skillsnet programme. For more details about the training programme, see www.salduzlawyer.eu.
3. Implemented under the NetPraLat (NETworking to strengthen pre-trial procedural rights by PRActice-oriented cross-border LAwyers Training) project funded by EU grant (JUST 2014/JTRA/AG/EJTR/6844).
4. A survey conducted in the US and published in Harvard Business Review found that lawyers were most likely to feel lonely at work out of all professions (followed by medical doctors). Achor, S., Rosen, Kellerman, G.S., Reece, A. & Robichaux, A. (2018), America's Loneliest Workers, According to Research, *Harvard Busineess Review*. Available at: https://hbr.org/2018/03/americas-loneliest-workers-according-to-research, accessed 17 October 2019.
5. In the SUPRALAT trainings, the relevant communication skills were trained during two consecutive days with help of practical exercises (group discussions of simulated situations, roleplays and group feedback). The skills were first trained outside of the context, and then placed in the context of lawyer-client consultations and police interrogations.
6. This aspect of the SUPRALAT trainings was evaluated by the participants on average with 4,5 points on a 5-point Likert scale.
7. In the SUPRALAT training, reflective skills were trained both in a separate part of the training devoted to reflexivity (during the follow-up session), as well as during the sessions focusing on other thematic issues (by encouraging reflexive writing, posing reflective questions during group discussions, and stimulating peer feedback).
8. In the SUPRALAT trainings, for instance, the Belgian, Dutch and Irish participants created their respective Whatsapp virtual groups, which to our best knowledge remain functional until now.
9. In the SUPRALAT trainings, it was achieved, for example, by investing (considerable) time into getting to know each other, controlling the group size, and ensuring confidentiality of the training proceedings.
10. In Belgium, this aspect of the SUPRALAT trainings was evaluated by the participants on average with 4,4 points on a 5-point Likert scale. Police officers were present in the part of the training devoted to police interrogation.
11. See the information on the SUPRALAT trainings on the website of the Flemish Bar Association. Available at: http://www.ordeexpress.be/UserFiles/ArtikelDocumenten/0OVB-folder%20SUPRALAT%202019.pdf, accessed 17 October 2019.

Disclosure statement

No potential conflict of interest was reported by the authors.

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