

Summary

On the presence of legal advisers during police interrogations

Influence of prior consultation and presence of lawyers on the organization and way of interrogating and suspect's position

Research questions

In the Netherlands, the presence of a legal adviser during police interrogation has been the subject of discussion for decades. In July 2008, a two-year experiment was initiated which allowed lawyers to be present during the first interrogation. This report documents the research into the experiment and its findings. The fact that a legal adviser is now allowed to be present during police interrogations within an experimental situation should be understood against the background of international developments and a number of criminal cases where the defendants were wrongfully convicted, based in part on false confessions. The experiment was prompted by mistakes made during the criminal investigation by the police, Public Prosecution Service and the Netherlands Forensic Institute in the case of the 'park murder' in Schiedam and the judicial errors based on them. These and similar errors led to the introduction of the 'Programma Versterking Opsporing en Vervolging' which aimed to optimize truth finding in criminal cases. On the one hand the programme includes measures aimed at improving the quality of police interrogations and on the other advancing the transparency of police interrogations. One of these measures was the introduction of audio or audio-visual recording of police interrogations in serious cases. In addition to the programme the political wish was expressed to allow lawyers to be present during interrogations. After acceptance of the motion Dittich by the Dutch House of Representatives, the Minister of Justice promised to introduce a temporary change in the procedure to be followed during the first police interrogation of a suspect: the 'experiment raadsman bij politieverhoor'.

The purpose of the experiment is to examine the added value of the presence of a legal adviser in improving the transparency and verifiability of the interrogation and the prevention of improper coercion by police interrogators. The practical implementation of this objective involves a twofold change in the

interrogation situation: first, the suspect's lawyer is allowed to attend the interrogation and, secondly, the suspect and his lawyer are given the opportunity to confer in private prior to the interrogation. This provisional (experimental) measure applies to all (successful) crimes against life, as mentioned in Title XIX Dutch Penal Code, in the regions of Amsterdam-Amstelland and Rotterdam-Rijnmond. For the purpose of the experiment, a 'protocol pilot raadsman bij politieverhoor van verdachten' was drafted, which outlines the appropriate behaviour of all the participants in the interrogations. It should be noted that, according to this protocol, suspect and lawyer are not allowed to communicate during the interrogation. In addition, the lawyer is not allowed to disrupt the interrogation in any way and can only intervene when he thinks the rules against improper coercion are being broken. In other words, the lawyer's role in the interrogation is largely passive.

The objective of the present study is to describe as accurately as possible the state of affairs concerning police interrogations with prior consultation and the presence of lawyers. The description of the actual course of events and the experiences of the actors involved in the experiment form the core of this study. In addition, an effort is made to determine if and to what extent the interrogation situation changes by the above-mentioned adjustments to police interrogations. The central research question reads as follows:

How do first police interrogations with prior consultation and the presence of a lawyer work out and what are the observable consequences of the consultation and the lawyer's presence for the course of the interrogation?

The central question is divided into a number of sub-questions. These sub-questions focus on the three participants in the interrogation process: the lawyer, the police interrogators and the suspect. The first cluster of research questions concerns the description of the actual course of events during interrogations with legal counsel present. The emphasis is on the lawyer's actions and on the interrogators' response to his actions, with the protocol used as a frame of reference. The second cluster of research questions is focused on the actions of the interrogators, with emphasis on the interrogation techniques being used, the extent to which coercion is exerted on the suspect and whether or not there are significant differences between interrogations with and without a lawyer present. In addition, attention is paid to the opinions of police interrogators and lawyers on any noticeable differences between interrogations with and without a lawyer. This will result in a better understanding of the extent to which the presence of a lawyer influences the way in which police interrogations are conducted. The final cluster of research questions focuses on the statements made by the suspect. These questions concern the invocation of the right to remain silent, the

willingness to make a statement about the crime or about personal or general matters, and confessions to committing the crime. A comparison is also made regarding the frequency of the use of the right to remain silent by suspects in interrogations with and without a lawyer. Attention is also paid to possible (future) consequences for the collection of evidence in criminal cases.

The answers to these research questions are vital in drawing well-founded conclusions about the added value, as defined by the Minister, of the extension of the consultation and of the presence of lawyers during police interrogations on the quality of the truth-finding process.

Research design

The introduction of the experimental measure is aimed at gaining insight into the possible consequences of extending the consultation and allowing the presence of a lawyer during police interrogations. In the police regions of Amsterdam-Amstelland and Rotterdam-Rijnmond the experimental measure is temporarily in force in cases involving murder and manslaughter, while the police regions of Haaglanden and Midden- and West-Brabant were designated as control regions. The purpose of the present study is to describe in detail the introduction of the experimental measure as well as its possible consequences. The collection of the data was for the most part carried out by observing police interrogations and all related events from the control room. In total, we were present during 168 interrogations of 94 suspects in 70 cases. This makes the total sample as it were. Of these 168 interrogations, 69 took place in Amsterdam-Amstelland, 80 in Rotterdam-Rijnmond, 13 in Haaglanden and 6 in Midden- and West-Brabant. Unfortunately, we were not able to retrieve the total amount of interrogations; the population of interrogations. We do know that we observed interrogations in 57% of the murder/manslaughter cases in Rotterdam-Rijnmond and in 41% in Haaglanden. Given the fact that we did not observe all interrogations of all suspects in the cases where we were present, the coverage of interrogations will be even lower than that of the cases. The information derived from these observations was systematized through the use of the following two methods. First, the observed interrogations were recorded in a report detailing a chronology of the interrogation sessions. Secondly, the characterizing elements of the interrogations, the suspects, the cases, and the interrogation techniques used were quantified on the basis of an observation framework especially developed for this research project. These quantitative data were analysed using multilevel (logistic) regression analyses. In addition to the observation of the interrogations, 12 lawyers and 28 criminal investigators involved in the interrogations were interviewed during several phases of the project. The interviews were conducted on the basis of a topic list and subsequently

transcribed and analysed. By using different data sources and their corresponding analysis techniques, we approached the subject matter from different angles in an attempt to draw as complete a picture of the situation as possible.

Empirical findings

The lawyer and the interrogation

With regard to the actual course of events surrounding police interrogations within the experimental situation, the research has yielded the following findings. First of all, it appears that not all interrogations are attended by a lawyer: well over one fifth of the interrogations in Amsterdam-Amstelland and Rotterdam-Rijnmond were conducted without a lawyer being present. The same applies to the suspect consulting with a lawyer prior to interrogation. It was also established that the arrangements between the police and the lawyers can be characterized as flexible as far as the scheduled starting time of the interrogation is concerned. In practice, the 30 minutes waiting time, as stipulated by the protocol, appears to be little more than a guideline. Depending on the circumstances, the police interrogators are often cooperative and willing to postpone the starting time of the interrogation after consultation with the lawyer.

As far as the quality of the lawyers is concerned it should be mentioned that as part of the experiment, all participating lawyers are required to meet a certain level of knowledge of criminal law to ensure minimal standards of expertise. It appears that in some cases, suspects requested the assistance of lawyers with no experience in criminal law. It is also inevitable that the lawyer on duty will sometimes be unavailable and has to send a replacement. Usually, these are lawyers with a similar background in criminal law, so that a certain level of expertise is ensured.

The general impression is that the introduction of the experimental measure has passed off relatively quietly. There have been no reports of heated arguments, although minor irritations and frictions have arisen from time to time. These are sometimes caused by a simple lack of knowledge or by differing interpretations of the protocol; sometimes as a result of police officers who adhere rigidly to the protocol; and sometimes because the lawyers go beyond what is allowed by the protocol. It also appears that many police officers regard the lawyers mainly as intruders who make their work more difficult. Given the idea behind the protocol that the lawyer is not allowed to intervene, police officers also question the added value of the presence of a lawyer in the interrogation room. They argue that the lawyer might as well monitor the interrogation from the control room or by looking at the tapes at a later stage. With very few exceptions, the lawyers abide by the rules of the protocol. The

peace within the experiment appears to depend largely on the lawyer's willingness to follow the protocol. So far, only one lawyer has broken the rules, which resulted in his removal from the interrogation room.

Nevertheless, some lawyers do take a more active stance during the interrogation than prescribed by the protocol. These lawyers take charge of practical matters, comment on the record of the interrogation, request time to confer with the client, offer advice, or point out to the interrogators that the suspect is being subjected to improper coercion. Concerning the record of the interrogation, it should be noted that there are different methods of taking minutes (verbatim or summary; by a typist or by a detective), and that there are differences as to when the record is written up. As a result of this, the lawyers are not always able to comment immediately on the record and have their remarks recorded. The lawyers themselves consider this opportunity – prescribed by the protocol – as a major added value of their presence during interrogations.

Some lawyers actively participate in the interrogation by giving advice or by asking for time to confer with their clients. This is often experienced by the interrogators as an inconvenient interruption of the interrogation process and their response is usually less than favourable. The lawyer tends to intervene when a silent or reluctant suspect finds himself in trouble and the interrogators are building up the pressure. The same applies to interventions based on the prohibition of improper coercion. This prohibition is sometimes invoked with regard to questions and comments expressed by the interrogators concerning suspects who remain silent. Given the settled jurisprudence in this area, it seems unlikely that a judge would find the interrogators' questions and remarks to be in violation of this prohibition. As was expected, some lawyers tend to use an overly broad interpretation of improper coercion. However, this does not alter the fact that sometimes remarks are made by the interrogators that border on deception, in the sense that they present a one-sided view of the juridical facts.

The interrogators' conduct

Our research into the conduct of the interrogators mainly focused on the pressure they exert on suspects and on the possible impact of a lawyer being present on the use of coercion. The extent to which the interrogators use coercion was assessed on the basis of two criteria: the length of the interrogation and the interrogation techniques used. The findings from our research show that there is no correlation between the length of the interrogation and the presence of a lawyer. The total length of the interrogation appears to be largely beyond the control of the lawyer. What did emerge was that most lawyers see to it that the interrogations do not continue uninterrupted for too long and that regular breaks are taken.

The exercise of coercion by the police was assessed with reference to fourteen interrogation techniques that are often deployed in the interrogation of suspects of serious crimes. These interrogation techniques were taken from the international literature. To gain insight into whether or not the police use coercion and how this is achieved, we looked at the extent to which the interrogators make use of these interrogation techniques and how the interrogation techniques are used to exert coercion. The first finding is that the more extreme interrogation techniques, such as physical intimidation and making promises, were only observed in 4.2% of the interrogations. In addition, an attempt was made to cluster the various interrogation techniques into dimensions of coercion. From this it emerged that the police use four different forms of coercion to induce suspects to make a statement. The first one of these is a sympathetic form of coercion which can be classified as *soft* coercion. This technique appears to be designed to alleviate the stress of the interrogation process and to foster an amiable atmosphere where the suspect is 'seduced' into giving a statement. Apart from this form of *soft* coercion, police interrogators also use intimidating, manipulative and confrontational forms of coercion, which can be classified as *hard* coercion. Generally speaking, all four forms of coercion are rarely used. Our findings suggest that on average police interrogators most often use the sympathetic approach towards a suspect, while confronting the suspect is the least used approach.

With regard to the effect of the presence of a lawyer on the use of coercion by the police, there seemed to be a discrepancy between the views of the police, the views of the legal profession, and what actually transpired during the observed interrogations. Police officers have indicated that they are aware of the fact that they will have to get used to lawyers looking over their shoulder, but they do not anticipate any major changes in the current practice. The lawyers on the other hand are confident that their presence will result in more balanced interrogations. According to our observations, both sides are partly right. We found no differences concerning the use of sympathetic, confrontational or manipulative coercion between interrogations with and without a lawyer present. What we did find is that when a lawyer is present during the interrogation, the interrogators are less likely to use intimidating coercion. Our findings also show that the interrogators are generally inclined to intimidate a suspect when he uses his right to remain silent. From this we can infer that intimidating a suspect constitutes an often-used strategy by the police to overcome a suspect's resistance. A tentative conclusion might be that the presence of a lawyer can serve as a safeguard to prevent the interrogation getting out of hand.

However, on the basis of the above-mentioned findings it is difficult to establish the extent to which the presence of a lawyer contributes to the transparency of the interrogation situation and to the prevention of improper

coercion. This subject was raised during interviews with both lawyers and police officers. The two parties appeared to hold different views on the issue. The police are generally of the opinion that the presence of a lawyer has no added value for the transparency of the interrogation situation. They argue that when the interrogations are audio-visually recorded, they can always be reviewed afterwards. The lawyers agree on the importance of audio-visual recordings but, unlike the police, they stress the added value of the presence of a lawyer during the interview itself. In their view, watching hours of video material is not an attractive option when one is not looking for anything specific. The lawyers also predict logistical problems when it comes to watching video tapes at a later stage. What they regard as an added advantage of their presence during interrogations is that they are in a position to comment on the record of the interrogation. This will benefit the quality of the record, which will eventually have an impact on how the record will be judged by the court.

As far as the prevention of improper coercion is concerned, the lawyers are of the opinion that their presence brings an added value, given that they can intervene when necessary. Obviously, improper coercion cannot be prevented by watching video recordings after the police interview has finished, because by that time the damage has already been done. The police, on the other hand, hold the opinion that instances of improper coercion are extremely rare. They admit that, should such situations arise, the presence of a lawyer will indeed provide an added value. However, according to the police, measures aimed at preventing exceptional cases should not be implemented indiscriminately across the board.

The suspects and their statements

Our research has shown that not all suspects who took part in the experiment were fully aware of all their rights as defined by the protocol, as the police did not always inform suspects that, in case they wanted to confer with their lawyer, they could request this. The connection is not entirely clear, but only 16% of the suspects in Amsterdam-Amstelland and 12% in Rotterdam-Rijnmond requested consultation or legal advice during the interrogation. When it comes to the suspects' position, we found that, as a rule, they were generally less than talkative about the crime in question. In 63% of the observed interrogations in all four police regions combined, the suspect was willing to talk about general and personal matters, but statements about the crime itself were only made in 31% of the interrogations. Confessions during interrogations are rare: in only 13% of the observed interrogations did the suspect admit his guilt. In 50% of the interrogations the suspects invoked their right to remain silent, although this did not mean that they actually refused to say anything. The research also found that the presence of a lawyer during the interrogation did not seem to affect the numbers for the categories 'invoking the right to remain silent', 'statements

about general/personal matters', 'statements about the crime' and 'confessions'. The only discernible effect of prior consultation was found in the category 'statements about general/personal matters'. It appeared that if the suspect conferred with his lawyer prior to the interrogation, the chances increased that he would be unwilling to talk about himself, his hobbies, the weather, etcetera. With regard to confessing suspects, the dynamics of the interrogation process were examined more in depth. As it turned out, the lawyers were hardly, if at all, able to influence these suspects during the interrogation. When emotional and 'inexperienced' suspects are willing to talk, they will talk, regardless of the advice of their lawyers.

The influence of the lawyer's presence on the suspects' position was further analysed using multilevel regression analysis. To this end, the suspects' willingness to provide a statement was expressed in one variable, i.e. 'using the right to remain silent'. In 36% of the police interrogations we observed, the suspect used his right to remain silent. Our analysis demonstrates that the chances that a suspect will use his right to remain silent are greater when he receives legal advice (be it in the form of consultation or the presence of a lawyer during the interview) than when no such assistance is provided. The findings also show that prior consultation seems to have a greater effect than the presence of a lawyer during the interrogation itself. These findings are supported by our observations. For instance, more than once, suspects were given a note by their lawyer with only the word 'zwijgrecht' written on it.

In light of our observation that legal advisers appear to have an influence on the position of suspects (particularly on their invocation of the right to remain silent), the question poses itself as to how the police will incorporate these new findings into their operating procedures. During the course of the experiment, police interrogation methods appeared not to have changed. As far as the future is concerned, the detectives regard the silence of suspects during interrogations mainly as a challenge to improve their own performance. They are also willing to concede that perhaps they may need to focus more on long-term criminal investigations, but as they see it, criminal investigations are already aimed at collecting evidence instead of targeting probable suspects. At least for now, no one is predicting a radical paradigm shift in police methods.

Our main conclusion can be summarized as follows. We found that a politically touchy issue as the presence of lawyers during police interrogations was implemented (temporarily) relatively quietly. In addition, consultations prior to interrogations will increase the chances that a suspect will use his right to remain silent. The police, on their part, are inclined to intimidate a suspect when he uses his right to remain silent. The presence of a lawyer appears to dissuade police interrogators from intimidating a suspect. In other words, our findings

indicate that prior consultation and the right to have a lawyer present during police questioning should not be considered separately. Allowing prior consultation (as already happened as a result of the Salduz and Panovits judgments of the ECHR) needs to be followed up by allowing the presence of the lawyer during the interrogation in order to prevent improper coercion and possibly false confessions.

Implications

Logistics

If the right to legal counsel were to be implemented on a broader scale, all parties concerned would need to consider several important issues. Standard police operating procedures deserve particular attention. In the past, police detectives were allowed to start the interrogation immediately after the suspect was taken into custody, but during the experiment they were required to first inform the legal aid scheme, then wait for a lawyer to get in touch, and wait again for his arrival. The protocol was designed to limit the waiting period by using as a guideline that as soon as the legal aid scheme had been contacted, the interrogation was postponed for half an hour to give the lawyer time to travel to the police station. After his arrival, lawyer and client were then allowed to confer in private for another half hour. Only when the urgency of the investigation at hand demanded it, were the police allowed to start the interrogation without the presence of a lawyer. The half-hour waiting period was based on the assumption of flawless communication between the participants, but in practice this schedule turned out to be fairly tight. However, the half-hour guideline was not strictly adhered to and the urgency of the investigation was never invoked. When the lawyer called, an agreement would be reached on when he could be present at the police station. By and large, both police and lawyers tried their utmost to be flexible. Only when the lawyer was absent at the agreed upon time, which was not often, the interrogation would begin without him. The half hour consultation period was also not strictly observed. The interrogators were often willing to wait until the lawyer indicated that he was ready, or he was asked to wrap up the consultation after forty-five minutes. This accommodating attitude resulted in a considerable amount of police time spent waiting. The police interrogators were not able to set their own pace, but instead found themselves dependent on other parties. This was experienced by many police officers as an unfortunate situation. One detective described the experiment as a 'logistical disaster'. However, the police are now facing a similar situation on a larger scale as a consequence of the Salduz judgment of the ECHR. A complete overview of the nature and scale of the changes resulting from this ruling was not available to us at the time of writing.

While the police are often forced to wait *prior* to the interrogation, lawyers are likely to be confronted with waiting periods *after* the interrogation. This has to do with the possibility to make on-the-spot comments regarding the record of the interrogation. In the interviews, most lawyers stated that they see this opportunity as an important added value of their presence during the interrogation. Our findings show that the police do not yet use a standard, uniform protocol on how and when interrogations should be put in writing. In order to enable legal advisers to comment on the record of the interrogation, the police will need to ensure that the interview is recorded preferably by a stenographer and that the record can be printed out at the end of the interrogation. If this cannot be realized, lawyers will have to wait around for the transcript to be completed. Lengthy interrogations in particular will unavoidably lead to considerable waiting times.

Criminal investigations

If legal advisers are going to be allowed to be present during the first stages of a criminal investigation, the police will have to change their *modus operandi*. The question presents itself as to how this will affect criminal investigations in general. Taking the findings from the present study as a starting point, the following changes in the criminal investigation process can be envisaged. Firstly, from a logistical point of view, it will become more difficult during the first stages of the investigation to obtain information from the suspect immediately after his arrest. A change in current thinking about the role of the suspect's statements in criminal investigations seems inevitable. At present, these statements play a central role. It emerged from our interviews that at the time of the experiment this view was not generally shared by criminal investigators. For most police interrogators, the fact that suspects increasingly often use their right to remain silent is not enough of a reason to change their minds on the central role of suspects' statements. They are generally more inclined to interpret a suspect's silence as a challenge to improve their interrogation techniques. However, the question arises as to whether or not such an attitude is sufficiently pragmatic. It would appear that this approach is bound to result in frustration and the loss of valuable investigation time. Surely there are more productive ways to spend police time than holding a silent suspect in custody for three days in a futile attempt to make him talk.

In this context, the attitude of the lawyers during the interrogation should also be mentioned. Our research has shown that the overwhelming majority of the interrogations passed off in relative peace, in spite of the radical changes introduced by the experimental measure. This seems, however, more likely to have been an armed peace brought about by the rules of the protocol, given that the legal advisers were more or less 'muzzled' during the interrogations. It

remains to be seen whether or not the lawyers will continue to maintain a passive stance when the experimental situation becomes standard practice (which is already the case given the ‘Aanwijzing rechtsbijstand politieverhoor’). If the lawyers take on a more active role, the legal battle between lawyers and police over the course of the interrogation (as well as the record of the interrogation) may move from the courtroom to the interrogation room. This may cause the police to offer resistance to this development by investing less in interrogations, which will reduce the importance of the interrogation during the first stages of the investigation. As a consequence of this, the police would need to invest in alternative investigative methods. On the other hand, if the legal battle does indeed move to the interrogation room, it is also conceivable that the police will invest more effort in the interrogation process in order to be better equipped to engage the legal advisers.

The experiences in the United Kingdom have shown that the police have shifted their focus from statements given by the suspect to the collection of information by means of special investigative methods. In short, this means longer investigation periods before a suspect is apprehended and less focus on eliciting statements from the suspect. As yet, it remains to be seen what changes will occur in the criminal investigation process in the Netherlands.

Finally, we should briefly mention that recent jurisprudence of the ECHR and the Supreme Court of the Netherlands has created a new situation. It will be interesting to see to what extent the conclusions drawn from the present research still apply in this new context. In other words, to what extent are we dealing with permanent effects? This will become clearer in the years to come, but it is certain that the extension of suspects’ right to legal counsel during police interrogation will remain a topic of discussion.